This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

4 9015 00289 0896

Non-
Circulating

University of
Michigan
Libraries
1817
FLINT COLLEGE

CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERMS, 1889, 1890, IN

135, 136, 137, 138 U. S.

BOOK 34,

LAWYERS' EDITION,

COMPLETE WITH HEAD LINES, HEAD NOTES, STATEMENTS OF CASES, POINTS AUTHORITIES OF COUNSEL, FOOT NOTES AND PARALLEL REFERENCES.

BY

STEPHEN K. WILLIAMS, LLD.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
ROCHESTER, NEW YORK

Copyright 1890 by
THE LAWYERS CO-OPERATIVE PUBLISHING CO.
Copyright Renewed 1918 by
THE LAWYERS CO-OPERATIVE PUBLISHING CO.

JUSTICES

OF THE

SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. SAMUEL F. MILLER,*
HON. STEPHEN J. FIELD,
HON. JOSEPH P. BRADLEY,
HON. JOHN M. HARLAN,
HON. HORACE GRAY,
HON. SAMUEL BLATCHFORD,
HON. LUCIUS Q. C. LAMAR,
HON. DAVID J. BREWER,
HON. HENRY B. BROWN.†

ATTORNEY-GENERAL,

HON. WILLIAM HENRY HARRISON MILLER.

SOLICITOR-GENERAL,

HON. WILLIAM HOWARD TAFT.

CLERK,

JAMES HALL MCKENNEY, ESQ.

REPORTER,

J. C. BANCROFT DAVIS, ESQ.

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

---

* Died at his residence at Washington, Monday, October 13, 1890.
† Commissioned December 29, 1890; sworn in January 6, 1891.

ALLOTMENTS, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

AS THEY STOOD DURING THE TERMS OF 1889 AND 1890, TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND TERMS OF SERVICE, RESPECTIVELY.

(Allotments, March 10, 1890, Nov. 3, 1890 and Jan. 19, 1891. See Appendix III., Book 33, and Appendices VII. and VIII., herein.)

Names of Justices, and whence appointed.	By whom Appointed.	Circuits, 1891.	Commissioned.	Sworn in.
Associate Justice HORACE GRAY, Massachusetts.	President Arthur.	First. Me., N. H., Mass., Rhode Island.	1881. (Dec. 20.)	1882. (Jan. 9.)
Associate Justice SAMUEL BLATCHFORD, New York.	President Arthur.	Second. Vermont, Conn., New York.	1882. (Mar. 22.)	1882. (April 3.)
Associate Justice JOSEPH P. BRADLEY, New Jersey.	President Grant.	Third. New Jersey, Penn., Del.	1870. (Mar. 21.)	1870. (Mar. 23.)
Chief Justice MELVILLE W. FULLER, Illinois.	President Cleveland.	Fourth. Md., Va., N. C., W. Va., S. C.	1888. (July 20.)	1888. (Oct. 8.)
Associate Justice LUCIUS Q. C. LAMAR, Mississippi.	President Cleveland.	Fifth. Ga., Ala., Fla., Miss., La., Tex.	1888. (Jan. 16.)	1888. (Jan. 18.)
Associate Justices DAVID J. BREWER,* HENRY B. BROWN, Michigan.	President Harrison.	Sixth. Ky., Tenn., Ohio, Mich.	1890. (Dec. 29.)	1891. (Jan. 6.)
Associate Justice JOHN M. HARLAN, Kentucky.	President Hayes.	Seventh. Ind., Ill., Wis.	1877. (Nov. 29.)	1877. (Dec. 10.)
Associate Justices SAMUEL F. MILLER,† Iowa.	President Lincoln.	Eighth. Minn., Iowa, Mo. Kan., Ark., Neb., Colo., N. Dak., S. Dak., Wyo.	1862. (July 16.)	1862. (Dec. 1.)
DAVID J. BREWER, Nebraska.	President Harrison.		1889. (Dec. 18.)	1890. (Jan. 6.)
Associate Justice STEPHEN J. FIELD, California.	President Lincoln.	Ninth. Cal., Or., Nev., Mont., Wash., Idaho.	1863. (Mar. 10.)	1863. (Dec. 7.)

* *Until allotment of Jan. 19, 1891; see Appendix VIII.*
† *Until his death, Oct. 12, 1890.*

GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

VOLUMES 135, 136, 137, 138.

A.

Adams, Wadsworth *v.* - - - - - 984
Adden, Reynolds *v.* - - - - - 360
Ætna L. Ins. Co., Pleasant Twp. *v.* - 864
Aiken, Reagan *v.* - - - - - - 892
Alexander *v.* United States (138 U. S. 353) 954
Allen *v.* Hanks (136 U. S. 300) - - 414
Ambler *v.* Eppinger (137 U. S. 480) - 765
American Loan & Trust Co., Kneeland *v.* 379
Kneeland *v.* - - - - - - 1052
American Mills Co., Fourth Nat. Bank of New York *v.* - - - - 655
Ames *v.* Moir (138 U. S. 306) - - 951
Anderson *v.* Carkins (135 U. S. 483) - 272
v. Watt (138 U. S. 694) - - 1078
Andriano, Missouri, *ex rel.* Carey, *v.* - 1012
Armstrong, Broom *v.* - - - - - 648
Artery, Chicago, M. & St. P. R. Co. *v.* - 747
Auffmordt *v.* Hedden (137 U. S. 310) - 674
Austin, Northern Pacific R. Co. *v.* - - 218
Ayers *v.* Watson (137 U. S. 584) - - 803

B.

Bacon, Hennessy *v.* - - - - - - 605
Baiz, *Ex parte* - - - - - - 222
Ballou, Kneeland *v.* - - - - - - 379
Kneeland *v.* - - - - - 1052
Baltimore & P. R. Co. *v.* Fifth Baptist Church (137 U. S. 568) - - 784
Bank, Berkshire Nat., *v.* Yale Lock Mfg. Co. - - - - - - - 168
Central Nat., *v.* United States, - 703
Fifth Nat., New York Elevated R. Co. *v.* - - - - - - 231
Fourth Nat. of New York, *v.* American Mills Co. - - 655
Merchants Nat., Chicago Railway Equipment Co. *v.* - - - 349
Union Nat. of Chicago, *v.* Bank of Kansas City - - - - 341
Union Stock Yards Nat., *v.* Gillespie - - - - - - - 724
of British North America *v.* Cooper (137 U. S. 473) - - - 759
of Kansas City, Union Nat. Bank of Chicago *v.* - - - - - 341
Barber, Minnesota *v.* - - - - - 455
Barney *v.* Oelrichs (138 U. S. 529) - - 1037
Bass *v.* Taft (137 U. S. 458) - - - 752
Bassett *v.* United States (137 U. S. 496) - 762
Beardsley *v.* Beardsley (138 U. S. 262) 928
Beatty *v.* Benton (135 U. S. 244) - - 124
Beaupre *v.* Noyes (138 U. S. 397) - 991
v. Noyes (138 U. S. 402) - - 993
Bent *v.* Thompson (138 U. S. 114) - 902
Benton, Beatty *v.* - - - - - - 124
Berkshire Nat. Bank *v.* Yale Lock Mfg. Co. (135 U. S. 342) - - 168
Bird, Packer *v.* - - - - - - 819
Bloch, Saloy *v.* - - - - - - - 468
Boston & L. R. Corp., Nashua & L. R. Corp. *v.* - - - - - - 363
Boston Marine Ins. Co., Richelieu & O. Nav. Co. *v.* - - - - - 398
Brimmer *v.* Rebman (138 U. S. 78) - 862
Briscoe, Upshur *v.* - - - - - - 931
Broom *v.* Armstrong (137 U. S. 266) - 648
Brown, *Ex parte* - - - - - - 304
v. Trousdale (138 U. S. 389) - 987
Brunswick, St. Germain *v.* - - - 122
Bryan *v.* Virginia (135 U. S. 662) - 304
Buckner, Norman *v.* - - - - - 252
Bunt *v.* Sierra Butte Gold Min. Co. (138 U. S. 483) - - - - - 1031
Bunyan, Gormley *v.* - - - - - 1086
Burlington, The Propeller, *v.* Ford (137 U. S. 386) - - - - - 731
Burns *v.* Rosenstein (135 U. S. 449) - - 193
Burrus, *Ex parte* - - - - - - 500
Busell Trimmer Co. *v.* Stevens (137 U. S. 423) - - - - - - 719
Butler *v.* Gage (138 U. S. 52) - - - 869
v. Steckel (137 U. S. 21) - - 582

C.

Cadwalader *v.* Partridge (137 U. S. 553) 783
Cahn, Seeberger *v.* - - - - - 599
Caldwell *v.* Texas (137 U. S. 691) - - 816
California, McCall *v.* - - - - - 391
Calumet and Chicago Canal & Dock Co., Cook County *v.* - - 1110
Camden, West *v.* - - - - - - 254
Cameron, Merritt *v.* - - - - - 772
Campbell, Iron Silver Min. Co. *v.* - - 155
Carey, Missouri, *ex rel.*, *v.* Andriano - 1012
Carkins, Anderson *v.* - - - - - 272
Carter, French *v.* - - - - - - 664
Case Mfg. Co. *v.* Soxman (138 U. S. 431) 1019
Casilear, Mackall *v.* - - - - - 776
Cedar Valley Land and Cattle Co., Coburn *v.* - - - - 876
Central Nat. Bank *v.* United States (137 U. S. 355) - - - - - 703
Central Pac. R. Co., United States *v.* - 895
Central Trust Co. of New York *v.* Grant (135 U. S. 207) - - - 97
v. Grant Locomotive Works (135 U. S. 207) - - - - - 97
v. Kneeland (138 U. S. 414) - 1014

Chase, United States v. - - - - - 117
Cheney v. Hughes (138 U. S. 403) - 993
Cherokee Nation v. Southern Kansas R. Co. (135 U. S. 641) - - 295
Chicago, M. & St. P. R. Co. v. Artery (137 U. S. 507) - - - 747
Fishburn v. - - - - - - 585
Chicago, S. F. & C. R. Co. v. Price (138 U. S. 185) - - - - - 917
Chicago Railway Equipment Co. v. Merchants Nat. Bank (136 U. S. 268) - - - - - - - 849
Childrey, Hucless v. - - - - - 304
Christensen, Crowley v. - - - - - 620
Churchill v. Farrar (135 U. S. 609) - 246
Clark, Miller v. - - - - - - - 966
Clasbey, Egan v. - - - - - - - 822
Clay v. Field (138 U. S. 464) - - - 1044
Freeman v. - - - - - - - 1044
Coburn v. Cedar Valley Land and Cattle Co. (138 U. S. 196) - - 876
Commercial Mfg. Co. v. Fairbank Canning Co. (135 U. S. 176) - 88
Confiance Compagnie d'Assurance contre l'Incendie v. Hall (137 U. S. 61) - - - - - - 573
Connor, United States v. - - - - 860
Consolidated Roller Mill Co. v. Walker (138 U. S. 124) - - - - 920
Converse, *Ex parte* - - - - - 796
Cook v. United States (138 U. S. 157) - 906
Cook County v. Calumet and Chicago Canal & Dock Co. (138 U. S. 635) - - - - - - - - 1110
Cooper, *Ex parte* - - - - - - 993
Bank of British North America v. 759
v. Virginia (135 U. S. 662) - - 304
Cope v. Cope (137 U. S. 682) - - - 832
Cornell University v. Fiske (136 U. S. 152) 427
Cragin, Lovell v. - - - - - - - 372
Cressey v. Meyer (138 U. S. 525) - - 1018
Crowley v. Christensen (137 U. S. 86) - 620
Crumpton v. United States (138 U. S. 361) - - - - - - - 958
Cunningham v. Neagle (135 U. S. 1) - 55
Curry, The Max Morris v. - - - - 586
Cuthbert v. Virginia (135 U. S. 662) - 304

D.

Dable Grain Shovel Co. v. Flint (137 U. S. 41) - - - - - - - 618
Daughtry, Kansas City, Ft. S. & M. R. Co. v. - - - - - - - 963
Davenport v. United States (136 U. S. 580) - - - - - - - 548
Dayton, Ft. W. & C. R. Co. v. Grant (135 U. S. 207) - - - - - 97
v. Grant Locomotive Works (135 U. S. 207) - - - - - 97
Des Moines & Ft. D. R. Co. v. Wabash, St. L. & P. R. Co. (135 U. S. 576) - - - - - - - 243
Detroit v. Osborne (135 U. S. 492) - 260
Devere v. Steamship Haverton (137 U. S. 145) - - - - - - - 608
District of Columbia, Eckloff v. - 120
Washington Market Co. v. - - 572
v. Woodbury (136 U. S. 450) - 472
Dobson v. Lees (137 U. S. 258) - - 652
Dolph, Troy Laundry Mach. Co. v. - 1083
Dreyfus, Freiburg v. - - - - - 206
Duncan v. Navassa Phosphate Co. (137 U. S. 647) - - - - - 825

E.

Eckloff v. District of Columbia (135 U. S. 24) - - - - - - 120
Eclipse, The, Rea v. - - - - - 269
Egan v. Clasbey (137 U. S. 654) - - 822
Elbert, Green v. - - - - - - - 792
Ellett v. Virginia (135 U. S. 662) - - 304
Ellithorpe Air Brake Co., Sire v. - 801
Eppinger, Ambler v. - - - - - 765
Excelsior Refinery Co., Mansfield v. - 162
Ex parte Baiz (135 U. S. 403) - - 222
Brown (135 U. S. 662) - - 304
Burrus (136 U. S. 586) - - - 500
Converse (137 U. S. 624) - - 796
Cooper (138 U. S. 404) - - - 993
Huntington (137 U. S. 63) - - 567
Kemmler (136 U. S. 436) - - 519
Lancaster (137 U. S. 393) - - 713
Lane (135 U. S. 443) - - - 219
Mills (135 U. S. 263) - - - 107
Pennsylvania Co. (137 U. S. 451) - 738
Pennsylvania Co. (137 U. S. 457) - 741

F.

Fairbank Canning Co., Commercial Mfg. Co. v. - - - - - - 88
Falk v. Robertson (137 U. S. 225) - 645
Falls, Thaw v. - - - - - - - 531
Farrar v. Churchill (135 U. S. 609) - 246
Fauché, Schell v. - - - - - - 1040
Field v. Clay (138 U. S. 464) - - 1044
Fifth Baptist Church, Baltimore & P. R. Co. v. - - - - - - 784
Fifth Nat. Bank, New York Elevated R. Co. v. - - - - - 231
Fishburn v. Chicago, M. & St. P. R. Co. (137 U. S. 60) - - - 585
Fiske, Cornell University v. - - 427
Fitzgerald, Fitzgerald & Mallory Construction Co. v. - - - - 608
Fitzgerald & Mallory Construction Co. v. Fitzgerald (137 U. S. 98) - 608
Flint, Dable Grain Shovel Co. v. - 618
Florsheim v. Schilling (137 U. S. 64) - 574
Fond du Lac County v. May (137 U. S. 395) - - - - - - 714
Ford, The Propeller Burlington v. - - 731
Fourth Nat. Bank of New York v. American Mills Co. (137 U. S. 234) 655
Freeman v. Clay (138 U. S. 464) - - 1044
Freiburg v. Dreyfus (135 U. S. 478) 206
French v. Carter (137 U. S. 239) 664
Fuller, Stevens v. - - - 461

G.

Gage, Butler v. - - - - - - - 869
Gale, Smith v. - - - - - - - 792
Gibbons v. Mahon (136 U. S. 549) - - 525
Gillespie, Union Stock Yards Nat. Bank v. 724
Glenn v. Liggett (135 U. S. 533) - - 262
v. Taussig (135 U. S. 533) - - 262
Gormley v. Bunyan (138 U. S. 623) - 1086
Graham v. Weeks (138 U. S. 461) - - 1051
Grant, Central Trust Co. of New York v. 97
Dayton, Ft. W. & C. R. Co. v. - 97

Grant Locomotive Works v. Central Trust Co. of New York (135 U. S. 207) - - - - - - 97
Dayton, Ft. W. & C. R. Co. v. - 97
Green v. Elbert (137 U. S. 615) - - 792
United States v. - - - - 960
Greenhow, Vashon v. - - - - - 304
Grimley, United States v. - - 636
Grover & Baker Sewing Mach. Co. v. Radcliffe (137 U. S. 287) - 670
Gurnee v. Patrick County (137 U. S. 141) 601

H.

Haggin, Norris v. - - - - - - 424
Haines v. McLaughlin (135 U. S. 584) - 290
Hall, Confiance Compagnie d'Assurance contre l'Incendie v. - - 573
Hamilton v. Home Ins. Co. of New York (137 U. S. 370) - - - 708
Hamilton v. Liverpool & L. & G. Ins. Co. (136 U. S. 242) - - - 419
Handley v. Stutz (137 U. S. 366) - - 706
Hanks, Allen v. - - - - - - 414
Hanner v. Moulton (138 U. S. 486) - - 1032
Hardin, Leisy v. - - - - - - 128
Harding v. Woodcock (137 U. S. 43) - 580
Hartranft v. Meyer (135 U. S. 237) - 110
Haverton, Steamship, Devere v. - - 603
Heath v. Wallace (138 U. S. 573) - 1063
Hedden, Auffmordt v. - - - - 674
Hennessy v. Bacon (137 U. S. 78) - 605
Hoffman v. Overbey (137 U. S. 465) - 754
Holden v. Minnesota (137 U. S. 483) - 734
Home Ins. Co. of New York, Hamilton v. 708
Hostetter v. Park (137 U. S. 30) - - 568
Hot Springs R. Co. v. Williamson (136 U. S. 121) - - - - - 355
Hucless v. Childrey (135 U. S. 662) - 304
Hughes, Cheney v. - - - - - 993
Huntington, *Ex parte* - - - - 567

I.

Indiana v. Kentucky (136 U. S. 479) - 329
Inland & Seaboard Coasting Co. v. Tolson (136 U. S. 572) - - - - 539
Insurance Co., Ætna L., Pleasant Twp. v. 864
Boston Marine, Richelieu & O. Nav. Co. v. - - - - 398
Home, of New York, Hamilton v. 708
Liverpool & L. & G., Hamilton v. 419
Phenix, Thompson v. - - - 408
Iron R. Co., Robinson v. - - - - 276
Iron Silver Min. Co. v. Campbell (135 U. S. 286) - - - - - 155
Irwin v. San Francisco Savings Union (136 U. S. 578) - - - 540

J.

Jackson, MacFarland v. - - - - 664
Wheeler v. - - - - - - 659
Jacobus, Oteiza y Cortes v. - - - 464
Janesville Cotton Mills, Lawrence Mfg. Co. v. - - - - - 1005
Jencks v. Quidnick Co. (135 U. S. 457) 200
Johnson v. Risk (137 U. S. 300) - - 683
Jones v. United States (137 U. S. 202) 691
Joy v. St. Louis (138 U. S. 1) - - 843
Juneau County, May v. - - - - 729

K.

Kansas City, Ft. S. & M. R. Co. v. Daughtry (138 U. S. 298) - - 963
Kauffman v. Wooters (138 U. S. 285) - 962
Kemmler, *Ex parte* - - - - - 519
Kentucky, Indiana v. - - - - - 329
Kingsbury v. Murray - - - - - 539
Kingsley, United States v. - - - - 896
Kneeland v. American Loan & Trust Co. (136 U. S. 89) - - - - 379
v. American Loan & Trust Co. (138 U. S. 509) - - - - - 1052
v. Ballou (136 U. S. 89) - - 379
v. Ballou (138 U. S. 509) - - 1052
Central Trust Co. of New York v. 1014

L.

Lancaster, *Ex parte* - - - - - 713
Lane, *Ex parte* - - - - - - 219
Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States (136 U. S. 1) - 478
Lawrence v. Rector (137 U. S. 139) - 600
Lawrence Mfg. Co. v. Janesville Cotton Mills (138 U. S. 552) - - 1005
v. Tennessee Mfg. Co. (138 U. S. 537) - - - - - - 997
Lees, Dobson v. - - - - - - 652
Leisy v. Hardin (135 U. S. 100) - - 128
Le Roy, San Francisco v. - - - 1096
Liggett, Glenn v. - - - - - 262
Lisle, United States, *ex rel.*, v. Lynch - 700
Liverpool & L. & G. Ins. Co., Hamilton v. - - - - - 419
Lloyd v. McWilliams (137 U. S. 576) - 788
Lodge v. Twell (135 U. S. 232) - - 153
Louisville, E. & St. L. R. Co. v. Wilson (138 U. S. 501) - - - 1023
Lovell v. Cragin (136 U. S. 130) - - 373
Lynch, United States, *ex rel.* Lisle, v. - 700
Lyng v. Michigan (135 U. S. 161) - 150

M.

McCall v. California (136 U. S. 104) - 391
McCauley v. Murray - - - - - 539
McDade, Washington & G. R. Co. v. 235
MacFarland v. Jackson (137 U. S. 258) 664
McGahey v. Virginia (135 U. S. 662) - 304
McGroarty, Smith Middlings Purifier Co. v. - - - - - - 346
Mackall v. Casilear (137 U. S. 556) - 776
v. Mackall (135 U. S. 167) - - 84
Mackenzie, Waterman v. - - - - 923
McLaughlin, Haines v. - - - - - 290
McWilliams, Lloyd v. - - - - 788
Mahon, Gibbons v. - - - - - 525
Mansfield v. Excelsior Refinery Co. (135 U. S. 326) - - - - - 162
Marshall v. Texas & P R. Co. (136 U. S. 393) - - - - - 385
Mason v. United States (136 U. S. 581) 545
Massachusetts Ben. Asso. v Miles (137 U. S. 689) - - - - - 834
Max Morris, The, v. Curry (137 U. S. 1) 586
May, Fond du Lac County v. - - - 714
v. Juneau County (137 U. S. 408) 729
Merchants Nat. Bank, Chicago Railway Equipment Co. v. - - 349

Merrill v. Monticello (138 U. S. 673) - 1069
Merritt v. Cameron (137 U. S. 542) - 772
Meyer, Cressey v. - - - - - - 1018
Hartranft v. - - - - 110
Michigan, Lyng v. - - - - 150
Miles, Massachusetts Ben Asso. v. - 834
Miller v. Clark (138 U. S. 223) - - 966
Moffitt v. - - - - - - 539
United States, *ex rel.*, v. Raum - 105
Milliken, Société Foncère et Agricole des États Unis v. - - - - 208
Mills, *Ex parte* - - - - - - 107
Minnesota v. Barber (136 U. S. 313) - 455
Holden v. - - - - - - 734
Missouri, *ex rel.* Carey, v. Andriano (138 U. S. 497) - - - - - 1012
Moffitt v. Miller - - - - - - 539
Moir, Ames v. - - - - - - - 951
Montana R. Co. v. Warren (137 U. S. 348) 681
Monticello, Merrill v. - - - - - 1069
Morgan's Louisiana & Texas R. & S. Co. v. Texas Cent. R. Co. (137 U. S. 171) - - - - - 625
Morrissey v. Perry (137 U. S. 157) - 644
Moseley v. The Nacoochee (137 U. S. 330) 687
Moulton, Hanner v. - - - - - 1032
Murray, Kingsbury v. - - - - - 539
McCauley v. - - - - - - 539
Thomas v. - - - - - - - 539

N.

Nacoochee, The, v. Moseley (137 U. S. 330) - - - - - - 687
Nashawannuck Mfg. Co., Shenfield v. 573
Nashua & L. R. Corp. v. Boston & L. R. Corp. (136 U. S. 356) - 363
Navassa Phosphate Co., Duncan v. - 825
Neagle, Cunningham v. - - - - 55
Needham, Red River Cattle Co. v. - 799
New Jersey Car Spring & Rubber Co., New York Belting & Packing Co. v. - - - - - - 741
New Orleans v. Whitney, Admr. (138 U. S. 595) - - - - - - 1102
New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co. (137 U. S. 445) - - 741
New York Elevated R. Co. v. Fifth Nat. Bank (135 U. S. 432) - - 231
Norfolk & W. R. Co. v. Pennsylvania (136 U. S. 114) - - - - - 394
Norman v. Buckner (135 U. S. 500) - 252
Norris v. Haggin (136 U. S. 386) - - 424
North v. Peters (138 U. S. 271) - - 933
North Carolina, United States v. - - 336
Northern Pacific R. Co. v. Austin (135 U. S. 315) - - - - - - 218
Noyes, Beaupre v. - - - - - - 991
Beaupre v. - - - - - - 993

O.

Oelrichs, Barney v. - - - - - - 1037
Oelschlaeger v. Robertson (137 U. S. 436) 744
Osborne, Detroit v. - - - - - 260
Oteiza y Cortes v. Jacobus (136 U. S. 330) 464
Overbey, Hoffman v. - - - - - 754

P.

Packer v. Bird (137 U. S. 661) - - - 819
Page, United States v. - - - - 828
Palliser v. United States (136 U. S. 256) - 514
Park, Hostetter v. - - - - - - 568
Partridge, Cadwalader v. - - - - 783
Patrick County, Gurnee v. - - - - 601
Pennsylvania, Norfolk & W. R. Co. v. - 394
Pennsylvania Co., *Ex parte* - - 738
Ex parte - - - - - - 741
Perry, Morrissey v. - - - - - - 644
Peters, North v. - - - - - - 936
Phelps, St. Paul, M. & M. R. Co. v - 767
Phenix Ins. Co., Thompson v. - - 408
Pleasant Twp. v. Ætna L. Ins. Co. (138 U. S. 67) - - - - - - 864
Post, Russell v. - - - - - - 1009
Prather, Preston v. - - - - - - 788
Preston v. Prather (137 U. S. 604) - 788
Price, Chicago, S. F. & C. R. Co. v. - 917

Q.

Quidnick Co., Jencks v. - - - - 200

R.

Radcliffe, Grover & Baker Sewing Mach. Co. v. - - - - - - 670
Railroad Co., Baltimore & P., v. Fifth Baptist Church - - - 784
Boston & L., Nashua & L. R. Corp. v. - - - - - - 363
Central Pac., United States v. - 895
Chicago, M. & St. P., v. Artery - 747
Fishburn v. - - - - - 585
Chicago, S. F. & C., v. Price - 917
Dayton, Ft. W. & C., v. Grant - 97
v. Grant Locomotive Works - 97
Des Moines & Ft. D., v. Wabash, St. L. & P. R. Co. - - 243
Hot Springs, v. Williamson - - 355
Iron, Robinson v. - - - - 276
Kansas City, Ft. S. & M., v. Daughtry - - - - - - - 963
Louisville, E. & St. L., v. Wilson 1023
Montana, v. Warren - - - 681
Nashua & L., v. Boston & L. R. Corp. - - - - - - - 363
New York Elevated, v. Fifth Nat. Bank - - - - - - 231
Norfolk & W., v. Pennsylvania - 394
St. Paul, M. & M., v. Phelps - 767
Sioux City St., v. Sioux City - 898
Southern Kansas, Cherokee Nation v. - - - - - - - 295
Texas & P., v. Marshall - - 385
v. Southern Pacific Co. - 614
Texas Cent., v. Morgan's Louisiana & Texas R. & S. Co. - - 625
Vicksburg, S. & P., v. Smith - 95
Wabash, St. L. & P., Des Moines & Ft. D. R. Co. v. - - - 243
Washington & G., v. McDade - 235
Raum, United States, *ex rel.* Miller, v. - 105
Rea v. The Eclipse (135 U. S. 599) - 269
Reagan v. Aiken (138 U. S. 109) - - 892
Rebman, Brimmer v. - - - - - 862
Rector, Lawrence v. - - - - - 600

Redfield, United States, *ex rel.*, *v.* Windom 811
Red River Cattle Co. *v.* Needham (137 U. S. 632) - - - - - - 799
Reynolds *v.* Adden (136 U. S. 348) - - 860
Rich, Upshur County *v.* - - - - 196
Richelieu & O. Nav. Co. *v.* Boston Marine Ins. Co. (136 U. S. 408) - - 398
Riddle *v.* Whitehill (135 U. S. 621) - 262
Ripley, Superior *v.* - - - - - - - 914
Risk, Johnson *v.* - - - - - - - 688
Robertson, Falk *v.* - - - - - - - 645
v. Oelschlaeger (137 U. S. 436) - 744
Sherman *v.* - - - - - - - 540
Robinson *v.* Iron R. Co. (135 U. S. 522) 276
Romney *v.* United States (136 U. S. 1) - 478
Rosenstein, Burns *v.* - - - - - 193
Royer *v.* Schultz Belting Co. (135 U. S. 319) - - - - - - - 214
Russell *v.* Post (138 U. S. 425) - - - 1009
Rutz, St. Louis *v.* - - - - - - 941
Ryan *v.* United States (136 U. S. 68) - 447

S.

St. Germain *v.* Brunswick (135 U. S. 227) 122
St. Louis, Joy *v.* - - - - - - - 843
v. Rutz (138 U. S. 226) - - - - 941
St. Paul, M. & M. R. Co. *v.* Phelps (137 U. S. 528) - - - - - - 767
Saloy *v.* Bloch (136 U. S. 338) - - 468
Sanborn *v.* United States (135 U. S. 271) 112
San Francisco *v.* Le Roy (138 U. S. 656) 1096
San Francisco Savings Union, Irwin *v.* 540
Saul, Simmons *v.* - - - - - - - 1054
Schell *v.* Fauché (138 U. S. 562) - - 1040
Schilling, Florsheim *v.* - - - - - 574
Schultz Belting Co., Royer *v.* - - - 214
Scott, Texas Land & Cattle Co. *v.* - 780
Seeberger *v.* Cahn (137 U. S. 95) - - 599
Shattuck, Whitehead *v.* - - - - - 873
Shenfield *v.* Nashawannuck Mfg. Co. (137 U. S. 56) - - - - - - 573
Sherman *v.* Robertson (136 U. S. 570) - 540
Sierra Butte Gold Min. Co., Bunt *v.* - 1031
Simmons *v.* Saul (138 U. S. 439) - - 1054
Sioux City, Sioux City St. R. Co. *v.* - 898
Sioux City St. R. Co. *v.* Sioux City (138 U. S. 98) - - - - - - 898
Sire *v.* Ellithorpe Air Brake Co. (137 U. S. 579) - - - - - - - 801
Smith *v.* Gale (137 U. S. 577) - - 792
Vicksburg, S. & P. R. Co. *v.* - 95
Smith Middlings Purifier Co. *v.* McGroarty (136 U. S. 237) - - - - 346
Snyder, Wellford, *v.* - - - - - 780
Société Foncère et Agricole des États Unis *v.* Milliken (135 U. S. 304.) - 208
Solomons *v.* United States (137 U. S. 342) 667
Southern Kansas R. Co., Cherokee Nation *v.* - - - - - - - 295
Southern Pacific Co., Texas & P. R. Co. *v.* 614
Soxman, Case Mfg. Co. *v.* - - - 1019
Sperry, United States Mortg. Co. *v.* - 969
Steckel, Butler *v.* - - - - - - 582
Stevens, Busell Trimmer Co. *v.* - - 719
v. Fuller (136 U. S. 468) - - 461
Stutz, Handley *v.* - - - - - 706
Superior *v.* Ripley (138 U. S. 93) - - 914

T.

Taft, Bass *v.* - - - - - - - - 752
Taussig, Glenn *v.* - - - - - 262
Tennessee Mfg. Co., Lawrence Mfg. Co. *v.* 997
Texas, Caldwell *v.* - - - - - - 816
York *v.* - - - - - - - 604
Texas & P. R. Co. *v.* Marshall (136 U. S. 393) - - - - - - - 385
v. Southern Pacific Co. (137 U. S. 48) 614
Texas Cent. R. Co. *v.* Morgan's Louisiana & Texas R. & S. Co. (137 U. S. 171) - - - - - - 625
Texas Land & Cattle Co. *v.* Scott (137 U. S. 486) - - - - - 780
Thaw *v.* Falls (136 U. S. 519) - - 531
Thomas *v.* Murray - - - - - - 539
Thompson, Bent *v.* - - - - - 902
v. Phenix Ins. Co. (136 U. S. 287) 408
Tolson, Inland & Seaboard Coasting Co. *v.* 539
Trinidad Coal & Coking Co., United States *v.* - - - - - - - 640
Trousdale, Brown *v.* - - - - - - 987
Troy Laundry Mach. Co. *v.* Dolph (138 U. S. 617) - - - - - - 1088
Tubbs *v.* Wilhoit (138 U. S. 134) - 887
Twell, Lodge, *v.* - - - - - - 153

U.

Union Nat. Bank of Chicago *v.* Bank of Kansas City (136 U. S. 223) - 841
Union Stock Yards Nat. Bank *v.* Gillespie (137 U. S. 411) - - - 724
United States, Alexander *v.* - - 954
Bassett *v.* - - - - - - - 762
Central Nat. Bank *v.* - - 703
v. Central Pac. R. Co. (138 U. S. 84) 895
v. Chase (135 U. S. 255) - - 117
v. Connor (138 U. S. 61) - - 860
Cook *v.* - - - - - - - 906
Crumpton *v.* - - - - - - 958
Davenport *v.* - - - - - - 548
v. Green (138 U. S. 293) - - 960
v. Grimley (137 U. S. 147) - 636
Jones *v.* - - - - - - - 691
v. Kingsley (138 U. S. 87) - 896
Late Corporation of the Church of Jesus Christ of Latter-Day Saints *v.* - - - - - - 478
Mason *v.* - - - - - - - 545
v. North Carolina (136 U. S. 211) - 336
v. Page (137 U. S. 673) - - 828
Palliser *v.* - - - - - - 514
Romney *v.* - - - - - - 478
Ryan *v.* - - - - - - - 447
v. Sanborn (135 U. S. 271) - 112
Solomons *v.* - - - - - - 667
v. Trinidad Coal & Coking Co. (137 U. S. 161) - - - - - - 640
v. Voorhees (135 U. S. 550) - - 258
Williams *v.* - - - - - - 590
Williams *v.* - - - - - - 1026
United States, *ex rel.* Lisle, *v.* Lynch (137 U. S. 280) - - - - - 700
Miller, *v.* Raum (135 U. S. 200) - 105
Redfield, *v.* Windom (137 U. S. 636) 811
United States Mortg. Co. *v.* Sperry (138 U. S. 313) - - - - - 969
Upshur *v.* Briscoe (138 U. S. 365) - 931
Upshur County *v.* Rich (135 U. S. 467) - 196

V.

Vashon *v.* Greenhow (135 U. S. 662) - 304

Vicksburg, S. & P. R. Co. v. Smith (135 U. S. 195) - - - - - 95
Virginia, Bryan v. - - - - - 304
Cooper v. - - - - - - 304
Cuthbert v. - - - - - 304
Ellett v. - - - - - - - 304
McGahey v. - - - - - 304
Voorhees, United States v. - - - 258

W.

Wabash, St. L. & P. R. Co., Des Moines & Ft. D. R. Co. v. - - - 243
Wadsworth v. Adams (138 U. S. 380) - 984
Walker, Chicago Roller Mill Co. v. - 920
Wallace, Heath v. - - - - - 1063
Warren, Montana R. Co. v. - - 681
Washington & G. R. Co. v. McDade (135 U. S. 554) - - - - - 235
Washington Market Co. v. District of Columbia (137 U. S. 62) - - 572
Waterman v. Mackenzie (138 U. S. 252) 928
Watson, Ayers v. - - - - - - 803
Watt, Anderson v. - - - - - 1078
Weeks, Graham v. - - - - - - 1051
Wellford v. Snyder (137 U. S. 521) - 780
West v. Camden (135 U. S. 507) - - 254
Wheeler v. Jackson (137 U. S. 245) - 659
Wheeling & B. Bridge Co. v. Wheeling Bridge Co. (138 U. S. 287) - 967
Wheeling Bridge Co., Wheeling & B. Bridge Co. v. - - - - - 967
Whitehead v. Shattuck (138 U. S. 146) 873
Whitehill, Riddle v. - - - - - 283
Whitney, Admr., New Orleans v 1102
Wilhoit, Tubbs v. - - - - - - 887
Willard v. Wood (135 U. S. 309) - - 210
Williams v. United States (137 U. S. 113) 586
v. United States (138 U. S. 514) - 1026
Williamson, Hot Springs R. Co. v. - 355
Wilson, Louisville, E. & St. L. R. Co. v. 1023
Windom, United States, *ex rel.* Redfield, v. - - - - - 811
Wood, Willard v. - - - - - - 210
Woodbury, District of Columbia v. - 472
Woodcock, Harding v. - - - - - 580
Wooters, Kauffman v. - - - - - 962

Y.

Yale Lock Mfg. Co. v. Berkshire Nat. Bank (135 U. S. 342) - - 168
York v. Texas (137 U. S. 15) - - 604

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1889.

Vol. 135.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1889,

AND REPORTED HEREIN,

VOL. 135,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 135 U. S.	Title.	Here in.
1	Neagle, *Re*	55
3–6	" "	62
6–42	" "	63
42–45	" "	64
45–47	" "	65
47–50	" "	66
50–53	" "	67
53–56	" "	68
56–59	" "	69
59–62	" "	70
62–64	" "	71
64–67	" "	72
67–70	" "	73
70–73	" "	74
73–76	" "	75
76–78	" "	76
78–81	" "	77
81–84	" "	78
84–87	" "	79
87–90	" "	80
90–92	" "	81
92–95	" "	82
95–98	" "	83
98–99	" "	84
100–102	Leisy *v.* Hardin	128
102–104	" "	129
104–107	" "	130
107–110	" "	132
110–113	" "	133
113–115	" "	134
115–118	" "	135
118–121	" "	136
121–124	" "	137
124–127	" "	138
127–130	" "	139
130–133	" "	140
133–135	" "	141
135–138	" "	142
138–141	" "	143
141–144	" "	144
144–147	" "	145
147–150	" "	146
150–153	" "	147
153–155	" "	148
155–158	" "	149
158–160	" "	150
161	Lyng *v.* Michigan	150
161–163	" "	151
163–165	" "	152
165–167	" "	153
167	Mackall *v.* Mackall	84
168–169	" "	85
169–172	" "	86
172–175	" "	87
175	" "	88
176–178	Commercial Mfg. Co. *v.* Fairbank Canning Co.	88
178–181	" " "	89
181–183	" " "	90
183–186	" " "	91
186–189	" " "	92
189–192	" " "	93
192–194	" " "	94
194–195	" " "	95
195–197	Vicksburg, S. & P. R. Co. *v.* Smith	95
197–200	" " "	96
200–201	United States, Miller, *v.* Raum	105
201–204	" " "	106
204–207	" " "	107
207–209	Central Trust Co. *v.* Grant Locomotive Works; Dayton, F. W. & C. R. Co. *v.* Grant Locomotive Works; Central Trust Co. *v.* Grant; Dayton, F. W. & C. R. Co. *v.* Grant	97
209–212	" " "	98
212–214	" " "	99
214–217	" " "	100
217–220	" " "	101
220–221	" " "	102
221–224	" " "	103
224–226	" " "	104
226–227	" " "	105
227–229	St. Germain *v.* Brunswick	123
229–231	" "	123
231	" "	124
232	Lodge *v.* Twell	153
232–235	" "	154
235–236	" "	155
237	Hartranft *v.* Meyer	110

Off. Rep. 135 U. S.	Title.	Here in
237–239	Hartranft v. Meyer	111
240	Eckloff v. District of Columbia	120
240–243	" " "	121
243–244	" " "	122
244–246	Beatty v. Benton	124
246–249	" "	125
249–252	" "	126
252–254	" "	127
255	United States v. Chase	117
255–258	" "	118
258–261	" "	119
261–262	" "	120
263	Mills, *Re*	107
263–266	" "	108
266–268	" "	109
268–271	" "	110
271–273	United States v. Sanborn Sanborn v. United States	112
273–276	" "	113
276–279	" "	114
279–282	" "	115
282–284	" "	116
284–286	" "	117
286	Iron Silver Min. Co. v. Campbell	155
287–289	" " "	156
289–292	" " "	157
292–295	" " "	158
295–298	" " "	159
298–300	" " "	160
300–303	" " "	161
304–305	Société Foncière Et Agricole Des États Unis v. Milliken	208
305–308	" " " "	209
308–309	" " " "	210
309	Willard v. Wood	210
310–311	" "	211
312–314	" "	213
314	" "	214
315–316	Northern P. R. Co. v. Austin	218
316–318	" " "	219
319	Royer v. Schultz Belting Co.	214
319–320	" " "	215
320–322	" " "	216
322–325	" " "	217
325	" " "	218
326	Mansfield v. Excelsior Refining Co.	162
327–330	" " "	163
330–332	" " "	164
332–335	" " "	165
335–338	" " "	166
338–341	" " "	167
341–342	" " "	168
342	Yale Lock Mfg. Co. v. Berkshire Nat. Bank Berkshire Nat. Bank v. Yale Lock Mfg. Co.	168
343–344	" " "	170
344–347	" " "	171
347–350	" " "	172
350–353	" " "	173
353–356	" " "	174
356–359	" " "	175
359–362	" " "	176
362–365	" " "	177
365–368	" " "	178
368	" " "	179
368–372	" " "	180
372–375	" " "	181
375–377	" " "	182
377–380	" " "	183
380–385	" " "	184
385–387	Yale Lock Mfg. Co. v. Berkshire Nat. Bank Berkshire Nat. Bank v. Yale Lock Mfg. Co.	186
387–390	" " "	187
390–396	" " "	188
396–398	" " "	191
398–401	" " "	192
401–403	" " "	193
403–405	Baiz, *Re*	222
405–408	"	223
408–411	"	224
411–413	"	225
417–418	"	226
418–421	"	227
421–424	"	228
424–427	"	229
427–430	"	230
430–432	"	231
432	New York Elevated R. Co. v. Fifth Nat. Bank	231
433–435	" " "	232
435–437	" " "	233
440–442	" " "	234
442–443	" " "	235
443	Lane, *Re*	219
444–445	"	220
445–448	"	221
448–449	"	222
449–450	Burns v. Rosenstein	193
450–453	" "	194
453–456	" "	195
456	" "	196
457	Randolph v. Quidnick Co.	200
458	" " "	202
458–461	" " "	203
461–464	" " "	204
464–466	" " "	205
466	" " "	206
467–468	Upshur County v. Rich	196
468–471	" " "	197
471–473	" " "	198
473–476	" " "	199
476–477	" " "	200
478–480	Freiburg v. Dreyfus	206
480–483	" "	207
483	" "	208
483	Anderson v. Carkins	272
484	" "	273
484–487	" "	274
487–490	" "	275
490–491	" "	276
492	Detroit v. Osborne	260
495–497	" "	261
497–500	" "	262
500–502	Norman v. Buckner	252
502–505	" "	253
505–507	" "	254
507	West v. Camden	254
508–510	" "	255
510–512	" "	256
512–520	" "	257
520–522	" "	258
522	Robinson v. Iron R. Co.	276
522–523	" "	278
523–526	" "	279
526–529	" "	280
529–532	" "	281
532	" "	282
533	Glenn v. Liggett Glenn v. Taussig	263

Off. Rep. 135 U. S.	Title.	Here in.
532–535	Glenn v. Liggett Glenn v. Taussig	264
535–538	" "	265
538–543	" "	266
543–546	" "	267
546–549	" "	268
549	" "	269
550	United States v. Voorhees	258
550–553	" " "	259
553–554	" " "	260
554–555	Washington & G. R. Co. v. McDade	235
555–558	" " "	236
558–561	" " "	237
561–564	" " "	238
564	" " "	239
567–569	" " "	240
569–572	" " "	241
572–575	" " "	242
575	" " "	243
576	Des Moines & F. D. R. Co. v. Wabash, St. L. & P. R. Co.	243
576–578	" " "	244
578–581	" " "	245
581–583	" " "	246
584–586	Haines v. McLaughlin	290
586–589	" "	291
589–591	" "	292
591–593	" "	293
593–596	" "	294
596–598	" "	295
599–601	"Eclipse," The	269
601–604	" "	270
604–606	" "	271
606–609	" "	272
609	Farrar v. Churchill Churchill v. Farrar	246
610–612	" "	248
612–615	" "	249
615–618	" "	250
618–621	" "	251
621	Riddle v. Whitehill	282

Off. Rep. 135 U. S.	Title.	Here in.
621–623	Riddle v. Whitehill	283
623–625	" "	284
625–628	" "	285
628–632	" "	286
632–635	" "	287
635–637	" "	288
637–640	" "	289
641	Cherokee Nation v. Southern Kansas R. Co.	295
642–645	" " "	297
645–648	" " "	298
648–650	" " "	299
650–653	" " "	300
653–656	" " "	301
656–658	" " "	302
658–661	" " "	302
662	McGahey v. Virginia Bryan v. " Cooper v. " Ellett v. " Cuthbert v. " Brown, *Re* Hucless v. Childrey Vashon v. Greenhow	304
664–666	" "	305
666–669	" "	306
669–672	" "	307
672–675	" "	308
675–677	" "	309
677–680	" "	310
680–683	" "	311
683–686	" "	312
686–689	" "	313
689–694	" "	314
695–699	" "	315
699–701	" "	316
701–706	" "	317
706–709	" "	318
709–713	" "	319
713–717	" "	320
717–719	" "	321
719–721	" "	322

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1889.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

---

[1] THOMAS CUNNINGHAM, Sheriff of the COUNTY OF SAN JOAQUIN, *Appt.*,
v.
DAVID NEAGLE.

(See S. C. Reporter's ed. 1-99.)

Justices of supreme court, when in discharge of duty imposed by law—power of the President to protect—authority of Attorney-General and district attorney—California law—power of marshal or his deputy to protect a judge—not answerable in state courts—habeas corpus, when granted—what is a law of the United States—discharge—act of marshal, when not a crime against the State.

1. The justices of the supreme court are members of the circuit courts of the United States, and, while traveling to attend such courts, are in the discharge of a duty imposed by law.
2. The President has power to protect a judge of a court of the United States, who, while in the discharge of the duties of his office, is threatened with personal violence or death.
3. Authority from the Attorney-General and district attorney of the United States is sufficient to warrant a marshal in making provisions for the protection and defense of a justice of the supreme court while in the discharge of his duty.
4. In California, homicide is justifiable in the protection of the life of another.
5. A marshal of the United States has the same power to keep the peace of the United States that a sheriff has to keep the peace of the State and is authorized to protect a judge from assault and murder.
6. A deputy marshal of the United States, charged with the duty of protecting and guarding a judge of the United States court while in the discharge of his official duties against assault, being present at the critical moment when prompt action is necessary, is justifiable in killing the person making such assault, if necessary to protect the life of the judge.
7. In so doing, the marshal is acting under the laws of the United States and is not answerable for the act in the courts of the State.
8. Federal judges should grant writs of habeas corpus to persons imprisoned for any act done in pursuance of a law of the United States. A duty imposed upon a marshal is a law within the meaning of the Statute providing for the writ of habeas corpus.
9. Under the Act of February 5, 1867 (14 Stat. 385), the court or judge shall proceed in a summary way to determine the facts of the case, and if the petitioner is deprived of liberty in contravention of the Constitution or laws of the United States, he shall forthwith be discharged.
10. Where the prisoner is held in the state court to answer for an act which he was authorized to do and which it was his duty to do as marshal of the United States, and in doing which he did no more than was necessary and proper for him to do, he cannot be guilty of a crime under the law of the State.

[No. 1472.]

Argued Mar. 4, 5, 1890. Decided Apr. 14, 1890.

APPEAL from a judgment of the Circuit Court of the United States for the Northern District of California, discharging, upon habeas corpus, David Neagle from the custody of the Sheriff of the County of San Joaquin, in the State of California, who held him a prisoner on the charge of murder of David S. Terry. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 5 L. R. A. 78, 39 Fed. Rep. 833.

Mr. **G. A. Johnson,** *Atty-Gen.* of California, with whom was *Mr.* **Z. Montgomery,** who also filed an elaborate brief, for appellant:

Assignment of errors.

1. The court below should have quashed the writ of habeas corpus, and dismissed the proceedings, on the motion made by respondent below, under § 754, Rev. Stat. U. S.

2. The court should have sustained the motion to strike out the amended traverse, or answer, which was filed after the testimony was taken, as the material facts could not thereby be ascertained. § 760, Rev. Stat. U. S.

3. The court should have sustained the motion to strike out the testimony, proof and evidence taken prior to the filing of the

amended traverse, as all amendments of the traverse should be filed before the taking of any evidence. Rev. Stat. U. S. §§ 760, 761.

4. The court erred in holding that under sections 751, 752 and 753 of the Revised Statutes of the United States, or under any other laws thereof, it had jurisdiction or authority under the state of facts on which the writ of habeas corpus was, in this case, allowed and executed, to allow, issue or execute said writ for the purpose of delivering the relator from the custody of the authorities of the State of California, or for interfering with said custody, or so in any way as to interfere with said custody.

5. The court erred in holding that the act of the relator in killing D. S. Terry, under the condition disclosed by the record, was an act done by the relator in his official character as a deputy marshal of the United States, in pursuance of a law of the United States, within the meaning of section 753 of the Revised Statutes.

In regard to the assignments of errors Nos. 1, 2 and 3, section 754, Revised Statutes, says that application for the writ of habeas corpus shall be made by complaint in writing, signed by the person for whose relief it is intended, and that the facts set forth in the complaint shall be verified by the oath of the person making the application. The application for this writ was not signed by the relator, nor sworn to by him. The petitioner is A. L. Farish, and not David Neagle, and the petition is sworn to by Farish.

The amended traverse to the return was filed after the evidence was heard and should have been stricken out. The testimony and proofs should have been stricken out, being introduced before the completion of the issues, but motions for these purposes were denied.

Respondent below then filed a demurrer to the amended traverse, but the court decided the whole case without first passing on the demurrer.

We concede that in accordance with section 753, Rev. Stat. U. S., the writ of habeas corpus may extend to a prisoner in jail, if he is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States. But we maintain that the said law "as mentioned in section 753, Rev. Stat.," means statutory law and its necessary incidents.

The great question involved is as to the proper boundary lines between the national and state jurisdiction.

Ex parte Royall, 117 U. S. 249 (29: 870), is cited, which is to the effect that Congress has the power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, a proposition which we do not gainsay. The power to pass such laws, and the non-exercise of such power, are two very different things. We concede that Congress may pass a law for the protection of the judges of the federal courts while traveling to or from their circuits; but what we maintain is that Congress has not passed any such law, and that it will require the action of Congress before any such protection can be furnished by the national government so as to oust the police power of the States.

But the case of *Ex parte Royall* has no application to the case at bar, for in *Ex parte Royall* there was a constitutional question involved, whether or not the constitutional provision against impairing the obligation of a contract was violated by the Act of the General Assembly of Virginia.

The opinion of the court below does not claim that the Statute of California against murder is unconstitutional, or that such a statute does not properly appertain to the police power of the State; so the case of *Ex parte Royall* and the case at bar are not parallel. Nor does the opinion claim, as we understand it, that any specific provision of the Constitution of the United States has been infringed by the arrest and detention of the relator.

The next case cited in that opinion is *Siebold's Case*, 100 U. S. 392 (25: 724). This case and the other cases where indictments had been found involved the question of the constitutionality of certain sections of title 26 of the Revised Statutes, entitled "The Elective Franchise," to wit: sections 2011, 2016, 2017, 2021, 2022, 5515 and 5522. These sections relate to the elections of members of the House of Representatives, and were an assertion on the part of Congress of a power to pass laws for regulating and superintending said elections. The question involved was the constitutional power of Congress to make such regulations, and this court sustained such power. In that case there was an Act of Congress against obstructing the supervisors of elections and the marshals, and giving them power to keep the peace. In the case at bar there is no Act of Congress, as we contend, nor, if we understand the opinion of the court below, is it contended that there is an Act of Congress giving jurisdiction to the federal court of this case of alleged murder.

The next case cited in that opinion is *Tennessee* v. *Davis*, 100 U. S. 257 (25: 648). But that case and this are entirely different. That case was removed from the state court into the federal court because of an express Act of Congress bearing on the subject—sec. 643, Rev. Stat. The prisoner, who was a deputy collector of internal revenue, was indicted for murder. The case was transferred to the circuit court under the provisions of the foregoing Act. A motion was made in the circuit court by the Attorney-General to remand the case to the state court, on the ground that the federal court had no jurisdiction. The case went up to the supreme court on a certificate of division of opinion between the judges; and yet even in such a case as that, where there was an express Act of Congress, two of the judges dissented, *Mr. Justice* Clifford and *Mr. Justice* Field. The dissenting opinion holds that even in a case of an indictment against a citizen of the State for murdering the revenue officer while engaged in the discharge of his official duties, the

circuit court would not have jurisdiction, under the existing laws, to try and sentence the offender, for the reason that the offense is not defined, and there is no Act of Congress giving jurisdiction. Although this decision was rendered in 1879, yet Congress has never yet passed any law regulating the mode of procedure in a case where a federal officer is indicted for the violation of a state law, and the case is removed to the federal court, and to be tried there. The majority opinion in that case is based entirely upon a specific Act of Congress, in relation to a particular subject, the revenue of the United States, to wit: sec. 643, Rev. Stat.

We claim that there is no statute of the United States which expressly or by necessary implication gave any authority for the relator to commit the homicide in question, so that this act could become a matter of federal cognizance.

The next case cited in the opinion of the court below is *Ex parte Jenkins*, 2 Wall. Jr. 530. This case can have no significance here on this inquiry. In that case there were both a statute of the United States and a process issued thereunder by a United States judge. *Judge* Kane says: "I am called upon to inquire whether officers are or are not imprisoned for acts done by them in pursuance of law or process,"—referring to the Act of 1850 and the warrant issued by the federal authorities thereunder. The writ of habeas corpus was awarded under a section of the Act of Congress of March, 2, 1833, which is substantially the same as sec. 753, Rev. Stat.

The next case referred to in the opinion is *Ex parte Robinson*, 6 McLean, 355. A petition and affidavit of Hiram H. Robinson, marshal of the United States, stated that he was imprisoned under the order of the *Honorable Judge* Parker, one of the judges of the Court of Common Pleas for the County of Hamilton, for the performance of his duty as marshal, under process signed by a commissioner of the United States, and prayed for a writ of habeas corpus. He was discharged, because what he did was authorized by the Fugitive Act of 1850.

The next case cited in the opinion is *United States* v. *Jailer of Fayette County*, 2 Abb. U. S. 279. This is a case where a deputy marshal was assisted by Roberts in endeavoring to serve process upon one Call, who was charged with crimes under the Internal Revenue Laws, and who was killed by Roberts.

The next case cited in the opinion of the lower court is *Re Ramsey*, 2 Flipp. 451. The prisoner, while in the discharge of his duty as deputy United States marshal, killed one Joseph Lightfoot. For that he was arrested, and held by the state officers. The officer had in his possession a warrant for the arrest of Lightfoot at the time of the homicide; Lightfoot had declared that he would not submit to an arrest; had reason to know that the officer came there to arrest him, and had a warrant, and his conduct was such as to imperil the life of the officer. *Judge* Ballard discharged the marshal.

The next case cited is *Re Neill*, 8 Blatchf. 167, which involved certain statutes, whereby the power of discharging from service in the army of the United States minors under the age of eighteen years is taken away from the courts, and is confided wholly to the Secretary of War. The petitioner, General Neill, refused to produce the body of an enlisted soldier before a state judge, and was discharged by *Mr. Justice* Blatchford, on the basis of these statutes and the statutes in relation to the writ of habeas corpus.

The next case cited is *Re Farrand*, 1 Abb. U. S. 140, where a commander in the army of the United States made returns to a writ of habeas corpus issued by a state court, showing that he held the petitioner as a recruit in the army, and pursuant to laws of the United States regulating enlistments. The state court directed the recruit to be discharged. The officer refused to discharge him, and was committed for contempt. *Judge* Ballard, on habeas corpus, discharged him.

The next case cited is *Electoral College of South Carolina*, 1 Hughes, 571. The conclusion of *Judge* Bond's opinion will sufficiently explain the case. He says that "the state board of canvassers were acting in official capacity; or, in other words, in pursuance of a law of the United States; and therefore, if anyone disturbs them in the exercise of their functions, they are entitled to the protection of the courts of the United States."

Thus, it will be seen that in all these cases cited in the opinion of the court below, some provision of the Constitution of the United States was violated, or some statute of the United States, or some order or process of a judge or court of the United States, and for this reason the petitioner was discharged from arrest.

But the lower court assumes to draw a distinction between a law of the United States and a statute of the United States, and claims that a law of the United States, even in the case of an alleged murderer, may include more than the statutes of the United States.

But the lower court is confronted with a formidable array of authorities and opinions in opposition to its view. The Constitution itself confers on Congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted. Art. 1, sec. 8, clause 18. The President of the United States says in his late message to Congress: "I recommend that more definite provision be made by law, not only for the protection of federal officers, but for a full trial for such cases in the United States courts." "The duty of protecting its officers, as such, and punishing those who assault them on account of their official acts, should not be devolved, expressly or by acquiescence, upon local authorities." Why does the President of the United States, who is charged with the duty of seeing that the laws of the United States are executed, recommend, after citing this very case of homicide here in question, that more definite provision be made by law for the protection of federal officers?

In the celebrated case of *United States* v. *Guiteau*, 1 Mackey, 538, *Mr. Justice* James, delivering the opinion of the court, says: "We find nothing in the statute, as we have

found nothing in the common law, which indicates that an act is not murder in a particular place, because the consequences of that act happened in some other place. If the act of the offender achieves murder, then that act is murder; and if that act is done in the place designated, then, in contemplation of this statute, the offender commits there the crime of murder."

Mr. Justice Cox, in his opinion upon the jurisdictional question in the same case, says: "The offense we are now dealing with is not an offense against the United States, except in consequence of its having been committed on territory under exclusive federal jurisdiction. If committed in a State, it would have been an offense against the State." The judge accordingly holds that the murder of a President of the United States, who was charged with the duty of seeing that the laws are executed, was not an offense against the United States. He says, further, that it is elementary law that the jurisdiction of the circuit courts over crime is statutory only. Counsel on both sides admitted that our contention is right.

The Constitution of the United States seems to have settled the question we are now discussing beyond any peradventure, in defining what shall constitute the supreme law of the land: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." It will be observed that the laws referred to are such laws as shall be made, using the future tense, in pursuance of the Constitution; not the common law, or any other existing system of laws at the time of the adoption of the Constitution.

By the adoption of the Tenth Amendment, the States, as to their reserved powers, to which belong their judicial department and their police power "are as independent of the general government as that government, within its sphere, is independent of the States."

The various statutes which have been passed by Congress, giving the United States courts jurisdiction, only make our contention the stronger, on the principle that the expression of the one thing is the exclusion of the other thing.

In support of this contention, we cite also the dissenting opinions of *Mr. Justice* Clifford and *Mr. Justice* Field, in *Tennessee* v. *Davis, supra; Ex parte Virginia*, 100 U. S. 349 (25: 680), and *Virginia* v. *Rives*, 100 U. S. 336 (25: 675), in which last named case *Mr. Justice* Field says: "Murder is not an offense against the United States, except when committed on an American vessel on the high seas, or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. The offense within the limits of a State, except where jurisdiction has been ceded to the United States, is as much beyond the jurisdiction of these courts as though it had been committed on another continent."

In *Ex parte Crouch*, 112 U. S. 179 (28: 690), *Mr. Chief Justice* Waite says: "If a prisoner is in the custody of a state court of competent jurisdiction, not illegally arrested, he cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because he is not guilty of the offense for which he is held." "The office of a writ of habeas corpus is neither to correct errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our reports are numerous. *Ex parte Watkins*, 28 U. S. 3 Pet. 202 (7: 653); *Ex parte Lange*, 85 U. S. 18 Wall. 163, 166 (21: 872, 875); *Ex parte Parks*, 93 U. S. 18, 23 (23: 787, 788); *Ex parte Siebold*, 100 U. S. 371, 374 (25: 717, 718); *Ex parte Virginia*, 100 U. S. 339, 343 (25: 676, 678); *Ex parte Rowland*, 104 U. S. 604, 612 (26: 816, 864); *Ex parte Curtis*, 106 U. S. 371, 375 (27: 232, 235); *Ex parte Yarbrough*, 110 U. S. 651, 653 (28: 274)."

In the case of *Osborn* v. *U. S. Bank*, 22 U. S. 9 Wheat. 865 (6: 234), what *Chief Justice* Marshall says is always limited by the fact that there is an Act of Congress on the subject.

But in this case there is no Act of Congress which can be appealed to in aid of the jurisdiction of the circuit court.

The simple fact that petitioner was a deputy United States marshal at the time he shot makes no difference. He had no process; he had committed an offense over which the state court had jurisdiction, and which was defined and punishable under state laws. It was not committed in the exclusive jurisdictional limits of the United States, nor is any case presented involving the infraction of the Constitution of the United States thereunder.

Judge Story says (2 Story, Const. § 1647) that "cases arising under the laws of the United States are such as grow out of the legislation of Congress, within the scope of their constitutional authority, whether they constitute the right, or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted." Where are those laws as applicable to the case at bar?

In the case of the *United States* v. *Bevans*, 16 U. S. 3 Wheat. 336 (4: 404), *Chief Justice* Marshall says: "The jurisdiction of a State is co-extensive with its territory; co-extensive with its legislative power."

Our position is fully covered by the case of *Ex parte Yarbrough*, 110 U. S. 659 (28: 276), where the court says: "Congress was slow to pass laws protecting officers of the government from personal injuries inflicted while in discharge of their official duties within the States. This was not for want of power, but because no occasion had arisen which required such legislation, the remedies in the state courts for personal violence having proved sufficient."

The stress of the argument of the learned court below, in support of its opinion, is that the United States marshal, in this case, was simply preserving the national peace; that in doing so he was authorized by the case of *Ex parte Siebold*, 100 U. S. 371 (25: 717);

secs. 787, 788, Rev. Stat., in regard to the powers and duties of marshals; sec. 362, in regard to the powers and duties of the Attorney-General, and certain common-law powers.

As to the *Siebold Case:* The indictments upon which Siebold and others were severally tried, convicted and sentenced by the Circuit Court for the District of Maryland, were framed partly under sec. 5515 and partly under sec. 5522 of the Revised Statutes of the United States; and the principal questions raised by the application for a writ of habeas corpus were, whether those sections, and certain sections of the Revised Statutes relating to the elective franchise, including sec. 2022, requiring the marshal and his deputies to keep the peace, are within the constitutional power of Congress to enact.

The *Siebold Case* does not help the opinion of the lower court, for in the *Siebold Case* there was an express statutory mandate on the marshals to keep the peace at a congressional election.

The opinion of the court below also relies on secs. 787, 788, Rev. Stat. Now, under section 787, the marshal must attend the court when sitting, not when the court is not sitting, and throughout his district he must execute all lawful precepts directed and given to him under the authority of the United States. The marshal had not any warrant at the time of the homicide, was not endeavoring to make any arrest, and no precept of any kind was given to him. And in regard to sec. 788, which provides that marshals and their deputies in each State shall have the same powers as sheriffs and their deputies in such State, yet it is only in executing the laws of the United States that they have such powers.

But the judges, in their opinion, appeal to the provision of the Constitution that the President "shall take care that the laws shall be faithfully executed," and to the inherent powers of the federal government.

In *Ex parte Merryman*, Taney, C. C. 246, the chief justice says: "The government of the United States is one of delegated and limited powers; it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative or judicial, can exercise any of the powers of government beyond those specified and granted.

The case of *Kendall* v. *U. S.*, 37 U. S. 12 Pet. 611 (9: 1215), is also in point. Says the court: "To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

We cite also *Re Kemp*, 16 Wis. 391. The President's duty to "take care that the laws shall be faithfully executed," presupposes the existence of the laws; not that he shall assume the prerogative of a co-ordinate branch of the government, the legislative, enact them himself, and then take care that they shall be faithfully executed. So the Attorney-General of the United States, even if acting with the approval of the President, cannot prescribe new duties for the United States marshals; his superintendence is limited to the manner of discharging their respective duties, the duties being defined by law.

We cite also *Tracy* v. *Swartwout*, 35 U. S. 10 Pet. 94 (9: 359); *Little* v. *Barreme*, 6 U. S. 2 Cranch, 179 (2: 246); *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 331 (4: 402).

It is claimed also by the court below that there is a common law which may be appealed to in this case. But is there any common law for the United States as applicable to this case?

In the case of *Pennsylvania* v. *Wheeling Bridge Co.*, 54 U. S. 13 How. 563 (14: 268), the court says: "It is admitted that the federal courts have no jurisdiction of common-law offenses, and that there is no abstract pervading principle of common law of the Union under which we can take jurisdiction.

In *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 658 (8: 1080), the court says: "The common law could be made a part of our federal system only by legislative adoption."

In *Ex parte Bollman*, 8 U. S. 4 Cranch, 93 (2: 561), *Mr. Chief Justice* Marshall says: "As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution or by the laws of the United States."

Mr. Chief Justice Marshall says: "To enable the court to decide on such questions, the power to determine it must be given by written law."

The police power is an inherent power with the States, which they cannot surrender or abdicate, and which cannot be taken away, although Congress may establish police regulations also; but their operation must be confined to the subjects over which it is given control by the Constitution of the United States. The whole domain of the criminal law comes under this power.

As to the extent of the police powers, we cite *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 (21: 929); *Mugler* v. *Kansas*, 123 U. S. 623–657 (31: 205–209); *Powell* v. *Pennsylvania*, 127 U. S. 678 (32: 253); *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923).

Messrs. Samuel Shellabarger and *J. M. Wilson* also filed a brief, making, among others, the following points for appellant:

If the habeas corpus order can deliver the relator from prosecution under the laws of California, in the courts of California, then it exempts him from all liability to trial anywhere.

Re Coy, 127 U. S. 752 (32: 278).

The courts of the United States have no criminal jurisdiction, within the body of the States, except such as is given to them by the statutes of the United States.

Cooley, Const. Lim. (4th ed.) 26; *U. S.* v. *Hudson*, 11 U. S. 7 Cranch, 32 (3: 259); *U. S.* v. *Hall*, 98 U. S. 345 (25: 180); *U. S.* v. *Coolidge*, 14 U. S. 1 Wheat. 416 (4: 125); *Ex parte Crane*, 30 U. S. 5 Pet. 204, 210 (8: 97); *U. S.* v. *Eckford*, 73 U. S. 6 Wall. 488 (18: 922); *U. S.* v. *Reese*, 92 U. S. 216 (23:563); *U. S.* v. *Coolidge*, 1 Gall. 495; *Baker* v. *Biddle*, 1 Baldw. 406; *U. S.* v. *Wilson*, 3 Blatchf. 438; *The Neil Cochran*, 1 Brown, Adm. 164; *Harrison* v. *Hadley*, 2 Dill. 234; *U. S.* v. *Terrel*, Hemp. 412; *Re Meador*, 1 Abb. U. S. 324; *U. S.* v. *New Bedford*

Bridge, 1 Woodb. & M. 435, 438, 440, 448; *U. S.* v. *Durkee*, McAll. 201; *U. S.* v. *Plumer*, 3 Cliff. 55; *U. S.* v. *Bevans*, 16 U. S. 3 Wheat. 336 (4: 404); *McIntyre* v. *Wood*, 11 U. S. 7 Cranch, 504 (3: 420); *Tennessee* v. *Davis*, 100 U. S. 282 (25: 656); *U. S.* v. *Britton*, 108 U. S. 206 (27: 700).

A party who sets up, in a trial under a state law, an exemption claimed under a federal law, cannot, in asserting such exemption, support it upon the ground that he apprehends that he would not be tried fairly in the state court.

Ex parte Crouch, 112 U. S. 178 (28: 690).

If a prisoner is in custody of a state court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because he is not guilty of the offense for which he was held.

Ex parte Watkins, 28 U. S. 3 Pet. 202 (7: 653); *Ex parte Lange*, 85 U. S. 18 Wall. 163, 166 (21: 872, 875); *Ex parte Parks*, 93 U. S. 18-23 (23: 787, 788); *Ex parte Siebold*, 100 U. S. 371, 374 (25: 717, 718); *Ex parte Virginia*, 100 U. S. 339, 343 (25: 676, 678); *Ex parte Rowland*, 104 U. S. 604, 612 (26: 861, 864); *Ex parte Curtis*, 106 U. S. 371, 375 (27: 232, 235); *Ex parte Yarbrough*, 110 U. S. 651, 653 (28: 274); *Ex parte Wildenhus*, 28 Fed. Rep. 924, 120 U. S. 1 (30: 565); *U. S.* v. *Jailer of Fayette County*, 2 Abb. U. S. 265; Rapalje, Contempts, § 22; *Ex parte Robinson*, 86 U. S. 19 Wall. 505, 512 (22: 205, 208).

Mr. **W. H. H. Miller**, *Atty-Gen.*, for appellee:

Under section 751 of the Revised Statutes, authorizing the circuit court to issue writs of habeas corpus, the petitioner, being restrained of his liberty, as he claims, in violation of the Constitution and laws of the United States, was entitled to demand, upon filing a proper petition, that a writ issue as a writ of right, and that the court determine whether he was thus unlawfully restrained of his liberty. Section 753 does not attempt to limit the right of the court to issue the writ in any case covered by the Constitution; that is, in any case arising under the Constitution or laws of the United States.

A prisoner in custody for an act done or omitted, in pursuance of a law of the United States, or of an order, process or decree of the court or judge thereof, is in custody in violation of the Constitution of the United States.

The question is whether the petitioner, Neagle, arrested by the officer of the State of California for taking the life of David S. Terry, in defense of the life of Mr. Justice Field, was in custody in violation of the Constitution and laws of the United States.

First. It was the right and duty of the Executive Department of the United States to guard and protect, at every hazard, the life of a federal judge in the discharge of his high duties.

Cohens v. *Virginia*, 19 U. S. 6 Wheat. 384, 387 (5: 286, 287); *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 363 (4: 111); *Siebold's Case*, 100 U. S. 371 (25: 717); *Tennessee* v. *Davis*, 100 U. S. 257 (25: 648); *Ex parte Yarbrough*, 110 U. S. 651 (28: 274).

When by the Constitution the President is invested with the executive power of the nation, and when that instrument enjoins upon him that he shall "take care that the laws be faithfully executed," it confers upon him all power reasonably incident to the exercise of the executive function, and necessary to the vindication and enforcement of the laws, which has not been withheld from him by the Constitution; and the powers so granted in the Constitution Congress neither has, nor has claimed to have, the right to abrogate.

So, when the Constitution grants the judicial power to the supreme court, and such inferior courts as may be organized by law, these courts are invested with the general judicial powers possessed by courts in common-law systems of judicature at the time the Constitution was framed.

Ex parte Siebold, 100 U. S. 395, 396 (25: 726).

Second. It was and is the duty of the Judicial Department of the government to sit in judgment on the conduct of the deputy marshal in the discharge of his duty; and if, upon inquiry, it is found that he did not exceed his functions, then it is the duty of the national judiciary to vindicate and protect such executive officer against the claims of any other power whatsoever.

Cohens v. *Virginia*, 19 U. S. 6 Wheat. 385 (5: 286); *Ableman* v. *Booth*, 62 U. S. 21 How. 506 (16: 169); *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 431 (4: 607); *Weston* v. *Charleston*, 27 U. S. 2 Pet. 449 (7: 481); *Collector* v. *Day*, 78 U. S. 11 Wall. 113 (20: 122); *Dobbins* v. *Erie County Comrs.* 41 U. S. 16 Pet. 435 (10: 1022).

Section 643 of the Revised Statutes, providing for the issuance of writ of habeas corpus *cum causa*, and the removal from state to federal courts of prosecutions instituted against revenue officers and officers acting under Registration Laws, and providing for the trial of such cases in the federal courts, is a clear assertion of this power.

Tennessee v. *Davis*, 100 U. S. 257 (25: 648).

The same assertion of authority is found in the Enrollment Act (13 Stat. p. 8, sec. 12).

U. S. v. *Gleason*, 1 Woolw. 75, 128.

The Circuit Court for the Northern District of California had the right to discharge the petitioner upon habeas corpus in the first instance.

Ex parte Royall, 117 U. S. 241 (29: 868); *Ex parte Fonda*, 117 U. S. 516 (29: 994); *Wildenhus' Case*, 120 U. S. 1 (30: 565); *Botiller* v. *Dominguez*, 130 U. S. 238 (32: 926); *Ex parte Bridges*, 2 Woods, 428; *Ex parte McCardle*, 73 U. S. 6 Wall. 325 (18: 817); *U. S.* v. *Jailer of Fayette County*, 2 Abb. U. S. 265; *Virginia Coupon Cases*, 114 U. S. 270, 292, 293 (29: 185, 193); *Tennessee* v. *Davis*, 100 U. S. 257 (25: 648); *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 363 (4: 111).

Numerous cases involving the right of the United States courts to discharge by habeas corpus persons from the custody of the officers of the state courts, on a charge of murder, have been decided at circuit, all supporting the jurisdiction of the United States courts in the premises.

Ex parte Jenkins, 2 Wall. Jr. 521; *Ex parte Robinson*, 6 McLean, 355; *U. S.* v. *Jailer of Fayette County*, 2 Abb. U. S. 265; *Re Ramsey*, 2 Flipp. 451; *Re Neill*, 8 Blatchf. 167; *Re Farrand*, 1 Abb. U. S. 140; *Electoral College of South Carolina*, 1 Hughes, 571; *Re Hurst*, 2 Flipp. 510.

It was the duty of the Executive Department of the United States to guard and protect, at any hazard, the life of Mr. Justice Field in the discharge of his duty:

Because such protection is essential to the existence of the government.

Because it is enjoined upon the President, as the executive, he being required to take care that the laws be faithfully executed. The marshal was merely the hand of the executive, and unless protected by the marshals the courts and judges have no protection.

It was the duty of the judiciary, having been thus protected by the Executive Department, to sit in judgment upon, and to vindicate, the officer of the Executive Department, if innocent, in the discharge of his duty:

Because such authority in the federal judiciary is essential in principle to the existence of the nation.

Such authority is amply sustained by decisions of this court.

The writ of habeas corpus in this case was a writ of right.

The petitioner being in custody, by reason of an act done in the discharge of his duty to the federal government, had the absolute right to its protection and to be heard and discharged at once. The case, within the decisions of this court, was a case of "urgency," and the circuit court had no discretion in the premises.

Messrs. **Joseph H. Choate** and *James C. Carter*, also for appellee:

The true function and office of the writ of habeas corpus provided by the several statutes amendatory of sec. 14 of the Judiciary Act of 1789, and now embodied in sec. 753 of the Revised Statutes, is not confined to what it was at common law, but necessarily devolves the power upon the federal court or judge, in inquiring into the cause of restraint of liberty, to hear and determine the facts and the law which constitute the petitioner's cause of justification, by federal authority, of the act done, or of a violation, by his continued custody, of the Federal Constitution, law or treaty, or of privilege, etc., by the Law of Nations, and to discharge the petitioner from custody, if such is made out, and to remand him if not.

Church, Habeas Corpus, § 221, p. 272; Cong. Globe, 2d Sess. 27th Cong. p. 444; Id. App. pp. 541, 557; *Ex parte Jenkins*, 2 Wall. Jr. 526; *Tennessee* v. *Davis*, 100 U. S. 257 (25: 648); *Thomas* v. *Crossin*, 5 Pa. L. J. 328; *Ex parte Robinson*, 6 McLean, 355, 4 Am. L. Reg. 617; *U. S.* v. *Morris*, 2 Am. L. Reg. 348; *Re McDonald*, 9 Am. L. Reg. 662; *U. S.* v. *Jailer of Fayette County*, 2 Abb. U. S. 265; *McDonald* v. *Hovey*, 110 U. S. 629 (28: 272); *Duramus* v. *Harrison*, 26 Ala. 326; Sedgwick, Const. Stat. (2d ed.) 229, *note*, and cases cited; *Ex parte Bridges*, 2 Woods, 428; *Ramsey* v. *Jailer of Warren County*, 2 Flipp. 457; *Re Brosnahan*, 18 Fed. Rep. 62; *Ex parte Royall*, 117 U. S. 241 (29: 868).

The personal protection of Mr. Justice Field by Neagle was a duty imposed upon him by authority of the United States, and the homicide necessarily committed by him in rendering that protection effectual was "an act done by him in pursuance of a law of the United States" in the sense of the Statute; and his detention therefor by the state court on a charge of murder was "in violation of the Constitution and laws of the United States" in the sense of the Statute.

Martin v. *Hunter*, 14 U. S. 1 Wheat. 304 (4: 97); *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316 (4: 579); *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264 (5: 257); *Ableman* v. *Booth*, 62 U. S. 21 How. 506 (16: 169); *Siebold's Case*, 100 U. S. 371 (25: 717); *Tennessee* v. *Davis*, 100 U. S. 257 (25: 648); *Chisholm* v. *Georgia*, 2 U. S. 2 Dall. 475 (1: 464); Whart. Crim. Law, §§ 495–501.

But to Neagle's right and duty, as a bystander and citizen, to protect Mr. Justice Field, is to be added his official authority and duty conferred and imposed upon him by Acts of Congress as a United States deputy marshal, attending the justice on his circuit, within the district of which he was marshal. Thus acting under federal authority, and in pursuance of the statutes under which he was appointed, his act in protection of the justice was clearly within the category of section 753 of the Revised Statutes: "Done in pursuance of a law of the United States."

U. S. Rev. Stat. §§ 780, 787, 788; Cal. Pol. Code, § 4176; chap. 75, Stats. of Cal. Stat. 1883, chap. 75, p. 320; Cal. Pen. Code, § 197; 1 Macaulay, 228; Dalton, Office of Sheriffs, (London ed. 1682), chapters 95, 98; The Federalist, No. 78.

But, if more be needed to demonstrate that Neagle, in protecting Mr. Justice Field, was discharging a duty imposed upon him by federal authority, or, in other words, was acting in pursuance of a law of the United States, it is to be found in the order of the Attorney-General, which is conclusively presumed to have been the order of the President, commanding the performance of that duty.

Osborn v. *Bank of U. S.* 22 U. S. 9 Wheat. 738, 865 (6: 204, 234); Const. art. II.; *Little* v. *Barreme*, 6 U. S. 2 Cranch, 170 (2: 243); *McElrath* v. *U. S.* 102 U. S. 426 (26: 189); *Runkle* v. *U. S.* 122 U. S. 543, 557 (30: 1167, 1171); *U. S.* v. *Macdaniel*, 32 U. S. 7 Pet. 14 (8: 592); *Decatur* v. *Paulding*, 39 U. S. 14 Pet. 497 (10: 559); *Office and Duties of Atty-Gen.* 6 Ops. Atty-Gen. 341, 342, 346; *Removal of Intruders on Public Lands*, 1 Ops. Atty-Gen. 475; *Confiscation Cases*, 87 U. S. 20 Wall. 92 (22: 320); *U. S.* v. *San Jacinto Tin Co.* 125 U. S. 273 (31: 747); *Wells* v. *Nickles*, 104 U. S. 444 (26: 825).

Points not taken in the court below, but raised for the first time here, cannot be made the ground of a reversal.

Wilson v. *McNamee*, 102 U. S. 572, 574 (26: 234); *Morrill* v. *Jones*, 106 U. S. 466, 467 (27: 267, 268); *Springer* v. *U. S.* 102 U. S. 586, 593 (26: 253, 256); *Clark* v. *Fredericks*, 105 U. S. 4 (26: 938).

The force used by Neagle, which resulted in the killing of Terry, was no more than was necessary in the discharge of his duty under the instructions to protect Mr. Justice Field at all hazards, and therefore the homicide was justifiable.

Cal. Pen. Code, §§ 197, 198; *Com.* v. *Barnacle*, 134 Mass. 215; *U. S.* v. *King*, 34 Fed. Rep. 302; Whart. Crim. Law, §§ 488–492, and cases cited; *Ex parte Bollman*, 8 U. S. 4 Cranch, 75 (2: 554); *Ex parte Royall*, 117 U. S. 251 (29: 871).

The clearly ascertained fact that the petitioner was in custody of a state court for an act done in pursuance of a law of the United States, and that he was still an officer of the United States, under obligation to proceed day by day with the discharge of his official duties, shows clearly that he was "in custody in violation of the Constitution of the United States," as provided by the other clause of section 753 of the Revised Statutes, and equally entitled to his immediate discharge on that ground, in the discretion of the circuit court, just as Mr. Justice Field himself was entitled to be and was discharged on habeas corpus.

Ex parte Yerger, 75 U. S. 8 Wall. 85 (19: 332); *McCardle's Case*, 73 U. S. 6 Wall. 318, 325 (18: 816, 817).

[3] *Mr. Justice* **Miller** delivered the opinion of the court:

This is an appeal by Cunningham, sheriff of the County of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to *Judge* Sawyer, the circuit judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. L. Farish on his behalf. This petition represented that the said Farish was a deputy [4] marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrences recited in the petition and at the time of filing it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows:

"In the Justice's Court of Stockton Township.
"State of California, } *ss*:
"County of San Joaquin, }
"The People of the State of California, to any sheriff, constable, marshal or policeman of said State or of the County of San Joaquin:

"Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said County of San Joaquin on the 14th day of August, A. D. 1889, in this, that one David S. Terry, a human being then and there being, was willfully, unlawfully, feloniously and with malice aforethought shot, killed and murdered, and accusing Stephen J. Field and David Neagle thereof: You are therefore commanded forthwith to arrest the above-named Stephen J. Field and David Neagle and bring them before me, at my office, in the City of Stockton, or, in case of my absence or inability to [5] act, before the nearest and most accessible magistrate in the county.

"Dated at Stockton this 14th day of August, A. D. 1889.

"H. V. J. Swain,
"Justice of the Peace.

"The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin County, California.

"Dated August 15, 1889.

"H. V. J. Swain,
"Justice of the Peace."

The petition then recites the circumstances of a rencontre between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition is that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney-General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defense of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation is very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the circuit court at that place. The allegation is also very full that Neagle was directed by Marshal Franks to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It is also stated, in more general terms, that Marshal Neagle, in killing Terry [6] under the circumstances, was in the discharge of his duty as an officer of the United States, and was not therefore guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham is in violation of the laws and Constitution of the United States, and that he is in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farish and presented to *Judge* Sawyer, he made the following order:

"Let a writ of habeas corpus issue in pursuance of the prayer of the within petition, returnable before the United States Circuit Court for the Northern District of California.

"Sawyer, Circuit Judge."

The writ was accordingly issued and delivered to Cunningham, who made the following return:

"County of San Joaquin, State of California:
"Sheriff's Office.

"To the Honorable Circuit Court of the United States for the Northern District of California:

"I hereby certify and return that before the coming to me of the annexed writ of habeas corpus the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the Justice's Court of Stockton Township, State of California, County of San Joaquin, and by the indorsement made upon said warrant. Copy of said warrant and indorsement is annexed hereto and made a part of this return. Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded.

"August, 17, 1889.

"Thos. Cunningham,
"Sheriff San Joaquin County, California."

Various pleadings and amended pleadings were made which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for [7] the writ of habeas corpus and Neagle filed a traverse to the return of the sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered when the case comes to be examined upon its facts.

The hearing in the circuit court was had before *Circuit Judge* Sawyer and *District Judge* Sabin. The sheriff, Cunningham, was represented by G. A. Johnson, attorney-general of the State of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order:

"In the Matter of David Neagle, on habeas corpus.

"In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that the petitioner be, and he is hereby, discharged from custody."

From that order an appeal was allowed which brings the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

If it be true, as stated in this order of the court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there does not seem to be any doubt that, under the Statute on that subject, he was properly discharged by the circuit court.

Section 753 of the Revised Statutes reads as follows:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection or exemption claimed under the commission, or order or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the Law of Nations; or unless it is necessary to bring the prisoner into court to testify."

And section 761 declares that when by the writ of habeas corpus the petitioner is brought up for a hearing the "court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." This of course means that if he is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.

By the law as it existed at the time of the enactment of the Revised Statutes, an appeal could be taken to the circuit court from any court of justice or judge inferior to the circuit court in a certain class of habeas corpus cases. But there was no appeal to the supreme court in any case except where the prisoner was the subject or citizen of a foreign state, and was committed or confined under the authority or law of the United States or of any State, on account of any act done or omitted to be done under the commission or authority of a foreign state, the validity of which depended upon the Law of Nations. But afterwards by the Act of Congress of March 3, 1885 (23 Stat. 437), this was extended by amendment as follows:

"That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: 'From the final decision of such circuit court an appeal may be taken to the supreme court in the cases described in the preceding section.'"

The preceding section here referred to is section 763, and is the one on which the prisoner relies for his discharge from custody in this case.

It will be observed that in both the provisions of the Revised Statutes and of this latter Act of Congress the mode of review, whether by the circuit court of the judgment of an inferior court or justice or judge, or by this court of the judgment of a circuit court, the word "appeal," and not "writ of error," is used, and as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review,

as in actions at common law, while by an appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner Neagle had its origin in a suit brought by William Sharon of Nevada in the Circuit Court of the United States for the District of California against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing, possessed and exhibited by her, purporting to be a declaration of marriage between them, under the Code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 8, 1883, was finally heard before *Judge* Sawyer, the circuit judge for that circuit, and *Judge* Deady, United States district judge for Oregon, who had been duly appointed to assist in holding the Circuit Court for the District of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered granting the prayer of the bill. In that decree it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, "was not signed or executed at any time by William Sharon, the complainant; that it is not genuine; that it is false, counterfeited, fabricated, forged and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be indorsed 'canceled,' and that the clerk write across it 'canceled' and sign his name and affix his seal thereto."

The rendition of this decree was accompanied by two opinions, the principal one being written by *Judge* Deady and a concurring one by *Judge* Sawyer. They were very full in their statement of the fraud and forgery practiced by Miss Hill, and stated that it was also accompanied by perjury. And inasmuch as Mr. Sharon had died between the hearing of the argument of the case on the 29th of September, 1885, and the time of rendering this decision, January 15, 1886, an order was made setting forth that fact, and declaring that the decree was entered as of the date of the hearing, *nunc pro tunc*.

Nothing was done under this decree. The defendant, Sarah Althea Hill, did not deliver up the instrument to the clerk to be canceled, but she continued to insist upon its use in the state court. Under these circumstances Frederick W. Sharon, as the executor of the will of his father, William Sharon, filed in the Circuit Court for the Northern District of California, on March 12, 1888, a bill of revivor, stating the circumstances of the decree, the death of his father, and that the decree had not been performed; alleging also the intermarriage of Miss Hill with David S. Terry, of the City of Stockton in California, and making the said Terry and wife parties to this bill of revivor. The defendants both demurred and answered, resisting the prayer of the plaintiff, and denying that the petitioner was entitled to any relief.

This case was argued in the circuit court before Field, *Circuit Justice*, Sawyer, *Circuit Judge*, and Sabin, *District Judge*. While the matter was held under advisement, *Judge* Sawyer, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to have been the residence of Terry and wife, [44 in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted *Judge* Sawyer, and had her husband change seats so as to sit directly in front of the judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then, in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares,"—the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that "The best thing to do with him would be to take him out into the bay and drown him." These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us.

This was August 14, 1888. On the 3d of September, the court rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by *Mr. Justice* Field, and during its delivery a scene of great violence occurred in the court-room. It appears that shortly before the court opened on that day, both the defendants in the case came into the court-room and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides *Mr. Justice* Field there were present on the bench *Judge* Sawyer, and *Judge* Sabin of the District Court of the United States for the District of Nevada. The defendants had denied the jurisdiction of the court originally to render the decree sought to be revived and the opinion of the court necessarily discussed this question without reaching the merits of the controversy. When allusion was made to this question Mrs. Terry arose from her seat, and addressing the justice who was delivering the opinion, asked in an excited manner whether he was going to order her to give up the marriage contract to be canceled. *Mr. Justice* Field said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said, in a very [45 excited and violent manner, that *Justice* Field had been bought, and wanted to know the price he had sold himself for; that he had got Newland's money for it, and everybody knew that he had got it, or words to that effect. *Mr. Justice* Field then directed the

marshal to remove her from the court-room. She asserted that she would not go from the room, and that no one could take her from it.

Marshal Franks proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, arose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie-knife, when he was seized by persons present and forced down on his back. In the meantime Mrs. Terry was removed from the court-room by the marshal, and Terry was allowed to rise and was accompanied by officers to the door leading to the marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in court.

For this conduct both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry for six months, and these sentences were immediately carried into effect. Both the judgment of the court on the petition for the revival of the decree in the case of Sharon against Hill and the judgment of the circuit court imprisoning Terry and wife for contempt have been brought to this court for review, and in both cases the judgments have been affirmed. The report of the cases may be found in *Ex parte Terry*, 128 U. S. 289 [32: 405], and *Terry* v. *Sharon*, 131 U. S. 40 [33: 94].

Terry and Mrs. Terry were separately indicted by the grand jury of the circuit court of the United States during the same term for their part in these transactions, and the cases were pending in said court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the court-room, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death the denunciations by Terry and his wife of Mr. Justice Field were open, frequent and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge Field and Judge Sawyer. Terry, who was present, said nothing to restrain her, but added that *he* was not through with Judge Field yet; and, while in jail at Alameda, Terry said that after he got out of jail he would horsewhip Judge Field; and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge Field would resent it, he said: "If Judge Field resents it I will kill him." And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed, and said, "Yes, I always carry that," and made a remark about judges and marshals, that they were "all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Judge Field some day.

Perhaps the clearest expression of Terry's feelings and intentions in the matter was in a conversation with Mr. Thomas T. Williams, editor of one of the daily newspapers of California. This interview was brought about by a message from Terry requesting Williams to call and see him. In speaking of the occurrences in the court, he said that Justice Field had put a lie in the record about him, and when he met Field he would have to take that back, "and if he did not take it back and apologize for having lied about him, he would slap his face or pull his nose." "I said to him," said the witness, "'Judge Terry, would not that be a dangerous thing to do? Justice Field is not a man who would permit anyone to put a deadly insult upon him like that.' He said, 'Oh, Field won't fight.' I said, 'Well, Judge, I have found nearly all men will fight; nearly every man will fight when there is occasion for it, and Judge Field has had a character in this State of having the courage of his convictions, and being a brave man.' At the conclusion of that branch of the conversation, I said to him, 'Well, Judge Field is not your physical equal, and if any trouble should occur he would be very likely to use a weapon.' He said, 'Well, that's as good a thing as I want to get.' The whole impression conveyed to me by this conversation was, that he felt he had some cause of grievance against Judge Field; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and he would get him into a fight." Mr. Williams says that after the return of Justice Field to California in the spring or summer of 1889, he had other conversations with Terry, in which the same vindictive feelings of hatred were manifested and expressed by him.

It is useless to go over the testimony on this subject more particularly. It is sufficient to say that the evidence is abundant that both Terry and wife contemplated some attack upon Judge Field during his official visit to California in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice Field, as soon as it became known that he was going to attend the circuit court in that year.

So much impressed were the friends of Judge Field, and of public justice, both in California and in Washington, with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the Attorney-General of the United States, suggesting the propriety of

his furnishing some protection to the judge while in California. This resulted in a correspondence between the Attorney-General of the United States, the district attorney and the marshal of the Northern District of California on that subject. This correspondence is here set out:

18] "Department of Justice,
"Washington, April 27th, 1889.
"John C. Franks, United States Marshal,
"San Francisco, Cal.

"Sir: The proceedings which have heretofore been had in connection with the case of Mr. and Mrs. Terry in your United States circuit court have become matter of public notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual caution, in case further proceedings shall be had in that case, for the protection of his honor Justice Field or whoever may be called upon to hear and determine the matter. Of course, I do not know what may be the feelings or purpose of Mr. and Mrs. Terry in the premises, but many things which have happened indicate that violence on their part is not impossible. It is due to the dignity and independence of the court and the character of its judge that no effort on the part of the government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their high duties.

"You will understand, of course, that this letter is not for the public, but to put you upon your guard. It will be proper for you to show it to the district attorney, if deemed best.

"Yours truly, W. H. H. Miller,
"Attorney-General."

"United States Marshal's Office,
"Northern District of California,
"San Francisco, May 6, 1889.
"Hon. W. H. H. Miller, Attorney-General,
"Washington, D. C.

"Sir: Yours of the 27th ultimo, at hand.

"When the Hon. Judge Lorenzo Sawyer, our circuit judge, returned from Los Angeles (some time before the celebrated court scene) and informed me of the disgraceful action of Mrs. Terry towards him on the cars, while her husband sat in front smilingly approving it, I resolved to watch the Terrys (and so notified my deputies) whenever they should enter the court-room, and be ready to suppress the very first indignity offered by either of them to the judges. After this, at the time of their ejectment from the court-room, when
19] I held Judge Terry and his wife as prisoners in my private office and heard his threats against Justice Field, I was more fully determined than ever to throw around the justice and Judge Sawyer every safeguard I could.

"I have given the matter careful consideration, with the determination to fully protect the federal judges at this time, trusting that the Department will reimburse me for any reasonable expenditure.

"I have always, whenever there is any likelihood of either Judge or Mrs. Terry appearing in court, had a force of deputies with myself on hand to watch their every action. You can rest assured that when Justice Field arrives he, as well as all the federal judges, will be protected from insults, and where an order is made it will be executed without fear as to consequences. I shall follow your instructions and act with more than usual caution. I have already consulted with the United States attorney, J. T. Carey, Esq., as to the advisability of making application to you, at the time the Terrys are tried upon criminal charges, for me to select two or more detectives to assist in the case, and also assist me in protecting Justice Field while in my district. I wish the judges to feel secure, and for this purpose will see to it that their every wish is promptly obeyed. I notice your remarks in regard to the publicity of your letter, and will obey your request. I shall only be too happy to receive any suggestions from you at any time.

"The opinion among the better class of citizens here is very bitter against the Terrys, though, of course, they have their friends, and, unfortunately, among that class it is necessary to watch.

"Your most obedient servant,
"J. C. Franks,
"U. S. Marshal, Northern Dist. of Cal."

"San Francisco, Cal., May 7, 1889.
"Hon. W. H. H. Miller, U. S. Attorney-General, Washington, D. C.

"Dear Sir: Marshal Franks exhibited to me your letter bearing date the 27th ult., addressed to him, upon the subject of using due [50
caution by way of protecting Justice Field and the federal judges here in the discharge of their duties in matters in which the Terrys are interested. I noted your suggestion with a great degree of pleasure, not because our marshal is at all disposed to leave anything undone within his authority or power to do, but because it encouraged him to know and feel that the head of our Department was in full sympathy with the efforts being made to protect the judges and vindicate the dignity of our courts.

"I write merely to suggest that there is just reason, in the light of the past and the threats made by Judge and Mrs. Terry against Justice Field and Judge Sawyer, to apprehend personal violence at any moment and at any place, as well in court as out of court, and that while due caution has always been taken by the marshal when either Judge or Mrs. Terry is about the building in which the courts are held, he has not felt it within his authority to guard either Judge Sawyer or Justice Field against harm when away from the Appraisers' Building.

"Discretion dictates, however, that a protection should be thrown about them at other times and places, when proceedings are being had before them in which the Terrys are interested, and I verily believe, in view of the direful threats made against Justice Field, that he will be in great danger at all times while here.

"Mr. Franks is a prudent, cool and courageous officer, who will not abuse any authority granted him. I would therefore suggest that he be authorized in his discretion to retain one or more deputies, at such times as he may deem necessary, for the purposes suggested. That publicity may not be given to

the matter it is important that the deputies whom he may select be not known as such, and that efficient service may be assured for the purposes indicated it seems to me that they should be strangers to the Terrys.

"The Terrys are unable to appreciate that an officer should perform his official duty when that duty in any way requires his efforts to be directed against them. The marshal, his deputies and myself suffer daily [51] indignities and insults from Mrs. Terry, in court and out of court, committed in the presence of her husband and without interference upon his part. I do not purpose being deterred from any duty nor do I purpose being intimidated in the least degree from doing my whole duty in the premises, but I shall feel doubly assured in being able to do so knowing that our marshal has your kind wishes and encouragement in doing everything needed to protect the officers of the court in the discharge of their duties.

"This, of course, is not intended for the public files of your office, nor will it be on file in my office. Prudence dictates great caution on the part of the officials who may be called upon to have anything to do in the premises, and I deem it to be of the greatest importance that the suggestions back and forth be confidential.

"I shall write you further upon the subject of these cases in a few days.

"I have the honor to be, your most obedient servant, John T. Carey,
"U. S. Attorney."

"Department of Justice,
"Washington, D. C., May 27, 1889.
"J. C. Franks, Esq., United States Marshal,
"San Francisco, Cal.

"Sir: Referring to former correspondence of the Department relating to a possible disorder in the session of the approaching term of court owing to the small number of bailiffs under your control to preserve order, you are directed to employ certain special deputies at a *per diem* of five dollars, payable out of the appropriation for fees and expenses of marshals, to be submitted to the court as a separate account from your other accounts against the government for approval, under section 846, Revised Statutes, as an extraordinary expense, that the same may be forwarded to this Department in order to secure executive action and approval.

"Very respectfully, W. H. H. Miller,
"Attorney-General."

[52] The result of this correspondence was that Marshal Franks appointed Mr. Neagle, a deputy marshal for the Northern District of California, and gave him special instructions to attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge Field went from San Francisco to Los Angeles to hold the circuit court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and returned with him to San Francisco.

It appears from the uncontradicted evidence in the case that while the sleeping-car, in which were Justice Field and Mr. Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge Field. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived, Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain, and take his breakfast in the car. This the judge refused to do, and he and Neagle got out of the car and went into the dining-room, and took seats beside each other in the place assigned them by the person in charge of the breakfast-room, and very shortly after this Terry and wife came into the room, and Mrs. Terry, recognizing Judge Field, turned and left in great haste, while Terry passed beyond where Judge Field and Neagle were and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car, and took from it a satchel in which was a revolver. Before she returned to the eating-room, Terry arose from his seat, and passing around the table in such a way as brought him behind Judge Field, who did not see him or notice him, came up where he was sitting with his feet under the table and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver in his hand and in a very loud voice shouted out: "Stop! stop! I am an officer!" Upon this Terry turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. At this instant Neagle fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes.

Mrs. Terry entered the room with the satchel in her hand just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon Field and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that Field and Neagle had murdered her husband intentionally, and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice. The satchel which she had, being taken from her, was found to contain a revolver.

These are the material circumstances produced in evidence before the circuit court on the hearing of this habeas corpus case. It is but a short sketch of a history which is given

in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute dicussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, traveling with him, and aware of all the previous relations of Terry to the judge,—as he was,—of his bitter animosity, his declared purpose to have re-
[54] venge even to the point of killing him, he would have been justified in what he did in defense of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the state authorities for this offense, unless there be found in aid of the defense of the prisoner some element of power and authority asserted under the government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the circuit courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defense of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves.

Mr. Justice Field was a member of the Supreme Court of the United States, and had been a member of that court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that court. The business of the supreme court has become so exacting that for many years past the justices of it have been compelled to remain for the larger part of the year in Washington City, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months.

But the justices of this court have imposed upon them other duties, the most important of which arise out of the fact that they are also judges of the circuit courts of the United
[55] States. Of these circuits there are nine, to each one of which a justice of the supreme court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows:

"The chief justice and associate justices of the supreme court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit or of the new appointment of a chief justice or associate justice, or otherwise."

Section 610 declares that it "shall be the duty of the chief justice, and of each justice of the supreme court, to attend at least one term of the circuit court in each district of the circuit to which he is allotted during every period of two years."

Although this enactment does not require in terms that the justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year, and the result of this is that he goes to some of them in one year and to others in the next year, thus requiring an attendance in the circuit every year.

The justices of the supreme court have been members of the circuit courts of the United States ever since the organization of the government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. In order to enable him to perform this duty Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important, as necessary, as much a discharge of his official duty, as that performed in the court-house. Im- [5
portant cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court.

So it is impossible for a justice of the Supreme Court of the United States, who is compelled by the obligations of duty to be so much in Washington City, to discharge his duties of attendance on the circuit courts as prescribed by section 610, without traveling in the usual and most convenient modes of doing it to the place where the court is to be held. This duty is as much an obligation imposed by the law as if it had said in words "The justices of the supreme court shall go from Washington City to the place where their terms are held every year."

Justice Field had not only left Washington and traveled the three thousand miles or more which was necessary to reach his cir-

cuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time; and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject.

In the case of *United States* v. *Schooner Little Charles*, 1 Brock. 380, a question arose before *Chief Justice* Marshall, holding the Circuit Court of the United States for Virginia, as to the validity of an order made by the district judge at his chambers, and not in court. The Act of Congress authorized stated terms of the district court, and gave the [57] judge power to hold special courts at his discretion, either at the place appointed by the law or such other place in the district as the nature of the business and his discretion should direct. He says: "It does not seem to be a violent construction of such an Act to consider the judge as constituting a court whenever he proceeds on judicial business,"—and cites the practice of the courts in support of that view of the subject.

In the case of *United States* v. *Gleason*, 1 Woolw. 128, the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend. These men, it was said, had visited the region of country where they were murdered, and having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed, and the court was asked to instruct the jury that under these circumstances they were not engaged in the duty of arresting the deserters named. "It is claimed by the counsel for the defendant," says the report, "that if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the purpose of making the arrests at that time, and were returning to headquarters at Grinnell, with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law." But the court held that this was not a sound construction of the Statute, and "that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the proper prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still engaged in arresting the deserters, within the meaning of the Statute. It is not necessary," said the court, "that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment."

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as circuit justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of habeas corpus must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an Act of Congress. It is not supposed that any special Act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the supreme court through their circuits and act as a body-guard to them to defend them against malicious assaults against their persons. But we are of opinion that this view of the Statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of habeas corpus to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody "for an act done or omitted in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States."

In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

It has in modern times become apparent

that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be subject to the laws of a State and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenseless and unprotected.

[60] The views expressed by this court through *Mr. Justice* Bradley, in *Ex parte Siebold*, 100 U. S. 371, 394 [25: 717, 725], are very pertinent to this subject and express our views with great force. That was a case of a writ of habeas corpus, where Siebold had been indicted in the Circuit Court of the United States for the District of Maryland, for an offense committed against the Election Laws, during an election at which members of Congress and officers of the State of Maryland were elected. He was convicted, and sentenced to fine and imprisonment, and filed his petition in this court for a writ of habeas corpus, to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was, that the Congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the State of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and state courts on this subject, it is said:

"Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the Act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, [6
except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.' . . . Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation. . . . It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction."

At the same term of the court, in the case of *Tennessee* v. *Davis*, 100 U. S. 257, 262 [25: 648, 650], where the same questions in regard to the relative powers of the federal and state courts were concerned, in regard to criminal offenses, the court expressed its views through *Mr. Justice* Strong, quoting from the case of *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 363 [4: 112], the following language: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers;" and then [6
proceeding: "It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the general

government is powerless to interfere at once for their protection, if their protection must be left to the action of the state court, the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

To cite all the cases in which this principle of the supremacy of the government of the United States, in the exercise of all the powers conferred upon it by the Constitution, is maintained, would be an endless task. We have selected these as being the most forcible expressions of the views of the court, having a direct reference to the nature of the case before us.

Where, then, are we to look for the protection which we have shown Judge Field [63] was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States; because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the Executive Department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by Act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by Acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combatting assumes that no such law has been passed by Congress.

If we turn to the Executive Department of the government, we find a very different condition of affairs. The Constitution, section 3, article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, who are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office and represent him in a thousand acts to [64] which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of Acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul-general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hulsemann, the Austrian minister at Washington, which arose out of this affair, and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what Act of Congress then existing can anyone lay his finger

in support of the action of our government in this matter?

[65] So, if the President or the Postmaster-General is advised that the mails of the United States, possibly carrying treasure, are liable to be robbed and the mail carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells* v. *Nickles*, 104 U. S. 444 [26: 825]. That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made to ascertain and fix the authority of these timber agents by any [66] positive provision of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the land office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273 [31: 747]. In that case, a suit was brought in the name of the United States, by order of the Attorney-General, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud and deceit practiced upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney-General or any other officer of the government to institute such a suit in the absence of any Act of Congress authorizing it. It was conceded that there was no express authority given to the Attorney-General to institute that particular suit or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this court to that suggestion conceded that in the Acts of Congress establishing the Department of Justice and defining the duties of the Attorney-General there was no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the government upon bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: "If the United States, in [67] any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney-General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself from frauds, impostures and deceptions than the private individual, is hardly open to argument." "There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney-General. How, then, can it be argued that if the United States has been deceived, entrapped or defrauded, into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring suit to avoid the effect of such instrument, thus fraudulently obtained, without a special Act of Congress in each case, or without some special authority applicable to this class of cases?" The same question was raised in the earlier case of *United States* v. *Hughes*, 51 U. S. 11 How. 552 [13: 809], and decided the same way.

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack

which may probably result in his death, and we think it clear that where this protection is to be afforded through the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the Attorney-General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording [68] this protection by the Attorney-General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defense of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointment and duties of the district attorneys, marshals and clerks of the courts of the United States, section 788 declares:

"The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

If, therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States.

Section 4176 of the Political Code of California reads as follows:

"The sheriff must:

"First. Preserve the peace.

"Second. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or have committed a public offense.

"Third. Prevent and surpress all affrays, breaches of the peace, riots and insurrections, which may come to his knowledge."

And the Penal Code of California declares (section 197) that homicide is justifiable when committed by any person "when resisting any attempt to murder any person or to commit a felony or to do some great bodily injury upon any person;" or "when committed in defense of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a felony."

[69] That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California,—are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if in performing this duty it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry's death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of California upon its peace officers, which become, by this Statute, in proper cases, transferred as duties to the marshals of the United States.

But all these questions being conceded, it is urged against the relief sought by this writ of habeas corpus, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of [7 California. That the Statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offense charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of habeas corpus are the results of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the States denied. The original Act of Congress on the subject of the writ of habeas corpus, by its 14th section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81. This did not present the question, or at least, it

gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the States. But when, during the controversy growing out of the Nullification Laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the state authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the Act of Congress of March 2, 1833 (4 Stat. 634), among other remedies for such condition of affairs, provided, by its 7th section, that the federal judges should grant writs of habeas corpus in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or [71] law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of habeas corpus might issue by the federal judges arose out of the celebrated *McLeod Case*, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New York. This led to an extension of the powers of the federal judges under the writ of habeas corpus, by the Act of August 29, 1842 (5 Stat. 539), entitled "An Act to Provide Further Remedial Justice in the Courts of the United States." It conferred upon them the power to issue a writ of habeas corpus in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the Law of Nations. In advocating the bill, which afterwards became a law, on this subject, Senator Berrien, who introduced it into the Senate, observed: "The object was to allow a foreigner, prosecuted in one of the States of the Union for an offense committed in that State, but which he pleads has been committed under authority of his own sovereignty or the authority of the Law of Nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the Law of Nations. The plea must show that it has reference to the laws or treaties of the United States or the Law of Nations, and showing this, the writ of habeas corpus is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison [72] awaiting the proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief." No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of habeas corpus was the Act of February 5, 1867 (14 Stat. 385), and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that "the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."

It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of habeas corpus one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law, and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case. We have already cited such decisions of this court as are most important and directly in point, and there is a series of cases decided by the circuit and district courts to the same purport. Several of these arose out of proceedings under the Fugitive Slave Law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another State, was arrested by the authorities of the State. In many of these cases they made application to the judges of the United States for relief by the [7 writ of habeas corpus, which gave rise to several very interesting decisions on this subject.

In *Ex parte Jenkins*, 2 Wall. Jr. 521, 529, the marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a justice of the peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the Circuit Court of the United States for the Eastern District of Pennsylvania a petition for a writ of habeas corpus, which was heard before *Mr. Justice* Grier, who held that under the Act of 1833, already referred to, the marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the Act of Congress concerning the rendition of fugitive slaves. He said: "The authority conferred on the judges of the United States by this Act of Congress gives them all the power

that any other court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned by any authority for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the Act was passed. It was passed when a certain State of this Union had threatened to nullify Acts of Congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such state legislation."

This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before *Judge* Kane on another writ of habeas corpus and again released. 2 Wall. Jr. 531. A third time the marshal, being indicted, was arrested on a bench warrant issued by the state court, and again brought before the circuit court of the United States by a writ of habeas corpus and discharged. Some remarks of *Judge* Kane on this occasion are very pertinent to the objections raised in the present case. He said (2 Wall. Jr. 543): "It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them [in the state court], will [74] in effect prevent their trial by jury at all, since there is no Act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our Constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either state or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis*, while the case is at bar. It is made ineffectual at any time by the discharge on habeas corpus. . . . And there is no harm in this. No one imagines that because a man is accused he must therefore of course be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating upon them."

Many other decisions by the circuit and district courts, to the same purport, are to be found, among them the following: *Ex parte Robinson*, 6 McLean, 355, 4 Am. L. Reg. 617; *United States* v. *Jailer of Fayette County*, 2 Abb. U. S. 265; *Re Ramsey*, 2 Flipp. 451; *Re Neill*, 8 Blatchf. 156; *Ex parte Bridges*, 2 Woods, 428; *Ex parte Royall*, 117 U. S. 241.

Similar language was used by Mr. Choate in the Senate of the United States upon the passage of the Act of 1842. He said: "If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the Constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another is totally immaterial. The single question submitted to the national tribunal, the question whether, under the Statute adopting the Laws of Nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the state court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either way, they do not ad- [7
minister the criminal law of a State. In the one case as much as in the other, and no more, do they interfere with state judicial power."

The same answer is given in the present case. To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offense, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The circuit court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impaneled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offense to be submitted to a jury, and if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the Statute, which we think requires of us to place ourselves, as far as possible, in the place of the circuit court, and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require.

The result at which we have arrived upon this examination is that, in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of [7
Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable

to answer in the courts of California on account of his part in that transaction.

We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.

Mr. Justice **Field** did not sit at the hearing of this case, and took no part in its decision.

Mr. Justice **Lamar,** with whom concurred *Mr. Chief Justice* **Fuller,** dissenting:

The chief justice and myself are unable to assent to the conclusion reached by the majority of the court.

Our dissent is not based on any conviction as to the guilt or innocence of the appellee. The view which we take renders that question immaterial to the inquiry presented by this appeal. That inquiry is, whether the appellee, Neagle, shall in this *ex parte* proceeding be discharged and delivered from any trial or further inquiry in any court, state or federal, for what he has been accused of in the forms prescribed by the Constitution and laws of the State in which the act in question was committed. Upon that issue we hold to the principle announced by this court in the case of *Ex parte Crouch*, 112 U. S. 178, 180 [28: 690, 691], in which *Mr. Chief Justice* Waite, delivering the opinion of the court, said: "It is elementary learning that, if a prisoner is in custody of a state court of competent jurisdiction, not illegally asserted, he cannot be taken from that jurisdiction and discharged on habeas corpus issued by a court of the United States, simply because he is not guilty of the offense for which he is held. All questions which may arise in the orderly course of the proceeding against him are to [77] be determined by the court to whose jurisdiction he has been subjected, and no other court is authorized to interfere to prevent it. Here the right of the prisoner to a discharge depends alone on the sufficiency of his defense to the information under which he is held. Whether his defense is sufficient or not is for the court which tries him to determine. If in this determination errors are committed, they can only be corrected in an appropriate form of proceeding for that purpose. The office of a writ of habeas corpus is neither to correct such errors, nor to take the prisoner away from the court which holds him for trial, for fear, if he remains, they may be committed. Authorities to this effect in our reports are numerous. *Ex parte Watkins*, 28 U. S. 3 Pet. 202 [7: 653]; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 166 [21: 872, 875]; *Ex parte Parks*, 93 U. S. 18, 23 [23: 787, 788]; *Ex parte Siebold*, 100 U. S. 371, 374 [25: 717, 718]; *Ex parte Virginia*, Id. 339, 343 [676, 678]; *Ex parte Rowland*, 104 U. S. 604, 612 [26: 861, 864]; *Ex parte Curtis*, 106 U. S. 371, 375 [27: 232, 235]; *Ex parte Yarbrough*, 110 U. S. 651, 653 [28: 274]."

Many of the propositions advanced in behalf of the appellee and urged with impressive force we do not challenge. We do not question, for instance, the soundness of the elaborate discussion of the history of the office and function of the writ of habeas corpus, its operation under and by virtue of section 753 of the Revised Statutes, or the propriety of its use in the manner and for the purposes for which it has been used, in any case where the prisoner is under arrest by a State for an act done "in pursuance of a law of the United States." Nor do we contend that any objection arises to such use of the writ, and based merely on that fact, in cases where no provision is made by the federal law for the trial and conviction of the accused. Nor do we question the general propositions, that the federal government established by the Constitution is absolutely sovereign over every foot of soil, and over every person, within the national territory, within the sphere of action assigned to it; and that within that sphere its Constitution and laws are the supreme law of the land, and its proper instrumentalities of government can be subjected to no restraint, and can be held to no accountability whatever. Nor, again, do we dispute the proposition that whatever is necessarily implied in the Constitution [7 and laws of the United States is as much a part of them as if it were actually expressed. All these questions we pretermit.

The recognition by this court, including ourselves, of their soundness does not in the least elucidate the case; for they lie outside of the true controversy. The ground on which we dissent, and which in and by itself seems to be fatal to the case of the appellee, is this: That in treating section 753 of the Revised Statutes as an Act of authority for this particular use of the writ a wholly inadmissible construction is placed on the word "law," as used in that Statute, and a wholly inadmissible application is made of the clause "in custody in violation of the Constitution . . . of the United States."

It will not be necessary to consider these two propositions separately, for they are called into this case as practically one.

The section referred to is as follows:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States," etc.

It is not contended in behalf of the appellee that the writ of habeas corpus could be used, as here it is, in any case, without authority of a statute. In *Ex parte Bollman*, 8 U. S. 4 Cranch, 75, 94 [2: 554, 561], *Chief Justice* Marshall said: "The power to award the writ [of habeas corpus] by any of the courts of the United States must be given by written law."

It is not contended that there is any statute other than those now found in the Revised Statutes of the United States. Nor is it contended that in those Statutes there is any authority for the use here made of the writ other than what is embraced in the clauses above quoted. The issue, as stated above, is thus narrowed to the proper force to be attributed to those clauses.

It is stated as the vital position in appel-

[79] lee's case, that it is not supposed that any special Act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the supreme court through their circuits and act as a body guard to them to defend them against malicious assaults against their persons; that in the view taken of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase; and that it would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there was to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments might operate unfavorably. In considering this position, it is indispensable to observe carefully the distinction between the individual man Neagle, and the same person in his official capacity as a deputy marshal of the United States; and also the individual man whose life he defended, and the same person in his official capacity of a circuit justice of the United States.

The practical importance of the distinction between the rights and liabilities of a person in his private character, and the authority and immunity of the same person in his official capacity, is clearly pointed out and illustrated in *United States* v. *Kirby*, 74 U. S. 7 Wall. 482, 486 [19: 278, 280], in which the court says: "No officer or employé of the United States is placed by his position, or the services he is called to perform, above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention, when accused of felony, in the forms prescribed by the Constitution and laws." And the court adds: "Indeed, it may be doubted whether it is competent for Congress to exempt the employés of the United States from arrest on criminal process from the state courts, when the crimes charged against them are not merely *mala prohibita*, but are *mala in se*. But whether legislation of that character be constitutional [80] or not, no intention to extend such exemption should be attributed to Congress unless clearly manifested by its language."

Now, we agree, taking the facts of the case as they are shown by the record, that the personal protection of Mr. Justice Field, as a private citizen, even to the death of Terry, was not only the right, but was also the duty of Neagle and of any other bystander. And we maintain that for the exercise of that right or duty he is answerable to the courts of the State of California, and to them alone. But we deny that upon the facts of this record, he, as Deputy Marshal Neagle, or as private citizen Neagle, had any duty imposed on him by the laws of the United States growing out of the official character of Judge Field as a circuit justice. We deny that anywhere in this transaction, accepting throughout the appellee's version of the facts, he occupied in law any position other than what would have been occupied by any other person who should have interfered in the same manner, in any other assault of the same character, between any two other persons in that room. In short, we think that there was nothing whatever in fact of an official character in the transaction, whatever may have been the appellee's view of his alleged official duties and powers; and therefore we think that the courts of the United States have in the present state of our legislation no jurisdiction whatever in the premises, and that the appellee should have been remanded to the custody of the sheriff.

The contention of the appellee, however, is that it was his official duty as United States marshal to protect the justice; and that for so doing in discharge of this duty, "which could only arise under the laws of the United States," his detention by the state courts brings the case within section 753 of the Revised Statutes, as aforesaid.

We shall therefore address ourselves as briefly as is consistent with the gravity of the question involved, to a consideration of the justice of that claim. We must, however, call attention again to the formal and deliberate admission that it is not pretended that there is any *single* specific statute making it, in so many words, Neagle's duty to protect the justice. The position assumed is, and is wholly, that the authority and duty [8 to protect the justice did arise directly and necessarily out of the Constitution and positive congressional enactments.

The Attorney-General of the United States has appeared in this case for the appellee, in behalf of the government; and in order that the grounds upon which the government relies in support of its claim against the State of California that Neagle should be discharged on this writ may fully appear, it is proper to give some of his most important propositions in his own language. He maintains that "it was the duty of the judiciary, having been thus protected by the Executive Department, to sit in judgment upon and to vindicate the officer of the Executive Department, if innocent, in the discharge of his duty, because such authority in the federal judiciary is essential in principle to the existence of the nation." "We insist that, by the Constitution of the United States, a government was created possessed of all the powers necessary to existence as an independent nation; that these powers were distributed in three great constitutional departments, and that each of these departments is, by that Constitution, invested with all of those govermental powers naturally belonging to such department which have not been expressly withheld by the terms of the Constitution. In other words, that Congress is invested not only with expressed but with implied legislative powers; that the judiciary is invested not only with expressed powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it; and that the President, in like manner, by the very fact that he is made the Chief

Executive of the nation, and is charged to protect, preserve and defend the Constitution and to take care that the laws are faithfully executed, is invested with necessary and implied executive powers which neither of the other branches of the government can either take away or abridge; that many of these powers pertaining to each branch of the government are self-executing, and in no way dependent, except as to the ways and means, upon legislation."

"The Constitution provides that before the
[82] President enters upon the execution of his office he shall take an oath—'I do solemnly swear that I will faithfully execute the office of President of the United States, and will to the best of my ability *preserve, protect and defend* the Constitution of the United States.'" And he asks: "Has this clause no significance? Does it not, by necessary implication, invest the President with self-executing powers; that is, powers independent of statute?"

In reply to these propositions, we have this to say: We recognize that the powers of the government "within its sphere," as defined by the Constitution, and interpreted by the well-settled principles which have resulted from a century of wise and patriotic analysis, are supreme; that these supreme powers extend to the protection of itself and all of its agencies, as well as to the preservation and the perpetuation of its usefulness; and that these powers may be found not only in the express authorities conferred by the Constitution, but also in necessary and proper implications. But while that is all true, it is also true that the powers must be exercised, not only by the organs, but also in conformity with the modes, prescribed by the Constitution itself. These great federal powers, whose existence in all their plenitude and energy is incontestable, are not autocratic and lawless; they are organized powers, committed by the people to the hands of their servants for their own government, and distributed among the Legislative, Executive and Judicial Departments; they are not *extra* the Constitution, for, in and by that Constitution, and in and by it alone, the United States, as a great democratic federal republic, was called into existence, and finds its continued existence possible. In that instrument is found not only the answer to the general line of argument pursued in this case, but also to the specific question propounded by the Attorney-General in respect to the President's oath, and its implications.

The President is sworn to "preserve, protect and defend the Constitution." That oath *has* great significance. The sections which follow that prescribing the oath (secs. 2 and 3 of art. 2) prescribe the duties and fix the powers of the President. But one very
[83] prominent feature of the Constitution which he is sworn to preserve, and which the whole body of the judiciary are bound to enforce, is the closing paragraph of sec. 8, art. 1, in which it is declared that "the Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

This clause is that which contains the germ of all the implication of powers under the Constitution. It is that which has built up the Congress of the United States into the most august and imposing legislative assembly in the world; and which has secured vigor to the practical operations of the government, and at the same time tended largely to preserve the equilibrium of its various powers among its co-ordinate departments, as partitioned by that instrument. And that clause alone conclusively refutes the assertion of the Attorney-General, that it was "the duty of the Executive Department of the United States to guard and protect, at any hazard, the life of Mr. Justice Field in the discharge of his duty, because such protection is essential to the existence of the government." Waiving the question of the essentiality of any such protection to the existence of the government, the manifest answer is, that the protection needed and to be given must proceed, not from the President, but primarily from Congress. Again, while it is the President's duty to take care that the laws be faithfully executed, it is not his duty to *make* laws or a law of the United States. The laws he is to see executed are manifestly those contained in the Constitution, and those enacted by Congress, whose duty it is to make all laws necessary and proper for carrying into execution the powers of those tribunals. In fact, for the President to have undertaken to make any law of the United States pertinent to this matter would have been to invade the domain of power expressly committed by the Constitution exclusively to Congress. That body was perfectly able to pass such laws as it should deem expedient in reference to such matter; indeed, it has passed such laws in reference to elections, [8
expressly directing the United States marshals to attend places of election to act as peace officers, to arrest with and without process, and to protect the supervisors of election in the discharge of their duties; and there was not the slightest legal necessity out of which to imply any such power in the President.

For these reasons the letters of the Attorney-General to Marshal Franks, granting that they did import what is claimed, and granting that the Attorney-General was to all intents and purposes, *pro hac vice*, the President, invested Neagle with no special powers whatever. They were, if so construed, without authority of law, and Neagle was then and there a simple deputy marshal—no more and no less.

To illustrate the large sphere of powers self-executing and independent of statutes claimed to be vested in the Executive reference is made to the continually recurring cases of the President's interference for the protection of our foreign-born and naturalized citizens on a visit to their native country; and we are cited, as a striking instance of the exercise of such power, to the case of Martin Koszta, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen, and who, whilst at Smyrna,

was seized by order of an Austrian official and confined on board an Austrian vessel, and who, being afterwards delivered up to Captain Ingraham, commanding an American war vessel, in compliance with a demand, backed by a demonstration of force, on the part of that officer, was placed in the hands of a French consul subject to negotiations between the American and Austrian governments, resulting in the famous correspondence between the American Secretary of State, Mr. Marcy, and the Chevalier Hulsemann, representing the Austrian government, and the restoration of Koszta to freedom. We are asked, Upon what express statute of Congress then existing can this act of the government be justified?

We answer, that such action of the government was justified because it pertained to the foreign relations of the United States in respect to which the federal government is the [35] exclusive representative and embodiment of the entire sovereignty of the nation, in its united character; for to foreign nations, and in our intercourse with them, States and state governments, and even the internal adjustment of federal power, with its complex system of checks and balances, are unknown, and the only authority those nations are permitted to deal with is the authority of the nation as a unit.

That authority the Constitution vests expressly and conclusively in the treaty-making power—the President and Senate—by one simple and comprehensive grant: "He [the President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur." This broad grant makes enumeration of particular powers unnecessary. All other delegations of powers in reference to the international relations of this country are carefully and specifically enumerated and assigned, one by one, to their designated departments. In reply, therefore, to the question, What law expressly justifies such action? we answer, The Organic Law, the Constitution, which expressly commits all matters pertaining to our diplomatic negotiations to the treaty-making power.

Other cases are referred to in illustration of the same point; but the one which it is alleged presents that principle in the most imposing form is that of *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273 [31: 747]. In that case a suit was brought in the name of the United States, by order of the Attorney-General, to set aside a patent which had been issued for a large body of land, on the ground that it had been obtained from the government by fraud and deceit practiced upon its officers. There are, it is true, some expressions in the opinion delivered in that case which seem to admit that there is no specific Act of Congress expressly authorizing the Attorney-General to bring suit for the annulment of a patent procured by fraud from the government; but a close examination of the doctrine of the court shows that it goes no farther than the assertion that the authority of the Attorney-General arises by implication, directly and immediately, out of the express law of Congress. The opinion quotes the clause of the Constitution which declares that the judicial power shall [8 extend to all cases to which the United States shall be a party, and says that this means, mainly, where it is a party plaintiff. It then refers to the Statute of Congress which expressly directs the United States district attorneys to bring suits in behalf of the government; and that the suits thus brought by them are to be under the immediate superintendence and control of the Attorney-General. The utmost extent to which the court goes is, that whilst admitting there is no express authority in the Attorney-General to institute the suit, yet such authority is directly and necessarily involved in the express provisions of the Statute vesting him with the entire control and superintendence of such suits, and the provision and control of the district attorneys in their conduct of them.

Equally conclusive is the answer which the Constitution makes to the assertion that by the Constitution the judiciary is invested, not only with the express powers granted in the Constitution as its share of the government, but with all the judicial powers which have not been expressly withheld from it. It may be found in the clause which declares that "the Congress shall have power . . . to constitute tribunals inferior to the supreme court;" and in that which declares it shall make all laws necessary and proper for carrying into execution the powers of those tribunals. The correlation between those clauses is manifest and unmistakable. If Congress can and must, by the very terms of the Constitution, make all laws proper for carrying into execution all the powers of any department of the government, and if it can create the circuit court, expand its powers, abridge them, and abolish the court at will, how can it be that that court, at the least, shall have any implied powers derived from the Constitution and independent of the statutes? And yet, in this transaction, it must be remembered that Mr. Justice Field is only claimed to be the representative of that court.

Not only do the foregoing views seem to us to be the logical and unavoidable results of original and independent studies of the Constitution, but they are also sustained and enforced by a long series of judicial recognitions and assertions.

In *United States* v. *Fisher*, 6 U. S. 2 Cranch, [1 358, 396 [2: 304, 316], *Chief Justice* Marshall, in delivering the opinion of the court, said of the clause above relied on: "In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

In *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat.

316, 420, 421 [4: 579, 605], *Chief Justice* Marshall, for the court, delivered one of those opinions which are among the chief ornaments of American jurisprudence. It is largely devoted to an exhaustive analysis of the constitutional clause in question. Among other things he says: "The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to restrain, the powers of Congress, or to impair the right of the Legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble. We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people."

In *United States* v. *Reese*, 92 U. S. 214, 217 [23: 563, 564], *Chief Justice* Waite, delivering the opinion of the court, said: "Rights and immunities created by or dependent upon the [88] Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected."

In *Strauder* v. *West Virginia*, 100 U. S. 303, 310 [25: 664, 666], the court says: "A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress."

Cooley in his work on "Constitutional Limitations" collates from the numerous adjudications of this court, cited by him, the following principles: "So far as that instrument [the Constitution] apportions powers to the national judiciary, it must be understood, for the most part, as simply authorizing Congress to pass the necessary legislation for the exercise of those powers by the federal courts, and not as directly, of its own force, vesting them with that authority. The Constitution does not, of its own force, give to national courts jurisdiction of the several cases which it enumerates, but an Act of Congress is essential, first, to create courts, and afterwards to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the supreme court by name. And although the courts of the United States administer the common law in many cases, they do not derive authority from the common law to take cognizance of and punish offenses against the government. Offenses against the nation are defined and their punishment prescribed by Acts of Congress." In a note to this paragraph he says: "Demurrer to an indictment for a libel upon the President and Congress. By the court: 'The only question which this case presents is, whether the circuit courts can exercise a common-law jurisdiction in criminal cases. . . . The general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition. The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States; whatever is not expressly given to the former the latter expressly reserve. . . . It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative Act, if it does not result to those courts as a consequence of their creation.' *United States* v. *Hudson*, 11 U. S. 7 Cranch, 32 [3: 259]; see *United States* v. *Coolidge*, 14 U. S. 1 Wheat. 415 [4: 124]. 'It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union, and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption.' *Per* McLean, *J.*, *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 658 [8: 1079],"—and citing many other authorities.

In *Tennessee* v. *Davis*, 100 U. S. 257, 267 [25: 648, 651], referring to the Judiciary Act of 1789, the court said: "It [the Constitution] did not attempt to confer upon the federal courts all the judiciary power vested in the government. Additional grants have from time to time been made. Congress has authorized more and more fully, as occasion has required," etc.

It would seem plain, therefore, that if the Constitution means anything, and if these judicial utterances, extending as they do over a period of eighty years, and embracing a variety of interests, mean anything, they mean that the power to provide and prescribe the laws necessary to effectuate the governmental and official powers of the United States and its officers is vested in Congress.

The gravamen of this case is in the assertion that Neagle slew Terry in pursuance of a law of the United States. He who claims to have committed a homicide by authority must show the authority. If he claims the authority of law, then what law? And if a law, how came it to be a law? Somehow and somewhere it must have had an origin. Is it a law because of the existence of a special and private authority issued from one of the executive departments? So in almost these words it is claimed in this case. Is it a law because of some constitutional investiture of sovereignty in the persons of judges who carry that sovereignty with them wherever they may go? Because of some power inher-

ent in the judiciary to create for others a rule or law of conduct outside of legislation which shall extend to the death penalty? So also, in this case, *in totidem verbis*, it is claimed. We dissent from both these claims. There can be no such law from either of those sources. The right claimed must be traced to legislation of Congress, else it cannot exist.

If it be said that Congress has the power to make such laws, yet in the absence of statutes from that source other departments may act in the premises; or if it be said that the possession of that power by the government does not negative the existence of similar powers in other departments of the government, the response that these powers are plainly not concurrent, but are exclusive, can be made in the language of *Mr. Justice* Story, in *Prigg* v. *Pennsylvania*, 41 U. S. 16 Pet. 539, 617 [10: 1060, 1089]. Speaking of the Fugitive Slave Law of 1793, he says: "If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, . . . in such a case the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

If it be said that that case had reference to the interference of a State with congressional powers, whilst in the case at bar no such question is involved, the answer is that the difference is favorable and not adverse to the theory of this opinion. The principle is the same; and if that principle can be applied, as applied it was, to the denial to a State Legislature of the powers previously enjoyed over matters originally appertaining to it, *a multo fortiori* will it apply to the exclusion of two co-ordinate departments of the same government from powers which they never possessed. As before stated, if the killing [1] of Terry was done "in pursuance of a law of the United States," that law had somewhere an origin. There are under the general government only two possible sources of law. The common law never existed in our federal system. The legislative power possessed by the United States must be found either exercised in the Constitution as fundamental law, or by some body or person to whom it was delegated by the Constitution. It has already been pointed out that the Constitution does not itself create any such law as that contended for; and that it could not have been created by any executive or judicial action or status is made manifest, not only by the clause in sec. 8, art. I., already cited and commented on, but also by sec. 1, art. I., and the two paragraphs of art. VI.

Sec. 1, art. I., provides that, "*all* legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The second paragraph of art. VI. provides that "the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." Now, what is it that constitutes the supreme laws of which so much is said in this case? How distinctly, how plainly and how fully the Constitution answers. The Constitution itself, the treaties and the laws made in pursuance of the Constitution. Made by whom? By Congress, manifestly. The two clauses already quoted give the power of legislation in the most sweeping terms. It alone has power to make any law. Anything purporting to be a law not enacted by Congress would not be "in pursuance of" any provision of the Constitution.

Thus we are driven to look for the source of this asserted law to some legislation of Congress—legislation made under either its express constitutional authority, or under its properly implied authority, it is immaterial which; and there is none of either class.

The authority is sought to be traced here through the self-preservative power of the federal judiciary implied from the Constitution; and then through the obligation of the Executive to protect the judges, implied [92] from the Constitution, whereas there is no such implication in either case, for the simple but all-sufficient reason that by the Constitution itself the whole of those functions is committed to Congress.

Since then the Constitution did not, by its own direct provisions, regulate this matter, but committed it to the hands of Congress with full powers in the premises, it is only by the enactment of some law of Congress that the appellee can show that he is in custody "in violation of the Constitution." As previously remarked, the two propositions are, as to this case, essentially one. Turning again to the Statute under which the writ is sued out, we find that the clause relied on is that which makes the writ applicable where the person "is in custody for an act done or omitted in pursuance of a law of the United States." The question then arises, What sort of law? What does the expression import? Is it not plain that it means just what the same expression all through the Constitution imports?

If that instrument, which is the fountain of the federal power, be consulted, it will be found that in it and the Amendments thereto the word "law," in either its singular form or its plural, "laws," is used forty-two times. Of these instances of that use sixteen are where the word is used in reference to the jurisprudence of the States, and of the Law of Nations, or where they are merely terms of description—such as "courts of law," "cases in law and equity," etc. Of the other instances of its use, and which all have reference to that body of rules which constitute the jurisprudence distinctly of the United States, there are only three cases in which it is not manifest that the word is used as equivalent to "statutes," "enactments of the Congress;" and it is clear in those three instances the word is used also as equivalent to "statutes." The following are examples:

"The Congress may, at any time, *by law*, make or alter such regulations [in regard to

the election of senators and representatives]." Art. I., sec. 4.

"Every bill . . . shall, before it become *a law*, be presented," etc. Art. I., sec. 7.

[93] "Congress shall have power . . . to establish . . . uniform *laws* on the subject of bankruptcies," etc. Art. I., sec. 8.

"Congress shall have power . . . to make *all laws* which shall be necessary and proper," etc. Art. I., sec. 8.

"No bill of attainder or *ex post facto law* shall be passed." Art. I., sec. 9.

"Congress shall make no *law* respecting an establishment of religion." 1st Amendment.

It would be tedious, and it is unnecessary, to set them all forth. They all have the same *manifest* meaning of "statutes," except three, and in those three instances the words do not mean anything other than statutes. We think it plain that the expression, "a law of the United States," as used in section 753 of the Revised Statutes, means just what the similar expression means all through the Constitution—and that is, a *statute* of the United States. *Tennessee* v. *Davis*, 100 U. S. 264 [25: 650].

Of the decisions of this court cited as authority to sustain the order discharging the appellee, *Ex parte Siebold*, 100 U. S. 371 [25: 717], and *Tennessee* v. *Davis*, *supra*, are relied on as having the most direct bearing on the case. We do not consider *Ex parte Siebold* as being adverse to the proposition which we maintain. In that case the existence of express statutes upon which the controversy arose was undisputed. The sole question was as to the constitutional competency of Congress to pass certain laws which, in the most express, explicit and imperative words, required marshals and deputy marshals of the United States to attend places for the election of members of Congress, to keep the peace at the polls, make arrests and protect the supervising officers in discharge of their duties at those elections. The court decided that the enactments of Congress in question were constitutional. The power of Congress to pass these laws being thus settled, no assertion as to the powers of the marshals and deputy marshals to execute them in the States can be found in that able opinion which do not follow as a logical consequence. We fail to see anywhere in the decision any intimation that, independently of such leg-
[94] islation, the officers therein named could, by virtue of their office, have exercised the same powers in obedience to the instructions of an executive department, in the exercise of its authority implied from the Constitution.

In *Tennessee* v. *Davis* the case was removed from a state court to the circuit court of the United States, under the express provisions of section 643 of the Revised Statutes. The homicide for which the petitioner was prosecuted, was committed by him while executing his duties as a revenue officer, in pursuance of the express requirements of the Revenue Laws, and in defense of his own life, upon a party offering unlawful resistance. So far from running counter to the position we are seeking to maintain, we think the principle there laid down, on the point we are now discussing, is in accord with that position. The language of the court, through *Mr. Justice* Strong, who delivered its opinion, is as follows: "Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. Story on the Constitution, sec. 1647; *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 379 [5: 285]."

Whilst it is true that the opinions in both of those cases assert in the strongest and most impressive language the supremacy of the government of the United States in the exercise of the powers conferred upon it by the Constitution, we regard them also as a vindication of Congress as the law-making department of the government, as the depository of the implied and constructive powers of the government; or as *Mr. Chief Justice* Marshall expresses it, of the power to legislate upon that vast mass of incidental powers which must be involved in the Constitution if that instrument be not a splendid bauble.

As the *Siebold Case* and *Tennessee* v. *Davis* have been referred to as the most important and directly in point in support of the opposite view, we do not deem it necessary to give an extended examination of the series of cases decided by the circuit and district courts cited to the same purport. *Ex parte Jenkins*, 2 Wall. Jr. 521, to which attention is more especially called, combined in itself the main features of most of the others, which were proceedings under the Fugitive Slave Law, in which United States marshals were arrested while executing process under that law by state officers acting under the authority of the statutes of the State, the inevitable effect, if not the avowed object, of which was to nullify the operation of the aforesaid Act of Congress.

This was so in *Ex parte Jenkins*. The United States marshal was arrested on a warrant issued by a state magistrate while he was executing a warrant issued under said law of Congress. He was brought before the Circuit Court of the United States for the Eastern District of Pennsylvania, on a writ of habeas corpus, and was discharged upon the ground that the Fugitive Slave Law, having been enacted in pursuance of the Constitution of the United States, was paramount to the law of Pennsylvania in conflict with it, and that the marshal, being in custody for an act done in pursuance of that law of Congress, and in execution of process under it, was entitled to his discharge. It is so manifest that that case was within the provision of section 753 of the Revised Statutes that further comment is unnecessary; and the same may be said of all of the other decisions of the circuit and district courts. In every one of them the party discharged was in custody either for an act done in pursuance of an express statute of Congress, or in the execution of a decree, order or process of a court, or the custody was in violation of the Constitution of the United States.

We stated at the outset of these remarks that we raised no question upon the discussion

of the history of the legislation of Congress upon the subject of the writ of habeas corpus. We think, however, it is pertinent in this connection to inquire what was the necessity for any such legislation at all if the theory contended for as to the sufficiency of the self-executing powers of the Executive and Judicial Departments of the government to protect all the agencies and instrumentalities of the federal government is correct. Why could not President Jackson, in 1833, as the head of the Executive Department, invested with the power and charged with the duty to take care that the laws be faithfully executed and to defend the Constitution, have enforced the collection of the federal revenues in the Port of Charleston, and have protected the revenue officers of the government against any arrest made under the pretensions of state authority, without the aid of the Act of 1833? Why, in 1842, when the third Habeas Corpus Act was passed, could not the President of the United States, by virtue of the same self-executing powers of the Executive, together with those of the Judicial Department, have enforced the international obligations of the government without any such Act of Congress? It is a noteworthy fact in our history that, whenever the exigencies of the country, from time to time, have required the exercise of executive and judicial power for the enforcement of the supreme authority of the United States government for the protection of its agencies, etc., it was found, in every instance, necessary to invoke the interposition of the power of the national Legislature. As early as 1807, in *Ex parte Bollman*, 8 U. S. 4 Cranch, 75, 94 [2: 554, 561], *Chief Justice* Marshall said: "The power to award the writ [of habeas corpus] by any of the courts of the United States must be given by written law. . . . The inquiry, therefore, on this motion will be, whether, by any statute compatible with the Constitution of the United States, the power to award a writ of habeas corpus, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court."

It is claimed that such a law is found in section 787 of the Revised Statutes, which is as follows:

"It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

It is contended that the duty imposed upon the marshal of each district by this section is not satisfied by a mere formal attendance upon the judges while on the bench; but that it extends to the whole term of the courts while in session, and can fairly be construed as requiring him to attend the judge while on his way from one court to another, to perform his duty. It is manifest that the Statute will bear no such construction. In the first place, the judge is not the court; the person does not embody the tribunal, nor does the tribunal follow him in his journeys. In the second place, the direction that he shall attend the court confers no authority or power on him of any character: it is merely a requirement that he shall be present, in person, at the court when sitting, in order to receive the lawful commands of the tribunal, and to discharge the duties elsewhere imposed upon him.

Great as the crime of Terry was in his assault upon Mr. Justice Field, so far from its being a crime against the court, it was not even a contempt of court, and could not have received adequate punishment as such. Section 725 of the Revised Statutes limits contempt to cases of misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.

It is claimed that the law needed for appellee's case can be found in section 788 of the Revised Statutes. That section is as follows: "The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." It is then argued that by the Code of California the sheriff has extensive powers as a conservator of the peace, the Statutes to that effect being quoted *in extenso;* that he also has certain additional common-law powers and obligations to protect the judges and to personally attend them on their visits to that State; that therefore no statutory authority of the United States for the attendance on Mr. Justice Field by Neagle, and for Neagle's personal presence on the scene was necessary; and that that Statute constituted Neagle a peace officer to keep the peace of the United States. This line of argument seems to us wholly untenable.

By way of preliminary remark it may be well to say that, so far as the simple fact of Neagle's attendance on Mr. Justice Field, and the fact of his personal presence, are concerned, no authority, statutory or otherwise, was needed. He had a right to be there; and being there, no matter how or why, if it became necessary to discharge an official duty, he would be just as much entitled to the protection of section 753 of the Revised Statutes as if he had been discharging an official duty in going there. The fallacy in the use made of section 788, in the argument just outlined, is this: That section gives to the officers named the same measure of powers when in the discharge of their duties as those possessed by the sheriffs, it is true; but it does not alter the duties themselves. It does not empower them to enlarge the scope of their labors and responsibilities, but only adds to their efficiency within that scope. They are still by the very terms of the Statute itself limited to the execution of "the laws of the United States;" and are not in any way by adoption, mediate or immediate, from the Code or the common law, authorized to execute the laws of California. The Statute therefore leaves the matter just where it found it. If the act of Terry had resulted in the death of Mr. Justice Field, would the murder of him have been a crime against the United States? Would the government of the United States, with all the supreme powers of which we have heard so

much in this discussion, have been competent, in the present condition of its statutes, to prosecute in its own tribunals the murder of its own supreme court justice, or even to inquire into the heinous offense through its own tribunals? If yes, then the slaying of Terry by the appellee, in the necessary prevention of such act, was authorized by the law of the United States, and he should be discharged; and that independently of any official character, the situation being the same in the case of any citizen. But if no, how stands the matter then? The killing of Terry was not by authority of the United States, no matter by whom done; and the only authority relied on for vindicaton must be that of the State, and the slayer should be remanded to the state courts to be tried. The question then recurs, Would it have been a crime against the United States? There can be but one answer. Murder is not an offense against the United States, except when committed on the high seas or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the national government has exclusive jurisdiction. [99] It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial and give immunity from any liability to trial where he is accused of murder, unless an express statute of Congress is produced permitting such discharge.

We are not unmindful of the fact that in the foregoing remarks we have not discussed the bearings of this decision upon the autonomy of the States, in devesting them of what was once regarded as their exclusive jurisdiction over crimes committed within their own territory, against their own laws, and in enabling a federal judge or court, by an order in a habeas corpus proceeding, to deprive a State of its power to maintain its own public order, or to protect the security of society and the lives of its own citizens, whenever the amenability to its courts of a federal officer or employé or agent is sought to be enforced. We have not entered upon that question because, as arising here, its suggestion is sufficient, and its consideration might involve the extent to which legislation in that direction may constitutionally go, which could only be properly determined when directly presented by the record in a case before the court for adjudication.

For these reasons, as briefly stated as possible, we think the judgment of the court below should be reversed and the prisoner remanded to the custody of the sheriff of San Joaquin County, California; and we are the less reluctant to express this conclusion, because we cannot permit ourselves to doubt that the authorities of the State of California are competent and willing to do justice; and that even if the appellee had been indicted, and had gone to trial upon this record, God and his country would have given him a good deliverance.

LEONARD MACKALL ET AL., *Appts.*, [1
v.
BROOKE MACKALL, JR., ET AL.

(See S. C. Reporter's ed. 167-175.)

Undue influence, when invalidates deed—gift to son—parol gift of real estate, when good.

1. Influence gained by kindness and affection will not be regarded as "undue," if no imposition or fraud be practiced, even though it induces one to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.
2. Where a parent gives property to a child who stands by him, rather than to children who desert him, something more than the natural influence springing from the relationship must be shown in order to defeat the gift.
3. A party who receives a parol gift of real estate, and enters into possession and expends money in improvements thereon, has an equitable right to a decree establishing a subsequent conveyance as a confirmation of his equitable title.

[No. 159.]

Argued Apr. 1, 2, 1890. Decided Apr. 21, 1890.

APPEAL from a decree of the Supreme Court of the District of Columbia in favor of defendants in a suit to set aside a deed as having been obtained through undue influence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **S. S. Henkle** and *R. M. Newton*, for appellants:

A consideration different in kind from that stated in the deed cannot be proved to sustain a deed when impeached for fraud.

Bridgman v. *Green*, 2 Ves. Sr. 627; *Clarkson* v. *Hanway*, 2 P. Wms. 203; *Peacock* v. *Monk*, 1 Ves. Sr. 127; *Maigley* v. *Hauer*, 7 Johns. 341; *Schemerhorn* v. *Vanderheyden*, 1 Johns. 139; *Howes* v. *Barker*, 3 Johns. 506; *Betts* v. *Union Bank*, 1 Harr. & G. 175, 201-203: *Hildreth* v. *Sands*, 2 Johns. Ch. 35; *Watt* v. *Grove*, 2 Sch. & Lef. 500-502; *Rollins* v. *Mooers*, 25 Me. 200; *Richardson* v. *Traver*, 112 U. S. 431 (28: 807); *Sewell* v. *Baxter*, 2 Md. Ch. 455; *Wesley* v. *Thomas*, 6 Harr. & J. 24; *Wolfe* v. *Hauver*, 1 Gill, 84; *Cole* v. *Albers*, 1 Gill, 412; *Ellinger* v. *Crowl*, 17 Md. 361.

Where there is a relation of trust and confidence existing between the grantor and the grantee in a voluntary conveyance, or where the grantee exercises a control or domination over the mind of the grantor, the gift is prima facie void, and if the deed be assailed by the grantor, his heirs or legal representatives, the *onus* is upon the grantee to establish the validity of the transaction.

Gibson v. *Jeyes*, 6 Ves. Jr. 276, 278; *Highberger* v. *Stiffler*, 21 Md. 338; Story, Eq. §§ 303, 322; *Todd* v. *Grove*, 33 Md. 188; *Billage* v. *Southee*, 9 Hare, 539, 540; *Griffiths* v. *Robins*, 3 Madd. Ch. 191; *Dent* v. *Bennett*, 4

NOTE.—*As to fraud and undue influence in avoidance of deed or will*, see *note* to Harding v. Handy, 6: 429.

Fraud or illegal consideration, how far will avoid contract. See *note* to Armstrong v. Toler, 6: 468.

As to cancellation of a deed or a contract in equity for fraud, concealment or misrepresentation, see *note* to Neblett v. Macfarland, 23: 471.

Myl. & Cr. 278; *Gibson* v. *Russell*, 2 Younge & C. Ch. 104, *note 2*, p. 120; *Siemon* v. *Wilson*, 3 Edw. Ch. 36; *Huguenin* v. *Baseley*, 14 Ves. Jr. 273; *Whelan* v. *Whelan*, 3 Cow. 537; *Taylor* v. *Taylor*, 49 U. S. 8 How. 200 (12: 1046); *Slocum* v. *Marshall*, 2 Wash. C. C. 397; *Harding* v. *Wheaton*, 2 Mason, 386-388; *Harding* v. *Handy*, 24 U. S. 11 Wheat. 125 (6: 435); *Rhodes* v. *Bate*, L. R. 1 Ch. 256; *Cooke* v. *Lamotte*, 15 Beav. 234; *Smith* v. *Kay*, 7 H. L. Cas. 750.

Where the relation of principal and agent, or other relation of trust or confidence, or of control and subjection, exists, it is indispensable for the grantee to show that the grantor had the advice at the time of the transaction of some disinterested. person capable of advising him.

Gibson v. *Russell*, 2 Younge & C. Ch. 116; *Brooke* v. *Berry*, 2 Gill, 83; *Allore* v. *Jewell*, 94 U. S. 510-512 (24: 263, 264); *Todd* v. *Grove*, 33 Md. 193; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15.

Messrs. **J. S. C. Blackburn**, *Samuel Shellabarger*, **Jeremiah M. Wilson** and *W. Willoughby*, for appellees:

The declarations of the grantor, when the grantee is not present, cannot be admitted in evidence to invalidate the deed.

Barrett v. *French*, 1 Conn. 354, 6 Am. Dec. 241; *Gibney* v. *Marchay*, 34 N. Y. 301; *Dodge* v. *Freedman's Sav. & Trust Co.* 93 U. S. 379 (23: 920); *Boylan* ads. *Meeker*, 28 N. J. L. 274; *King* v. *Thompson*, 34 U. S. 9 Pet. 215 (9: 106).

Equity protects a parol gift, if accompanied by possession and the donee induced by the promise to give it has made valuable improvements on the property.

Shepherd v. *Bevin*, 9 Gill, 32; *Neale* v. *Neale*, 76 U. S. 9 Wall. 1 (19: 590).

The deed was good until set aside.

Hawes v. *Wyatt*, 2 Cox, Ch. 263, 3 Bro. Ch. 160; *Simpson* v. *Walker*, 5 Sim. 1; *Hick* v. *More*, Ambler, 215; *Walton* v. *Walton*, 7 Johns. Ch. 272, 11 Am. Dec. 456; *Goodtitle* v. *Otway*, 7 T. R. 399.

The bill cannot be considered as one of constructive fraud.

Eyre v. *Potter*, 56 U. S. 15 How. 42 (14: 592); *French* v. *Shoemaker*, 81 U. S. 14 Wall. 335 (20: 857); *Voorhees* v. *Bonesteel*, 83 U. S. 16 Wall. 29 (21: 270); *Clark* v. *Hackett*, 1 Cliff. 279; *Badger* v. *Badger*, 2 Cliff. 153.

Although transactions between parents and children, by which the former acquire the land of the latter, are to be carefully scrutinized, yet there is no presumption that they are invalid.

Hunter v. *Atkins*, 3 Myl. & K. 113; *Jenkins* v. *Pye*, 37 U. S. 12 Pet. 253 (9: 1075); *Howe* v. *Howe*, 99 Mass. 88; *Greer* v. *Greer*, 9 Gratt. 330; *Taylor* v. *Taylor*, 49 U. S. 8 How. 200 (12: 1046); *Slocum* v. *Marshall*, 2 Wash. C. C. 397; *Bissett* v. *Bissett*, 1 Har. & McH. 211; *Hatter* v. *Greenlee*, 1 Port. (Ala.) 222, 26 Am. Dec. 373, *note*, and cases cited; *Pierce* v. *Brown*, 74 U. S. 7 Wall. 205 (19: 134); *U. S.* v. *Huckabee*, 83 U. S. 16 Wall. 414 (21: 457); *Barrett* v. *French*, 1 Conn. 354, 6 Am. Dec. 241.

The influence to vitiate an act must destroy free agency.

Gardner v. *Gardner*, 22 Wend. 526; *Small* v. *Small*, 4 Me. 220, 16 Am. Dec. 253; *Children's Aid Soc.* v. *Loveridge*, 70 N. Y. 387; *McMahon* v. *Ryan*, 20 Pa. 329; *Elliott's Will*, 2 J. J. Marsh. 341.

Mr. Justice **Brewer** delivered the opinion [168] of the court:

This is an appeal from a decree of the Supreme Court of the District of Columbia. The facts are these:

On December 9, 1879, Brooke Mackall, Sr., made a will, whereby he gave to his children, other than Brooke Mackall, Jr., all his property, declaring as to said Brooke Mackall, Jr., that "by this my last will and testament I do not give, devise or bequeath to my son, Brooke Mackall, Jr., any part, parcel or portion of my property whatever, as the said Brooke Mackall, Jr., heretofore received from me many and large advances, and as it would be unjust to my other children hereinbefore named, but I direct Leonard to pay him one dollar." This will was duly probated. On [16 February 27, 1880, he executed and delivered to Brooke Mackall, Jr., a deed conveying many lots in Washington and Georgetown. A few days thereafter, and on March 7, 1880, he died, being at the time about eighty years of age. On February 14, 1882, complainants, devisees under the will, filed their bill setting forth the will and the deed, and praying a decree, "declaring null and void and of no effect the deed of conveyance executed on the 27th day of February, 1880, by the decedent to the defendant, Brooke Mackall, Jr., and ordering the same to be delivered up to the complainants, and affirming the validity of the will made by the decedent on the 9th day of December, 1879." The gravamen of the bill was undue influence on the part of Brooke Mackall, Jr., in securing the execution of the deed. Upon final hearing a decree was entered as follows by the general term, in which the case was heard in the first instance: "That the deed of Brooke Mackall, Sr., to the defendant, Brooke Mackall, Jr., of February 27, 1880, described in the bill of complaint, shall, as to lot No. 7, in square 223, at the southwest corner of Fourteenth Street and New York Avenue, in the City of Washington, D. C., and the interest therein described and growing out of the same, operate as a confirmation of the title, legal and equitable, in the said grantee, the defendant, Brooke Mackall, Jr., as to all the parties to this suit, and shall stand as a deed of conveyance for such purposes; but as to the remainder of the property described in said conveyance, not relating to said lot No. 7, in square 223, the said conveyance shall be, and the same is hereby, adjudged and decreed to be inoperative, null and void." From that decree the complainants appealed to this court.

As the bill was to set aside the deed as a whole, as having been obtained through undue influence, the decree is apparently incongruous, in that it declares that the deed be sustained as a confirmation of the title of Brooke Mackall, Jr., to lot No. 7, and void as to the other real estate; for if it were, as charged in the bill, a deed obtained through

undue influence, it would seem that it should have been adjudged void *in toto*, and not sustained in part. It will be observed, however, [170] that Brooke Mackall, Jr., took no appeal; so that the question before us is, not whether there was error in declaring the deed void in part, but whether there was error in declaring it valid in part. Error, if error there was, may have been in either portion of the decree; but the limit of our inquiry is as to whether the deed was valid, and should be confirmed as to lot No. 7. If that part of the decree can be sustained the incongruity is no matter of concern, for defendants have taken no steps to bring before us the other portion.

Further, in respect to this lot No. 7, it must be observed that the answer alleges that the defendant, Brooke Mackall, Jr., was, and had been for many years, the equitable owner. So, if the deed, as an independent and separate instrument, was valid, or the allegation of Brooke Mackall, Jr., that he was the equitable owner of lot No. 7, is true, any informality in the language of the decree may be disregarded, for in substance it was right. This compels an inquiry not merely into the circumstances surrounding the execution of the deed, but also as to the relations of the parties to this litigation to one another, and to the decedent.

More than twenty years before his death differences arose between Brooke Mackall, Sr., and his wife, which culminated in a decree of divorce. In those differences Brooke Mackall, Jr., sided with his father, the other children with their mother; and a large part of the record before us is made up of a story of those differences, and of the conduct and testimony of the children. No good purpose would be served by parading in this opinion those unpleasant facts, or by attempting to pass judgment in approval or condemnation of the conduct of either. Charity kindly throws a mantle of oblivion over these matters of long ago; and justice requires only notice of the fact that in the separation of parents the children took part, the one with the father, the others with the mother. During the score of years which intervened between this separation and the death of Brooke Mackall, Sr., the defendant, Brooke Mackall, Jr., was his constant companion and friend. This intimacy was unbroken, save in two instances of short duration each, the latter one being in [171] the fall of 1879, during which time the will referred to was executed. That after this temporary estrangement had ceased, he should desire to transfer to this son and constant companion his property, is not only not strange, but most natural and reasonable. It is true the deed was made after his last sickness had commenced; but how natural that during those hours of sickness the relations between himself and his children, during times of trouble and length of years, should present themselves to his mind with exceeding force. It is conceded that up to the time of his sickness he was a strong man, physically and mentally. Such a nature forms strong likes and strong dislikes; and at no time are such likes and dislikes so potent as when the thought of approaching death suggests the last action in respect thereto. That up to and including the time of the execution of this deed he retained his mental faculties in full vigor, unclouded by opiates, the testimony of his physician, his pastor, the justice of the peace before whom the deed was acknowledged, his counsel and his nurse abundantly establishes. Indeed, the contention of counsel on the argument was not that the grantor was ignorant of the scope and purposes of the deed, or was doing that which he did not intend to do, but rather that the deed thus knowingly and intentionally executed was induced by undue influence; and, in this respect, reference was made to the long intimacy between father and son, the alleged usurpation by the latter of absolute control over the life, habits and property of the former, efforts to prevent others during the last sickness of the father from seeing him, and the subjection of the will of the father to that of the son, manifest in times of health, naturally stronger in hours of sickness. A confidential relation between father and son is thus deduced, which, resembling that between client and attorney, principal and agent, parishioner and priest, compels proof of valuable consideration and bona fides in order to sustain a deed from one to the other. But while the relationships between the two suggest influence do they prove undue influence? In this respect, we quote from the notes to the case of *Small* v. *Small*, 4 Me. 220, reported in 16 Am. Dec. 259, as follows:

"Influence gained by kindness and affection will not be regarded as 'undue,' if no imposition or fraud be practiced, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made. *Re Gleespin's Will*, 26 N. J. Eq. 523. . . . Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence. *Lee* v. *Lee*, 71 N. C. 139. Nor does the fact that the testator on his death-bed was surrounded by beneficiaries in his will. *Bundy* v. *McKnight*, 48 Ind. 502. . . . Nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to his business affairs, his other children having forsaken him. *Elliott's Will*, 2 J. J. Marsh. 340; *S. C.* Redf. Am. Cas. on Wills, 484. . . . It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them.

"Undue influence must destroy free agency. It is well settled that in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the persons exercising the influence."

That the relations between this father and his several children during the score of years preceding his death naturally inclined him towards the one and against the others is evident, and to have been expected. It would have been strange if such a result had not followed; but such partiality towards the one, and influence resulting therefrom, are not only natural, but just and reasonable, and come far short of presenting the undue influence which the law denounces. Right or wrong, it is to be expected that a parent will favor the child who stands by him, and [173] give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress or something of that nature must appear; otherwise that disposition of property which accords with the natural inclinations of the human heart must be sustained. So that if this case turned simply upon the question of undue influence, compelling a voluntary conveyance, it would be difficult to find enough in the testimony to overthrow this deed.

But the case does not rest upon this alone. Brooke Mackall, Jr., alleged in his answer that lot seven was equitably his, having been given him years before by his father; and this allegation seems to have been recognized as true by the court below, for it established the deed as a confirmation of his title. It appears that in November, 1851, Brooke Mackall, Sr., purchased the lot, one half of Key and Dunlop, and the other half of W. W. Corcoran. Neither party at the time made a deed, and from Key and Dunlop the title was only acquired thereafter by a decree in equity. A deed from Corcoran was not obtained until some time in 1865. Prior to this time the father had given the property to the son, and placed him in possession. This fact is proved, not alone by the testimony of the son, or the uncertain recollection of witnesses, but from written statements, which carry no taint of failing memory, and speak the same language one day and another. On October 6, 1865, Mr. Hyde, the agent for Mr. Corcoran, gave a certificate, in which, after mentioning the balance claimed to have been owing, he adds: "This sum has been paid, and Mr. Mackall asks, in lieu of the delivery of the deed as aforesaid to himself, to have the property conveyed to Brooke Mackall, Jr., he being a party to the same." On November 28, 1865, Brooke Mackall, Sr., gave a deposition, which was filed in a case in the Supreme Court of the District of Columbia, in which he stated: "Mr. Corcoran also refused to give me a deed unless I paid him additional for some back taxes, which I refused to do. I never did get a deed until the other day, since his return from Europe. This property [174] I gave my son, Brooke Mackall, Jr., some years ago, and he has had it in possession ever since, and has subdivided them into six lots. There is not a more valuable property in the city, as is the belief of many good judges. He rented the part occupied as a restaurant on the 9th of February, 1868, and has been drawing the rent ever since." There was also filed in the testimony in that case the following letter and relinquishment:

"Washington, March 3, 1866.

"Maj. Gen'l Meigs, Quartermaster-General.

"Sir: During the lifetime of Gov. Corwin, I employed him individually in behalf of my son, Brooke Mackall, Jr., of this city, who owns the lot on corner of New York Avenue and 14th Street, occupied by paymaster-general department, to procure and collect from said department what was due to said Brooke Mackall, Jr., for rent and use of the premises. Since Gov. Corwin's death neither Brooke nor myself, as his agent, has ever recognized anyone except Black, Lamon & Co. as attorneys in the premises, as will appear by power of attorney to them from Brooke Mackall, Jr. Mr. Corwin desired me to allow his partner, Judge Johnson, to assist in the claim, but I refused to allow anyone but himself to take charge of it, having confidence in him as an old friend.

"Very respectfully, (Signed) B. Mackall.

"I hereby relinquish all right to, and authorize Brooke Mackall, Jr., to receive the amount awarded for use of, property on 14th Street and New York Avenue, as it is his.

"Witness: (Signed) B. Mackall.

"(Signed) L. G. Brandeburg.

"22d October, 1865."

On July 12, 1871, Brooke Mackall, Sr., filed a answer under oath in said cause, which was entitled *Alfred Richards et al.* v. *Brooke Mackall et al.*, in which he alleged "that he purchased said lot and promised to give it to his son, Brooke Mackall, Jr., at some future time, but has not since been in a financial condition to carry out such intention, and has never given him any conveyance of the said lot, nor any paper-writing relating to said lot."

Again, litigation concerning this lot has been twice at least to this court. *Mackall* v. *Richards*, 112 U. S. 369 [28: 737]; *Richards* v. *Mackall*, 124 U. S. 183 [31: 396]. In each of these cases the equitable title of Brooke Mackall, Jr., was recognized. We refer to these various statements and decisions, not as conclusive against the appellants, but as furnishing a solid foundation upon which to rest the testimony of Brooke Mackall, Jr., that the lot was given to him twenty years before the execution of this deed, possession taken, and improvements made by him. A party who receives a parol gift of real estate, enters into possession and expends money in improvements thereon, presents equitable considerations which will uphold a decree establishing a subsequent conveyance as a confirmation of his equitable title. So that in this respect, also, the ruling of the court below finds abundant support.

Another matter requires notice: The will referred to gives his property to his children other than Brooke Mackall, Jr.; and this, notwithstanding the fact that he had made two prior wills, giving his property to Brooke Mackall, Jr. But as explaining this last will, in the second item he says: "I do not give, devise or bequeath to my son, Brooke Mackall, Jr., any part, parcel or por-

tion of my property whatever, as the said Brooke Mackall, Jr., heretofore received from me many and large advances." While no property is mentioned, yet, reading between the lines, it is evident that the testator recognized the validity of his parol gift of lot 7; and doubtless that was what was meant when he said that Brooke Mackall, Jr., had heretofore received from him large advances. It was his other property which he was giving to his other children; and it would be straining the language of the will to suppose that thereby he intended to ignore his parol gift, and to dispossess this son of that which he had given to him theretofore.

Putting these various matters together, we think that whatever criticism may be made upon the form of the decree, it is substantially right, and therefore *it is affirmed.*

---

[6] THE COMMERCIAL MANUFACTURING COMPANY, CONSOLIDATED, ET AL., *Appts.*,
v.
THE FAIRBANK CANNING COMPANY.

(See S. C. Reporter's ed. 176-195.)

Reissue of patent, when invalid—foreign patent.

1. A reissue of a patent for an invention, after the expiration of foreign patents for the same invention, is invalid.
2. The Bavarian patent which expired April 8, 1876, and the Austrian patent which expired May 26, 1876, were for the same invention as the American reissued letters-patent No. 10,137, granted June 13, 1882, the original of which was granted Dec. 3, 1873, for an improvement in treating animal fats; hence such reissue was invalid.

[No. 253.]

Argued and Submitted April 11, 1890. Decided April 21, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois dismissing a suit for the infringement of reissued letters-patent No. 10,137, granted June 13, 1882, on an application filed May 20, 1882, for an improvement in treating animal fats. *Affirmed.*

The facts are stated in the opinion.

Opinion below, 27 Fed. Rep. 78.

Messrs. **C. K. Offield, B. F. Thurston** and **T. D. Lincoln** for appellants.

Mr. **Lysander Hill** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of Illinois, on the 11th of December, 1882, by the Commercial Manufacturing Company, Consolidated, a New York corporation, and The National Dairy Company, an Ohio corporation, against the Fairbank Canning Company, an Illinois corporation, for the infringement of reissued letters-patent No. 10,137, granted June 13, 1882, on an application filed May 20, 1882, to The Commercial Manufacturing Company, Consolidated, for an improvement in treating animal fats. The original patent, No. 146,012, was granted December 30, 1873, having been applied for December 13, 1873, to Hippolyte Mége as inventor. It was assigned to The United States Dairy Company and was reissued to that company as No. 8,424, September 24, 1878. That reissue was then assigned to one Remsen, who assigned it to The Commercial Manufacturing Company, Consolidated, to which reissue No. 10,137 was granted. The National Dairy Company was the exclusive licensee for the State of Illinois, in which State the infringement was alleged to have taken place.

The answer set up, among other defenses, that the United States patent had expired before the last reissue thereof was granted, by reason of the expiration of certain foreign patents granted to Mége for the same invention; that the last reissue was invalid; and that the defendant did not infringe.

So much of the specification of reissue No. 10,137, as is important in the present case, is as follows: "Be it known that Hippolyte Mége of Paris, France, now deceased, chemist manufacturer, did invent an improved means for transforming animal fat into butter, of which the following is a specification: This invention, which is the result of physiological investigations, consists of artificially producing the natural work which is performed by the cow when it reabsorbs its fat in order to transform the same into butter. The improved means he employed for this purpose are as follows:

"I. Neutralization of the ferments. In order to prevent the greasy substance which is settled in the tissue of the animals from taking the disagreeable taste of the fat it is necessary that the ferments which produce this taste shall be completely neutralized. For this effect, as soon as possible after the death of the animal, he plunged the raw fats, called '*graisses en branches*,' into water containing fifteen per cent of sea salt and one per cent of sulphite of soda. He began thus the transformation an hour, at least, after the immersion, and twelve hours, at most, afterward.

"II. Crushing. A complete crushing is necessary in order to obtain rapid work without alteration. For this purpose, when the substance is coarsely crushed, he let it fall from the cylinders under millstones which completely bruise all the cells.

"III. Concentrated digestion. The crushed fat falls into a vessel which is made of well-tinned iron or enameled iron or baked clay. This vessel must be plunged in a water bath of which the temperature is raised at will. When the fat has descended in the vessel he melted it by means of an artificial digestion, so that the heat does not exceed 103° Fahrenheit, and thus no taste of fat is produced. For this purpose he threw into the washtub containing the artificial gastric juice about two liters per hundred kilograms of greasy substance. This gastric juice is made with

---

NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 433.

What reissue may cover. See *note* to O'Reilly v. Morse, 14: 601.

the half of a stomach of a pig or sheep, well washed, and three liters of water containing thirty grams of biphosphate of lime. After a maceration during three hours he passed the substance through a fine sieve, and obtained the two liters which are necessary for a hundred kilograms. He slowly raised the temperature to about 103° Fahrenheit, so that the matter shall completely separate. This greasy matter must not have any taste of fat. It must, on the contrary, have the taste of molten butter. When the liquid does not present any more lumps he threw into the said liquid one kilogram of sea salt (reduced to powder) per hundred kilograms of greasy matter. He stirred during a quarter of an hour and let it set until obtaining perfect limpidness. This method of extraction has a considerable advantage over that which has been previously essayed. The separation is well made and the organized tissues which do deposit are not altered.

"IV. Crystallization in a mass. In order to separate the oleomargarine from the stearine separated crystallizers or crystallizations at unequal temperatures have been already employed. He contrived for this purpose the following method, which produces a very perfect separation, and is as follows: He rendered the molten fat in a vessel which must be sufficient for containing it. This vessel is placed in a washtub of strong wood, which serves as a water bath. In this washtub he put water at the fixed temperature of 86° Fahrenheit, for the soft fats proceeding from the slaughter-house, and 98° for the harder fats, such as mutton fat. Afterward the washtubs are covered, and after a certain
179] time, more or less long according to the fats, the stearine is deposited in the form of teats in the middle of the oleomargaric liquid.

"V. Separation by centrifugal force. In order to avoid the numerous inconveniences of the employment of the presses which have been hitherto used, he caused the mixture of stearine and oleomargarine to flow into a centrifugal machine called 'hydro-extractor'. The greasy liquid passes through the cloth and the stearine is collected. When all the liquid is passed he put the machine in motion, and the crystals of stearine are entirely exhausted without the auxiliary of the presses. However, during certain seasons there are animals which produce crystals of stearine soft enough for rendering necessary the stroke of a press as a last operation, but in this case this operation has little importance, because it is applied only to a fraction of the product. In all cases the oleomargarine is separated from the stearine when it is cold, and passed to the cylinder, constituting, especially if its yellow color has been raised, a greasy matter of very good taste and which may replace the butter in the kitchen, where it is employed under the name of 'margarine;' but, if it is desired to transform it into more perfect butter, he employed the following means:"

The claims in that reissue are as follows:

"1. The improved material herein described, produced by treating animal fats so as to remove the tissues and other portions named, with or without the addition of substances to change the flavor, consistency or color, as set forth. 2. The process herein described of treating animal fats in the production of oleomargarine."

The claims of reissue No. 5,868 were six in number, and those of reissue No. 8,424 were nine in number; while the claims of the original patent and of reissue No. 10,137 were identical in number and language.

After a replication to the answer, proofs were taken, and the case was heard before *Judges* Gresham and Blodgett. The opinion of the court, delivered by the latter, is found in 27 Fed. Rep. 78; and, in accordance with its conclusions, a decree was entered, on the 22d of March, 1886, dismissing the bill. From that decree the plaintiffs have appealed.

The ground for the dismissal was, that the [1
Bavarian patent, which was granted April 8, 1873, expired April 8, 1876; that the Austrian patent, which was granted October 31, 1869, expired May 26, 1876; and that therefore reissue No. 10,137 was invalid, because the application on which it was granted was not made until May 20, 1882. Mége also took out a patent in France for his invention, July 15, 1869, for fifteen years. The defendant contends that the Bavarian and the Austrian patents were granted for the same invention as reissue No. 10,137, while the plaintiffs allege the contrary.

The text of the specification of the Bavarian patent is as follows:

"The crude fats and the crude tallow have, until the present time, been used in a very imperfect manner for the preparation of edible fat or soaps, or the fabrication of melted tallow for the preparation of fatty acids, by means of chemical modes of saponification or other purposes.

"The new modes of procedure described herein consist both of chemical and physiological processes; they are not intended to improve the former methods of fabrication, but, on the contrary, on account of their nature and better properties, furnish neutral and new products. They are especially intended to benefit the navy and the less wealthy classes, by furnishing excellent edible and preservable fats at a price considerably lower than that of present similar products—for instance, butter and the finer grades of fats.

"The reduction in the price of butter will, in a large measure, contribute to the general wealth, for stock-raisers, instead of making butter, will feed their milk to calves and thereby get more stock, thus furnishing more cattle for slaughtering purposes and at a lower price. The new procedure is also of considerable importance, from a hygienic point of view, in doing away with the emanation of bad odors inevitable with the former chemical methods, and due to the excessive high temperature to which fats had been exposed. The new procedure depends upon the following conclusions of modern science: 1, that the malodorous, colored, acid and rancid ingredients are not originally contained in the crude fats as they occur in [1
nature; 2, that these harmful substances are

developed by the activity of the organized tissues under the influence of fermentation, heat and chemical agents; 3, that the fats of milk, termed butter, consist only of the immediate fat, which is altered first by a cellular tissue and then by the organized tissue of the udder. By utilizing these principles in industrial pursuits, or in domestic economy, there is obtained from the crude fats and the tallow—

"A. A pure fat, without the customary fatty smell and taste, which does not stick to the palate and which resembles the fatty bodies most desired for eating purposes.

"B. Stearine for candles.

"C. As a residue, common tallow.

"D. This fat, really identical with the fat of butter, taken from its source before it has been changed in the milk gland, can be made into different kinds of butter, which, although prepared by an artificial process, is really butter, and differs only from the ordinary butter by keeping fresh for a much longer length of time.

"The means employed in the new preparation of these partly new, partly known, products constitute, in their details and in their entirety, the invention which we claim as our property. They are as follows:

"1. Washing and crushing. The crude fat is exposed to a jet of cold water between the conical cogs on two iron cylinders; it is finely subdivided by the current of water and the pressure, and falls then ce into a tank where a current of cold water completes the washing.

"2. Artificial digestion. This fat, now freed from all soluble animal substances, is mixed with artificial gastric juice (stomach of the pig or sheep in acidulated water), to the extent of immersing it completely, or, to 1,000 kilo of fat, 300 kilo of water, 1 kilo bicarbonate of sodium and two stomachs (pig or sheep) are added. This mixture is then kept at the temperature of the animal body (by means of steam-pipes, or otherwise), until all the molten fat has been dissolved by the pepsin of the stomachs, and appears in a clear layer on the surface. It is allowed
82] to settle, or it is decanted, and the process repeated in order to extract all the fatty constituents, which now have lost the odor of animal fat, but have obtained a particular taste. The residue is tallow.

"3. Cooling. The fluid fat is poured into vessels which have an opening at the bottom and contain a layer of tepid water. They are covered, and, when crystallization has occurred in consequence of cooling, the water is drawn off through the opening, the vessel is inverted, and the cake is allowed to fall on a table.

"4. Pressure. This operation is intended to separate the hard constituent which makes the fat granular, congeal rapidly, and stick to the palate. The cooled fat is cut into slices about one inch thick, and put into a cloth between hot plates of a press. The portion which runs off is a mixture of margarine and oleine, resembling lard in composition and of about the taste of fresh butter. It melts in the mouth like butter and does not stick to the palate like beef fat. The solid residue taken out of the cloth is good stearine, fit for making candles immediately.

"5. Uniformity and ductility. In order to remove the granular appearance of the margarine produced by congelation and to give it the solid and uniform appearance usually possessed by fats, and in order, also, to remove any air which may have entered and might interfere with its preservation without admitting air again, a vessel is filled with the fat, completely closed, and a churning or stirring apparatus in its interior is set into motion. The margarine is thus kept in motion and is then withdrawn from the vessel before cooling. It is now hard or even brittle, according to the temperature. It is rendered soft and ductile by rolling it between wooden cylinders. It is put into the form of plates or filled in tubs to be put in the market.

"6. Decolorization. The first fat is ordinarily of a light yellow color. If it is desired to remove this color without attacking the fat, the property which the fat possesses of remaining fluid for some time before cooling can be utilized. In this state an acid—for instance, muriatic acid—is added in sufficient quantity to remove the color, and it is then washed with tepid water until the last trace of acid has disappeared.

"This entire procedure, with or without pressure, can be applied to all crude fats.

"The white or faintly yellowish fat obtained by means of the described procedure is remarkably pure and has a taste of almonds, hitherto not known of any animal fat. It is especially available for—

"A. Food, as a substitute for animal fats and lard.

"B. For the fabrication of fine toilet soaps.

"C. The manufacture of ordinary soaps to replace the olive oil.

"D. The lubrication of machinery, which is never attacked if the one hundredth part of calcined magnesia be added to the fat.

"E. The artificial production of butter.

"7. Transformation into butter. The pure fat which has undergone no change by heat or chemical agents is the same substance which the cow consumes in its organism in order to have it pass through the udder in the form of milk fat or butter. The fat is therefore but butter in its original form. This observation, and the observation that the milk gland of a cow contains a kind of pepsin possessing the property of making a milky emulsion of fat and water, are the basis of the industrial procedure of changing fat into butter, a physiological operation to be carried out as follows:

"At the temperature of the animal body, one part of fat is mixed with the same quantity of water, to which $\frac{1}{10}$ part (2 per cent milk cheese, or milk without water, or cream, in water) has been added, and with $\frac{1}{100}$ part of bicarbonate of sodium, and $\frac{1}{10}$ part of the tissue of the mammary gland. The mixture is kept at the temperature of the body and allowed to work. When the fat becomes milky it appears at first like a thick milky cream; later on it changes into butter, which is allowed to cool with the precautions explained

in articles 3 and 5. The gland tissue of the mixture can also be replaced by artificial products, but with a less satisfactory result. Butter thus prepared keeps longer than milk butter and does not, like the latter, acquire [184] the pungent odor [due] to butyric acid, or it contains less casein, insoluble in ether, and may contain less water or buttermilk, as may be desired, than butter obtained in the usual manner.

"Since the above-described modes of procedure, dependent on known and on unknown methods, are new in their industrial entirety and furnish new products, we claim them as our exclusive property for the entire term of the patents."

The text of the specification of the Austrian patent is as follows:

"My invention consists in the production of neutral fatty bodies of hitherto unknown natural appearance and excellent properties. By means of special treatment of the crude tallow I obtain a pure fat devoid of smell and taste, which does not become rancid and which keeps for a long time. This substance I obtain through procedures partly known, partly new, the entirety of which constitutes the following methods:

"1. Perfect washing. This is done by crushing the fresh fat just taken from the animal between rollers under a spray of fresh water. The fat, subdivided finely by the action of the water and the pressure, falls into a tub, where the washing is completed by a current of water.

"2. Artificial digestion. This fat, from which all soluble animal substances have been removed, is mixed with artificial gastric juice (maceration of a pig's stomach in acidulated water), in sufficient quantity to immerse it, and the mixture is kept at the temperature of the animal body until the fat appears as a clear layer on the surface. The mixture is allowed to settle, and the sediment is subjected to another operation, in order to extract all fatty matter, which in this case has no longer the odor of animal fat, but the taste of the finest fats.

"3. Pressure. This operation separates the hard constituent, which makes the fat granular and causes it to congeal rapidly. This work, hitherto very difficult, is carried out on a commercial scale, in the following manner: The fluid clear fat is poured into vessels with an opening at the bottom and containing a layer of tepid water. They are covered, and when the cooling and the [185] crystallization have taken place the water is drawn off through the opening, the vessel is inverted, and the mass allowed to fall upon a table. It is cut into cakes one to two centimeters thick. These are put into canvas and pressed between two warm plates. By this method there is obtained about 60 per cent of a fatty body resembling butter, and identical in composition with lard, but free from odor and of a perfectly pure taste. The solid portion remains in the canvas.

"4. Uniform solidity is given to this fatty body in the following manner: In order to make it hard and not granular, without admitting air, it is poured into a tinned-iron vessel filled thus completely. This well-closed vessel contains a stirring apparatus kept in motion from the outside. The vessel is, beside, kept surrounded by cold water, so that the fat which is being stirred, while cooling without the admission of air, becomes thick and uniform. It is then put into another vessel, where it becomes completely solid and hard.

"This hard fat is finally cut or sliced into thin slices, by some cutting machine similar to the mechanical arrangement used for cutting fine soaps, the blades being set to furnish thin slices. This work, giving the fat the proper ductility, can also be done by hand.

"5. Decolorization can be employed or omitted as desired. This fat is usually of a yellow tinge. This color can be removed easily and without damage, by utilizing the property of the fat of remaining fluid for some time in cooling. In this state it is mixed with enough fine acid—for instance, muriatic acid—to remove the color. It is then repeatedly washed with warm water until the last trace of the acid has been removed.

"This entire procedure, with or without pressure, can be employed in the case of any fresh fat just taken from the animal. By means of the same I obtain partly solid, partly soft, white or faintly yellowish perfectly pure fatty bodies, which have a faint flavor of almonds. These new fatty bodies are applicable to various industrial purposes, according to their degree of consistency, especially to—

"1. The fabrication of toilet soap, particularly fine and beneficial to the skin.

"2. The fabrication of ordinary soaps, to [1 replace the olive oil and give a large yield.

"3. The lubrication of machinery, which is never attacked by this excellent lubricating material, especially when $\frac{1}{100}$ part of calcined magnesia has been added.

"I claim, therefore, as my invention, the above-described mode of preparation of a wholly new fatty body. The peculiar points of importance of my procedure consist in washing, digesting, pressing, solidifying and decolorizing."

It is contended by the plaintiffs that they have shown, by the testimony of experts, that reissue No. 10,137 differs from the foreign patents in these particulars: (1) the neutralization of the ferments is entirely lacking in each foreign patent; (2) complete crushing is provided for in the United States patent, so as to bruise all the fat cells, while the foreign patents do not provide for such complete crushing, but do provide for coarse crushing and washing, both of which actions render difficult, if not impossible, the production of the article which is the result of the United States patent and involve a different process; (3) each of the foreign patents makes vital the use of an artificial digestion, produced by a large proportion of gastric juice, while the United States patent practically dispenses with this gastric juice as an operative element in the process and product, and relies upon the slow increase of temperature to produce complete

separation; (4) each foreign patent directs the cooling of the product to solidification, so as to be sliced into pieces to be pressed, while the United States patent directs a crystallization at a uniform temperature, about 86°, leaving the oil fluid; and (5) each foreign patent provides for the separation of oil from the stearine by pressing the cold-sliced or solidified cakes between hot or warm plates, while the United States patent separates the oil from the stearine with the product at the temperature of uniform crystallization, namely 86°. The contention is, that no step of the foreign patents is found in the United States patent, nor any equivalent therefor; and that the artificial digestion, the cooling to solidification, and the pressing between hot plates, found in each of the foreign patents, is an absolute
187] bar to the production of the article which is the result of the United States patent.

Professor Henry Morton, an expert witness for the plaintiffs, says: "There is, of course, a difference in the improved product described and claimed in the Mége patent, according as it is made with or without the addition of materials affecting its color, consistency and flavor. I will therefore refer to each of these conditions separately. When the improved product of Mége, without these additions referred to, is compared with ordinary dairy butter, we find it to be substantially identical therewith, as regards its main constituents and its general consistency and character. Both products then consist substantially of mixtures in nearly the same proportions, in either case of stearine, margarine and oleine, and both are unctuous solids varying in consistency, being quite solid near the melting point of ice, quite fluid at a temperature of about 90°, and more or less soft and plastic at intermediate temperatures. The Mége product, however, differs from dairy butter, in the first place, as to its composition, by reason of the presence in the dairy butter of several substances not found in the Mége product. Thus, the dairy butter contains about five per cent to six per cent of the peculiar fat known as butyrine; it also contains a smaller amount of casein, some trace of albumen; also extremely minute quantities of caprilin, caproilin and caprylin. None of these substances would be present in the Mége product, as above referred to, which would therefore lack the peculiar flavor due to the presence of these products. The amount of water and of salt would also, as a rule, be greater in dairy butter than in the Mége product. There would also be a difference in consistency, inasmuch as the dairy butter would not constitute a homogeneous mass of fatty substance, but would be a solid emulsion of such fatty substance in which the same existed as minute spheroids or particles of the said fatty substance, separated from each other by an aqueous fluid consisting of water, holding in solution salt and traces of albumen and casein. When the Mége product has been converted into a
188] more perfect butter, as he calls it, by the addition of certain substances, as indicated by him, it will then contain all or nearly all the materials found in dairy butter, though not in exactly the same proportions, all these distinctive matters being, as a rule, present in smaller proportions in the Mége product than in the dairy butter. As regards the water and salt, the relative proportions may vary either way in different samples, depending upon the amount of salt added and the amount of working to which the butter of the Mége product has been subjected. As regards consistency of the more perfect butter of the Mége patent and ordinary dairy butter, there will be a substantial identity, both being solid emulsions of fatty matter with an aqueous fluid. . . . As articles of food, the Mége product and ordinary dairy butter are only distinguishable by characteristics which are variations of degree. Thus the Mége product, in its simplest form, would have less flavor and a less agreeable consistency than good dairy butter, while, on the other hand, its freedom from disagreeable flavor would render it superior to a low or poor grade of dairy butter. When the flavoring materials were added the Mége product would then be extremely difficult to distinguish from the best dairy butter, but, as compared with a very fine and highly flavored dairy butter, would be lacking in flavor. As regards wholesomeness, I do not think there would be any difference between the Mége product in either of its conditions and ordinary good dairy butter, though the Mége product would be better in this respect than a strong or rancid quality of dairy butter. The same remark applies to the nutritiousness of the materials compared, while as regards palatableness the Mége product would, I think, hold an intermediate place between the highest and the lower grades of diary butter, being better than the low grades and not quite equal to the highest in this respect."

On the question of the identity of the Bavarian patent with reissue No. 10,137, the opinion of the circuit court, after quoting the text of the specification of the Bavarian patent, says: "Here we have the directions of the Bavarian patent for producing the Mége product, consisting, first, of crushing between cogged cylinders and washing, by which it is 'finely subdivided.' The American patent says: 'A complete crushing is necessary under millstones.' So that it would seem there is only a difference in degree in the Bavarian and American processes, as to the crushing. The American process says the fat must be completely crushed so as to bruise all the cells. The Bavarian patent says it is to be finely subdivided by the current of water and by crushing between the conical cogs of iron cylinders. In both patents Mége uses the word 'crushing' as a title or heading for his directions. The directions for the artificial digestion are the same for the two patents, except that in the Bavarian he does not instruct specifically how to make the artificial gastric juice. He simply says it is 'the stomach of the pig or sheep in acidulated water;' but the proof in this case shows that the mode of making artificial gastric juice was well known in the arts before the date of Mége's invention, and he undoubtedly assumed that the person

who would attempt to use the process covered by his patent would have sufficient physiological and chemical knowledge and skill to make artificial gastric juice. The American patent also states that the fat, while in the process of digestion, is to be kept at a temperature of 103° F., while the Bavarian patent says it is to be the temperature of the animal body; but the proof in this case shows that 103° F. is the temperature of the animal body, so it would seem there is no substantial difference between the processes of digestion described in the two patents. The third step in the Bavarian patent is entitled 'Cooling,' the process of which is pouring the clear liquid fat into vessels which have an opening at the bottom, and containing a layer of tepid water, where they are covered and remain until crystallization has occurred in consequence of the cooling. He does not give specific directions as to the temperature at which the fat is to be kept during the crystallizing process, but evidently leaves that to the skill of the operator, assuming that he will sufficiently understand by the use of the word 'crystallization' what the process must be. The next step after crystallization is the separation of the oleo and margarine from the crystallized stearine; and this in [190] the Bavarian patent is accompanied by pressure between the hot plates of a press. Inasmuch as the centrifugal machine, or the hydro-extractor, and the press are analogous devices for accomplishing the same results—that is, of expelling the liquid or fluid contents from the mass—there is no essential difference between the Bavarian and American patents in this step of the process. The Bavarian patent is also silent as to the neutralization of the ferments or germs of decay, but it can hardly be possible that any person would enter upon the manipulation of animal fat without sufficient common knowledge and skill to know, without instruction by the specific terms of the patent, that, in order to produce sweet and pure oil or fat, the process of fermentation and decay must be prevented. So that, taking the Bavarian patent as a whole, there would seem to be such an identity in the processes described as to make them essentially the same. Probably because Mége assumed that whoever would attempt the transformation of crude fats under his process in Bavaria would possess more knowledge or experience in regard to the handling of fats than he assumed would be known in this country, as a matter of general knowledge, he deemed it necessary in his American patent to give more minute and specific directions in regard to some of the steps of the process than he did in his foreign patents. Yet we think there can be no doubt that he has substantially described the same process in both patents."

In regard to the Austrian patent, the opinion of the circuit court says: "In the Austrian patent issued to Mége, October 31, 1869, he describes the first process under the title of 'Perfect washing,' which he says is done 'by crushing the fresh fat just taken from the animal between rollers under a spray of fresh water.' The second step, 'Artificial digestion,' consists in mixing the crushed fat 'with artificial gastric juice (maceration of a pig's stomach in acidulated water), in sufficient quantity to immerse it, and the mixture is kept at the temperature of the animal body until the fat appears as a clear layer on the surface.' Here we have the same process as in the American patent, except that the directions for crushing do not include grinding or crushing under millstones, and he gives no recipe for making [19 artificial gastric juice, except that of the maceration of a pig's stomach in acidulated water, which we must infer he assumed was a sufficient direction to enable an ordinarily intelligent person, skilled in the art of manipulating or handling fats, to make the gastric juice. The directions for crystallization require the clear fluid fat to be poured into a vessel with an opening at the bottom, and containing a layer of tepid water. The vessel is then covered, and, when the cooling and crystallization have taken place, the cooled mass is turned out, cut in slices and placed in canvas bags and pressed between warm plates, by which method he says there is obtained about sixty per cent of a fatty body resembling butter, and identical in composition with lard, but free from odor and of a perfectly pure taste."

The opinion then proceeds: "The French and the English patents give substantially the same description for the process as is contained in the Austrian and Bavarian patents. All the steps of the American patent, with the exception of the neutralization of the ferments, are specifically called for and described, although, perhaps, not with all the minute directions which are found in the American patent. All the proofs agree that Mége was a man of inventive genius and high scientific acquirements and it can hardly be possible that if, between the time he took out the French, English and Austrian patents, in 1869, and the Bavarian patent, in April, 1873, and the time when he applied for his American patent, in December, 1873, he had discovered any substantially new and material addition to the process covered by those foreign patents, he would not have specifically named and stated wherein the American differed from the foreign patents. As already said, it seems clear, from Mége's own statements, and those of his solicitors, that the purpose was to cover by the American patent what had been covered by his French patent of 1869, and we cannot believe that, if anything in addition to this foreign patent had been intended to be introduced into the American patent, it would not have been stated in some explicit terms; and there can be no doubt that the French, Austrian and Bavarian patents are substantially identical."

In regard to the foreign patents the opinion [19 of the circuit court says: "The scientific experts called by the complainant, Professors Morton, Chandler and Wheeler, have testified that they do not think the invention described in the American patent is found in either of the foreign patents. Their reasons for such conclusion, briefly summarized, are: (1) that the crushing spoken of in the foreign patents is not so complete and thorough as

that called for by the American patent, where the fat is to fall from cylinders under millstones, which shall completely bruise all the cells; (2) that in the American patent the digestion is to be accomplished with a less quantity of gastric juice than is called for by the foreign patents, as the foreign patents say the crushed fat is to be immersed in the artificial gastric juice; (3) that by the Amercian patent the temperature may be raised above 103° F., 'so that the matter shall completely separate,' while the foreign patents limit the degree of heat to the temperature of the animal body; (4) that in the foreign patents the process of cooling is allowed to proceed to such a point that the mass can be cut in pieces or slices, while in the American patent the product is not allowed to cool so as to become rigid, but is retained at a temperature of about 86°.

"With all due respect to the opinions of these eminent chemists, we must say that the points of difference suggested by their testimony are purely wholly differences in degree. The necessity of crushing is stated in all the patents, both American and foreign. The degree of crushing would obviously affect the quantity of oil extracted from the fat by the process of digestion, as the only object of the crushing is to release the fat from the tissues in which it is held in its natural condition. The necessity for thorough and minute comminution is one that would suggest itself from any operative's common knowledge. Any man who had intelligence enough to know the uses of his own teeth would know the necessity of the complete comminution of any article to be subjected to the process of digestion or the action of the gastric juice. It would hardly require a scientist to instruct an operative that the
93] more finely a substance is comminuted the more direct and prompt would be the action of the gastric juice and the process of digestion.

"As to the differences in the process of digestion between the American and foreign patents, it would seem to be true that the measured quantity of gastric juice directed to be used in the American patent is less than that called for in the foreign patents, because he gives specific directions as to the number of liters of gastric juice for 100 kilogrammes of fat in the American patent, while in the foreign patent he says the fat must be immersed in the gastric juice; but the proof shows that the formula for the gastric juice in the American patent gives a more potent and effective product, and we presume Mége may, by his experience and practice under his patents, have ascertained at the time he took the American patent that the process of digestion could be accomplished with a less quantity of gastric juice than was described in his first patents; but this is only a difference in degree, and with a larger quantity of gastric juice and not so complete comminution, about the same result would probably be obtained as with complete and thorough crushing of all the fat cells and a smaller quantity of gastric juice, especially if made stronger or more potent; so that the difference in the American and foreign patents in that regard seems to us wholly immaterial and unsubstantial.

"As to the claim that these witnesses find in the American patent permission to raise the temperature above 103° F., we do not think it is well founded when the whole of Mége's specifications in his American patent are considered. Under the third head, 'Concentrated digestion,' Mége says: 'When the fat has descended in the vessel he melted it by means of artificial digestion, so that the heat does not exceed 103° F.' Further on, in the same paragraph, he says: 'He slowly raised the temperature to about 103° F., so that the matter shall completely separate.' Taking these two expressions together, it seems to us the first limits the second, and that the directions of the patent are specific not to raise the temperature above 103° F. Certainly the language, 'I slowly raise the temperature to about 103°,' does not authorize raising the temperature above that point. When the distinction immediately before is that it must not exceed 103° F.; and when we consider this language of the specifications in the light of the testimony in the case, which shows that gastric juice is destroyed whenever its temperature is raised much above 103° F., we think there can be no doubt that the eminent scientist who devised this process intended to keep within the limits in which his gastric juice would be operative for the purposes of digestion.

"The last and final distinction, that the foreign patents contemplated a cooling of the mass below 86°, or until it had become stiff so that it could be handled and cut, before the pressure was applied for the purpose of separating the oleomargarine from the stearine, is a distinction, as it seems to us, without a difference. If the stearine had become crystallized in the mass, although it might at one time have been cooled below 86°, when it was sliced and placed between the warm plates in the press the oleomargarine would again become liquid, and flow out under the action of the warm plates and the press, so as to secure the separation; and that such was the result is sufficiently established by the statements in the foreign patents, notably the Austrian and English, that about 60 per cent of a mixture of the margarine and oleine, of a composition identical with lard, but of superior flavor, was obtained by the pressure, and would seem to show, in the light of the proof in this case, that he obtained as large a product as is obtained by the process of the American patent.

"A fair test of the question as to whether the American patent is anticipated by the foreign patents, or is included in them, we think would be: Were a person in this country, after the issue of the present American patent, to commence the manufacture of oleomargarine by the precise process described in the Bavarian or Austrian patents, supposing that process had not been patented abroad, would the courts refuse an injunction to restrain the use of the process on the ground that it infringed that covered by the American patent? We can hardly deem it possible that any intelligent court would deny an injunction if applied for under such

[195] circumstances, and we think this fairly illustrates the relation of the foreign to the American patent."

The conclusion of the circuit court was that the plaintiff's patent expired by the expiration of the Bavarian and Austrian patents.

We have carefully considered the arguments urged in the briefs of the counsel for the plaintiffs, in connection with the testimony of their experts, and are of opinion that the views of the Circuit Court, above quoted, are correct. Its *decree is affirmed.*

THE VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD COMPANY, *Plf. in Err.*, *v.* ROBERT N. SMITH ET AL.

(See S. C. Reporter's ed. 195-200.)

Jurisdictional amount.

Where plaintiffs claim to recover a part of a tract of land, which part is not of the value of over $2,000, this court has no jurisdiction of the case, although the whole of the tract of which plaintiffs claim the ownership is worth $10,000.

[No. 276.]

Submitted Apr. 11, 1890. Decided Apr. 21, 1890.

IN ERROR to the Circuit Court of the United States for the Western District of Louisiana to review a judgment to recover possession of land. *Dismissed.*

The facts are stated in the opinion.

Messrs. **Edward Colston,** *Frank P. Stubbs* and *Wise & Herndon* for plaintiff in error.

Messrs. **A. H. Leonard** and *Land & Land* for defendants in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the [196] Circuit Court of the United States for the Western District of Louisiana, by Robert N. Smith, Elizabeth A. Smith (wife of Marine Duvall, joined, authorized and assisted by her husband), William L. Smith, Elizabeth W. Smith (widow of James F. Smith), citizens of Kentucky, and John S. Smith, a citizen of Colorado, as legal heirs of William W. Smith, deceased, against George A. Turner, a citizen of Louisiana.

The petition avers that the State of Louisiana, on the 14th of May, 1853, sold to William W. Smith a certain tract of land known as Silver Lake, situated in section 31, township 18, ranges 13 and 14, in the Parish of Caddo, in the State of Louisiana, containing an area of 186.57 acres, at the maximum price of $1.25 per acre, which at the same time was paid into the treasury of the State by said Smith; that, after that sale, and on the 24th of February, 1855, the State issued a patent for said tract of land to Smith; that it acquired said tract as swamp and overflowed land, granted to it by the Acts of Congress of 1849 and 1850, and sold the land to Smith as swamp and overflowed land; that all sales of land in Louisiana, claimed by the State as swamp and overflowed lands, whether made by the United States or by the State, and whether the land sold was of that character or not, were confirmed by the Act of Congress of March 2, 1855, entitled "An Act for the Relief of Purchasers and Locators of Swamp and Overflowed Lands;" that the Act of 1855 was extended to sales made after its passage, and was continued in force, by the Act of March 3, 1857, to confirm all selections of swamp and overflowed lands by the several States under the Acts of 1849 and 1850; that the Act of 1855 confirmed the title of Smith to the tract of land known as Silver Lake, whether it belonged to the State under the Swamp-Land Acts of Congress, or whether it belonged to the United States; that Smith acquired a title to the land both from the State and the United States, by purchase and by confirmation by Act of Congress; that that title is paramount to all subsequent claims from the government, and is indefensible under the Act of Confirmation of March 2, 1855; that the plaintiffs are the owners of the tract of land known as Silver Lake, which is illegally withheld from them, and a part of it, containing 40 acres or more, is in the possession of George [197] A. Turner, a citizen of Louisiana, who refuses to deliver to the plaintiffs that part of the land; and that the part in the possession of Turner is worth at least $600. The prayer of the petition is for a citation to Turner, and for judgment for the recovery of said tract of land in his possession, with its revenues, from judicial demand.

Turner was served with a citation, and put in an answer alleging that he was in the possession of a portion of the property described in the petition as a tenant of the Vicksburg, Shreveport and Pacific Railroad Company, and praying that his said lessor and the owner of the property be made defendant, and he be discharged. An order was made by the court that the Company be made a defendant in his place, and a citation was issued to it, with which its president was duly served. It was a Louisiana corporation.

The Company first filed an exception to the capacity of the plaintiffs to sue, on the ground that they were not the legal heirs of Smith, and if they were, were not his sole heirs. This exception was tried and overruled. A plea and exception of *res adjudicata* to the suit was then filed by the Company, on the ground that, in a suit entitled *The State of Louisiana* v. *W. W. Smith*, in the District Court of Caddo Parish, Smith put at issue the validity and legality of his title to the land described in the plaintiffs' petition under the certificate and patent described therein; that, upon a final hearing, judgment was rendered in that suit decreeing said certificate and patent null and void, and that they be canceled and delivered to the State of Louisiana; and that the plaintiffs, the heirs of Smith, were bound by the judgment in that suit.

The Company also put in an answer to the petition, denying its allegations, and alleging that the sale or entry of the land, as set forth in the petition, was canceled by the register of the state land office, on the 10th

of June, 1853, and the cancellation was duly notified to Smith; that the sale, entry and patent were without authority of law, for reasons set forth in the answer; that the land was never selected by the State of Louisiana as swamp and overflowed lands, and never reported to the commissioner of the General [98] Land Office, and never approved as such by the surveyor-general, the Secretary of the Interior or the commissioner of the General Land Office, and never listed or returned by the Secretary of the Interior to the State as swamp and overflowed lands; that the State had never claimed or acquired the land as such; that the land did not belong to that class of lands, but to the other class, known or designated as "shallow lakes," and therefore was not embraced in the grant from the United States of swamp and overflowed lands, under the Acts of Congress of 1849 and 1850; that the Company was the owner of the land, by grant from the United States to the State, under the Act of Congress of June 3, 1856, to aid in the construction of railroads in the State, and which was accepted by the State for that purpose; that, all the requirements of said grant having been complied with by the State and by the Vicksburg, Shreveport and Texas Railroad Company, the land described in the petition, being embraced in that grant, was acquired by that company, and duly certified or patented by the United States as belonging to that company; and had been legally sold or transferred by it to the defendant Company; and that the land described in the petition and sought to be recovered in the suit was worth at least $10,000. The answer prayed that the plaintiffs' demand be rejected, and for judgment decreeing the Company "to be the owner of said land and quieted in possession thereof, and for general relief."

The case was tried by a jury, which rendered the following verdict: "We, the jury, find for plaintiffs, and that the land sued for is described in the plat made by W. R. Devoe and filed in evidence." A motion for a new trial was made and overruled, and a judgment was entered against Turner and the Company, adjudging that the plaintiffs were the owners of the land in controversy, and entitled to its possession, the land "being known and described as follows,"—and then giving a description of it by courses and distances, "containing thirty-five $\frac{18}{100}$ acres, situated in the Parish of Caddo, Louisiana, and as shown and described on map and survey of same made by W. R. Devoe, civil engineer, on file and of record in said cause." [99] The judgment also ordered that writs of possession issue in favor of the plaintiffs and against the defendants; that the plaintiffs have judgment against the defendants for costs; and that the plea of *res adjudicata* be overruled. The Railroad Company has brought a writ of error to review the judgment.

There are six bills of exceptions found in the record. One of them states that on the trial the Company offered three persons as competent witnesses to prove that the land described and claimed by the plaintiffs in their petition, under a certificate and patent from the State of Louisiana, "and which is claimed by defendant under a grant from the United States government to the State of Louisiana to aid said railroad, and for which defendant prays judgment, recognizing their ownership," etc., was worth $10,000; that the plaintiffs' counsel objected, on the ground that the only part of the Silver Lake tract of 186.57 acres that was in controversy in this suit was the part alleged to be in the possession of Turner, "and it was admitted by counsel for defendant that said part or parcel of land was not worth exceeding two thousand dollars." The bill of exceptions states that the objection of the plaintiffs was sustained by the court, on the ground that the petition claimed only the number of acres in the possession of Turner; that the judgment in this case, if for the plaintiffs, could affect only the land held by him; and that the claim set up by him or by the Railroad Company did not make this a suit for more than the number of acres of land claimed by the plaintiffs, "which is about forty acres, more or less, and is shown by admission of counsel not to be worth more than two thousand dollars."

The plaintiffs move to dismiss the writ of error, on the ground that the matter in dispute does not exceed the sum of $5,000, exclusive of costs. The Railroad Company contends that the plaintiffs, by their petition, claim to be the owners of the entire Silver Lake tract of 186.57 acres; that the Company by its answer also claims title to the entire tract; that it is stated by the court, in one of the bills of exceptions, that, if the suit involves title to the 186.57 acres, the land "is worth about $10, 000, as is admitted by counsel for plaintiffs;" and that therefore this court has jurisdiction of the writ of error.

But we are of opinion that this court is [20 without jurisdiction of the case. All that the plaintiffs, in their petition, claimed to recover was the part of the land which was in the possession of Turner, alleged therein to contain 40 acres or more. The answer alleged that the land sought to be recovered in the suit was worth at least $10,000, and prayed that the plaintiffs' demand be rejected, and for judgment decreeing the Company "to be the owner of said land." This put in issue only the land in the possession of Turner. The judgment is limited to a piece of land described by metes and bounds, and containing $35\frac{18}{100}$ acres, as shown by a map and survey of the same, on file and of record in the cause. The value of that parcel of land is shown clearly to be not over $2,000 and this is conclusive as to our jurisdiction. *Elgin* v. *Marshall*, 106 U. S. 578 [27: 249], and cases there cited; *Opelika City* v. *Daniel*, 109 U. S. 108 [27: 873]; *Bruce* v. *Manchester & K. R. Co.* 117 U. S. 514 [29: 990]; *Gibson* v. *Shufeldt*, 122 U. S. 27 [30: 1083].

Writ of error dismissed.

207] THE CENTRAL TRUST COMPANY OF NEW YORK, *Appt.*,
v.
THE GRANT LOCOMOTIVE WORKS ET AL.

THE DAYTON, FORT WAYNE AND CHICAGO RAILROAD COMPANY, *Appt.*,
v.
THE GRANT LOCOMOTIVE WORKS ET AL.

THE CENTRAL TRUST COMPANY OF NEW YORK, *Appt.*,
v.
R. S. GRANT.

THE DAYTON, FORT WAYNE AND CHICAGO RAILROAD COMPANY, *Appt.*,
v.
R. S. GRANT.

THE CENTRAL TRUST COMPANY OF NEW YORK, *Appt.*,
v.
THE GRANT LOCOMOTIVE WORKS ET AL.

THE CENTRAL TRUST COMPANY OF NEW YORK, *Appt.*,
v.
R. S. GRANT.

(See S. C. Reporter's ed. 207-227.)

Appealable interest—final decrees, when vacated—intervening petition—discretion of court, not reviewable—appeal, what it brings up—bills of review, when brought.

1. Purchasers at a mortgage-foreclosure sale under a decree which provided for the payment in cash of sufficient of their bid to pay claims adjudged to be prior in equity to the mortgage or for a resale of the property, cannot, nor can their assignee, appeal from the orders adjudging that such claims be paid by them out of the amount of their bid or that the mortgaged property be resold; they have no appealable interest in the premises.
2. The court below cannot of its own motion vacate its final decrees, after the close of the term at which they were made.
3. A decree upon an intervening petition in a foreclosure suit against a railroad company, adjudging that certain locomotives used by that company under a contract for their purchase should be paid for from the sale, is a final decree.
4. The refusal of the court below to allow pleadings to be amended and the denying an application to intervene are matters in the discretion of that court with which this court will not interfere.
5. Where an order is merely in execution of a former decree, an appeal from the order does not bring the former decree up for revision.
6. Bills of review for errors apparent of record must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed.

[Nos. 1277, 1278, 1279, 1280, 1281, 1282.]

Submitted Mar. 31, 1890. Decided Apr. 21, 1890.

APPEALS from decrees of the Circuit Court of the United States for the Southern District of Ohio decreeing payment in Nos. 1277, 1278, 1279, 1280, of certain amounts due intervening petitioners out of the sum bid on a mortgage foreclosure sale, and that, in default of payment, the mortgaged property be resold; and from decrees striking from the files bills of review in Nos. 1281 and 1282. *Nos. 1278 and 1280 dismissed. Nos. 1277, 1279, 1281 and 1282 affirmed.*

Statement by *Mr. Chief Justice* **Fuller:** [20

On August 1 and 2, 1883, upon a creditor's bill brought by Granville D. Braman, a judgment creditor of the Toledo, Cincinnati and St. Louis Railroad Company, Edwin D. Dwight was appointed receiver of all the property of the company in Illinois, Indiana and Ohio, by orders made in the Circuit Courts of the United States in Districts of those States. August 14, 1883, the Central Trust Company filed its bill in the United States Circuit Court for the Southern District of Ohio, against the Toledo, Cincinnati and St. Louis Railroad Company, the Cincinnati Northern Railway Company and the said Braman and another, asking a foreclosure of certain mortgages therein described. This cause was numbered 3554.

In October, 1883, the Central Trust Company filed its bill in the same court against the Toledo, Cincinnati and St. Louis Railroad Company, the Toledo, Delphos and Burlington Railroad Company and the said Braman, for a foreclosure of certain mortgages therein set forth, which cause was numbered 3578. On October 25, 1883, one William J. Craig was appointed receiver of the mortgaged property in each of these causes, took possession of it and superseded the possession of the former receiver, Dwight. October 27, 1883, the Grant Locomotive Works and the American Loan and Trust Company by leave filed their intervening petition in No. 3578, setting up a contract [2
between the Toledo, Cincinnati and St. Louis Railroad Company and the Grant Locomotive Works, for the leasing and conditional purchase by and sale to the railroad company of ten locomotives, Nos. 57 to 66, for the price of $105,000, payable in installments, the title to the locomotives remaining in the Grant Locomotive Works until payment was fully made; that the whole purchase price was represented by bonds of the railroad company, made payable at the office of the American Loan and Trust Company at Boston, and certified to by said trust company as trustee; the default of the Toledo, Cincinnati and St. Louis Railroad Company; and praying a surrender of the ten locomotives and the payment of all arrears due for rent, interest and repairs up to that time under said contract, and also of any deficiency that might arise upon a resale by them of the said ten locomotives, and for other relief.

NOTE.—*Bill of review; nature of; when may be brought; who may maintain; time within which to be brought; what it should contain.* See *note* to Bank of U. S. v. Ritchie, 8: 890; also *note* to Shelton v. Van Kleeck, 27: 259.

On the same day, R. S. Grant filed in No. 3554 his intervening petition, alleging a similar contract with the Cincinnati Northern Railway Company in respect to other locomotives at the price of $90,558.97, of which $18,558.97 was paid in cash, and the remaining $72,000 was made payable in monthly installments, represented by bonds of the Cincinnati Northern Railway Company, the payment of which was assumed by the Toledo, Cincinnati and St. Louis Railroad Company, upon consolidating with the former company in 1883, the title to the locomotives remaining in the said Grant until payment in full was completed; the default of the Toledo, Cincinnati and St. Louis Railroad Company; and praying for the return of the locomotives; the payment of all arrears due for rent, interest and repairs up to that time, and also of any deficiency that might arise upon a resale of the said locomotives, and for other relief.

On December 6, 1883, Craig, as receiver, by his attorney, filed his answer to the intervening petitions, admitted the agreements and the defaults in payment, and further answered that all the locomotives were in his possession and were necessary to the operation of the railroads by him, and prayed that the court would make such order as would enable [210] him to retain the possession and use of the locomotives. On the 17th of December, 1883, the attorney of the receiver notified the judge of the court that there was no reason why judgment should not go upon the intervening petitions, and that there was no objection to the draft of decrees, as the receiver had only resisted claims for damages, and these had been waived. On the 22d day of December, 1883, of the October Term, two orders were entered in each of said causes Nos. 3554 and 3578, in favor of the intervening petitioners. The two in favor of R. S. Grant in No. 3554 were as follows:

"The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioner.

"And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotive No. 73, and is using the same in the operation of the said Cincinnati Northern Railway Company between Cincinnati and Dayton, Ohio, and that said locomotive is one of the ten covered by the agreement of lease set out in said petition, and was acquired by said railway company under the terms of said agreement, and was so held at the date of the appointment of the receiver herein;

"And it further appearing that the present receiver or his predecessor took the said locomotive, with its tender, into his possession as such receiver on the first day of August last, and has had the same in continuous use and possession since that date without having made any of the monthly payments of rental as provided in said indenture of lease, or other compensation for the use thereof;

"And it further appearing that the said locomotive is, in the judgment of the receiver, necessary to the proper operation of said railway and should be acquired as part of its permanent equipment, and that the value of said locomotive as fixed in said agreement of lease is reasonable, and that the petitioner, R. S. Grant, the owner of said locomotive and tender, is willing, upon receipt of the contract price or upon being adequately secured therein, to transfer the title of the same to the receiver;

"And the matter being fully heard by the court and upon due deliberation thereon, it [211] is hereby ordered, adjudged and decreed that the receiver pay to the said petitioner as rental for said locomotive and tender and in full for all claims for rental, interest and repairs down to the first day of December, 1883, the sum of $770.48, the same being the amount due to said date under the terms of said lease.

"And the further sum of $7,520, balance in full as purchase money for said locomotive and tender.

"And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said railway out of any money not appropriated for the payment of current labor, supplies and taxes.

"And it is further ordered and decreed that the said several amounts with interest thereon at the rate of six per cent from the first day of December, 1883, shall be a charge upon the earnings, income and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the said Cincinnati Northern Railway Company, as ahead of the first-mortgage or other bonded debt of said company or either of them; and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railways shall be a first lien thereon, and the said sale shall be made subject thereto."

The second order commenced:

"The said cause came on to be heard upon the petition and the answer of the receiver thereto and upon the evidence submitted on behalf of said petitioner. And it appearing to the satisfaction of the court that the receiver has in his possession Grant locomotives numbered 67, 68 and 72, with their tenders, and is using the same in the operation of the said southeastern division of the said defendant company's railroad, between Dayton and Wellston, Ohio, and that the said locomotives are three of the ten covered by the agreement of lease set out in said petition and were acquired by said railway company under the terms of said agreement, and were so held at the date of the appointment of the receiver herein."

This order continued in the terms of the preceding one, and decreed certain amounts for rentals, interest and repairs down to [212] December 1, 1883, and a further sum in full as purchase money for said locomotives and tenders, and concluded as follows:

"And it is further ordered that the receiver pay said several amounts as part of the operating expenses of the said southeastern division out of any money not appropriated for the payment of current labor, supplies and taxes.

"And it is further ordered and decreed that the said several amounts, with interest thereon at the rate of six per cent from the 1st day of December, 1883, shall be a charge upon the earnings, income and all the property of the said Toledo, Cincinnati and St. Louis Railroad Company, and especially of the said division, prior to the first-mortgage or other bonded debt of said railroad or said division thereof, and any balance of said several amounts remaining unpaid at the date of the foreclosure and sale of said railroad or said division shall be a first lien thereon and the said sale shall be made subject thereto."

Upon the 7th day of March, A. D. 1884, the same being one of the days of the February Term, 1884, of the court, these orders were suspended by an order of court, the petitioner objecting.

On the 15th day of March, A. D. 1884, the Central Trust Company filed its petition in the cause, which it prayed might be taken as an answer to the intervening petition of Grant, and also as a petition for rehearing and review of the orders of December 22, 1883, which it further asked should be annulled and set aside.

On the 10th day of April, of the April Term, 1884, an order was entered in the circuit court as follows:

"This day this cause came on further to be heard upon the intervening petition of R. Suydam Grant, filed in this cause October 27, 1883, and the court, being fully advised in the premises, does order, adjudge and decree as follows, to wit:

"The court finds that the two decrees herein made and entered upon said intervening petition on the 22d day of December, A. D. 1883, were entered without notice to the complainant herein and without proof; that the [213] said decrees are erroneous and unjust to the bondholders for whom said complainant is trustee; that said decrees are not authorized by the pleadings, and are based upon a misrecital of the facts, as evidenced by the record of this cause.

"That said decrees were authorized by the court without examination in the erroneous belief, entertained at the time, that all the parties in interest had assented to said decrees, and that the parties adversely interested acquired no knowledge of the allowance of said decrees until about the 24th day of February, A. D. 1884, and after the adjournment of the term of court at which the same were entered.

"And thereupon it is by the court, of its own motion, ordered, adjudged and decreed that the said decrees be, and they are hereby, annulled, set aside and held for naught.

"And the court, coming now to determine the question arising upon the said intervening petition of R. Suydam Grant, does order, adjudge and decree as follows, to wit:

"That the relief prayed for in the said intervening petition be, and it is hereby, denied except as hereinafter provided.

"And the court does further find that the said petitioner is entitled to fair compensation for the use of said rolling stock described in his said intervening petition by the receiver of this cause upon the railroad of the Cincinnati Northern Railway Company, defendant herein, and for any deterioration by reason of such use.

"But the court defers the determination of the amount of such compensation until the coming in of the report thereon of the master appointed in this cause on the 5th day of April, A. D. 1884.

"And the court does further find that the said petitioner is entitled to take and repossess himself of his said rolling stock, wherever the same may be found, in the possession of the receiver appointed in this cause, or of the receiver appointed in causes No. 3576, 3577, 3578 and 3579 in this court.

"And leave is hereby granted to said petitioner to apply at any time to this court for any additional orders that may be necessary in that behalf.

"And the said R. Suydam Grant applied for leave to answer the petition of the complainant, the Central Trust Company, filed March 15, 1884, and to support his answer by affidavits or other proof, and the court, entertaining the opinion that the answer and affidavits proposed are, by the force of the foregoing decree, rendered unnecessary, declined to grant the leave asked and refused to permit an answer to said petition for rehearing, on affidavits or other proof in support thereof, to be filed; and thereupon the intervening petitioner, R. Suydam Grant, in open court, prayed an appeal from the foregoing decree, which is disallowed by the court."

Two like orders, *mutatis mutandis*, were entered in case 3578 on the petition of the Grant Locomotive Works and the American Loan and Trust Company, December 22, 1883, and were suspended March 7, 1884, and set aside April 10, 1884, by similar orders to those in No. 3554.

In June, 1884, the southeastern division of the Toledo, Cincinnati and St. Louis Railroad Company was sold under a decree of foreclosure, which sale was reported and confirmed July 18, 1884. The Cincinnati northern division of the said railroad was sold under a decree of foreclosure and the sale confirmed by order made on July 9, 1884. The decree for the sale of the southeastern division provided that unless the railroad company defendant should within ten days pay into court the amount of interest in arrear and the sum of $20,000 to be applied to the payment of costs and expenses, including the receiver's indebtedness, then the property should be sold, and that upon the sale not less than $20,000 should be paid in cash and such further portions of the purchase price should be paid in cash as the court should from time to time direct, to meet other claims which the court should adjudge to be prior to the first mortgage, the court reserving the right to resell in case of failure to comply with any order in that regard; and that the balance of the purchase money should be paid either in cash or bonds taken at their net value under the decree. The fund arising from the sale was directed to be applied to the payment: 1st., of costs, fees and expenses of

sale; 2d, of receiver's expenses and indebtedness, "and to the payment of any other claims which have been or which may be [215] adjudged by this court in this cause to have priority over said first mortgage;" 3d, to the payment of the first-mortgage bonds. The decree for the sale of the Cincinnati northern division made provisions similar in all respects, except that the amount to be paid for costs and expenses and the amount of the bid to be paid down in cash was $50,000. The southeastern division was sold to N. H. Mansfield and others as trustees for $500,000, and the Cincinnati northern division to J. N. Kinney, A. S. Winslow and others for $200,000. On the confirmation of each of the said sales, it was ordered that the purchasers upon paying in cash the $20,000 or the $50,000, respectively, should receive a conveyance of the mortgaged property and become subrogated to all the rights thereof of the lien holders, parties to the suit, and that the receivers should thereupon surrender possession of the mortgaged property to such purchasers. Each of the orders of confirmation contained the following clause:

"And it is further hereby ordered, adjudged and decreed that this decree of confirmation of the sale of the premises and property, rights and franchises, aforesaid, be subject to the terms and provisions of the decree of sale heretofore entered in this cause, whereby it is provided that of the purchase price so bid at said sale such further portions thereof, in addition to the said sum of fifty thousand dollars heretofore mentioned, shall be paid in cash as this court might from time to time in this case direct, in order to meet other claims which this court has or hereafter may adjudge in this case to be prior in equity to said first mortgage, and whereby this court did reserve the right to resell in this cause said premises and property, rights and franchises, upon the failure to comply within twenty days with any order of this court in that regard; and the right, title and interest of the said purchasers in and to the premises and property, rights and franchises aforesaid by virtue of the said sale and of this confirmation thereof and of the deed to be made in pursuance hereof shall be deemed to be acquired subject to said provision."

On the 8th day of February, 1887, the Grant Locomotive Works and R. S. Grant [216] severally filed petitions in the causes Nos. 3554 and 3578, setting up the matters hereinbefore detailed, and alleging that the orders of April 10, 1884, purporting to annul the decrees of December 22, 1883, were void; that the decrees were still in full force; and praying that the said decrees of December 22, 1883, be adjudged to be in full force and effect, and that the same be carried into execution. The Central Trust Company answered, and the purchasers of the southeastern and of the Cincinnati northern divisions demurred, and on the 11th of June, 1887, the following order was entered on each of said petitions:

"This cause this day was heard upon the petition of R. S. Grant and the Grant Locomotive Works, respectively, herein, filed February 8, A. D. 1887, praying that the court set aside certain orders hereinbefore made on the 10th day of April, 1884, setting aside certain other orders theretofore made herein on December 22, 1883, upon the intervening petition of R. Suydam Grant, filed herein on October 27, 1883, and was argued by counsel; and the court being fully advised in the premises it is ordered, adjudged and decreed that said order of said 10th day of April, A. D. 1884, be, and the same hereby is, set aside and held for naught, and that said orders of December 22, 1883, be, and the same hereby are, restored.

"And thereupon came complainant, The Central Trust Company, and prayed an appeal to the Supreme Court of the United States from this decree setting aside said order of April 10, 1884, and restoring said orders of December 22, 1883, which appeal is allowed upon complainant giving bond in the sum of five hundred dollars for costs, to be approved by the clerk of this court."

The appeals so allowed were never perfected.

January 28, 1889, the intervening petitioners having moved that the purchasers of the railroad property be required to pay into the registry of the court for the use of the intervenors the amount due under the decrees, and that in default thereof the said railroad company property be resold for the benefit of the intervenors, decrees were entered in each case, reciting: "And the said intervenor being present, by his counsel, and the purchasers of the Dayton and of the Cincinnati divisions being represented by C. [21 W. Fairbanks, their solicitor, and the Cincinnati, Lebanon and Northern Railway Company, assignee of the purchasers at the foreclosure sale of the Cincinnati Northern Railway, by William M. Ramsay, its solicitor, and the Dayton, Fort Wayne and Chicago Railroad Company, assignee of the purchasers of the southeastern division, and of the purchasers of the Iron Railroad, by John C. Coombs, its solicitor, and R. D. Marshall, the present receiver of the said railroad company, and the purchasers of the main line, the Toledo terminal and the St. Louis division, being present by Clarence Brown, their solicitor, objecting to the jurisdiction of the court, and the complainant, the Central Trust Company of New York, opposing said motion of the said intervenor, being represented by Edward Colston, its solicitor. And thereupon, pending the hearing upon the said motion, comes the complainant, the Central Trust Company of New York [and prays that its petition for rehearing, filed] on the 15th day of March, 1884, be now heard as a petition for a rehearing of the said decrees of December 22, 1883; or, if that relief be denied, that the same be taken and held to be a bill of review, or a bill in the nature of a bill of review; or if that relief be denied, that the said petition be amended and supplemented in certain respects, as stated in a certain paper now read, and be now

docketed as an original bill of review as of the 15th day of March, 1884," which application and each part thereof was denied, and the Trust Company excepted; and also, pending the hearing, the Dayton, Fort Wayne and Chicago Railroad Company, as assignee of the purchasers of the southeastern division, prayed leave to intervene and be heard "in review upon the matters of the original orders and decrees entered herein on December 22, 1883, and as set forth in a petition in writing therefor," which it moved the court for leave to file herein, which application was denied and the railroad company excepted.

The court, then, having heard argument, decreed that the respective purchasers should make payments into court, within sixty days, of the amounts still due to the intervening petitioners, and that in default of [218] such payment the mortgaged property should be resold. The decrees recited the setting aside, on the 11th of June, 1887, of the orders of the 10th of April, 1884, as void, and that all the orders or decrees entered in pursuance or in execution of the said order of April 10, 1884, were equally void and of no effect; and that the decrees entered on December 22, 1883, were in full force and effect; and ascertained the amounts remaining due, after deducting credits, to the Grant Locomotive Works for locomotives, which had been used upon the southeastern division, with interest from a date named, and for a locomotive which had been used on the Cincinnati northern division; and the amounts remaining due, after deducting credits, to Grant for certain locomotives which had been used on the southeastern division, and for a locomotive which been used on the Cincinnati northern division, with interest; and ordered that the amounts should be paid, and upon default thereof the divisions should be sold to realize the said amounts respectively. It was provided also that the decrees were "without prejudice to any right the said intervenors may have to apply for orders to resell other mortgage divisions of the Toledo, Cincinnati and St. Louis Railroad for the payment out of the proceeds of such resale of any balance of the amount hereinbefore named;". and without prejudice to the right of contribution as between the purchasers of the divisions named and the purchasers of other divisions of the Toledo, Cincinnati and St. Louis Railroad. From the orders of January 28, 1889, the Central Trust Company was allowed and perfected appeals to this court. which are here docketed as Nos. 1277 and 1279.

Exceptions to the rulings of the court, denying the motions of the Trust Company that its petitions filed March 15, 1884, be amended and supplemented, and permitted to be filed as original bills of review as of that date, appear in the records.

The Dayton, Fort Wayne and Chicago Railroad Company was allowed and perfected appeals to this court from parts of three of the said orders of January 28, 1889. These appeals are Nos. 1278 and 1280.

On the same 28th of January the Central Trust Company, by its solicitors, filed in the clerk's office of the circuit court its bill [2 of review against the Grant Locomotive Works and the American Loan and Trust Company, stating the filing of its bill of foreclosure October 20, 1883, in No. 3578; the appointment of Craig as receiver; the filing of the bill in No. 3554, and in three other cases; the objects of the five bills; the filing of similar bills in October, 1883, for the foreclosure of mortgages, made respectively by other constituent companies on their respective roads, which roads when connected would form a line of railroad extending from Delphos to Toledo, Ohio, and from Delphos through Indiana and Illinois to East St. Louis, Illinois, in the proper Circuit Courts of the United States for the Northern District of Ohio, the District of Indiana and the Southern District of Illinois; that the Toledo, Cincinnati and St. Louis Railroad Company was a corporation formed by the consolidation, under the respective laws of Illinois, Indiana and Ohio, of the above-named constituent companies and other companies, extending from St. Louis to Delphos, thence to Toledo, and from Delphos to Cincinnati and Ironton; that each mortgage was a separate and distinct mortgage upon separate property, there being no property in one mortgage included in another; that all of said mortgages were made prior to any consolidation and were entirely unaffected thereby; that on October 27, 1883, the American Loan and Trust Company and the Grant Locomotive Works filed their intervening petition in No. 3578, a copy of which is attached to and made part of said bill of review; that certain orders were entered thereon, set aside, etc., giving the proceedings in detail; that the railroad was sold on foreclosure in No. 3578 in June, 1884, but not subject to any claim or lien for locomotives, and none of the locomotives were included in said sale, but were treated as the property of the Locomotive Works and Grant; that they subsequently took and removed said locomotives; that in February, 1887, the Grant Locomotive Works and Grant filed petitions to set aside the orders of April 10, 1884, and restore the orders of December 22, 1883, which petitions were granted on June 11, 1887, and the orders of April 10, 1884, were set aside and adjudged to be null and void, and the orders of December 22, 1883, [2 were restored; that the Grant Locomotive Works filed its motion in No. 3578, asking for an order that the purchasers of the railroad sold in that case pay into court the several amounts mentioned in the orders of December 22, 1883; that thereupon complainant prayed the court to treat such proceedings of March 15, 1884, entitled "Petition for rehearing," as a bill of review to correct said orders, and to permit complainant to amend said proceedings of March 15, 1884, by adding thereto the averments contained in this bill of review, and to docket the same as thus amended as an original bill of review as of date March 15, 1884; and that the court refused to allow the same to be done, and ordered, January 28, 1889, the railroad to be sold unless the respective amounts named in the orders of December 22, 1883, should be

paid within sixty days by the purchasers of said railroad sold at foreclosure sale in No. 3578. Complainant further says that it was impossible for it to file a bill of review to correct said decrees (of December 22, 1883) at any time between March 15, 1884, and June 11, 1887, because said decrees, by said order of April 10, 1884, had been set aside and annulled, and complainant so regarded them during said period, and moreover it believed, and had the right to believe, that said Grant Locomotive Works and the American Loan and Trust Company and R. S. Grant had abandoned all claim of right under the orders of December 22, 1883; and therefore complainant says that said period of time should not have been counted against it in filing its bill of review; that the said orders of December 22, 1883, "are erroneous and ought to be reviewed, reversed and set aside for the many errors and imperfections common thereto, as shown by the record of the said case 3578, that is to say;" and then follow a number of grounds assigned for the review desired, and special grounds as to each of the orders. Complainant "files herewith a copy of the record in said cases 3554 and 3578, and craves leave to refer to same as part hereof," and prays that the orders be reviewed, reversed and set aside, and that the American Loan and Trust Company and said Grant Locomotive Works may be required to answer the premises, and for general relief. [221] This bill of review was subscribed and sworn to January 10, A. D. 1889. Process was issued and served on the solicitor of record for the American Loan and Trust Company and the Grant Locomotive Works.

On the 29th day of January, 1889, there came on to be heard the motion of the said Loan and Trust Company and the Grant Locomotive Works, to strike the bill of review from the files, which was argued by counsel and sustained by the court. From this order the Central Trust Company prayed an appeal to this court, which was granted, and bond given and approved on the 31st day of January, A. D. 1889. The record was filed in this court October 2, 1889, and the cause docketed as number 1281.

On the same 28th day of January the Central Trust Company filed a similar bill of review against R. S. Grant, setting up the prior bill of foreclosure in case No. 3554 and the subsequent proceedings thereon, and on the intervening petition of R. S. Grant, as in the other case, and praying similar relief on the same grounds in respect to the orders of December 22, 1883. This bill of review was likewise stricken from the files on the 29th day of January, 1889, and an appeal prayed to this court, the record being filed herein October 2, 1889, and the cause numbered 1282.

Messrs. **B. H. Bristow, Bluford Wilson** and **W. S. Opdyke,** for appellees, in support of motions to dismiss and affirm:

The Trust Company cannot be affected by the decrees of January 28, 1889.

Farmers Loan & Trust Co. v. *Waterman*, 106 U. S. 265 (27: 115).

There is sufficient color of right to a dismissal to justify the court in considering the motion to affirm.

Whitney v. *Cook*, 99 U. S. 607 (25: 446); *Hinckley* v. *Morton*, 103 U. S. 764 (26: 458); *Micas* v. *Williams*, 104 U. S. 556 (26: 842); *The S. C. Tryon*, 105 U. S. 267 (26: 1026); *Swope* v. *Leffingwell*, 105 U. S. 3 (26: 939); *Ackley School Dist.* v. *Hall*, 106 U. S. 428 (27: 237); *Evans* v. *Brown*, 109 U. S. 180 (27: 898); *Davies* v. *Corbin*, 113 U. S. 687 (28: 1149); *Eureka Lake & Yuba Canal Co.* v. *Yuba County Super. Ct.* 116 U. S. 410 (29: 671); *Walston* v. *Nevin*, 128 U. S. 578 (32: 544); *The Alaska*, 130 U. S. 201 (32: 923); *Chanute* v. *Trader*, 132 U. S. 210 (33: 345).

The decrees of December 22, 1883, were final decrees.

Fosdick v. *Schall*, 99 U. S. 235 (25: 339); *Fosdick* v. *Car Co.* 99 U. S. 256 (25: 344); *Trustees* v. *Greenough*, 105 U. S. 527 (26: 1157); *Savannah* v. *Jesup*, 106 U. S. 563 (27: 276); *Miltenberger* v. *Logansport R. Co.* 106 U. S. 286 (27: 117); *Williams* v. *Morgan*, 111 U. S. 684 (28: 559).

Being final decrees, the circuit court had no power to vacate or modify the same after the close of the October Term.

Barrell v. *Tilton*, 119 U. S. 637 (30: 511); *Bronson* v. *Schulten*, 104 U. S. 410 (26: 797); *McMicken* v. *Perin*, 59 U. S. 18 How. 507 (15: 504); *Cameron* v. *McRoberts*, 16 U. S. 8 Wheat. 591 (4: 467).

There was no way in which these decrees could be modified, except by an appeal therefrom taken within two years, or by the filing, within two years, of a bill of review.

Muller v. *Ehlers*, 91 U. S. 249 (23: 319); *Buffington* v. *Harvey*, 95 U. S. 99 (24: 381); *Ensminger* v. *Powers*, 108 U. S. 292, 302 (27: 732, 736), and cases cited; Mitford & Tyler, Eq. Pr. 487.

The appellant's bills in Nos. 1281 and 1282 being based upon error upon the record merely, the circuit court had no jurisdiction to entertain the same after two years had passed since the entry thereof.

Clark v. *Killian*, 103 U. S. 766 (26: 607); *Kennedy* v. *Georgia State Bank*, 49 U. S. 8 How. 586 (12: 1209); *Whiting* v. *Bank of U. S.* 38 U. S. 13 Pet. 6 (10: 33); *Thomas* v. *Harvie's Heirs*, 23 U. S. 10 Wheat. 146 (6: 287).

Messrs. **Edward Colston** and **George Hoadley, Jr.,** for appellants, in opposition:

The receiver does not represent the complainant in the cases below in any claims upon the property.

Union Trust Co. v. *Illinois Midland R. Co.* 117 U. S. 469 (29: 975).

These orders are not decrees.

Washington R. Co. v. *Bradleys*, 77 U. S. 10 Wall. 299 (19: 894); *Forgay* v. *Conrad*, 47 U. S. 6 How. 204 (12: 405); *Pulliam* v. *Christian*, 47 U. S. 6 How. 209 (12: 408); *Craighead* v. *Wilson*, 59 U. S. 18 How. 200 (15: 333); *Beebe* v. *Russell*, 60 U. S. 19 How. 284 (15: 668); *Thompson* v. *Dean*, 74 U. S. 7 Wall. 345 (19: 95); *North Carolina R. Co.* v. *Swasey*, 90 U. S. 23 Wall. 405 (23: 136); *Crosby* v. *Buchanan*, 90 U. S. 23 Wall. 453 (23: 142); *Grant* v. *Phœnix Ins. Co.* 106 U. S. 431 (27: 238); *Burlington, C. R. & N. R. Co.* v. *Simmons*, 123 U. S. 52 (31: 73); *Por-*

ter v. *Pittsburg Bessemer Steel Co.* 120 U. S. 649 (30: 830); *Green* v. *Fisk*, 103 U. S. 518 (26: 486); *Brown* v. *Swann*, 34 U. S. 9 Pet. 1 (9: 29).

The court can review its own orders given to the receiver.

Union Trust Co. v. *Illinois Midland R. Co.* 117 U. S. 434 (29: 963).

The doctrine of relation cannot be invoked in order to cut off these bills of review.

Lynch v. *Bernal*, 76 U. S. 9 Wall. 315 (19: 714); *Gibson* v. *Chouteau*, 80 U. S. 13 Wall. 92 (20: 534).

There is no difference between an appeal taken in open court and one taken out of court before a judge, except that in the latter case a citation is necessary.

Hudgins v. *Kemp*, 59 U. S. 18 How. 537 (15: 513).

When an appeal is allowed and security taken, the appeal is transferred to this court.

Draper v. *Davis*, 102 U. S. 370 (26: 121); *Keyser* v. *Farr*, 105 U. S. 265 (26: 1025); *Goddard* v. *Ordway*, 101 U. S. 745 (25: 1040); *Ensminger* v. *Powers*, 108 U. S. 302 (27: 736).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The appeals in 1277, 1278, 1279 and 1280 were taken from the orders of January 28, 1889, requiring payment for the use of the Grant Locomotive Works, and R. S. Grant, of the amounts decreed December 22, 1883 (less what had been received in the intermediate period), and in execution of said decrees, from the purchasers of the southeastern division, and from the purchasers of the Cincinnati northern division, of the Toledo, Cincinnati and St. Louis Railroad Company. [22] These purchasers bought subject to the provisions of the decrees, the terms of sale, and the orders confirming the sales, which were the source of their title, and which provided for the payment down of a specified sum in cash, and of such further portions of their bid in cash as might be necessary in order to meet such other claims as the court might adjudge to be prior in equity to the mortgages, with the reservation of a right of resale in case of default in this particular: and the right, title and interest they acquired was expressly made subject to these provisions. Costs, fees and expenses of sale, receiver's expenses and indebtedness, and claims awarded priority, were to be first paid. The balance of their bid they could pay in cash or in first-mortgage bonds. That bid, in the instance of the southeastern division, was $500,000, and the purchasers were not required by the orders in question to pay any amount in excess thereof. Neither the purchasers of the Cincinnati northern division, nor their assignee, the Cincinnati, Lebanon and Northern Railway Company, took any appeal.

It does not appear to us that the Dayton, Fort Wayne and Chicago Railroad Company, the assignee of the purchasers of the southeastern division, has an appealable interest in the premises.

The purchasers were bound to pay such portions of their bid in cash as the court might direct, to meet other claims, and whether the payments of their bids were to be made for the benefit of the bondholders, or partly for the bondholders and partly for the benefit of the appellees, it is clear that they, as purchasers, and the railroad company as their assignee, had no interest in the matters affected by the decrees appealed from.

In *Swann* v. *Wright's Executor*, 110 U. S. 590, 601 [28: 252, 256], Swann had purchased the railroad under a decree, which provided that the sale should be subject to the liens already established, or which might be established on references then pending, as prior and superior to the lien of the mortgage, and the claim of Wright was one of this class. It was pending before the master and reported on after the sale, when the purchaser applied to oppose its confirmation, and was not allowed to do so; and the sale was afterwards confirmed, expressly subject to all liens established as specified in the [22 decree of sale. Swann afterwards filed a bill to set aside Wright's claim for fraud in its inception, which was dismissed, and the dismissal affirmed on the ground that the property was purchased expressly subject to all established claims, or claims that might be established on references then pending, which included Wright's. "If the court," observed *Mr. Justice* Harlan, delivering the opinion, "had in the decree of sale reserved to the purchaser, although not a party to the proceedings, the right to appear and contest any alleged liens then under examination, and therefore not established by the court, an entirely different question would have been presented. But no such reservation was made; and the purchaser was required, without qualification, to take the property, upon confirmation of the sale, subject to the liens already established, or which might, on pending references, be established as prior and superior to the liens of the first-mortgage bondholders. . . . All that we decide is that, in view of the express terms of the decree of sale, and since neither the purchaser nor his grantee proposes to surrender the property to be resold for the benefit of those concerned, such purchaser has no standing in court for the purpose of re-litigating the liens expressly subject to which he bought and took title."

In *Stuart* v. *Gay*, 127 U. S. 518 [32: 191], under a decree for the foreclosure of certain liens, which contemplated the payment of the purchase money on the sale, in money, in annual installments, Stuart purchased, and by a subsequent order was allowed to be credited on unpaid purchase money with various liens he had acquired. From a later order in respect to allowances of interest upon certain prior liens he appealed to this court, and it was held that he had no appealable interest, as a purchaser of the property, because it was a matter of indifference to him as such how the proceeds of the sale should be distributed among the creditors.

It is argued, however, that the purchase of the southeastern division was not made subject to the decrees of December 22, 1883, because it is said that at the time of the purchase "these decrees were dead and thought to be beyond resurrection;" and "that a pur- [22

chaser buying under such circumstances ought to have the right to resist their reappearance." This would hardly be contended if the orders of April 10, 1884, were void for want of jurisdiction to enter them. Those orders were not made upon a bill of review or a bill in that nature, nor upon any petition for rehearing, which under Equity Rule 88 could not then have been filed if the decrees of December 22, 1883, were final and appealable. On March 15, 1884, the Central Trust Company filed certain petitions which it asked might be treated as petitions for rehearing or in review, but the court made no order in regard to them, and did not predicate its action upon them. On the contrary, it was specifically set forth that the orders of December 22, 1883, were annulled and set aside "by the court of its own motion."

If these orders were final decrees the court could not vacate them of its own motion after the close of the October Term, 1883. *McMicken* v. *Perin*, 59 U. S. 18 How. 507, 511 [15: 504, 506]. We think they were final. They determined the ownership of the locomotives and the right to their possession; and that they were essential to the operation of the roads by the receiver, and should be purchased by him; that certain designated amounts should be paid for the rentals and the purchase price, which amounts were made a charge upon the earnings, income and property of the Toledo, Cincinnati and St. Louis Railroad Company, and especially of the particular divisions named; and that the amounts should be paid by the receiver, and any balance remaining unpaid at the date of the foreclosure and sale of the railroad or the particular division should be a first lien thereon and the sale be made subject thereto. They were therefore final in their nature, and made upon matters distinct from the general subject of litigation, the foreclosure of the mortgages.

In *Trustees* v. *Greenough*, 105 U. S. 527 [26: 1157], an appeal from an order for the allowance of costs and expenses to a complainant, suing on behalf of a trust fund, was sustained. In *Hinckley* v. *Gilman, C. & S. R. Co.*, 94 U. S. 467 [24: 166], a receiver was allowed to appeal from a decree against him to pay a sum of money in the cause in which he was appointed. In *Williams* v. *Morgan*, 111 U. S. 684 [28: 559], a decree in a foreclosure suit, fixing the compensation
225] to be paid to the trustees under a mortgage from the fund realized from the sale, was held to be a final decree as to that matter; and in *Fosdick* v. *Schall*, 99 U. S. 235 [25: 339], a decree upon an intervening petition in respect to certain cars used by a railroad company under a contract with the manufacturer was so treated. There was a fund in court in that case, but in principle the orders here are the same. And see *Farmers Loan & Trust Co., Petitioner*, 129 U. S. 206, 213 [32: 656, 657].

The decrees of June 11, 1887, were clearly right in adjudicating the orders of April 10, 1884, to be of no effect, and reinstating the prior decrees.

Even if the orders of April 10, 1884, were voidable merely, the purchasers should have made the defense now suggested, of reliance upon them, when the application was made which resulted in the decrees of June 11, 1887. They did indeed appear and file a demurrer, but they made no resistance upon the merits, and they certainly prayed no appeal from the decrees then entered.

The result is that the appeals of the Dayton, Fort Wayne and Chicago Railroad Company, Nos. 1278 and 1280, must be dismissed.

Turning to the appeals of the Central Trust Company, it is strenuously argued, in support of the motions to dismiss, that as the decrees of January 28, 1889, affected the purchasers only, the bondholders as such had no further interest in the litigation, nor had their representative, the Trust Company; that at least the record does not definitely show that either the Trust Company or the railroad company had certainly an interest; that though one or the other may have had, it is not sufficiently clear which it is; and that therefore the appeals of both must be dismissed. It is enough that sufficient color is given to the motions to enable us to pass upon the motions to affirm.

The orders of January 28, 1889, which are alone appealed from, were merely in execution of the former decrees, and as such we do not find that any error supervened in their rendition. The amounts named were not disputed and could not have been except in [2
respect to credits, as to which there was no controversy, inasmuch as those amounts had been previously determined, and their payment decreed; and the resale had been expressly provided for in the foreclosure decrees and the order of confirmation.

The action of the circuit court in refusing to allow the Trust Company to amend and supplement its petitions of March 15, 1884, and file them as original bills of review as of that date, and in denying the application of the Dayton, Fort Wayne and Chicago Railroad Company to intervene and file a petition in the cases in review of the orders of December 22, 1883, was taken in the exercise of a discretion with which we are not justified in interfering. *Buffington* v. *Harvey*, 95 U. S. 99 [24. 381]; *Brockett* v. *Brockett*, 43 U. S. 2 How. 238 [11: 251]; *Mellen* v. *Moline M. Iron Works*, 131 U. S. 352 [33: 178].

No appeal having been prosecuted from the orders of December 22, 1883, or those of June 11, 1887, and the appeals from the orders of January 28, 1889, only, not bringing the former orders before us for revision, we are constrained to sustain the motions to affirm in Nos. 1277 and 1279, without entering upon the consideration of the errors so earnestly urged as existing in the December decrees.

It remains to dispose of the motions in Nos. 1281 and 1282. These are appeals from orders of the circuit court striking from the files two bills placed there on the 28th of January, 1889, by the Central Trust Company, to review the decrees of December 22, 1883, for errors apparent.

Reference is made to the records in the cases 3554 and 3578, and we do appellant no injustice in assuming that these bills, veri-

fied January 10, 1889, are the same presented to the circuit court when application was made in those cases for leave to amend and supplement appellant's petitions of March 15, 1884, and docket the same as bills of review of that date. That application having been denied appellant put these papers on file as the court was entering the other orders. Here again, while the motions to dismiss will not be sustained, we hold there was color for them.

[77] The bills are not based upon new matter or newly discovered evidence, and no leave was given to file them. They are clearly bills for the review of the orders of December 22, 1883, for errors apparent of record. Such bills must ordinarily be brought within the time limited by statute for taking an appeal from the decree sought to be reviewed. *Thomas* v. *Harvie's Heirs*, 23 U. S. 10 Wheat. 146 [6: 287]; *Ensminger* v. *Powers*, 108 U. S. 292, 302 [27: 732, 736]. Over five years had elapsed, but it is insisted that the time between the 10th of April, 1884, and the 11th of June, 1887, when the orders of April 10th, 1884, were declared void, ought not to be considered in passing upon this question, because of appellant's belief in the validity of and reliance upon those orders and the acquiescence of appellees therein.

It seems to us that appellant was not justified in such belief and reliance, and that, at all events, after the orders of June 11, 1887, it should have moved promptly by way of appeal or bill of review. These bills attack the orders of December 22, 1883, merely, and not the decrees of June 11, 1887, reinstating the former as in full force and effect.

The rule laid down in *Thomas* v. *Harvie's Heirs* is based upon the principle of discountenancing laches and neglect. Under all the circumstances we cannot concede that appellant acted in apt time, and must therefore affirm the orders of the Circuit Court striking the bills from the files.

The appeals in Nos. 1278 and 1280 are dismissed and the decrees in Nos. 1277, 1279, 1281 and 1282 are affirmed.

---

[200] UNITED STATES, *ex rel.* CHARLES R. MILLER, *Plff. in Err.*,

v.

GREEN B. RAUM, Commissioner of Pensions.

(See S. C. Reporter's ed. 200-207.)

Executive officers—when mandamus may be issued—ministerial duty.

1. The courts will not interfere with the executive officers of the government in the exercise of their ordinary official duties.

2. But when such officers refuse to act at all, where the law requires them to act, or when they refuse to perform a mere ministerial duty, a mandamus lies to compel them to act or to perform such ministerial duty.

3. When a subordinate officer is overruled by his superior having appellate jurisdiction over him, his duty to obey the decision of such superior is a ministerial duty, which he can be compelled by mandamus to perform.

[No. 1572.]

Submitted Apr. 7, 1890. Decided Apr. 21, 1890.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment dismissing a petition for a mandamus to command the Commissioner of Pensions to reissue a pension certificate. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. G. Bigelow** for plaintiff in error.

Mr. **Wm. A. Maury**, *Assistant Atty-Gen.*, for defendant in error.

Mr. Justice **Bradley** delivered the opinion [201] of the court:

The relator, Charles R. Miller, applied for a peremptory mandamus against the respondent, Green B. Raum, Commissioner of Pensions, to command him to reissue the relator's pension certificate, with the rates of $25 per month from June 6, 1866; $31.25 per month from June 4, 1872; $50 per month from June 4, 1874; and $72 per month from June 17, 1878; and to allow him the monthly difference between these sums and what had been allowed him. From the statements of the petition it appears that the sums heretofore allowed to the relator by way of pension have been $8 per month from the date of his discharge from military service, August 27, 1865; $15 per month from June 6, 1866; $18 per month from June 4, 1872; $24 per month from November 23, 1881; $30 per month from March 3, 1883; and $50 per month from January 14, 1885.

The injuries of which the relator complains are anchylosis, or rigidity, of the spinal column, and of the left leg, resulting from wounds received in the service, and making him nearly helpless, so as to require, as he alleges, the regular personal aid and attendance of another person.

After repeated applications for an increase of his pension, in which he succeeded in getting only $30 per month from March 3, 1883, under the Act of that date, he finally appealed from the Commissioner of Pensions to the Secretary of the Interior, who rendered a decision on the 6th of February, 1885, directed to the Commissioner, and declaring, amongst other things, that "the pensioner is greatly disabled; and it is evident from the papers in his case that he is utterly unable to do any manual labor, and is therefore entitled to $30 per month under the Act of March 3, 1883, which has been allowed him by your office." On a reconsideration of the case, a further decision was made on the 12th of February, 1885, in which the Secretary said:

"Since the departmental decision above referred to the papers in the claim have been carefully reconsidered by the Department and

NOTE.—*When mandamus will issue.* See *note* to McCluny v. Silliman, 4: 263.

As to mandamus to control inferior courts; discretion,—see *note* to *Ex parte* Morgan, 29: 135.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see *note* to Davenport v. U. S. 19: 704.

[202] a personal examination of the pensioner made, and it satisfactorily appears that he is unable to put on his shoe and stocking on the foot of the injured leg for the reason that the 'nearest point that can be reached by hand from foot is 23 inches,' and for the further reason that from 'necrosis of the lower vertebræ of spine, producing anchylosis of the spinal column and destruction of some of the spinal nerves,' he is unable to bend his back.

"After a careful review of all the facts in this case the Department is constrained to think that the pensioner comes under the meaning of the law granting pensions to those persons who require regular aid and attendance.

"The decision of the 6th instant is therefore overruled in so far as it denies that the pensioner requires regular aid and attendance."

Upon the receipt of this decision the then Commissioner of Pensions reissued the relator's certificate at $50 per month from January 14, 1885, the time of his last examination by the medical officers of the bureau. To this rate the present Commissioner adheres, refusing to make a further reissue. This is the ground of the relator's complaint, and hence his application for a mandamus.

A rule to show cause being granted in pursuance of the former decision of this court in *United States, ex rel. Miller*, v. *Black*, 128 U. S. 50 [32: 358], the Commissioner filed an answer, by which he claims, amongst other things, that his official action in the matter of pensions is not subject to revision by the courts. He further states that from the records of the Pension Bureau it appears that the relator has been borne on the pension rolls and paid as a pensioner as set forth in his petition; which rates have been fixed by the several Commissioners of Pensions, from time to time, in the exercise of their lawful discretion in the execution of the several Pension Laws applicable to the relator's case; that there is no law prescribing for a disability of the character of that of the relator a specific rate of pension; and that, in determining the rates of pension to which the relator was from time to time entitled, the several Commissioners have had to determine, and in the lawful exercise of their discretion [203] have determined, to what specific disability, the rate of pension for which was fixed by law, the unspecified disability of the relator was equivalent. The Commissioner, further answering, denies that he has failed and refused to carry out the decision of the Secretary of the Interior; and alleges that the decision of the Secretary made on the 6th of February, 1885 (as was the fact), confirmed the action of the Pension Bureau in granting the relator a pension of $8 per month from August 27, 1865; $15 per month from June 6, 1866; $18 per month from June 4, 1872, and $24 per month from March 3, 1883, with the exception that his pension was improperly reduced on June 4, 1882, from $24 to $18 per month. The Commissioner further states that, in pursuance of the decision made by the Secretary of the Interior on the 12th day of February, 1885, the Pension Bureau issued a new certificate to the relator at $24 per month from 4th June, 1882; and at an increase of $30 per month from 3d March, 1883, and at $50 per month from 14th January, 1885, the date of the last examination of the relator by the medical officers of the Pension Bureau; and that this action of the Pension Bureau was afterwards affirmed on the relator's appeal by Assistant Secretary of the Interior Hawkins.

The Commissioner, further answering, says.

"That the provision of law under which the relator claims to be entitled to be carried on the pension rolls and paid a pension at the rate of seventy-two dollars ($72) per month from June 17, 1878, is contained in the Act of Congress approved June 16, 1880 (21 Stat. at L. p. 281), the operation of which is limited to 'all soldiers and sailors who are now (*i. e.*, at the date of said Act) receiving a pension of fifty dollars per month ($50) under the provisions of an Act' therein cited, whereas the relator, according to the showing of his own petition and in fact, was at that time only receiving a pension of $18 per month, which said rate had been theretofore fixed as hereinbefore set forth, by the Commissioner of Pensions for the time being, in the exercise of his lawful discretion in the premises."

It is true, as stated by the Commissioner, that the relator relies upon the Act of June 16, 1880; and that this Act only provides for [20 soldiers and sailors who were then (at the date of the Act) receiving a pension of $50 per month; and that the relator was not then receiving such pension, but only a pension of $18 per month.

Without assuming to decide whether the construction given by the Commissioner to the Act was right or wrong, the question which we are to consider is whether, in adopting the construction he did, and acting upon it, he disregarded and disobeyed the decision of the Secretary of the Interior. In *United States, ex rel. Dunlap*, v. *Black*, 128 U. S. 40 [32: 354], we held that the courts will not interfere with the executive officers of the government in the exercise of their ordinary official duties. even where those duties require an interpretation of the law, inasmuch as no appellate power is given them for that purpose; but that when such officers refuse to act at all in a case in which the law requires them to do so, or when by special statute, or otherwise, a mere ministerial duty is imposed upon them, and they refuse to perform it, a mandamus lies to compel them to act or to perform such ministerial duty. And in *United States, ex rel. Miller*, v. *Black*, *ubi supra*, argued at the same time, we held that when a subordinate officer is overruled by his superior having appellate jurisdiction over him, his duty to obey the decision of such superior is a ministerial duty, which he can be compelled by mandamus to perform. In the latter case, in which the relator was the same person as in the present, the record was very meagre, and did not set forth all the facts; but on the showing of the petition it seemed prima facie that the Commissioner of Pensions had

refused to carry out the decision of the Secretary of the Interior; and we held that the court below ought at least to have granted the relator a rule to show cause why a mandamus should not issue. The relator thereupon filed a new petition, being the petition in the present case, and the court below, in obedience to our decision, granted a rule to show cause, which the Commissioner answered, as before stated. He afterwards amended his answer by annexing thereto, as part thereof, a copy of the several decisions of the Secretary of the Interior, made on the 6th and 12th of February, 1885, and a subsequent decision by the assistant secretary, made on the 28th of July, 1886, confirming the action of the Pension Bureau.

205] With the additional facts before us which are now presented by these documents, in connection with the answer of the Commissioner, we are satisfied that there was no failure to comply with or to carry out the decision of the Secretary. That decision was not that the relator was entitled to $72 per month from June 17, 1878, and to the other rates for other dates, as claimed by him; but taking the Secretary's two rescripts of February 6 and February 12, 1855, together, the decision by the first was, that the relator had been receiving all that he was entitled to under the law, except from June 4, 1882, the date his pension was reduced from $24 per month to $18 per month; that he should be allowed the difference between those amounts; and that he was entitled to $30 per month under the Act of March 3, 1883; and by the second rescript, the decision was that the relator came under the meaning of the law granting pensions to those persons who require regular aid and attendance. This was all (which is material) that the Secretary decided. And this decision was fully carried out as the Commissioner understood the law applicable to it. He issued a new certificate to the relator at $24 per month from 4th June, 1882, and at an increase of $30 per month from March 3, 1883, and at $50 per month from 14th of January, 1885, the latter date being the date of the last medical examination of the relator.

The new certificate follows the Secretary's decision specifically except in regard to the last item, that of $50 per month from 14th January, 1885. This item was allowed as the supposed proper rate due to the relator's condition as expressed in the concluding part of the Secretary's decision, namely, that he "came under the meaning of the law granting pensions to those persons who require regular aid and attendance." The Secretary did not decide what the proper rate for that condition was; but left it to be decided by the Commissioner under the laws then in force. The latter, by his construction of the law, rated the pension at $50 per month
206] from the last medical examination. As before stated, he considered the Act of June 16, 1880, as not applying to the case, because the relator was not then in receipt of a pension of $50 per month; and he evidently regarded the case as coming within the terms of the previous Act of June 18, 1874 (18 Stat. 78; Rev. Stat. § 4698), by which it was declared that "all persons who, while in the military or naval service of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person, by the loss of the sight of both eyes, or by the loss of the sight of one eye, the sight of the other having been previously lost; or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of fifty dollars per month."

But, whatever may have been the grounds on which the Commissioner based his conclusion, it is clear that the decision of the Secretary left the matter open; that he only decided that the relator came "under the meaning of the law granting pensions to those persons who require regular aid and attendance," and that the Commissioner acquiesced in this decision, and rated the pension at $50 upon the basis of it.

The relator, not being satisfied with this action of the Commissioner, again appealed to the Secretary of the Interior, and the decision of the assistant secretary (Hawkins) dated July 28, 1886, was as follows: "After a careful consideration of all the papers in this case, the Department is of opinion that there is nothing in the evidence to show that Mr. Miller has been entitled to a higher rate of pension than that allowed by your office."

The making of the rate of $50 per month to commence from January 14, 1885, the date of the last medical examination of the relator, by which his condition of total and permanent disability was finally established, was based on section 4698½ of the Revised Statutes, which declares that "except in cases of permanent specific disabilities, no increase of pension shall be allowed to commence prior to the date of the examining surgeon's certificate establishing the same, made under the pending claim for increase [20
. . . subject to the approval of the Commissioner of Pensions."

But enough has been said to show that the allegation is unfounded on which the application for mandamus was based, namely, the allegation that the Commissioner of Pensions refused to obey the decision of the Secretary of the Interior.

The judgment is therefore affirmed.

Ex Parte:

In the Matter of ED. MILLS, Petitioner. [20

(See S. C. Reporter's ed. 263-271.)

Jurisdiction of United States District Court for Western Arkansas—United States Court in Indian Territory, jurisdiction of—grand jury—imprisonment in penitentiary—sentence over one year—void sentences.

1. The jurisdiction of the United States District Court for the Western District of Arkansas over offenses punishable by imprisonment in a penitentiary, is not affected by the Act of March 1, 1889, creating a United States court in the Indian Territory, which is in that district.

2. The exclusive jurisdiction given by such Act to the latter court does not embrace offenses punishable by imprisonment in a penitentiary.
3. Such offenses must be proceeded against by presentment or indictment of a grand jury; such Act did not give such court power to call a grand jury.
4. It is only where a person convicted of an offense against the United States is sentenced to imprisonment for a longer period than one year that the sentence can be executed by confinement in a penitentiary.
5. Where the sentences of imprisonment on two convictions were, one for one year, and the other for six months, the orders directing the sentences to be executed in a penitentiary are void.

[No. 4, Original.]

Submitted Apr. 3, 1890. Decided Apr. 28, 1890.

UPON return to rule to show cause by the warden of the state penitentiary at Columbus, Ohio, why a writ of habeas corpus should not be issued upon the application of the petitioner, Ed. Mills, who is imprisoned there. *Writ of habeas corpus granted.*

The facts are stated in the opinion.

Mr. **Thos. Marcum** for the prisoner.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.*, for the United States.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an original application to this court for a writ of habeas corpus. Leave to file the petition having been given, a rule was granted against the warden of the state penitentiary at Columbus, Ohio, in which the petitioner was imprisoned, requiring him to show cause why the writ should not be [264] issued. The return to that rule shows that the petitioner was received by the respondent, August 1, 1889, from the marshal of the United States for the Western District of Arkansas, pursuant to a judgment of the District Court of the United States for that District, sentencing the prisoner to confinement in that penitentiary.

It appears that the prisoner was charged by indictment in the District Court of the United States for the Western District of Arkansas with the offense of having, on the 7th day of July, 1889, "at the Creek Nation, in the Indian country," within that district unlawfully engaged in and carried on the business of a retail liquor dealer without having first paid the special tax required by law. The indictment was based upon section 3242 of the Revised Statutes, providing that "every person who carries on the business of a . . . retail liquor dealer, . . . without having paid the special tax as required by law, shall, for every such offense, be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than two years." Upon a plea of guilty, the court adjudged that the accused be imprisoned in the Ohio state penitentiary, at Columbus, for the term and period of one year, and pay to the United States a fine of one hundred dollars, and its costs in the prosecution expended.

It also appears that the petitioner was charged by indictment in the same court with the offense of having on the 7th of July, 1889, "at the Creek Nation, in the Indian country," unlawfully introduced into that country, in said district, spirituous liquors, to wit, one gallon of whiskey. That indictment was based upon section 2139 of the Revised Statutes, providing: "No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters or disposes of any spirituous liquor or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars." 19 Stat. 244, chap. [26 69; Rev. Stat. Sup. 269, par. 48. Upon a plea of guilty, it was adjudged that the accused be imprisoned in the same penitentiary for the period of six months, and pay to the government a fine of fifty dollars, together with its costs; also, that this term of imprisonment commence and date from the expiration of the term of one year for which he was sentenced in the other case.

The petition for the writ of habeas corpus proceeds upon the ground that the court which passed the above sentences was without jurisdiction of the offenses charged, and that sole and exclusive jurisdiction thereof was in the court established by the Act of Congress, passed March 1, 1889, entitled, "An Act to Establish a United States Court in the Indian Territory, and for Other Purposes." 25 Stat. 783, chap. 333. This question will be first examined.

As the country lying west of Missouri and Arkansas known as the Indian Territory was within the Western District of Arkansas when the above Act of March 1, 1889, was passed, and as the district courts have jurisdiction of all crimes and offenses cognizable under the authority of the United States, and committed within their respective districts (Rev. Stat. §§ 533, 563), it cannot be disputed that the court below had jurisdiction of the offenses charged against the petitioner, unless its jurisdiction was taken away by the Act establishing a court in the Indian Territory. That Act establishes "a United States court" with jurisdiction extending over the Indian Territory, bounded on the north by Kansas, on the east by Missouri and Arkansas, on the south by Texas and on the west by Texas and the Territory of New Mexico. Its criminal jurisdiction is thus declared in the fifth section of the Act: "That the court hereby established shall have exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory as in this Act defined, not punishable by death or by imprisonment at hard labor." As the offenses charged against the petitioner were offenses against the United States, and were committed in the Indian Territory, the question as to the jurisdiction of the court established by this Act depends upon the meaning that may be given to the [words "punishable . . . by imprisonment at hard labor." There are offenses against the United States for which the statute, in terms, prescribes punishment by im-

prisonment at hard labor. There are others, the punishment of which is "imprisonment" simply. But, in cases of the latter class, the sentence of imprisonment—if the imprisonment be for a longer period than one year (§ 5541)—may be executed in a state prison or penitentiary, the rules of which prescribe hard labor. These statutory provisions were referred to in *Ex parte Karstendick*, 93 U. S. 396, 399 [23: 889, 890], where *Chief Justice* Waite, delivering the opinion of the court, said: "In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases. Thus, a wide range of punishment is given, and the courts are left at liberty to graduate their sentences so as to meet the ever-varying circumstances of the cases which come before them."

In view of this condition of the law at the time of the passage of the Act creating a United States court in the Indian Territory, there is fair ground for dispute as to the true interpretation of the words "punishable . . . by imprisonment at hard labor." An offense which the statute imperatively requires to be punished by imprisonment "at hard labor," and one that must be punished by "imprisonment," but the sentence to which imprisonment the court may, in certain cases, and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are each "punishable" by imprisonment at hard labor. The former offense certainly must be thus punished; and as the latter may, in the discretion of the court, be so punished, it may also, and not unreasonably, be held to be "punishable" by imprisonment at hard labor. Shall the Act of Congress be so interpreted as to exclude from the jurisdiction of the court [267] established in the Indian Territory, an offense which the statute imperatively requires to be punished by imprisonment at hard labor, and include within its jurisdiction offenses for which the court, in its discretion, may sentence the accused to imprisonment in a penitentiary whose rules require hard labor upon the part of its inmates?

It would seem that the same considerations of public policy that induced Congress to exclude the former from the jurisdiction of the new court would demand the exclusion of the latter. It must be remembered, in this connection, that prior to the passage of the Act of March 1, 1889, this court decided, in respect to crimes against the United States that are punishable by "imprisonment," that being punishable by imprisonment in a state prison or penitentiary, they are infamous, within the meaning of the Fifth Amendment of the Constitution, whether the accused is or is not put to hard labor, and therefore can be proceeded against only by presentment or indictment of a grand jury. In *Ex parte Wilson*, 114 U. S. 417, 426 [29: 89, 92], it was said that, in determining whether a crime was infamous within the meaning of the Constitution, the question is whether it "is one for which the statutes authorize the court to award an infamous punishment; not whether the punishment ultimately awarded is an infamous one." And in *Mackin* v. *United States*, 117 U. S. 348, 352 [29: 909, 911], the court said: "We cannot doubt that at the present day imprisonment in a state prison or penitentiary, with or without hard labor, is an infamous punishment. It is not only so considered in the general opinion of the people, but it has been recognized as such in the legislation of the States and Territories, as well as of Congress." Now, it is significant that the Act establishing a United States court in the Indian Territory makes no provision for a grand jury, although it does provide for petit juries in civil and criminal cases. A grand jury, by which presentments or indictments may be made for offenses against the United States, is a creature of statute. It cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal. The provisions of the Revised Statutes relating to the impaneling of grand juries for [26 the district and circuit courts (title 13, chap. 15) do not apply to the court established in the Indian Territory by the Act of March 1, 1889; for although the latter is a court of the United States, it is not a district or circuit court of the United States. *Reynolds* v. *United States*, 98 U. S. 145, 154 [25: 244, 246]; *Ex parte Farley*, *Ex parte Wilson*, 40 Fed. Rep. 66.

We think it apparent from the very face of the Act of March 1, 1889, that Congress did not intend to invest the court created by it with power to organize a grand jury, or with jurisdiction of offenses that could not be proceeded against except on the presentment or indictment of a grand jury. The offenses with which the petitioner Mills was charged could not be proceeded against by information for the reason that, being "punishable" by imprisonment in a state prison or penitentiary, he could not be required to make answer thereto except on the presentment or indictment of a grand jury.

These considerations justify us in holding, as we do, that the words "punishable . . . by imprisonment at hard labor," in the Act of March 1, 1889, embrace offenses which, although not imperatively required by statute to be so punished, may, in the discretion of the court, be punished by imprisonment in a penitentiary. This interpretation will best effectuate the intention of Congress. A different interpretation would impute to Congress a purpose to invest the court, established by that Act for the Indian Territory, with jurisdiction of offenses which it could not punish for the want of authority to impanel a grand jury to return presentments or indictments against the offenders.

It results that the jurisdiction of the court below of the offenses charged against the petitioner was not affected by the Act of March 1, 1889, creating a United States court in the Indian Territory.

If the application for the writ depended

upon the question of the jurisdiction of the District Court of the United States for the Western District of Arkansas of the offenses with which the petitioner was charged, it would be denied. But the petition alleges that his detention in the penitentiary, under
269] the above sentences, is contrary to the laws of the United States. It is our duty to inquire whether or not that point be well taken. If it appears on the face of the papers that, apart from any question as to whether the court below, or the United States court established in the Indian Territory by the Act of March 1, 1889, had exclusive original jurisdiction of the offenses with which the petitioner was charged, his detention in a penitentiary is in violation of the laws of the United States, he is entitled to be discharged from the custody of the warden of that institution. *Ex parte Royall*, 117 U. S. 241, 248 [29: 868, 870].

It is provided by section 5541 of the Revised Statutes that "in every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or State where such court is held, the use of which jail or penitentiary is allowed by the Legislature of the State for that purpose;" by section 5546, that "all persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a district or Territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts, or available therefor, shall be confined during the term for which they may have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General;" and by section 5547, that "the Attorney-General shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence and proper employment of them, and shall give the court having jurisdiction of such offenses notice of the jail or penitentiary where such prisoners will be confined."

Assuming that the penitentiary at Columbus, Ohio, has been designated as one in which a judgment of the court below, sentencing to imprisonment a person found
270] guilty of an offense against the United States, may be executed, whenever the sentence is one that may be ordered to be executed in a state prison or penitentiary, we are of opinion that the sentences under which the petitioner was committed to that institution are not of that class. A sentence simply of "imprisonment," in the case of a person convicted of an offense against the United States —where the statute prescribing the punishment does not require that the accused shall be confined in a penitentiary—cannot be executed by confinement in a penitentiary, except in cases in which the sentence is "for a period *longer* than one year." In neither of the cases against the accused was he sentenced to imprisonment for a period longer than one year. In one case, the imprisonment was "for the term and period of one year;" in the other, "for the term and period of six months." There is, consequently, no escape from the conclusion that the judgment of the court sentencing the petitioner to imprisonment in a penitentiary, in one case for a year and in the other for six months, was in violation of the statutes of the United States. The court below was without jurisdiction to pass any such sentences, and the orders directing the sentences of imprisonment to be executed in a penitentiary are void. This is not a case of mere error, but one in which the court below transcended its powers. *Ex parte Lange*, 85 U. S. 18 Wall. 163, 176 [21: 872, 878]; *Ex parte Parks*, 93 U. S. 18, 23 [23: 787, 788]; *Ex parte Virginia*, 100 U. S. 339, 343 [25: 676, 678]; *Ex parte Rowland*, 104 U. S. 604, 612 [26: 861, 864]; *Re Coy*, 127 U. S. 731, 738 [32: 274, 275]; *Hans Neilsen, Petitioner*, 131 U. S. 176, 182 [33: 118, 120].

Such is the effect of section 5541, which is, in part, and without substantial change, a reproduction of the third section of the Act of March 3, 1865, entitled "An Act Regulating Proceedings in Criminal Cases, and for Other Purposes." 13 Stat. 500, chap. 86. That section provides: "That in every case where any person convicted of any offense against the United States shall be sentenced to imprisonment for a period longer than one year, it shall be lawful for the court by which the sentence is passed to order the same to be executed in any state prison or penitentiary within the district or State where such court is held the use of which prison or penitentiary is allowed by the Leg- [27
islature of such State for such purposes; and the expenses attendant upon the execution of such sentence shall be paid by the United States." The words "state jail" in section 5541, and "state prison" in the Act of 1865, mean the same thing.

For the reasons stated, we are of opinion that the detention of the petitioner by the respondent, the warden of the penitentiary at Columbus, Ohio, is in violation of the laws of the United States. The rule is therefore made absolute.

The petitioner is entitled to the writ of habeas corpus.

SALLIE D. HARTRANFT, Adm'x of JOHN [23
F. HARTRANFT, Deceased, late Collector of Customs for DISTRICT OF PHILADELPHIA, *Plff. in Err.*,

v.

CHARLES H. MEYER ET AL.

(See S. C. Reporter's ed. 237-239.)

Duty on matelasse cloth.

Matelasse cloth, composed of silk, cotton and wool, silk being the component material of chief value,

NOTE.—*As to action to recover back duties paid under protest; protest, how made, and its effect,*—see *note* to Greely v. Thompson, 13: 397.

is dutiable under schedule L, sec. 2502, of the Act of March 3, 1883 (22 Stat. 508, 510), at fifty per cent *ad valorem*.

[No. 148.]

Argued Apr. 18, 1890. Decided Apr. 28, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of plaintiffs to recover duties illegally exacted. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.*, for plaintiff in error.

Mr. **Frank P. Pritchard** for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

In 1885 Meyer & Dickinson were merchants in the City of Philadelphia, and John F. Hartranft was collector of customs for that district. They imported various lots of matelasse cloth. This cloth was composed partly of silk, partly of cotton and partly of wool, silk being the component material of chief value, and the proportion in value of wool being less than twenty-five per cent. The question presented in this case is, whether the goods were dutiable under schedule K or schudule L, section 2502, of the Act of March 3, 1883 (22 Stat. pp. 508 and 510).

Schedule K, which is entitled "Wool and Woolens," imposes a certain rate of duty upon "woolen cloths, woolen shawls and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this Act." Schedule L, entitled "Silk and Silk Goods," imposes a different duty on "all goods, wares and merchandise, not specially enumerated or provided for in this Act, made of silk, or of which silk is the component material of chief value." If either schedule stood alone in the statutes, obviously the goods would be dutiable under that schedule, for they were made in part of wool as described in schedule K, and they were goods of which silk is the component material of chief value, as described in schedule L. Both schedules being found in the same Statute we must deduce from them, taken in connection with other provisions, the intent of Congress in reference to goods of this description, for it cannot be assumed that Congress intended two rates for the same goods to be selected at the pleasure of either the collector or the importer. In each schedule are found the words "not specially enumerated or provided for in this Act," so that neither description is absolute or exclusive. We place no stress on the position of the two schedules in the Act, or on the fact that schedule L, coming after schedule K, expresses the later thought and purpose of Congress; but we turn rather to the character of the descriptive language used in the one, it being more general than in the other. In schedule K it is "made wholly or in part of wool," thereby reaching to all manufactured articles of which any portion is wool, while in schedule L it is narrower and more limited—"made of silk, or of which silk is the component material of chief value." This is a special enumeration rather than the other. This idea was presented in *Solomon* v. *Arthur*, 102 U. S. 208 [26: 147], in which the descriptions compared were these: "Manufactures composed of mixed materials, in part of cotton, silk," etc., and "manufactures of which silk is the component part of chief value." Both expressions were held to be merely descriptive, and the true interpretation to be given to them was thus clearly stated by *Mr. Justice* Bradley in the opinion of the court: "It is observable that the description of 'manufactures made of mixed materials, in part of cotton, silk,' etc., is more general than that of 'manufactures of which silk is the component part of chief value.' Logically, the two phrases standing together in the same Act or system of laws would be related as follows: 'Goods made of mixed materials, cotton, silk, etc., shall pay a duty of thirty-five per cent; *but if* silk is the component part of chief value, they [23 shall pay a duty of fifty per cent.'" Applying the same rule of construction here the circuit judge, in deciding this case, and holding that the goods were dutiable under schedule L (28 Fed. Rep. 358), well said that the Statute was in substance to be read thus: "All manufactures of wool of every description, not especially enumerated or provided for in this Act, shall be subject to a duty of thirty-five cents per pound and thirty-five per centum *ad valorem*; but if silk is the component material of chief value they shall be subject to a duty of fifty per cent *ad valorem*." We think this construction harmonizes the two sections better than any other, and gives force to the intent of Congress.

Another matter is also worthy of notice, and that is the change made in section 2499 of the Revised Statutes by the Act of 1883. In the Revised Statutes the section contained this provision: "And on all articles manufactured from two or more materials, the duty shall be assessed at the highest rates at which any of its component parts may be chargeable;" while in the Act of 1883 the provision is changed so as to read: "And on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which the component material of chief value may be chargeable." It is true that this section, at least in its main provisions, refers solely to non-enumerated articles, and these goods must be considered as enumerated. *Arthur's Executors* v. *Butterfield*, 125 U. S. 70 [31: 643]. And yet, though this clause may apply solely to non-enumerated articles, it shows the intent of Congress in reference to a question of the kind presented. Instead of making the duty depend on the highest rate at which any competent part is chargeable, it is made to depend on the highest rate at which the component material of chief value is chargeable. Applying that idea here, and the rate would be that chargeable under schedule L, for silk, as appears from the findings, was the component material of chief value.

The judgment of the Circuit Court was correct, and it is affirmed.

[271]

UNITED STATES, *Plff. in Err.*,
v.
JOHN D. SANBORN.

JOHN D. SANBORN, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 271-286.)

Recovering moneys paid—interest, when withheld—laches—costs, what recoverable by government.

1. Where a contract was made by the Secretary of the Treasury, under Act of May 8, 1872, to pay a person a percentage for assisting the officers of the government in recovering moneys due from one therein named to the government for taxes, and the Secretary afterwards paid such person the agreed percentage on the collection of such tax, induced by his representation that the collection was made by him, the government may recover back the money so paid, if such representation was false, and if the person receiving the same performed no services in the matter, and the person paying the taxes had made no effort to evade their payment.
2. Where interest is recoverable not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.
3. The same rule applies to the government when it has long delayed an assertion of its rights, without reason or excuse for the delay, especially when it does not appear that the defendant has earned interest upon the money improperly received by him.
4. The United States is entitled, as costs, on recovery against a defendant, to the sums paid for actual and necessary expenses of clerks of a department, in going to and returning from and in attending the court, by direction of the government, as witnesses in its behalf.
5. No auditing of such expenses is required; they are to be taxed as costs.

[Nos. 224, 225.]

Argued Mar. 21, 1890. Decided Apr. 28, 1890.

IN ERROR to the Circuit Court of the United States for the District of Massachusetts to review a judgment in favor of the United States in an action to recover moneys wrongfully received by defendant from the government. *Reversed, with directions to enter judgment for the principal sum with interest from the commencement of the action, and for costs as indicated in the opinion.*

The facts are stated in the opinion.

Messrs. **Benj. F. Butler** and **O. D. Barrett** for Sanborn.

Mr. **Alphonso Hart,** *Solicitor of Internal Revenue,* for the United States.

[272] *Mr. Justice* **Harlan** delivered the opinion of the court:

These are writs of error from the same judgment. The action was brought by the United States October 15, 1883, to recover from John D. Sanborn the sum of $7,334, on account of moneys alleged to have been received by him from the government without authority of law and without right thereto, with interest on that sum from August 16, 1873. A jury was waived by the written stipulation of the parties and the case was tried by the court, which made a special finding of facts and of law.

It was provided by an Act of Congress, approved May 8, 1872, making appropriations for the legislative, executive and judicial expenses of the government for the fiscal year ending June 30, 1873, that "the Secretary of the Treasury shall have power to employ not more than three persons to assist the proper officers of the government in discovering and collecting any money belonging to the United States, whenever the same shall be withheld by any person or corporation, upon such terms and conditions as he shall deem best for the interests of the United States; but no compensation shall be paid to such persons except out of the money and property so secured; and no person shall be employed under the provisions of this clause who shall not have fully set forth in a written statement, under oath, addressed to the Secretary of the Treasury, the character of the claim out of which he proposes to recover, or assist in recovering, moneys for the United States, the laws by the violation of which the same have been withheld, and the name of the person, firm or corporation having thus withheld such moneys." 17 Stat. 69, chap. 140.

On the 15th day of July, 1872, Sanborn [27 sent to the Secretary of the Treasury a communication, verified by his oath, submitting a statement under the above Act, and proposing to recover, or assist in recovering, moneys due the United States for evasions of, and frauds upon, the laws for the collection of internal revenue tax on spirituous and fermented liquors, as well in making false returns of the amounts manufactured as in evading the payment of taxes upon those returned; and asking to be allowed, in the form of a percentage, such amount from the collections as in the judgment of the Secretary was fit and meet.

This letter was followed by a written contract between Sanborn and the acting Secretary of the Treasury under date of August 13, 1872, in which it was agreed that the former might proceed to collect the taxes so alleged to be due to the United States by the persons named; that legal proceedings in the premises should be conducted by the proper United States attorneys, the written consent of the Secretary of the Treasury being first obtained; that no settlement of such claims should be made except under the provisions of section 10 of the Act of March 3, 1863; that the costs and expenses incurred by him in investigating and prosecuting said claims, of every nature, should be borne by him, and no part thereof paid out of the portion retained by the United States; that whenever required by the Secretary he should make a full report in writing of his acts and proceedings under the contract; that the

NOTE.—*When money wrongfully and illegally exacted may be recovered back.* See *note* to Bank of U. S. v. Bank of Washington, 8: 298.

As to action to recover back duties paid under protest, see *note* to Greely v. Thompson, 13: 398.

As to interest, when recoverable as damages or on money, see *note* to Sneed v. Wister, 5: 717.

money collected, either by legal proceedings or "by settlement as compromise," should be placed to the credit of the Secretary of the Treasury, and out of the same there should be paid to Sanborn, in full for his services and for all the costs and expenses of collection, a sum equal to 50 per cent of the gross amount collected and received, which should be paid to him as fast as collected and placed to the credit of the Secretary of the Treasury, the balance to be paid into the Treasury of the United States; and that the contract might be revoked at any time at the pleasure of the Secretary.

On the 25th of October, 1872, Sanborn sent to the Secretary another letter, accompanied [74] by a statement verified by his oath, asking that his employment be extended and made to relate to claims against the persons whose names were set forth in a schedule annexed to his letter, for moneys illegally withheld by them from the government. "I desire, also," he said, "to state that the foregoing claims, out of which I propose to recover, or assist in recovering, moneys for the United States, arise under the taxes imposed upon legacies and successions and income under the Act of July 30, 1864, and subsequent amendatory Acts, providing for the collection of taxes for internal revenue. And I further request that the foregoing cases may be brought under my contract with the Secretary of the Treasury, bearing date August 13, 1872."

In the statement referred to in that letter is the following:

"District Waldenham . . . James A. Burtis . . . John E. Wool."

Pursuant to this request, the acting Secretary of the Treasury on the 30th of October, 1872, entered into another contract with Sanborn, containing, among other provisions, the following:

"Whereas John D. Sanborn, of the City of Boston, has fully set forth in a written statement signed by him, under oath, and has filed the same in the office of the Secretary of the Treasury, wherein he proposes to recover, or assist the proper officers of the government in recovering, for the United States from the following persons, to wit: . . . John E. Wool estate, . . . large sum of money, that is to say, the sum of fifty thousand dollars, which the said Sanborn claims to be due to the United States, as and for internal revenue taxes which have been withheld by said persons, under and by force of the Act of June 30, 1864, and other Acts amendatory thereof, imposing taxes upon legacies, successions and incomes; it is hereby agreed by and between W. A. Richardson, acting Secretary of the Treasury, of the first part, and the said John D. Sanborn, of the second part, that the contract or agreement entered into by and between the said parties, bearing date August 13, 1872, relating to the proposed recovery of certain moneys alleged to be due to the United States, is hereby extended and enlarged, so as to embrace [75] and relate to the persons herein specifically enumerated; and all the provisions, conditions and terms of the said contract of August 13, 1872, shall be held to apply to and control this agreement."

The Secretary, under date of February 8, 1873, issued a paper addressed "To supervisors and collectors of internal revenue," in which he requested them to assist Sanborn "in the examination of official records in reference to such cases of alleged violation of the Internal Revenue Laws as he may ask for your co-operation," stating that he was acting under his appointment, and "may need some information from the offices of collectors and assessors for the purpose of verifying his claims." Subsequently, on the 15th of October, 1873, the Secretary issued a similar circular, and asked supervisors and collectors to render Sanborn such assistance as he required.

General John E. Wool died at Troy, New York, November 10, 1869, leaving a large estate, Mrs. Wool surviving him. His will having been duly probated on the 8th of February, 1870, letters testamentary were issued to John A. Griswold and Asher R. Morgan. Subsequently, October 31, 1872, Griswold died leaving Morgan as sole executor. Mrs. Wool died May 7, 1873.

On the first day of August, 1873, Morgan delivered to Lucien Hawley, a supervisor of internal revenue, in payment of taxes due from the estate of Wool, his draft, as executor, upon the United States Trust Company of New York, payable to the order of the Secretary of the Treasury, for the sum of $14,668. Hawley delivered it to Sanborn on or about its date, and on the 3d of August, 1873, the latter inclosed it to the Secretary of the Treasury, in a letter of which the following is a copy: "Referring to the contract made by me with the Hon. George S. Boutwell, late Secretary of the Treasury, bearing date August 13, 1872, and as amended by the agreement October 30, 1872, I have the honor to report that Asher R. Morgan, executor of the estate of General John E. Wool, deceased, late of Troy, N. Y., and one of the parties named in my schedule accompanying said contract, has paid to me the sum of $14,668, being the full amount of taxes due the government by him arising [2 from the legal assessment on legacies and successions of said trust, and which has never before been paid. I herewith inclose said sum and respectfully request that one half of the same shall be paid into the Treasury to the credit of the Secretary of the Treasury, and that the remaining half thereof shall be paid to me in accordance with the terms of my said contract. Please transmit receipt to Mr. Morgan, No. 7 Beekman Street, New York."

The Secretary of the Treasury on the 9th of August, 1873, indorsed this draft to the order of the Treasurer of the United States, and directed the latter to deposit it to the special credit of the Secretary on account of moneys received and paid under the first section of the Legislative, Executive and Judicial Appropriation Act, approved May 8, 1872. The draft, having been indorsed by the treasurer of the United States to the assistant treasurer of the United States at New York, was paid by the United States Trust Company, and the proceeds were placed to the special credit of the Secretary of the Treasury.

On the 16th of August, 1873, the Secretary delivered to Sanborn a draft on the Treasurer of the United States for $16,001.34, on account of moneys collected in various cases specified in his contract, and of that sum, the above $7,334 was on account of collections from the estate of General Wool. That draft on its face directed the treasurer to charge its amount to the Secretary's special deposit account of moneys received and paid under the first section of the Legislative, Executive and Judicial Appropriation Act, approved May 8, 1872. Under date of August 16, 1873, the Secretary inclosed to Morgan a writing, acknowledging "the receipt, through John D. Sanborn, special agent, of the sum of fourteen thousand six hundred and sixty-eight dollars ($14,668), being the amount of taxes on legacies and successions due the government from the estate of the late General John E. Wool, of Troy, N. Y." It was found as a fact that the United States has never refunded any part of the sum collected from the estate of General Wool; that no demand to have the same refunded has ever been made; and that the taxes were paid without protest. And it was found, as matter of law, that the United States was entitled to recover the said sum of $7,334, with interest at the rate of six per cent per annum from August 16, 1873, to the date when judgment should be entered. Judgment was accordingly entered August 14, 1886, in favor of the United States against the defendant for the sum of $13,052.08 damages, and for its costs, which, under the order of the court, were taxed at $83.30.

As by section 125 of the Act of June 30, 1864, amended by that of July 13, 1866 (14 Stat. 140, chap. 184) a legacy tax was due and payable whenever the party interested was entitled to the enjoyment of the legacy, or to the beneficial interest in the profits accruing therefrom, there was some discussion at the bar in respect to the time when the legacies in question vested in possession and enjoyment; whether immediately upon the death of the testator, as claimed by the defendant, or at the death of the widow, as claimed by the government. The Solicitor of Internal Revenue contends that although the tax was not collectible until Mrs. Wool died, liability therefor arose immediately upon the death of the testator, and that such liability was not discharged, but was saved, by the Act of July 14, 1870, abrogating all legacy taxes. 16 Stat. 256. He also contends that these taxes, not being payable until Mrs. Wool died, were not, within the meaning of the Act of May 8, 1872, under which this contract of October 30, 1872, with Sanborn purports to have been made, "withheld" from the United States at the time that contract was made. On this last ground he questions the authority of the Secretary of the Treasury to have allowed Sanborn any part of the sum collected from Wool's estate on account of legacies.

It is unnecessary in the present case to examine any of these questions; for both of the parties to the present suit insist that these taxes were, when collected, legally due from Wool's estate to the government. The defendant insists that they were collected under a valid contract between him and the Secretary of the Treasury. If we assume, for the purposes of this case, that such contract was in all respects valid, and was broad enough [27 to embrace the collection of legacy taxes from Wool's estate, whether due upon the death of the testator or upon the death of the widow, nevertheless, the judgment below, so far as it recognized the right of the United States to recover the amount paid to the defendant out of the sums received from that estate, must be affirmed. It must be affirmed because the payment was made in the belief, superinduced by Sanborn's representations to the Secretary of the Treasury, that the collection from Wool's estate was made by him. What are the facts, disclosed by the finding of the court below, which justify this conclusion?

Within a few weeks after the death of the widow, Morgan—upon his own motion, without having known Sanborn, and without having the matter brought to his attention by Sanborn, or by anyone representing him—wrote to the Secretary of the Treasury asking that the question of a succession and legacy tax from the estate of General Wool be referred to some person having authority to pass upon his liability to pay it.

This was followed by a communication, under date of the 12th of July, 1873, by the commissioner of internal revenue, addressed to Collector Masters, in which the former said: "T. J. Cram, of 1817 De Lancey Place, Philadelphia, Pennsylvania, writes: 'Major-General Wool, U. S. A., died November 10, 1869 (in Troy, N. Y., his residence), leaving legacies of $4,000 each to my wife and myself. But there was a condition in the will forbidding his executors from paying any legacies until after the death of his wife. . . . Mrs. Wool died 6th May last. The executor proposes to retain from the legacies U. S. tax of 6 per cent on payment 18th inst. of the legacies,' etc. There is nothing in the statements above to show that the said legacies are not subject to tax, but the same would appear to be liable, as indicated in Circular 86. (See p. 30, Series 6, No. 1.)"

At the date of General Wool's death Masters was collector of internal revenue, his district including the City of Troy. He and his deputy knew of his death at or about the time it occurred, and knew that he left a large estate. They also knew what were the provisions of his will and talked together, both before and after Mrs. Wool died, in [27 reference to the claim that a legacy tax would be due after her death. Prior to July 31, 1873, Morgan received from the Secretary of the Treasury a letter referring all questions relating to these taxes to Lucien Hawley, supervisor of internal revenue, with whom he had several conversations upon this subject. The collector, Masters, under date of July 31, 1873, addressed a letter to Morgan, as executor, in which he said: "No return has been made to me of the legacies and distributive shares of the estate of the late General John E. Wool, of whose will I am informed you are the only surviving executor who has qualified as such. Inclosed

herewith is the 'collector's notice for legacy and succession taxes' and the proper form upon which to make a return of all the legacies and distributive shares arising from personal property, etc., being in your charge and trust as executor as aforesaid. Please make a return to me at your earliest convenience of all such legacies and distributive shares or successions, and all other facts and information as required by law to be made by you as executor." In that letter he enclosed a collector's notice for legacy and succession taxes and the proper blank upon which to make the required return.

It is stated in the finding that about one month after the death of Mrs. Wool the defendant called on Hawley "for aid in the matter of collecting the tax due from the estate of said John E. Wool."

In view of the findings, which, upon this writ of error, we must assume to be true, it is clear that the representation of the defendant to the Secretary of the Treasury, in his letter of August 31, 1873, that the executor of Wool had paid *to him* the sum of $14,668, for taxes due the government on legacies and successions, was not in accordance with the facts. The draft covering the taxes was delivered by the executor of Wool to Hawley, a supervisor of internal revenue, who, instead of sending it directly to the Secretary of the Treasury, as he might properly have done, and as, perhaps, he ought to have done, delivered it to Sanborn, who—so far as the record shows—performed no services in this business, except to call upon Hawley about [90] one month after the death of Mrs. Wool and ask his aid in the matter of collecting the taxes claimed from Wool's estate.

It is, however, contended that the court below erred in excluding certain evidence offered by the defendant, which would have disclosed more fully the nature of the services rendered. It is only necessary to say upon this point that the evidence so offered and excluded relates to efforts made by Hawley and his employés to secure the payment of the taxes claimed from Wool's estate. That evidence, if admitted, would have strengthened the case for the government, for it tended to show that what Hawley did was done under his own responsibility and duty as an officer, and not in aid of Sanborn under his contract for the collection of taxes from Wool's estate. The defendant, it is true, communicated to the Secretary of the Treasury, in October, 1872, the fact that the government had a claim against that estate for taxes. But that fact was known long before that time to the collector of the district in which the testator resided at his death, who intended to enforce the rights of the government when the widow died. The defendant is not shown to have performed any services whatever in the matter, except to request the aid of Supervisor Hawley. That, however, did not justify him in representing to the Secretary of the Treasury that *he* had collected those taxes from Wool's estate. In fact, there was no effort upon the part of the executor to evade payment of them. He brought the matter himself to the attention of the Secretary, and sought a decision by competent authority of the question of his liability. As soon as it was determined adversely to him he paid the taxes through the officer to whom the matter was referred by the Secretary, and not to Sanborn, of whom he had no knowledge.

The suggestion that Sanborn was entitled to fifty per cent of all collections from the persons named in his contract, by whomsoever, or in whatever mode, such collections were made, is wholly inadmissible. The contract, upon its face, contemplated, as a condition of his receiving compensation, that he should do something of a substantial character in collecting the taxes alleged to be withheld.

We are of opinion that the payment of the [28 $7,334 to the defendant was due to a misapprehension, upon the part of the Secretary of the Treasury, as to the nature of his services—a misapprehension resulting from his representations to that officer—and that the amount so paid ought, in equity and good conscience, to be returned to the United States.

But we are of opinion that the court below erred in allowing interest for any time prior to the institution of this action. More than ten years elapsed after the payment to Sanborn before his right to retain the money was questioned by suit or otherwise. When the facts disclosed by the evidence were first discovered by the officers of the government whose duty it was to institute legal proceedings against the defendant, does not appear. It is entirely consistent with the record that the long delay which occurred is without excuse. In *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174 [28: 109], the question was whether the plaintiff was entitled, under the circumstances of that case, to recover interest, the action being against a collector to recover damages for an illegal exaction of customs dues. The court, after observing that interest is recoverable as of right, when reserved expressly in the contract, or when implied by the nature of the promise, said: "But where interest is recoverable not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld." We think that the same rule should be applied against the government when in a case like the present one it has long delayed an assertion of its rights, without showing some reason or excuse for the delay, especially when it does not appear that the defendant has earned interest upon the money improperly received by him.

The writ of error on behalf of the government presents a question of costs that must be determined. After judgment was ordered in the court below for the United States, its attorney submitted a bill of costs, which included, among other items, duly certified, the sums paid for the actual and necessary expenses of four clerks, two in the War Department and two in the internal revenue office at Washington, in going to and return- [28 ing from Boston, and in attending the court there, by direction of the government, as witnesses in its behalf. These sums amounted to $212.20. The defendant objected to any

allowance whatever in the taxation for costs for the traveling or other expenses of witnesses in the employment of the United States. The question having been submitted to the court, this objection was sustained. *United States* v. *Sanborn*, 28 Fed. Rep. 299.

The whole subject of fees in the courts of the United States is regulated by chapter 16, title *Judiciary*, of the Revised Statutes. By section 823 it is provided that the fees allowed in that chapter and no other "compensation" shall be taxed and allowed in the courts of the United States, to the officers therein named and to witnesses, except in cases otherwise expressly provided by law; leaving attorneys, solicitors and proctors to charge and receive from their clients, other than the government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or as may be agreed upon between the two parties. Sections 824 to 827, inclusive, relate to the fees of attorneys, solicitors and proctors, and section 828 to the fees of clerks. Section 829 allows a marshal two per centum "for disbursing money to jurors and witnesses and for other expenses," and provides that "in all cases where milage is allowed to the marshal he may elect to receive the same or his actual traveling expenses to be proved on his oath to the satisfaction of the court." Section 846 provides: "The accounts of the district attorneys, clerks, marshals and commissioners of circuit courts shall be examined and certified by the district judge of the district for which they are appointed before they are presented to the accounting officers of the Treasury Department for settlement. They shall then be subject to revision upon their merits by said accounting officers, as in case of other public accounts: *Provided*, That no accounts of fees or costs paid to any witness or juror, upon the order of any judge or commissioner, shall be so re-examined as to charge any marshal for an erroneous taxation of such fees or costs." Other sections of the Statute bearing more or
283] less upon the question before us are as follows, under the head of *Witnesses' Fees:*

"Sec. 848. For every day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpenaed in more than one cause between the same parties, at the same court, only one travel fee and one *per diem* compensation shall be allowed for attendance. Both shall be taxed in the case first disposed of, after which the *per diem* attendance fee alone shall be taxed in the other cases in the order in which they are disposed of. When a witness is detained in prison for want of security for his appearance, he shall be entitled, in addition to his subsistence, to a compensation of one dollar a day.

"Sec. 849. No other officer of the United States courts, in any State or Territory, or in the District of Columbia, shall be entitled to witness fees for attending before any court or commissioner where he is officiating.

"Sec. 850. When any clerk or other officer of the United States is sent away from his place of business as a witness for the government, his necessary expenses, stated in items and sworn to, in going, returning and attendance on the court, shall be audited and paid; but no milage or other compensation in addition to his salary shall in any case be allowed."

"Sec. 855. In cases where the United States are parties, the marshal shall, on the order of the court, to be entered on its minutes, pay to the jurors and witnesses all fees to which they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts."

"Sec. 983. The bill of fees of the clerk, marshal and attorney, and the amount paid printers and witnesses, and lawful fees for exemplifications and copies of papers necessarily obtained for use on trials in cases where by law costs are recoverable in favor of the prevailing party, shall be taxed by a judge or clerk of the court, and be included in and form a portion of a judgment or decree against the losing party. Such taxed bills shall be filed with the papers in the cause."

Upon full consideration of all the provisions of the Statute, and in view of the settled practice in different circuits, we are all of opinion that the court below erred in holding that the word "audit" in section 850 means that the necessary expenses of the witnesses, therein provided, are to be audited by the proper executive department or officer, and that nothing was to be taxed for the travel or attendance of the clerks named in the government's bill of costs. The word "audit," in that section, does not necessarily imply that these expenses must be audited, in the first instance, by an executive department or officer. The bill for such expenses is unlike the ordinary claim for *per diem* and milage. The Statute fixes the amount to be allowed for attendance and milage to witnesses entitled to claim therefor, and no auditing in respect to such claims is required; whereas, the items that enter into the account of a clerk or other officer, sent away from his place of business as a witness for the government, for his necessary expenses "in going, returning and attendance on the court," cannot well be known to the court or its clerk, and must be furnished by the witness himself. Those items are to be examined, looked over and adjusted; in other words, they must be audited. The auditing contemplated by section 850 must be done, primarily, in the court in which the case is pending, and where it can be best determined what expenses have been necessarily incurred by the witness. This construction of the section is supported by section 983, which provides that the amount paid, that is, properly paid, to witnesses, shall be taxed by a judge or clerk of the court, and be included in and form a portion of the judgment or decree against the losing party; by section 855, providing that in cases where the United States are parties the marshal shall, on the order of the court, to be entered in its minutes, pay to the witnesses all fees to which

they appear by such order to be entitled, which sum shall be allowed him at the treasury in his accounts: and by section 846, providing that the accounts of a marshal for fees or costs paid to witnesses, upon the order of any judge or commissioner, shall not be so re-examined at the treasury as to charge him for an erroneous taxation of such fees or costs.

[285] It is not disputed that the United States, if successful in a suit, is entitled to have included in the judgment the statutory fees for *per diem* and milage for its witnesses, other than its officers, who may be sent away from their places of business to attend upon a court. And we cannot think it was intended by section 850 to deny to the government the right, when successful in a suit, to have even the necessary expenses of witnesses of the class described in that section included in the judgment for costs; or that the United States intended to remit to its defeated adversary not only witness fees for *per diem* and milage, but the necessary expenses of witnesses who happened to be in its employment, and whom it sent away from their places of business to testify in its behalf. As a person of that class receives, while absent, his stipulated salary, and is paid, in that way, for his time, it is not deemed just that he should also receive milage and *per diem*. But, instead thereof, he is allowed his necessary expenses, which being audited, by or under the direction of the court upon which he attends as a witness, he is entitled to have paid to him; and the government, being under an obligation to pay them, is entitled to have the amount so audited included in its bill of costs, and in any judgment rendered in its favor. In other words, when the government is successful in a suit, the "necessary expenses" of its witnesses, of the class described in section 850, takes the place, in its bill of costs, of the *per diem* and milage which, but for that section, would have been taxed and allowed in its favor, just as a marshal may elect to take his actual traveling expenses, instead of milage, where milage is allowed to him.

These views find additional support in section 851, which allows the court, subject to certain restrictions, to fix the compensation to be allowed to a seaman or other person sent to this country by a United States minister, *chargé d'affaires*, consul, captain or commander, to give testimony in a criminal case pending in a court of the United States. This section, as well as section 850, is brought forward from the third section of an Act passed in 1853 to regulate "fees and costs" in the circuit and district courts of [286] the United States, in which Act both sections appear under the head of *Witnesses' Fees*. 10 Stat. 167, 168, chap. 80. As the court was to fix the compensation to be allowed to witnesses under section 851, it is a reasonable interpretation of section 850 to hold that the auditing therein provided for was also to be, primarily, under its direction.

For the reasons stated, we are of opinion that the court below erred in disallowing the item in the bill of costs of $212.20.

The judgment is reversed with directions to enter a judgment in favor of the United States for the sum of $7,334, with interest at the rate of six per cent per annum from October 15, 1883, the date of the commencement of this action, and for its costs in the court below, as indicated in this opinion.

UNITED STATES, *Plff.*, [255]
v.
LESLIE G. CHASE.

(See S. C. Reporter's ed. 255-262.)

Mailing obscene letter—division in opinion.

1. The knowingly depositing in the mails of an obscene letter, enclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, is not an offense within the Act of July 12, 1876, chapter 186.
2. The question whether an indictment charges the defendant with any offense is too general to be the subject of a certificate of division.

[No. 241.]

Argued Mar. 28, 31, 1890. Decided April 28, 1890.

ON a certificate of division in opinion between the judges of the Circuit Court of the United States for the District of Massachusetts, upon motion in arrest of judgment, after plea of guilty and before sentence on an indictment for mailing an obscene letter.

The facts are stated in the opinion.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.*, for the United States:

Upon the point whether an obscene writing, to come within the law, must be a publication in the sense of a book or pamphlet, or may be private such as a writing contained in an envelope or wrapper on which is inscribed only the address, there is considerable conflict of opinion.

U. S. v. *Gaylord*, 17 Fed. Rep. 438; *U. S.* v. *Hanover*, 17 Fed. Rep. 444; *U. S.* v. *Morris*, 18 Fed. Rep. 900; *U. S.* v. *Thomas*, 27 Fed. Rep. 682; *U. S.* v. *Foote*, 13 Blatchf. 418; *Thomas* v. *State*, 103 Ind. 420; *U. S.* v. *Williams*, 3 Fed. Rep. 484; *U. S.* v. *Comerford*, 25 Fed. Rep. 902; *U. S.* v. *Mathias*, 36 Fed. Rep. 892; *U. S.* v. *Hartwell*, 73 U. S. 6 Wall. 395, 396 (18: 832).

The records of a court of justice are not to be used for spreading obscenity before the public.

U. S. v. *Foote*, 13 Blatchf. 419; *U. S.* v. *Bennett*, 16 Blatchf. 339; Wh. Cr. Pl. and Pr. (9th ed.) § 177.

But see, *contra*, *State* v. *Hayward*, 83 Mo. 299.

Mr. **Warren O. Kyle,** for defendant:

The questions should not be answered because there is a fatal defect in the indictment.

U. S. v. *Buzzo*, 85 U. S. 18 Wall. 125 (21: 812); *U. S.* v. *Britton*, 108 U. S. 207 (27: 701); *Com.* v. *Boynton*, 12 Cush. 499, 500, and cases cited; *Com.* v. *Harris*, 13 Allen, 539; *Com.* v. *Collins*, 2 Cush. 558; *U. S.* v. *Carll*, 105 U. S. 611 (26: 1135), and cases cited; *Com.* v. *Reily*, 9 Gray, 2; *U. S.* v. *Corbin*, 11 Fed. Rep. 238; *U. S.* v. *Reed*, 1 Lowell, 232; *Com.* v. *Dean*, 110 Mass. 64; *Com.* v. *Bean*, 11 Cush. 414; *Com.* v. *Lindsay*, 11 Cush. 415.

A letter is not within the inhibition of the Act of Congress of July 12, 1876, § 1, unless there is written or printed upon the envelope thereof "indecent, lewd, obscene or lascivious delineations, epithets, terms or language."

The adjudicated cases on this point are divided, those sustaining indictments in cases similar to the one at bar being:

U. S. v. *Gaylord*, 17 Fed. Rep. 438; *U. S.* v. *Hanover*, 17 Fed. Rep. 444; *U. S.* v. *Britton*, 17 Fed. Rep. 731; *U. S.* v. *Morris*, 18 Fed. Rep. 900; *U. S.* v. *Thomas*, 27 Fed. Rep. 682.

The cases against indictments in similar cases are:

U. S. v. *Williams*, 3 Fed. Rep. 484; *U. S.* v. *Loftis*, 12 Fed. Rep. 671; *U. S.* v. *Comerford*, 25 Fed. Rep. 902; *U. S.* v. *Mathias*, 36 Fed. Rep. 892; *U. S.* v. *Huggett*, 40 Fed. Rep. 636.

Mr. Justice **Lamar** delivered the opinion of the court:

This was an indictment on the Act of Congress of July 12, 1876, chapter 186, found and returned in the district court, and remitted, pursuant to section 1037 of the Revised Statutes, to the court below, charging that on the twenty-fifth day of January, 1876, at North Attleborough, in the District of Massachusetts, "Leslie G. Chase did unlawfully and knowingly deposit and cause to be deposited in the mails of the said United States, then and there for mailing and delivery, a certain obscene, lewd and lascivious letter, which said letter was then and there non-mailable matter, as declared by section one of an Act of Congress approved on the twelfth day of July, in the year of our Lord one thousand eight hundred and seventy-six, and which said letter is and then and there was so grossly obscene, lewd and lascivious that the same would be offensive to the court here, and is unfit and improper to appear upon the records thereof, wherefore the [256] jurors aforesaid do not set forth the same in this indictment, which said letter was then and there inclosed in a certain paper wrapper, which said wrapper was then and there addressed and directed as follows, that is to say, 'Watchweer Print, Providence, R. I.,' against the peace and dignity of the said United States, and contrary to the form of the statute in such case made and provided."

After a plea of guilty had been entered and before sentence, a motion in arrest of judgment was made, on the following grounds:

"1. The indictment does not set forth the contents of the letter which is alleged to be obscene, lewd, lascivious and non-mailable, nor does it describe said letter or any part thereof, nor does it in any way identify said letter.

"2. The indictment does not allege that the defendant knew the contents of said letter at the time of the alleged deposit thereof in the mails of the said United States.

"3. The indictment does not allege that the defendant deposited said letter in the mails of the said United States for the purpose of circulating and disposing of, or of aiding in the circulation or disposition of, anything declared to be non-mailable matter by any law of the United States.

"4. The indictment does not allege that the defendant deposited, or caused to be deposited, for mailing or delivery, anything declared to be non-mailable matter by section one (1) of an Act of Congress approved on the twelfth day of July, A. D. 1876, or by any law of the United States.

"5. The indictment does not charge the defendant with any offense."

At the hearing in the circuit court upon the motion in arrest of judgment, the following questions arose upon which the judges by whom the court was held were divided in opinion, viz.:

"First. Is the knowingly depositing in the mails of an obscene letter, inclosed in an envelope or wrapper upon which there is nothing but the name and address of the person to whom the letter is written, an offense within the Act of July 12, 1876, chapter 186?

"Second. Does this indictment allege that the defendant deposited, or caused to be deposited, for mailing or delivery, anything declared to be non-mailable matter by that Act or by any law of the United States?

"Third. Does this indictment charge the defendant with any offense?

"Thereupon, at the request of the counsel for the United States, it is ordered that these questions be stated as aforesaid and be certified under the seal of this court to the Supreme Court of the United States at its next session."

Objection is taken to the consideration of the questions presented by this certificate of division, for several reasons, none of which are deemed sufficient to preclude our taking jurisdiction of the case; and we shall therefore proceed to consider the questions certified in the order they are arranged in the certificate.

Sec. 1 of the Act July 12, 1876 (19 Stat. 90), on which this indictment is founded, is as follows:

"Every obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means, any of the hereinbefore mentioned matters, articles or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any postoffice nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of, the same, shall be guilty of a misdemeanor, and shall for each and every offense be fined not less than one hundred dollars nor more than five thousand dollars, or imprisoned at hard

labor not less than one year nor more than ten years, or both, at the discretion of the court."

The contention on the part of the United States is, that the term "writing," as used in this Statute, is comprehensive enough to include, and does include, the term "letter," as used in the indictment; and it is insisted, therefore, that the offense charged is that of unlawfully and knowingly depositing in the mails of the United States an obscene, lewd and lascivious "writing," etc., etc.

We do not concur in this construction of the Statute. The word "writing" when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments nor in common intercourse are the two terms "letter" and "writing" equivalent expressions. When in ordinary intercourse men speak of mailing a "letter" or receiving by mail a "letter," they do not say mail a "writing" or receive by mail a "writing." In law the term "writing" is much more frequently used to denote legal instruments—such as deeds, agreements, memoranda, bonds and notes, etc. In the Statute of Frauds the word occurs in that sense in nearly every section. And in the many discussions to which this Statute has given rise, these instruments are referred to as "the writing" or "some writing." But in its most frequent and most familiar sense the term "writing" is applied to books, pamphlets and the literary and scientific productions of authors. As for instance, in that clause in the United States Constitution which provides that Congress shall have power "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective *writings* and discoveries."

In the Statute under consideration, the word "writing" is used as one of a group or class of [259] words—book, pamphlet, picture, paper, writing, print—each of which is ordinarily and prima facie understood to be a publication; and the enumeration concludes with the general phrase "or other publication," which applies to all the articles enumerated, and marks each with the common quality indicated.

It must therefore, according to a well-defined rule of construction, be a published writing which is contemplated by the Statute, and not a private letter, on the outside of which there is nothing but the name and address of the person to whom it is written.

We do not think it a reasonable construction of the Statute to say that the vast mass of postal matter known as "letters" was intended by Congress to be expressed in a term so general and vague as the word "writing," when it would have been just as easy, and also in strict accordance with all its other postal laws and regulations, to say "letters" when letters were meant; and the very fact that the word "letters" is not specifically mentioned among the enumerated articles in this clause is itself conclusive that Congress intended to exclude private letters from its operations.

Upon this point *Judge* Hammond, in his opinion in *United States* v. *Huggitt*, 40 Fed. Rep. 686, 641, makes the following apt and, to our minds, conclusive remarks: "I have taken the trouble to examine with care the legislation concerning our postal affairs, and do not find a single instance where Congress has ever used any other word to include 'letters' than that word itself, except such expressions as 'the mail,' 'mail-matter,' 'bag or mail of letters,' etc. . . . Whenever the legislation in hand requires specific classification or enumeration, I find no word ever substituted for 'letters' to express that which is commonly known as letters in relation to the postal service. We have 'letter and newspaper envelopes,' 'letter correspondence,' 'registered letters,' 'unclaimed letters,' 'dead letters,' 'request letters,' 'non-delivered letters,' 'all letters and other mail matter,' 'foreign letters,' 'letters or packets,' 'letters and packets,' 'letter postage,' 'letter mail,' 'letter and other mail matter,' and such like, almost innumerably; and these I have taken quite at random from the Revised Statutes. Can it be possible [2 that Congress, then, wishing to include 'letters' in any particular and accurate enumeration, shall drop that word so imbedded in our Postal Laws and that of our ancestors beyond the sea, and adopt some unfamiliar, inferior and in every sense ambiguous term to express the idea?"

A further argument in support of the view we have asserted is found in the fact that the Statute, after it has declared by enumeration, in the clause under consideration, what articles shall be non-mailable, adds a separate and distinct clause declaring that "every letter *upon the envelope of which* . . . indecent, lewd, obscene or lascivious delineations, epithets, terms or language may be written or printed, . . . shall not be conveyed in the mails," and the person knowingly or willfully depositing the same in the mails "shall be deemed guilty of a misdemeanor," etc. This distinctly additional clause, specifically designating and describing the particular class of letters which shall be non-mailable, clearly limits the inhibitions of the Statute to that class of letters alone, whose indecent matter is exposed on the envelope. It is an old and familiar rule that, "where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment." *Pretty* v. *Solly*, 26 Beav. 610, *per* Romilly, *M. R.; State* v. *Comr. of Railroad Taxation*, 37 N. J. L. 228. This rule applies wherever an Act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560.

The decisions of the circuit courts upon the question presented to us by this certificate have been conflicting. Those sustaining indictments in cases similar to this hold that the term "writing" comprehends "letters," and insist that even if the general phrase "other publication" is allowed to apply to the word, the sending or [26 mailing a letter by one person to another is a

sufficient publication to bring a letter within the Statute, as is held to be the case in an action of slander and libel.

The reply to this is, that the Statute prohibits the conveyance by mail of matter which is a publication before it is mailed, and not such as becomes a publication by reason of its being mailed.

Another argument on which indictments of this character have been sustained by some of the circuit courts is, that a reasonable construction must be given the Statute, and, it being evident that Congress intended to exclude anything of an obscene character from the mails, it is immaterial whether the thing prohibited is inside or outside of an envelope, and therefore unreasonable to hold that Congress intended not to allow a decent writing in an obscene envelope, but at the same time to allow obscene writing in a proper envelope. We recognize the value of the rule of construing statutes with reference to the evil they were designed to suppress as an important aid in ascertaining the meaning of language in them which is ambiguous and equally susceptible of conflicting constructions. But this court has repeatedly held that this rule does not apply to instances which are not embraced in the language employed in the statute, or implied from a fair interpretation of its context, even though they may involve the same mischief which the statute was designed to suppress. *United States* v. *Sheldon*, 15 U. S. 2 Wheat. 119 [4: 199]; *United States* v. *Wiltberger*, 18 U. S. 5 Wheat. 76, 95 [5: 87, 42]; *United States* v. *Morris*, 39 U. S. 14 Pet. 464, 475 [10: 543, 548]; *United States* v. *Hartwell*, 73 U. S. 6 Wall. 385 [18: 830]; *United States* v. *Reese*, 92 U. S. 214 [23: 563].

But we cannot concede that the policy of the Statute was so sweeping as the argument assumes. We think that its purpose was to purge the mails of obscene and indecent matter as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence from examination. *Ex parte Jackson*, 96 U. S. 727 [24: 877]. This object seems to have been accomplished by forbidding the use of the mails to books, pamphlets, pictures, papers, writings and prints, and other publications of an indecent nature, and also to private letters and postal cards whereon the indecent matter is exposed to the inspection of others than the person to whom the letter is written.

Ashurst, *J.*, said in *Jones* v. *Smart*, 1 T. R. 51: "It is safer to adopt what the legislature have actually said than to suppose what they meant to say." In the *Queensberry Leases*, 1 Bligh, 497, *Lord* Redesdale said: "The proper mode of disposing of difficulties arising from a liberal construction is by an Act of Parliament, and not by the decision of court." Congress seems to have acted upon this idea; and if further argument were needed in support of our view it will be found, we think, in the fact that in an Amendment to this Statute passed September 26, 1888 (25 Stat. 496), for the first time in the history of the postal service the word "letter" was included in the list of articles made non-mailable by reason of their obscene, lewd, lascivious or otherwise improper character. If letters were embraced in the Statute on which this indictment was founded, why did Congress consider it necessary to insert the specific word to designate them in 1888? It must be that that body did not put the construction on the prior Statute claimed in behalf of the United States, else we have it doing a useless and vain act. But as the Amendment of 1888 is not involved in this case, no opinion is expressed as to whether the term "letter," as used therein, can, under a proper construction of that Statute, be held to include a strictly private sealed letter.

With reference to the argument that the word "writing" occurs, in the legislation on this subject, as an amendment, we have only to remark that the entire history of that legislation, so far from forming a basis for a different construction of this Act, confirms it.

For the reasons above given our answer to the first question certified is in the negative. This being decisive, we need not consider the second question; and the third, as has been repeatedly held, is too general to be the subject of a certificate of division.

ADOLPHUS ECKLOFF, *Plff. in Err.*, [240]
v.
DISTRICT OF COLUMBIA.

(See S. C. Reporter's ed. 240-244.)

Power to remove police officer — notice — Act of 1878.

1. The commissioners of the District of Columbia have power to remove a police officer without charges, notice or hearing.
2. The grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice.
3. The Act of 1878 is an Organic Act, intended to dispose of the whole question of a government for the District of Columbia.

[No. 244.]

Submitted March 27, 1890. Decided April 28, 1890.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment at general term reversing a judgment at special term for salary of a lieutenant of the police force of the District of Columbia. *Affirmed.*

The facts are stated in the opinion.

Messrs. **C. C. Cole** and **W. L. Cole**, for plaintiff in error:

Repeal by implication is not favored by the court. When there are two Acts upon the same subject, the rule is to give effect to both.

Beals v. *Hale*, 45 U. S. 4 How. 37 (11: 865); *U. S.* v. *Tynen*, 78 U. S. 11 Wall. 92 (20: 154); *McCartee* v. *Orphan Asylum Society*, 9 Cow. 437; *State* v. *Palmes*, 23 Fla. 620; *Robinson* v. *Rippey*, 111 Ind. 112; *Dugan* v. *Gittings*, 3 Gill, 138; *People* v. *Gustin*, 57 Mich. 407; *State* v. *Stoll*, 84 U. S. 17 Wall. 431 (21: 654); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 617 (22: 437); *Red Rock* v. *Henry*, 106 U. S. 601 (27: 253); *Pana* v. *Bowler*, 107 U. S. 538 (27: 428); *Fussell* v. *Gregg*, 113 U. S. 560 (28: 996).

The construction of a statute by those charged

with the execution of it is entitled to great weight.

U. S. v. *Johnston*, 124 U. S. 253 (31: 396); *Brown* v. *U. S.* 113 U. S. 571 (28: 1080).

The legal right to the office carries with it the right to the salary.

U. S. v. *Perkins*, 116 U. S. 483 (29: 700); *U. S.* v. *Addison*, 73 U. S. 6 Wall. 291 (18: 919); *Fitzsimmons* v. *Brooklyn*, 102 N. Y. 536; *Andrews* v. *Portland*, 79 Me. 484; *Memphis* v. *Woodward*, 12 Heisk. 499; *People* v. *Smyth*, 28 Cal. 21.

Mr. **George C. Hazleton** for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court.

On March 31, 1883, the plaintiff in error, who had been for years theretofore a lieutenant of the police force of the District of Columbia, was removed from office by the commissioners of the District. This removal was without any written charges preferred against him, or any notice or hearing. Challenging the validity of such removal, he brought his action for salary subsequent thereto. At the trial of the case, at a special term of the Supreme Court of the District, his summary removal was adjudged unauthorized, and his claim for salary sustained. This judgment was reversed by the court at its general term, and the action dismissed at his cost. 4 Mackey, 572. To reverse that judgment of the general term, this writ of error is prosecuted.

The single question presented by the record is as to the power of the commissioners to remove a police officer without charges, notice or hearing. The Act of June 11, 1878 (20 Stat. 102), by which the police force was placed under the control of the commissioners of the District, empowers them (§ 3) "to abolish any office, to consolidate two or more offices, reduce the number of employés, remove from office and make appointments to any office under them authorized by law." If this were all the legislation, there would be no question, for the grant of a general power to remove carries with it the right to remove at any time or in any manner deemed best, with or without notice; but the contention of the plaintiff in error is, that this unrestricted right of removal is limited by the provisions of prior statutes.

[241]

In 1861 an Act was passed creating a metropolitan police system for the District of Columbia, and establishing a police for such District. 12 Stat. 320. By that Act a board, consisting of five commissioners, was created, to whom was given full control over the police force. This board was continued until the Act of 1878, and its power of removal was limited by this provision: "No person shall be removed from the police force except upon written charges preferred against him to the board of police, and after an opportunity shall have been afforded him of being heard in his defense; and no person removed from the police force for cause shall be reappointed to any office in said force." Sec. 8 of the Act of 1861, embodied in Revised Stat. D. C. § 355. And the contention is that the Act of 1878 simply changed the control from one board to another; that this limitation on the power of removal was not expressly repealed by the Act of 1878; that repeals by implication are not favored; and therefore that, construing the old law with the new, whatever power the new board had over other subordinates, its power over the police was subject to that limitation. On the other hand, it appears that in 1871 an Act was passed providing a government for the District of Columbia. 16 Stat. 419. This established a territorial government, with a governor and legislative assembly, to which the general administration of the affairs of the District was committed. It did not change the police department, which was left, as theretofore, under the charge of the police commissioners. This territorial system not proving satisfactory, Congress, in 1874 (18 Stat. 116), abolished it, and vested the affairs of the District in a commission. That Act contained the provision we have heretofore quoted from the Act of 1878; and gave to this commission large powers of administration, but without control of the police or the schools. Evidently this scheme of administration was experimental, as section 5 of the Act provided for the appointment of a committee of Congress to prepare a suitable frame of government for the District and report the same to the succeeding Congress. The experiment was found to be satisfactory, and in 1878, four years thereafter, the Act from which we first quoted was passed, which was entitled "An Act Providing a Permanent Form of Government for the District of Columbia." Following the idea and enlarging the scope of the Act of 1874, the general administration of affairs was vested in a commission, and to that commission was given control also over the police and schools; for by section 6 it was provided, "That from and after the first day of July, eighteen hundred and seventy-eight, the board of metropolitan police and the board of school trustees shall be abolished; and all the powers and duties now exercised by them shall be transferred to the said commissioners of the District of Columbia, who shall have authority to employ such officers and agents and to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this Act. And the commissioners of the District of Columbia shall, from time to time, appoint nineteen persons, actual residents of said District of Columbia, to constitute the trustees of public schools of said District, who shall serve without compensation and for such terms as said commissioners shall fix. Said trustees shall have the powers and perform the duties in relation to the care and management of the public schools which are now authorized by law."

It will be noticed that a distinction is provided between the police and the schools. An intermediate board is to be appointed for the latter, while the direct control of the police is given to the commissioners; and they "are authorized to adopt such provisions as may be necessary to carry into execution the powers and duties devolved upon them by this Act." When to a board having general administrative supervision of the affairs of a community, and with plenary power in the matter of appointment and removal of subordinates, is added the control of another department, and no express words of limitation are found in the Act making the transfer, it is to be presumed that such

board has the same plenary power in respect to this new department, and is not hampered by limitations attached to the board which theretofore had control of it. The presumption against implied repeal obtaining in the construction of ordinary statutes yields to the inferences arising from the subject matter of legislation. Plenary powers having been found by experience valuable in the management of affairs already under the control of the board, the transfer of another department to the same control carries with it a strong implication that the added department is subject to the same plenary powers. The primary thought is not a mere transfer of authority, but the bringing of the added department within the control of the general supervising board. It is unity of administration and not change of commission.

But our conclusions are not controlled by this construction alone. The court below placed its decision on what we conceive to be the true significance of the Act of 1878. As said by that court, it is to be regarded as an Organic Act, intended to dispose of the whole question of a government for this District. It is, as it were, a constitution for the District. It is declared by its title to be an Act to provide "a permanent form of government for the District." The word "permanent" is suggestive. It implies that prior systems had been temporary and provisional. As permanent it is complete in itself. It is the system of government. The powers which are conferred are organic powers. We look to the Act itself for their extent and limitations. It is not one Act in a series of legislation, and to be made to fit into the provisions of the prior legislation; but is a single complete Act, the outcome of previous experiments, and the final judgment of Congress as to the system of government which should obtain. It is the constitution of the District, and its grants of power are to be taken as new and independent grants, and expressing in themselves both their extent and limitations.
[1] Such was the view taken by the court below; and such we believe is the true view to be taken of the Statute. Regarded in this light, but one interpretation can be placed upon the section quoted. The power to remove is a power without limitations. The power is granted in general terms, as well as the authority to adopt such provisions as may be necessary to carry it into execution. Full authority is given to the commission; and in the absence of rules and regulations directing a different procedure, its act of summary dismissal cannot be challenged.

The judgment is affirmed.

---

[227] FERDINAND DE ST. GERMAIN, *Appt.*,
v.
EMANUEL BRUNSWICK.

(See S. C. Reporter's ed. 227-231.)

Patentability of inventions—inventive faculty—void patent.

1. The application of an old process or machine or apparatus to a similar or analogous subject, with no change in the manner of application, and no result distinct in its nature, will not sustain a patent, although the new form of result may not have before been contemplated.
2. Competent knowledge and skill of an intelligent mechanic would have enabled him to construct the revolving billiard-cue rack in question without calling the inventive faculty into play.
3. The patent, No. 72,969, granted to Brunswick, January 7, 1868, for a revolving cue rack, is void for want of novelty.

[No. 257.]

Argued April 11, 1890. Decided April 28, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of California in favor of complainant for an infringement of letters-patent. *Reversed.*

Statement by *Mr. Chief Justice* **Fuller:** [228]

This was a bill filed by Emanuel Brunswick against Ferdinand de St. Germain in the Circuit Court of the United States for the District of California, October 25, 1880, for an alleged infringement of letters-patent No. 72,969, granted to Brunswick January 7, 1868, for a revolving cue rack.

The defendant demurred to the bill February 16, 1881, and among other causes of demurrer assigned that "the said complaint does not describe or set forth any new or useful invention or discovery, or any invention or discovery patentable under the Patent Laws of the United States, but, on the contrary, the descriptions of the alleged inventions contained in said complaint show that the same is not patentable." The demurrer was overruled, whereupon the defendant answered, denying, among other things, that the alleged invention was of any utility or value. Replication having been filed, proofs were taken, and an interlocutory decree was entered on the 12th of May, 1884, in favor of the complainant, sustaining the patent, finding that there had been infringement, and referring the case to a master to take and state an account of the gains and profits, and also the damages. The master subsequently reported that the defendant had realized $1,176 profits from the manufacture and sale of the cue rack, but that no damages had been sustained by complainant, by reason of respondent's sales, over and above the profits. Exceptions were filed by both complainant and defendant and were overruled by the court, and on the 27th of May, 1886, a final decree in complainant's favor was entered in the case, for the amount reported by the master, with interest and costs, and an appeal duly taken to this court by the defendant.

The first error assigned is, "that the court erred in holding that the said letters-patent were valid." The specification, drawings and claim are as follows:

"Be it known that I, E. Brunswick, of the City of Chicago, in the County of Cook, State of Illinois, have invented new and useful improvements in billiard-cue racks, and I do hereby declare that the following is a full and exact description thereof, reference being had to the accompanying drawings, making part of this specification, in which— [229]

"Drawing No. 1 represents the plain revolving cue rack; and

---

[1] NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 438.

As to patentability of inventions, see *note* to Thompson v. Boisselier, 29: 76; also *note* to Corning v. Burden, 14: 683.

"Drawing No. 2 represents the lock-up rack for private use.

"The nature of my invention consists in making the billiard-cue rack so arranged that it may revolve and be detached from the wall.

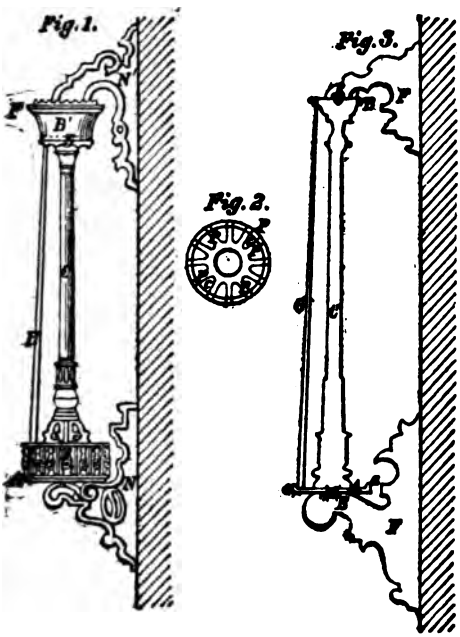
"To enable others skilled in the art to make and use my invention, I will proceed to describe its construction and operation.

"Two circular plates, A and B (drawing No. 1), are firmly secured to a vertical shaft, C. The lower plate A is provided with a rim, *a*, at its outer edge to prevent the butt ends of the cues from slipping off the plate and the upper plate B is provided with several openings through which the points of the cues are passed. Each plate is provided with a metallic pin, D, which enters a metallic socket, E, inlaid in the stationary brackets, F F, and revolve in it. The brackets are secured to a wall, a pillar or any other object, and support the rack.

"I make private cue racks (drawing No. 2) in which the lower plate A forms a bottom to a round box, B, open on top, and divided into compartments, C C, by partitions, *p p*, each compartment having a door, D, hung on hinges and provided with a lock and key. The upper plate E forms a bottom to the box B, and is provided with several holes. The rack, being revolving, is very convenient for handling the cues.

"What I claim as my invention and desire to secure by letters-patent is—

"The revolving billiard-cue rack constructed and operated substantially as and in the manner herein described and specified."



Mr. **M. A. Wheaton,** for appellant:

There is nothing described in the patent in this case except the idea of applying old devices to a new and analogous use, and the exercise of the most ordinary kind of mechanical knowledge in making such application.

Brown v. *Piper*, 91 U. S. 37 (23: 200); *Terhune* v. *Phillips*, 99 U. S. 592 (25: 293); Curtis, Patents, §§ 41, 44, 49, 52, 53, 55, 56, 66; Walker, Patents, § 25 *et seq.*; *Atlantic Works* v. *Brady*, 107 U. S. 192 (27: 438); *Vinton* v. *Hamilton*, 104 U. S. 492 (26: 810); *Smith* v. *Nichols*, 88 U. S. 21 Wall. 119 (22: 567); *Pearce* v. *Mulford*, 102 U. S. 117, 118 (26: 95); *Hicks* v. *Kelsey*, 85 U. S. 18 Wall. 670 (21: 852); *Crouch* v. *Roemer*, 103 U. S. 797 (26: 426); *Gardiner* v. *Herz*, 118 U. S. 180 (30: 158); *Western Electric Mfg. Co.* v. *Ansonia Brass & C. Co.* 114 U. S. 447 (29: 210); *Pennsylvania R. Co.* v. *Locomotive E. S. Truck Co.* 110 U. S. 490 (28: 222); *Day* v. *Fair Haven & W. R. Co.* 132 U. S. 98 (33: 265); *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 161 (133: 295); *Marchand* v. *Emken*, 132 U. S. 195 (33: 332); *Aron* v. *Manhattan R. Co.* 132 U. S. 84 (33: 272).

Messrs. **Willard Parker Butler** and *John L. Boone* for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court: [2

This case falls within the familiar rule that the application of an old process or machine or apparatus to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, although the new form of result may not have before been contemplated.

The ordinary cue rack was made with the upper part perforated with holes to receive the small ends of the cues when put in the rack, and with a ledge or molding along the front of the lower part, on which the cues stood, so as to prevent them from slipping off. The horizontal and straight upper and lower parts of the ordinary cue rack were changed by complainant into two circular disks, called "plates" in the specification, having the perforations and the rim, secured to a vertical shaft, [2 and each provided with a metallic pivot, entering into and revolving in a metallic socket, inserted in ordinary brackets attached to the wall or pillar or any other object for the support of the rack.

As the revolving rack held the cues in the same way and by the same means as the ordinary rack, if patentable novelty existed at all it must be found in making the racks revolve, when constructed and operating in the manner stated.

But revolving contrivances, such as table casters and the like, for the reception and carriage of articles, so as to bring them easily within reach, were well known, and the application of such a contrivance to the holding and carrying of cues was but the application of an old device to a new and analogous use, with such changes only as would naturally be made to adapt it thereto.

The making of the old cue rack circular, putting in the revolving apparatus, and suspending it on brackets, a common use of the latter, involved mechanical skill simply, and not the exercise of invention, in the creation of a novel, substantive result.

The state of the art, as shown by the prior patents for revolving dining tables and bottle casters, introduced on behalf of defendant, illustrates the correctness of this conclusion.

These tables and casters were so arranged as

to revolve about a common centre and bring around dishes and decanters in that way, as desired. The office performed was the same in respect to dishes and decanters as that performed by complainant's contrivance in respect to cues. The difference between revolving and stationary tables and casters and between revolving and stationary cue racks is the same. Those revolve and these do not. We think that competent knowledge and skill in his calling on the part of an intelligent mechanic would have enabled him, on request, to construct the revolving billiard-cue rack in question, without calling the inventive faculty into play.

The patent was void for want of novelty, and *the decree is reversed and the cause remanded, with a direction to dismiss the bill.*

---

[244] FRANCES BEATTY ET AL., *Plffs. in Err.*,
v.
GEORGIA BENTON, EXR'X.

(See S. C. Reporter's ed. 244-254.)

Review of state judgment.

Where the case was decided by the state court on an independent ground, broad enough to maintain the judgment and not involving a federal question, even though the state court also decided a federal question, this court will dismiss the writ of error without considering the federal question.

[No. 279.]

Submitted April 18, 1890. Decided April 28, 1890.

IN ERROR to the Supreme Court of the State of Georgia to review a judgment, affirming a judgment of the Superior Court of Richmond County in that State, in favor of plaintiff, settling her title to certain land. *Dismissed.*

The facts are stated in the opinion.

Mr. **Salem Dutcher** for plaintiffs in error.

(No counsel for defendant in error.)

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 3d of May, 1854, one Carrie executed and delivered to Elijah D. Robertson, a white man, a warranty deed of a lot of land in Augusta, Georgia, 82 feet 6 inches in width by 200 feet in depth. The consideration expressed in the deed was $600, and it conveyed to Robertson, his heirs and assigns forever, the lot in question, in trust nevertheless, to and for the sole use, benefit and behoof of the following free persons of color of Augusta, "to wit, [245] Fanny Gardner, the wife of Thomas Gardner, and their daughter, Frances Gardner, and any future issue of the said Fanny by the said Thomas, and, in case of the death of the said Frances and Fanny, in trust for the next of kin of the said Thomas Gardner." The deed also authorized Robertson, in case it should be deemed advisable and to the interest of all concerned that a sale of the property should take place, to sell and make titles to it, provided the consent of the said Frances and Fanny, their guardian or guardians, should be first had and obtained.

In March, 1879, Fanny Gardner filed a bill in equity, in the Superior Court of Richmond County, Georgia, setting forth the purchase of the lot of land by Gardner from Carrie, for $600, and the making of such deed; that Gardner, who was her husband, and the father, by a former wife, of Frances Gardner, who had intermarried with one Beatty, died in 1865; that all of those persons were free persons of color; that, on the 3d of May, 1854, Gardner and the plaintiff and Frances took possession of the property; that afterwards, Frances having married, Gardner divided the lot and erected a house on a part of it for Frances; that the parties thus continued in the possession of the property until the death of Gardner; that from that time Frances had remained in possession of the portion of the lot on which the house was erected for her use, and the plaintiff had occupied the remaining part of the lot; that the deed to Robertson was void, because at that time all conveyances of real estate in Augusta to or for the use of free persons of color residing therein were prohibited by law; that the plaintiff acquired title to the property occupied by her, by actual adverse possession of the same for twenty years, and Francis had acquired title in the same way to the premises occupied by her; that the plaintiff desired to sell her part of the property, but could not do so, because Frances claimed that under the terms of the trust deed she owned a remainder interest in the whole of the property, and the plaintiff had only a life estate therein; and that the property could not be sold except with the consent of Frances.

The bill prayed for a decree that the plaintiff owned a fee-simple title to the portion of the [246] lot so occupied by her; that the trust deed be canceled; that, if the court should hold that the title of the plaintiff and of Frances was derived from seven years' possession under the trust deed, as color of title, it would decree that the terms of such deed did not bind the plaintiff or limit her title in the property; that, if the plaintiff did not have a fee-simple title to the part in her possession, she and Frances might be decreed to be tenants in common of the entire property, and the same might be divided by commissioners, or be sold and the proceeds divided, share and share alike, between the plaintiff and Frances; and for general relief.

The bill was afterwards amended by inserting an allegation that the plaintiff furnished to Gardner at the time of the purchase one half of the purchase money of the property, the same being the proceeds of her labor as a free person of color; and further that if the court held that the plaintiff acquired no legal interest under the division of the lot by Gardner, in the part which he gave to her and on which she had since lived, and no interest that could ripen by prescription, then Gardner died in possession of all of the lot, leaving the plaintiff and Frances as his only heirs; that such heirs had, by tacit consent, actually occupied, held and claimed the

NOTE.—*Jurisdiction of United States Supreme Court; it is for state courts to construe their own statutes; supreme court will not review their decisions except when specially authorized by statute.* See note to Commercial Bank v. Buckingham, 12:169.

portions so divided to them by Gardner, from the time of his death; and that Gardner made no will and left no other heirs.

Frances, being then the wife of one Davis, answered the bill, denying that the property was ever divided between her and the plaintiff by Gardner, or since his death, otherwise than that Gardner built another house for her on the property, for convenience, because she was married and had many children; and that her title and that of the plaintiff was that of *co-cestuis que trust* for life, with remainder over to the children of Frances who should be living at the termination of such equitable life estate.

By way of cross-bill, the answer averred that, before January 1, 1863, no proceedings were ever instituted to escheat the property as being conveyed for the benefit of free persons of color; that by section 2627 of the Code of [247] Georgia, becoming of force on January 1, 1863, it was declared that escheat should lie only on failure of heirs; that by the Act of Georgia of March 17, 1866, free persons of color were vested with all the property rights of white persons; that among those rights was that to a prescriptive title by adverse possession for seven years under written evidence of title; that by possession adverse to all the world, under the trust deed, for seven years and more prior to the bringing of the bill, the plaintiff and Frances had a good prescriptive title to the property under the limitations of the deed, and had an equitable life estate in common, with remainder in fee, on their death, to the next of kin of Gardner; that Frances had six children then living, two of them by her first husband, Beatty, one of whom was an adult and the other a minor, and four of them by her husband Davis, all of whom were minors, such six children being the next of kin after Frances to Gardner, their grandfather; and that Gardner had no issue by the plaintiff.

The answer prayed that the court might declare the trust to be valid, and appoint a trustee to hold the property for the joint use and benefit of the plaintiff and the defendant during their lives, or the life of either of them, and, at the termination of such lives, to convey the property to such children of the defendant as might then be living, and should there be none such, then to whoever should be next of kin to Gardner; and that the adult son of the defendant be made a defendant, with a guardian *ad litem* to be appointed for her minor children.

The answer was afterwards amended by averring that Gardner died in November, 1865; that from the date of the trust deed to that time the plaintiff and the defendant and Gardner resided together on the lot, being in occupation of it under and by virtue only of the trust deed; that from the time Gardner died until the bringing of the suit, the plaintiff and the defendant continued to occupy the lot; that more than seven years elapsed from the death of Gardner to the bringing of the suit; that under the laws of Georgia, as they existed from the date of the trust deed, any instrument in writing purporting to convey a title to land, [248] even if void, was good as color of title, and adverse possession of the land thereunder for seven years gave a good title by prescription to the land; that, under the first section of the Act of Congress of April 9, 1866, all persons within the jurisdiction of the United States became entitled to the equal benefit of all laws and proceedings for the security of person and property as was enjoyed by white citizens, and all citizens of the United States became entitled in every State to the same rights as were enjoyed by the white citizens thereof, as respected real and personal property; that, under the first section of the 14th Article of Amendment to the Constitution of the United States, it was provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; that under said Act of Congress and said Amendment the defendant became entitled to the same rights, as to prescriptive title by possession under color of title, as any white person; that under said Act of Congress and said Amendment, the Act of Georgia of December 19, 1818, and that of December 22, 1819, could not be lawfully enforced as against the rights of the defendant under the trust deed as color of title, even if the deed were originally void; and that, under said Act of Congress and the 14th Amendment, the plaintiff and the defendant, under the trust deed, and their occupancy of the lot thereunder for seven years after the death of Gardner, had an equitable life estate in common in the lot, with remainder in fee to the next of kin of Gardner.

The answer was also amended by averring that the claim of the plaintiff that she had furnished to Gardner, at the time of the purchase, one half of the purchase money of the property, was barred by the Statute of Limitations, the claim being first asserted by an amendment to the bill, made June 28, 1884, more than thirty years after the purchase of the property by Gardner; and that the plaintiff was estopped by laches from asserting such claim.

A guardian *ad litem* was appointed for the minors, and he and the adult Beatty were [2 made defendants. The case was tried by a jury. The court at the trial charged the jury as follows: "Under the law in force at the time of making this deed, free persons of color could not hold real estate, and the deed from Carrie to Gardner in trust was absolutely void, and the fact that the war and its results, as declared by the Constitution of the United States and the Acts of our own Legislature, have put all colored persons on the same footing with white persons, does not and cannot make the laws invalid or validate any title acquired under them, and no continuance of possession for any number of years by the wife and daughter under this void deed can ripen it into a good title. The transaction being illegal and void, no act of either and no post-war enactments can galvanize it into life. If you believe that Thomas Gardner paid Carrie for this land, it being admitted that there were no proceedings before 1860 to escheat this property, and remained in possession of the land until after the close of the war, and died in November, 1865, then, notwithstanding the law which made a trust deed void, and he died in possession of the land, the wife and daughter took this

estate by inheritance absolutely, each being entitled to one half. If the evidence does not show that, but shows that Thomas Gardner paid the purchase money and went into possession and then divided the lot between Fanny and Frances, and that they both went into possession and remained in possession until after the war closed and are still in possession, Frances is estopped from denying the title of Fanny to the one half now claimed by her; so that you see that my view of the law is that the trust deed cannot be enforced or be made the basis of any title. If, therefore, you find for the complainant, Fanny, you may appoint three discreet persons to make the division of the lot, providing for a sale in case no division of the kind can be made."

The defendants requested the court to charge the jury as follows, which requests were declined: "2. If you find from the evidence in this case that Thomas Gardner bought this land for the joint use of Fanny and Frances during their lives, and at their death to go to his next of kin, and had the deed of 1854 made to carry out this purpose, and that Frances and [250] Fanny entered on the occupancy of the land by virtue of the deed, and were in the occupancy of the land under the deed at the time free persons of color became entitled to equal property rights under the law with white persons, and remained in such possession and occupancy for seven years thereafter, then I charge you that, even if the deed itself were void, they obtained a good prescriptive title such as set out in the deed—that is, a good prescriptive title to the joint use and enjoyment of the land during their lives. The fact that the deed was void, or that Fanny or Frances were free persons of color, in no wise prevents such a prescriptive title as stated accruing to them, if the evidence shows the facts above stated. 3. Whenever two persons are from any cause entitled to the possession simultaneously of any property in this State, they are tenants in common and each entitled to the use and enjoyment of one half of the common property, and are each liable for one half of the burdens imposed by law on the common property, such as taxes. If, therefore, you find, from the evidence in this case, that Fanny and Frances became simultaneously entitled to the possession of this property, they were tenants in common, equally entitled to its benefits and equally liable for its burdens. If you find that one lived on one half and one on the other, this is nothing more than the law entitled them to; and if one paid the taxes on her half and the other on hers, this is nothing but what the law required them to do. The fact of one living on one half and the other on the other, or of one paying the taxes on one half and the other the taxes on the other, no matter how long this was kept up, would not give either one a fee-simple title to the particular half on which she lived and paid taxes. At the end of half a century they would still be tenants in common, each having the right to possess the joint property and to use and enjoy one half of it. No tenant in common can set up an exclusive right by prescription against his co-tenant in the whole or any part of the property, unless he actually ousts his co-tenant, or expressly notifies his co-tenant that he holds adversely to his rights, or unless he assumes exclusive possession of the whole property, and refuses to admit his co-tenant to his rightful participa- [251] tion, after the co-tenant demands such admission. If, therefore, you find that Frances and Fanny became simultaneously entitled to the use and enjoyment of this lot, they were tenants in common and are so still, unless you find that Fanny has taken some of the steps above mentioned against Frances and followed it up with adverse possession for seven years under color of title or twenty years without it. 4. The next of kin to Thomas Gardner, as the words are used in the deed of 1854, mean his nearest blood relations after his own child Frances. A man's nearest blood relations after his own children are his grandchildren. Thomas Gardner's grandchildren are parties respondent to this bill. If Fanny and Frances are tenants in common for life in this land, these grandchildren, should they outlive them, would be entitled to the land, share and share alike. Fanny claims that she has a fee-simple interest in a part of this land, by possession thereof for twenty years, and consequently there is no remainder in this part for the next of kin. You cannot find that Fanny has a fee-simple interest in any part of this land by adverse possession for twenty years unless you find that she has been in such possession of such part for the full period of twenty years from the time that free persons of color became vested in this State with the same property rights as white persons. 5. If you find that a good prescriptive title has arisen under this trust deed, the effect is that Fanny and Frances will each be entitled for life to the use and enjoyment of one half of the property, and at their death it goes to the next of kin of Thomas Gardner. If you find that Fanny has a fee-simple interest in that part of the lot whereon she now resides, the next of kin of Thomas have no rights whatever therein. Fanny may dispose of it while living, as she pleases, and if she dies intestate it would go to her next of kin. 6. If you find, from the evidence, that the complainant did not set up any claim to the property in dispute, by having furnished part of the purchase money, until twenty years had expired from the time the purchase was made, I charge you that she is now barred by the Statute of Limitations from setting up title to the property, for that reason."

The jury found the following verdict: "We, [252] the jury, find for the complainant the exclusive right and fee-simple title to that portion of said property now occupied by her." The defendants moved for a new trial, alleging as grounds therefor error on the part of the court in charging the jury as set forth, and in refusing to charge them as requested. The motion for a new trial was overruled, and a judgment was entered to that effect. The defendants excepted to the judgment, and a bill of exceptions was made and certified to the Supreme Court of Georgia, to which the defendants took the case by a writ of error. The plaintiff having died, leaving a will which was duly admitted to probate, her executrix and sole legatee, Georgia Benton, was made a party in her place. The case was heard in the supreme court, and it affirmed the judgment of the Superior Court of Richmond County, in an opinion reported

in 73 Ga. 187, which was as follows: "This is a bill filed by Fanny Gardner against Frances Beatty and children, to settle her title to one half of a lot in Augusta, occupied by her, while Frances occupied the other half. The lot was bought by Thomas Gardner, deceased, in 1854, and one half the purchase money was paid by him, and the other half by complainant, who was his wife. Frances, the defendant, was the daughter, by a former wife, of deceased, and married Beatty afterwards. Up to that time the lot was one, only one house being on it; then it became crowded and was divided, and a house built for Beatty and wife, who occupied it ever since. All the parties were free persons of color before the war. When the purchase was made in 1854, a deed was taken to the property in the name of Robertson, trustee, a white person, to the use of Fanny and Frances for life, and then to the next of kin of Thomas Gardner. If that trust deed was valid when made, the complainant only had a life estate, and having died and left a will since this writ of error was brought, she and her executrix now can take nothing. So that the verdict and decree, being that she shall keep the half set apart to her in the division, and so long in her possession, is wrong, if that trust deed be operative.

"1. Under the decision of this court in *Swoll* v. *Oliver*, 61 Ga. 248, that deed, as the law of Georgia stood in 1854, was void. So, in *Planters Loan & Sav. Bank* v. *Johnson*, 70 Ga. 302 (an Augusta case), the same point is decided emphatically, based on the Act of 1818, Cobb's Digest, p. 993. Therefore the trust deed is out of the way.

"2. When the law freed slaves in Georgia and put free persons of color, as to real property, on the same footing as whites, this lot, as divided, was in possession of these two colored women, a moiety with a house on it, erected by the husband and father, in possession of each. The primary element of title, possession, being thus in each, and the State never having escheated the property whilst the old law stood, this possession is good against the claim of all others, and the verdict and decree giving each her several share is right.

"3. The decree is all the more equitable, because complainant paid one half of the purchase money. Cases of this sort, under the anomalous condition of such property remaining in the possession of a class of persons who could not formerly hold title thereto, should be adjudicated under broad views of natural equity.

"There is nothing in the minor points made by the able and indefatigable counsel for plaintiffs in error which can unsettle the result which the above principles necessitate, we think, as the law of this case. Judgment affirmed." To review such judgment of affirmance the defendants have brought a writ of error.

We are of opinion that this writ must be dismissed, because no federal question is involved. The Supreme Court of Georgia decided that, if the trust deed was valid when made, the plaintiff took under it only a life estate, and that that had ceased by her death; that the deed, however, was void under the Statute of Georgia which existed when the deed was made in 1854; that therefore the trust deed was entirely out of the way; that at the time it became the law of Georgia that free persons of color were put, as to real property, on the same footing as white persons, each of the two women was in possession of a part of the lot, each part having a house upon it; that, as the State had never enforced an escheat of the property, such possession of each of the [2 parties was good against the claim of all other persons; and that therefore the verdict and judgment, which gave to each her several share in fee-simple title to the part of the property which was in her occupation, was right.

We see nothing in these conclusions of the state court which raises any federal question. The construction of the trust deed and the question of its validity under the Statutes of Georgia of 1818 and 1819 were matters for the exclusive decision of the Supreme Court of that State; and the case was decided upon the rights of the parties as they existed by virtue of the acts of Gardner, and of their own acts, during his lifetime, and as they stood at the time of his death in 1865, and thereafter, down to the bringing of this suit in 1879. The rights thus adjudicated existed and were passed upon independently of the Act of Congress referred to, and of the 14th Amendment to the Constitution, and were not, and could not be, affected by any provisions thereof. The case was decided against the plaintiffs in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment. In such a case, even though the state court also decides a federal question against the plaintiffs in error, this court dismisses the writ of error without considering the federal question. *Marrow* v. *Brinkley*, 129 U. S. 178, 181 [32: 654, 655]; *Hale* v. *Akers*, 132 U. S. 554, 565 [33: 442, 447], and cases there cited; *San Francisco* v. *Itsell*, 133 U. S. 65, 66 [33: 570]; *Hopkins* v. *McLure*, 133 U. S. 380, 386 [33: 660, 662].

Writ of error dismissed.

00] GUS. LEISY & COMPANY, *Plff. in Err.*,
v.
A. J. HARDIN.

(See S. C. Reporter's ed. 100-160.)

Right to import and sell beer in a State—power of State—right of transportation—state regulations—power of Congress to regulate commerce—is exclusive—when importation is unrestricted—void state law.

1. A citizen of one State has the right to import beer into another State, and the right to sell it there in its original packages.
2. Up to such sale, the State has no power to interfere, by seizure, or any other action, to prevent the importation and sale by a foreign or nonresident importer.
3. The right of transportation of an article of commerce from one State to another includes the right of the consignee to sell it in unbroken packages at the place where the transportation terminates.
4. It is only after the importation is completed and the property imported is mingled with and becomes a part of the general property of the State by a sale by the importer, that state regulations can act upon it.
5. The power vested in Congress to regulate commerce among the States cannot be stopped at the external boundary of a State, but is capable of authorizing the disposition within the State of the article imported.
6. Commerce between the States has been confided exclusively to Congress by the Constitution and is not within the jurisdiction of the police power of the State, unless placed there by congressional action.
7. The absence of a law by Congress as to any article of commerce is equivalent to its declaration that the importation of that article into the States shall be unrestricted; and it is for the courts to determine what state action is or is not a regulation of such commerce.
8. A law of a State which forbids the receipt of an imported commodity or its sale before it has ceased to be an article of trade between one State and another, is a regulation of commerce between the States, and void.

[No. 1459.]

Submitted Jan. 6, 1890. Decided April 23, 1890.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment of that court reversing the judgment of the Superior Court of Keokuk in Iowa and giving judgment against the plaintiffs and their sureties on their replevin bond for the value of the property, in an action of replevin to recover certain quantities of beer seized. *Reversed.*

Statement by *Mr. Chief Justice* **Fuller:**

Christine Leisy, Edward Leisy, Lena and Albert Leisy, composing the firm of Gus. Leisy & Company, citizens of Illinois, brought their action of replevin against A. J. Hardin, the duly elected and qualified marshal of the City of Keokuk, Iowa, and *ex officio* constable of Jackson Township, Lee County, Iowa, in the Superior Court of Keokuk, in said county, to recover 122 one-quarter barrels of beer, 171 one-eighth barrels of beer and 11 sealed cases of beer, which had been seized by him in a proceeding on behalf of the State of Iowa against said defendants, under certain provisions of the Code of the State of Iowa; and upon issue joined, a jury having been duly waived by the parties, the case was submitted to the court for trial, and having been tried, the court, after having taken the case under advisement, finally "rendered and filed in said cause its findings of fact and conclusions of law in words and figures following, to wit:

"1st. That plaintiffs, Gus. Leisy & Co., are a firm of that name and style, residing in the State of Illinois, with principal place of business at Peoria, Illinois; that said firm is composed wholly of citizens of Illinois; that said firm is engaged as brewers in the manufacture of beer [10 in the said City of Peoria, Illinois, selling same in the States of Illinois and Iowa.

"2d. That the property in question, to wit, 122 one-quarter barrels of beer, of the value of $300, 171 one-eighth barrels of beer, value $215, and 11 sealed cases of beer, value $25, was all manufactured by said Leisy & Co. in the City of Peoria, Illinois, and put up in said kegs and cases by the manufacturers, viz., Gus. Leisy & Co., at Peoria, Illinois; that each of said kegs was sealed and had placed upon it, over the plug in the opening of each keg, a United States internal revenue stamp of the district in which Peoria is situated; that said cases were substantially made of wood, each one of them containing 24 quart bottles of beer, each bottle of beer corked and the cork fastened in with a metallic cap, sealed and covered with tin-foil, and each case was sealed with a metallic seal; that said beer in all of said kegs and cases was manufactured and put up into said kegs and cases as aforesaid by the manufacturers, to wit, Gus. Leisy & Co., plaintiffs in this suit, and to open said cases the metallic seals had to be broken.

"3d. That the property herein described was transported by said Gus. Leisy & Co. from Peoria, Illinois, by means of railways to Keokuk, Iowa, in said sealed kegs and cases, as same was manufactured and put up by them in the City of Peoria, Illinois.

"4th. That said property was sold and offered for sale in Keokuk, Iowa, by John Leisy, a resident of Keokuk, Iowa, who is agent for said Gus. Leisy & Co.; that the only sales and offers to sell of said beer was in the original keg and sealed case as manufactured and put up by said Gus. Leisy & Co. and imported by them into the State of Iowa; that no kegs or cases sold or offered for sale were broken or opened on the premises; that as soon as same was purchased it was removed from the premises occupied by Gus. Leisy & Co., which said premises are owned by Christiana Leisy, a member of the firm of Gus. Leisy & Co., residing in and being a citizen of Peoria, Illinois; that none of such sales or offers to sell were made to minors or persons in the habit of becoming intoxicated.

"5th. That on the 30th day of June, 1888, the defendant, as constable of Jackson Township, [10 Lee County, Iowa, by virtue of a search-warrant issued by J. G. Garrettson, an acting justice of the peace of said Jackson Township, upon an information filed charging that in premises occupied by said John Leisy there were

certain intoxicating liquors, etc., seized the property therein described and took same into his custody.

"6th. And the court finds that said intoxicating liquors thus seized by the defendant in his official capacity as constable were kept for sale in the premises described in the search warrant in Keokuk, Lee County, Iowa, and occupied by Gus. Leisy & Co., for the purpose of being sold, in violation of the provisions of the laws of Iowa, but which laws, the court holds, are unconstitutional and void, as herein stated.

"7th. That on the 2d day of July, 1888, plaintiffs filed in this court their petition, alleging, among other things, that they were the owners and entitled to the possession of said property, and that the law under which said warrant was issued was unconstitutional and void, being in violation of section 8 of article I. of the Constitution of the United States, and, having filed a proper bond, a writ of replevin issued and the possession of said property was given to plaintiffs.

"From the foregoing facts the court finds the following conclusions:

"That plaintiffs are the sole and unqualified owners of said property and entitled to the possession of same and judgment for $1 damages for their detention and costs of suit; that so much of chapter 6, title XI., of the Code of 1873, and the amendments thereto, as prohibits such sales by plaintiffs as were made by plaintiffs, is unconstitutional, being in contravention of section 8 of article I. of the Constitution of the United States; that said law has been held unconstitutional in a like case heretofore tried and determined by this court, involving the same question, in the case of *Collins* v. *Hills*, decided prior to the commencement of this suit and prior to the seizure of said property by defendant; to all of which the defendant at the time excepted."

Judgment was thereupon rendered as follows:

"This cause coming on for hearing, plaintiffs [103] appearing by Anderson & Davis, their attorneys, and the defendant by H. Scott Howell & Son and Wm. B. Collins, his attorneys, and the cause coming on for final hearing on the pleadings on file and the evidence introduced, the court makes the special finding of facts and law herewith ordered to be made of record and finds that plaintiffs are the sole and unqualified owners and entitled to possession of the following described personal property, to wit: 122 one-quarter (¼) barrels of beer, of the value of $300; 171 one-eighth (⅛) barrels of beer of the value of $215 and eleven (11) sealed cases of beer of the value of $25.

"That, plaintiffs being in possession of said property by virtue of a bond heretofore given, said possession in plaintiffs is confirmed. The court further finds that the writ issued by J. G. Garrettson, a justice of the peace, under which defendant held possession of said property and seized same, is void, same having been issued under sections of the law of Iowa that are unconstitutional and void.

"That plaintiff is entitled to one dollar damages for the wrongful detention of said property.

"It is therefore ordered and considered by the court that the plaintiffs have and recover of defendant the sum of one dollar damages, and costs of this action, taxed at $—.

"To which findings, order and judgment of court the defendant at the time excepts and asks until the 31st day of October, 1888, to prepare and file his bill of exceptions, which request is granted and order hereby made."

A motion for new trial was made and overruled, and the cause taken to the Supreme Court of Iowa by appeal, and errors therein assigned as follows:

"I. The court erred in finding that the plaintiffs were the sole and unqualified owners and were entitled to the possession of the intoxicating liquors seized and held by appellant.

"II. In finding that the plaintiffs were entitled to one dollar damages for their detention, and for costs of suit.

"III. The court erred in holding that the sales of beer in 'original packages,' by the keg and case, as made by John Leisy, agent of plaintiffs, were lawful.

"IV. The court erred in its conclusions and finding that so much of the law of the State of [1 Iowa embraced in chapter 6, title XI., Code of 1873, and the amendments thereto, as prohibits such sales of beer in the State of Iowa, was unconstitutional, being in contravention of section 8, article I., of the Constitution of the United States.

"V. The court erred in rendering a judgment for plaintiffs and awarding them the intoxicating liquors in question and damages and costs against defendant.

"VI. The court erred in overruling the defendant's motion for a new trial."

The supreme court reversed the judgment of the superior court and entered judgment against the plaintiffs and their sureties on the replevin bond in the amount of the value of the property, with costs. The judgment thus concluded: "And it is further certified by this court, and hereby made a part of the record, that in the decision of this suit there is drawn in question the validity of certain Statutes of the State of Iowa, namely, chap. 6 of title XI. of the Code of Iowa of 1873 and the amendments thereto, on the ground of their being repugnant to and in contravention of section 8 of article I. of the Constitution of the United States, said appellees, Gus. Leisy & Co., claiming such Statutes of the State of Iowa are invalid, and the decision in this cause is in favor of the validity of said Statutes of the State of Iowa."

To review this judgment, a writ of error was sued out from this court.

The opinion of the supreme court, not yet reported in the official series, will be found in 43 N. W. Rep. 188.

The seizure of the beer in question by the constable was made under the provisions of chapter 6, title XI., of the Code of 1873 and amendments thereto. (Code 1873, p. 279; Laws 1884, chap. 8, p. 8, chap. 143, p. 146; Laws 1888, chap. 71, p. 91; 1 McClain's Ann. Code, §§ 2359-2431, p. 603.)

Section 1523 of the Code is as follows:

"No person shall manufacture or sell, by himself, his clerk, steward or agent, directly or

indirectly, any intoxicating liquors except as hereinafter provided. And the keeping of intoxicating liquor, with the intent on the part
05] of the owner thereof, or any person acting under his authority, or by his permission, to sell the same within this State contrary to the provisions of this chapter, is hereby prohibited, and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided."

Chapter 71 of the Laws of the 22d General Assembly is an Act approved April 12, 1888 (Laws Iowa 1888, p. 91), of which the first section is as follows:

"That after this Act takes effect no person shall manufacture for sale, sell, keep for sale, give away, exchange, barter or dispense any intoxicating liquor, for any purpose whatever, otherwise than as provided in this Act.

"Persons holding permits as herein provided shall be authorized to sell and dispense intoxicating liquors for pharmaceutical and medicinal purposes and alcohol for specified chemical purposes, and wine for sacramental purposes, but for no other purposes whatever; and all permits must be procured as hereinafter provided from the district court of the proper county at any term thereof after this Act takes effect, and a permit to buy and sell intoxicating liquors when so procured shall continue in force for one year from date of its issue unless revoked according to law or until application for renewal is disposed of, if such application is made before the year expires.

"Provided, that renewals of permits may be annually granted upon written application by permit holders who show to the satisfaction of the court or judge that they have during the preceding year complied with the provisions of this Act, and execute a new bond as in this Act required to be originally given; but parties may appear and resist renewals the same as in applications for permits."

Section 2 provides for notice of application for permit, and section 3 reads thus:

"Applications for permits shall be made by petition signed and sworn to by the applicant and filed in the office of the clerk of the district court of the proper county at least ten days before the first day of the term, which petition shall state the applicant's name; place of residence; in what business he is then engaged, and in what business he has been
06] engaged for two years previous to filing petition; the place, particularly describing it, where the business of buying and selling liquor is to be conducted; that he is a citizen of the United States and of the State of Iowa; that he is a registered pharmacist and now is, and for the last six months has been, lawfully conducting a pharmacy in the township or town wherein he proposes to sell intoxicating liquors under the permit applied for, and, as the proprietor of such pharmacy, that he has not been adjudged guilty of violating the law relating to intoxicating liquors within the last two years next preceding his application; and is not the keeper of a hotel, eating-house, saloon, restaurant or place of public amusement; that he is not addicted to the use of intoxicating liquors as a beverage, and has not, within the last two years next preceding his application, been directly or indirectly engaged, employed or interested in the unlawful manufacture, sale or keeping for sale of intoxicating liquors; and that he desires a permit to purchase, keep and sell such liquors for lawful purposes only."

Various sections follow, relating to giving bond; petition as to the good moral character of applicant; hearing on the application; oath upon the issuing of permit; keeping of record; punishment by fine, imprisonment, etc., etc.

By section 20, sections 1524, 1526 and other sections of the Code were in terms repealed.

The Code provided for the seizure of intoxicating liquors unlawfully offered for sale, and no question in reference to that arises here, if the law in controversy be valid.

By section 1 of chapter 8 of the Laws of 1884, p. 8, ale, beer, wine, spirituous, vinous and malt liquors are defined to be intoxicating liquors.

Section 1524 of the Code of 1873, p. 279, was as follows:

"Nothing in this chapter shall be construed to forbid the sale, by the importer thereof, of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance with such laws: *Provided*, That the said liquor, at the time of said sale by said importer, remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the [107
laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only; and nothing contained in this law shall prevent any persons from manufacturing in this State liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary or sacramental purposes."

This section is substantially identical with section 2 of chapter 45 of the Acts of the Fifth General Assembly of Iowa, approved January 22, 1855 (Laws Iowa, 1855, p. 58); and it was carried into the Revision of 1860 as section 1560 (Revision 1860, chap. 64, p. 259). It was repealed by section 20 of the Act of April 12, 1888, as before stated.

Section 1553 of the Code as amended by the Act of April 5, 1886 (Laws Iowa 1886, p. 83), forbade any common carrier to bring within the State of Iowa, for any person or persons, or corporation, any intoxicating liquors from any other State or Territory of the United States, without first having been furnished with a certificate, under the seal of the county auditor of the county to which said liquor was to be transported, or was consigned for transportation, certifying that the consignee, or person to whom such liquor was to be transported, conveyed or delivered, was authorized to sell intoxicating liquors in such county. This was held to be in contravention of the Federal Constitution, in *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 465 [31:700].

Mr. **James C. Davis**, for plaintiff in error:

The power to regulate commerce among the

several States rests wholly with Congress to the exclusion of state authority.

Welton v. *Missouri*, 91 U. S. 279 (23: 349); *Tiernan* v. *Rinker*, 102 U. S. 127 (26: 104); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 469 (24: 529); *Mobile County* v. *Kimball*, 102 U. S. 697 (26: 239); *Brown* v. *Houston*, 114 U. S. 631 (29: 260); *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 573 (30: 249); *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 492 (30: 695); *Leloup* v. *Mobile*, 127 U. S. 640 (32: 311); *Webber* v. *Virginia*, 103 U. S. 344 (26: 565); *Asher* v. *Texas*, 128 U. S. 129 (32: 368); *Stoutenburgh* v. *Hennick*, 129 U. S. 141 (32: 637).

The Supreme Court of Iowa has recognized the same principle.

Marshalltown v. *Blum*, 58 Iowa, 184; *Pacific Junction* v. *Dyer*, 64 Iowa, 38.

The limits and extent of the police power have been established by the Supreme Court of the United States.

Henderson v. *New York City*, 92 U. S. 271 (23: 548); *New York* v. *Compagnie Générale Transatlantique*, 107 U. S. 60 (27: 384); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 468 (24: 529); *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700).

Beer is an article of commerce, and the provision of the Iowa Law, prohibiting its importation into the State, is unconstitutional and void.

Bowman v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700).

Commerce among the States must of necessity be commerce within the States. The power of Congress is to be exercised within the territorial jurisdiction of the several States.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 7, 9 (6: 24, 25); *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 447 (6: 688); *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 132 (19: 384).

The negotiation of sale of goods, which are in another State, for the purpose of introducing them into the State in which the sale is made, is interstate commerce.

Robbins v. *Shelby County Taxing Dist.* 120 U. S. 497 (30: 697).

There is no analogy between the power of taxation and the power of regulating commerce.

Hinson v. *Lott*, 75 U. S. 8 Wall. 150 (19: 388); *Leloup* v. *Mobile*, 127 U. S. 640 (32: 311).

The purpose and effect of the Iowa Statutes is to prohibit all foreign and interstate commerce in liquors.

Swift v. *Sutphin*, 39 Fed. Rep. 630; *Re Christian*, 39 Fed. Rep. 636; *Re Barber*, 39 Fed. Rep. 641.

Messrs. **W. B. Collins, John Y. Stone** and **H. Scott Howell,** for defendant in error:

The Statutes of Iowa which are claimed to be unconstitutional have been declared to be constitutional by the Supreme Court of Iowa in many cases.

Collins v. *Hills*, 3 L. R. A. 110, 77 Iowa, 181; *Grousendorf* v. *Howat*, 77 Iowa, 187; *Drake* v. *Kaiser*, 73 Iowa, 703; *Dickinson* v. *Heeb Brewing Co.* 73 Iowa, 705; *Pearson* v. *International Distillery*, 72 Iowa, 348; *Martin* v. *Blattner*, 68 Iowa, 295; *State* v. *Stucker*, 58 Iowa, 498; *Santo* v. *State*, 2 Iowa, 165.

Every possible presumption is in favor of the validity of a statute.

Sinking Fund Cases, 99 U. S. 718 (25: 501).

It cannot be maintained that every law which tends to diminish the consumption of any article is unconstitutional.

License Cases, 46 U. S. 5 How. 621 (12: 309).

Rights are held subject to the police power of the State.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 32, 33 (24: 991, 992); *Patterson* v. *Kentucky*, 97 U. S. 501 (24: 1115); *Mugler* v. *Kansas*, 123 U. S. 623 (31: 205); *Stone* v. *Mississippi*, 101 U. S. 814 (25: 1079); *Butchers Union S. H. & L. L. Co.* v. *Crescent City L. L. & S. H. Co.* 111 U. S. 746 (28: 585); *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (24: 1036); *Powell* v. *Pennsylvania*, 127 U. S. 679 (32: 254); *Slaughter House Cases*, 83 U. S. 16 Wall. 36, 62 (21: 394, 404).

The police power cannot be surrendered to the general government by the States.

Cooley, Const. Lim. 282, 283.

The Statute of Iowa was a proper exercise of the police power of the State.

Bowman v. *Chicago & N. W. R. Co.* 125 U. S. 474-476 (31: 703).

Statutes of other States, having the same purpose, have been held to be constitutional.

Pierce v. *State*, 13 N. H. 576; *Metropolitan Excise Board* v. *Barrie*, 34 N. Y. 666; *Bode* v. *State*, 7 Gill, 326; *Bancroft* v. *Dumas*, 21 Vt. 456; *Thomasson* v. *State*, 15 Ind. 449; *Jones* v. *People*, 14 Ill. 196; *Mette* v. *McGuckin*, 18 Neb. 323; *License Cases*, 46 U. S. 5 How. 504 (12: 256); *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923); *Foster* v. *Kansas*, 112 U. S. 206 (28: 629); *Kidd* v. *Pearson*, 128 U. S. 1 (32: 346); *Powell* v. *Pennsylvania*, 127 U. S. 685 (32: 257).

The regulation of the liquor traffic is a proper subject for the exercise of the police power of the State.

Collins v. *Hills*, 3 L. R. A. 110, 77 Iowa, 181.

As against this universally asserted right of state control of the liquor traffic, by state legislation, Congress has never enacted a law denying it. As to the effect of non-action of Congress, the cases in this court have not been uniform.

The cases of *Willson* v. *Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 (7: 412); *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); *Gillman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18: 96); *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678 (27: 442); *Parkersburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 701 (27: 588); *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 178 (24: 98); *Munn* v. *Illinois*, 94 U. S. 135 (24: 87); *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 466 (30: 242),—hold that Congress, not having legislated upon the subject, has left the States free to do so.

Bowman v. *Chicago & N. W. R. Co.* 125 U. S. 482, 483 (31: 706).

No class of legislation falls more clearly under the police power of the State than does the liquor traffic.

Kohn v. *Melcher*, 29 Fed. Rep. 435; *Sherlock* v. *Alling*, 93 U. S. 103 (23: 820); *Nathan* v.

inclusive), including the transportation of nitro glycerine and other similar explosive substances, with the proviso that, as to them, "any State, Territory, district, city or town within the United States" should not be prevented by the language used "from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use or consumption therein," is referred to as indicative of the intention of Congress that the transportation of commodities between the States shall be free, except where it is positively restricted by Congress itself, or by States in particular cases by the express permission of Congress. It is said that the law in question was not an inspection law, the object of which "is to improve the quality of articles produced by the labor of a country, to fit them for exportation, or, it may be, for domestic use (*Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 203 [6: 23, 71]; *Turner* v. *Maryland*, 107 U. S. 38, 55 [27: 370, 376]); nor could it be regarded as a regulation of quarantine or a sanitary provision for the purpose of protecting the physical health of the community; nor a law to prevent the introduction into the State of diseases, contagious, infectious or otherwise. Articles in such a condition as tend to spread disease are not merchantable, are not legitimate subjects of trade and commerce, and the self-protecting power of each State therefore may be rightfully exerted against their introduction, and such exercise of power cannot be considered a regulation of commerce, prohibited by the Constitution; and the observations of *Mr. Justice* Catron, in *The License Cases*, 46 U. S. 5 How. 504, 599 [12: 256, 299], are quoted to the effect that what does not belong to commerce is within the jurisdiction of the police power of the State, but that which does belong to commerce is within the jurisdiction of the United States; that to extend the police power over subjects of commerce would be to make commerce subordinate to that power, and would enable the State to bring within the police [114] power "any article of consumption that a State might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the products of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." And *Mr. Justice* Matthews thus proceeds: "For the purpose of protecting its people against the evils of intemperance it has the right to prohibit the manufacture within its limits of intoxicating liquors; it may also prohibit all domestic commerce in them between its own inhabitants, whether the articles are introduced from other States or from foreign countries; it may punish those who sell them in violation of its laws; it may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such a regulation might be. . . . Can it be supposed that by omitting any express declaration on the subject, Congress has intended to submit to the several States the decision of the question in each locality of what shall and what shall not be articles of traffic in the interstate commerce of the country? If so, it has left to each State, according to its own caprice and arbitrary will, to discriminate for or against every article grown, produced, manufactured or sold in any State and sought to be introduced as an article of commerce into any other. If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent [115] the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the State would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several States of the Union, it cannot be supposed that the Constitution or Congress have intended to limit the freedom of commercial intercourse among the people of the several States."

Many of the cases bearing upon the subject are cited and considered in these opinions, and among others *The License Cases*, 46 U. S. 5 How. 504 [12: 256], wherein laws passed by Massachusetts, New Hampshire and Rhode Island, in reference to the sale of spirituous liquors, came under review and were sustained, although the members of the court who participated in the decisions did not concur in any common ground upon which to rest them. That of *Peirce* v. *New Hampshire* is perhaps the most important to be referred to here. In that case the defendants had been fined for selling a barrel of gin in New Hampshire which they had bought in Boston and brought coastwise to Portsmouth, and there sold in the same barrel and in the same condition in which it was purchased in Massachusetts, but contrary to the law of New Hampshire in that behalf. The conclusion of the opinion of *Mr. Chief Justice* Taney is in these words: "Upon the whole, therefore, the law of New Hampshire is in my judgment a valid one. For, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the

policy which the State may suppose to be its interest or duty to pursue."

Referring to the cases of Massachusetts and [116] Rhode Island, the chief justice, after saying that if the laws of those States came in collision with the laws of Congress authorizing the importation of spirits and distilled liquors, it would be the duty of the court to declare them void, thus continues: "It has, indeed, been suggested, that, if a State deems the traffic in ardent spirits to be injurious to its citizens, and calculated to introduce immorality, vice and pauperism into the State, it may constitutionally refuse to permit its importation, notwithstanding the laws of Congress; and that a State may do this upon the same principles that it may resist and prevent the introduction of disease, pestilence or pauperism from abroad. But it must be remembered that disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, as far as human foresight or human means can guard against them. But spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic like any other commodity in which a right of property exists. And Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded; and may therefore admit, or not, as it shall deem best, the importation of ardent spirits. And inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction. . . . These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the State. These laws may, indeed, discourage imports, and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, [117] or diminish the profits of the importer, or lessen the revenue of the general government And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper."

The New Hampshire case, the chief justice observed, differs from *Brown* v. *Maryland* in that the latter was a case arising out of commerce with foreign nations, which Congress had regulated by law; whereas the case in hand was one of commerce between two States, in relation to which Congress had not exercised its power. "But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation. The question, therefore, brought up for decision is, whether a State is prohibited by the Constitution of the United States from making any regulations of foreign commerce, or of commerce with another State, although such regulation is confined to its own territory, and made for its own convenience or interest, and does not come in conflict with any law of Congress. In other words, whether the grant of power to Congress is of itself a prohibition to the States, and renders all state laws upon the subject null and void." He declares it to appear to him very clear "that the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress." [1 He comments on the omission of any prohibition in terms, and concludes that if, as he thinks, "the framers of the Constitution (knowing that a multitude of minor regulations must be necessary, which Congress amid its great concerns could never find time to consider and provide) intended merely to make the power of the federal government supreme upon this subject over that of the States, then the omission of any prohibition is accounted for, and is consistent with the whole instrument. The supremacy of the laws of Congress, in cases of collision with state laws, is secured in the article which declares that the laws of Congress, passed in pursuance of the powers granted, shall be the supreme law; and it is only where both governments may legislate on the same subject that this article can operate." And he considers that the legislation of Congress and the States has conformed to this construction from the foundation of the government, as exemplified in state laws in relation to pilots and pilotage, and health and quarantine laws.

But conceding the weight properly to be ascribed to the judicial utterances of this eminent jurist, we are constrained to say that the distinction between subjects in respect of which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, does not appear to us to have been sufficiently recognized by him in arriving at the conclusions announced. That distinction has been settled by repeated decisions of this court, and can no longer be regarded as open to re-examination. After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the States and the exercise of power over purely local commerce and local concerns.

The authority of *Peirce* v. *New Hampshire*,

in so far as it rests on the view that the law of New Hampshire was valid because Congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by the numerous cases hereinafter referred to.

119] The doctrine now firmly established is, as stated by *Mr. Justice* Field, in *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 507 [31: 714], "that where the subject upon which Congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the State can act until Congress interferes and supersedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the States shall be unrestricted. It is only after the importation is completed, and the property imported is mingled with and become a part of the general property of the State, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled."

The conclusion follows that, as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. Illustrations exemplifying the general rule are numerous. Thus we have held the following to be regulations of interstate commerce: a tax upon freight transported from State to State (*Case of the State Freight Tax*, 82 U. S. 15 Wall. 232 [21: 146]); a statute 120] imposing a burdensome condition on ship-masters as a prerequisite to the landing of passengers (*Henderson* v. *New York City*, 92 U. S. 259 [23: 543]), a statute prohibiting the driving or conveying of any Texas, Mexican or Indian cattle, whether sound or diseased, into the State between the first day of March and the first day of November in each year (*Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527]); a statute requiring every auctioneer to collect and pay into the state treasury a tax on his sales, when applied to imported goods in the original packages by him sold for the importer (*Cook* v. *Pennsylvania*, 97 U. S. 566 [24: 1015]); a statute intended to regulate or tax, or to impose any other restriction upon, the transmission of persons or property, or telegraphic messages, from one State to another (*Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 [30: 244]); a statute levying a tax upon nonresident drummers offering for sale or selling goods, wares or merchandise by sample, manufactured or belonging to citizens of other States. *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489 [30: 694].

On the other hand we have decided, in *Mobile County* v. *Kimball*, 102 U. S. 691 [26: 238], that a state statute providing for the improvement of the river, bay and harbor of Mobile, since what was authorized to be done was only as a mere aid to commerce, was, in the absence of action by Congress, not in conflict with the Constitution; in *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678 [27: 442], that the State of Illinois could lawfully authorize the City of Chicago to deepen, widen and change the channel of, and construct bridges over, the Chicago River; in *Parkersburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 691 [27: 584], that the jurisdiction and control of wharves properly belong to the States in which they are situated unless otherwise provided; in *Brown* v. *Houston*, 114 U. S. 622 [29: 257], that a general state tax laid alike upon all property is not unconstitutional, because it happens to fall upon goods, which, though not then intended for exportation, are subsequently exported; in *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 455 [30: 237], that a state law requiring each vessel passing a quarantine station to pay a fee for examination as to her sanitary condition and the ports from which she came, was a rightful exercise of police power; in *Smith* v. *Alabama*, 124 U. S. 465 [31: 508], and in *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96 [32: 352], that a state statute requiring locomotive engineers to be examined and obtain a license was not in its nature a regulation of commerce; and in *Kimmish* v. *Ball*, 129 U. S. 217 [32: 695], that a statute providing that a person having in his possession Texas cattle, which had not been wintered north of the southern boundary of Missouri at least one winter, shall be liable for any damages which may accrue from allowing them to run at large, and thereby spread the disease known as the Texas fever, was constitutional.

We held, also, in *Welton* v. *Missouri*, 91 U. S. 275 [23: 347], that a state statute requiring the payment of a license tax from persons dealing in goods, wares and merchandise, which are not the growth, produce or manufacture of the State, by going from place to place to sell the same in the State, and requiring no such license tax from persons selling in a similar way goods which are the growth, produce or manufacture of the State, is an unconstitutional regulation; and to the same effect in *Walling* v. *Michigan*, 116 U. S. 446 [29: 691], in relation to a tax upon nonresident sellers of intoxicating liquors to be shipped into a State from places without it. But it was held in *Patterson* v. *Kentucky*, 97 U. S. 501 [24: 1115], and in *Webber* v. *Virginia*, 103 U. S. 344 [26: 565], that the right conferred by the Patent Laws of the United States did not remove the tangible property in which an invention might take form from the operation of the laws of the State, nor restrict the power of the latter to protect the commu-

nity from direct danger inherent in particular articles.

In *Mugler* v. *Kansas*, 123 U. S. 623 [31: 205], it was adjudged that "state legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States, or by the amendments thereto." And this was in accordance with our decisions in *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 [21: 929]; *Boston Beer Co.* v. *Massachusetts*, 97 U. [22] S. 25 [24: 989], and *Foster* v. *Kansas*, 112 U. S. 201 [28: 629]. So in *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346], it was held that a state statute which provided (1) that foreign intoxicating liquors may be imported into the State, and there kept for sale by the importer, in the original packages, or for transportation in such packages and sale beyond the limits of the State; and (2) that intoxicating liquors may be manufactured and sold within the State for mechanical, medicinal, culinary and sacramental purposes, but for no other, not even for the purpose of transportation beyond the limits of the State, was not an undertaking to regulate commerce among the States. And in *Eilenbecker* v. *District Court of Plymouth County*, 134 U. S. 31 [33: 801], we affirmed the judgment of the Supreme Court of Iowa, sustaining the sentence of the District Court of Plymouth in that State, imposing a fine of $500 and costs and imprisonment in jail for three months, if the fine was not paid within thirty days, as a punishment for contempt in refusing to obey a writ of injunction issued by that court, enjoining and restraining the defendant from selling or keeping for sale any intoxicating liquors, including ale, wine and beer, in Plymouth County. *Mr. Justice* Miller there remarked: "If the objection to the statute is that it authorizes a proceeding in the nature of a suit in equity to suppress the manufacture and sale of intoxicating liquors which are by law prohibited, and to abate the nuisance which the statute declares such acts to be, wherever carried on, we respond that, so far as at present advised, it appears to us that all the powers of a court, whether at common law or in chancery, may be called into operation by a legislative body for the purpose of suppressing this objectionable traffic; and we know of no hindrance in the Constitution of the United States to the form of proceedings, or to the court in which this remedy shall be had. Certainly it seems to us to be quite as wise to use the processes of the law and the powers of a court to prevent the evil, as to punish the offense as a crime after it has been committed."

These decisions rest upon the undoubted right of the States of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the [23] national government; but whenever the law of the State amounts essentially to a regulation of commerce with foreign nations or among the States, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity or its disposition before it has ceased to become an article of trade between one State and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void.

In *Mugler* v. *Kansas*, *supra*, the court said that it could not "shut out of view the fact, within the knowledge of all, that the public health, the public morals and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism and crime existing in the country are, in some degree at least, traceable to this evil." And that "if in the judgment of the Legislature [of a State] the manufacture of intoxicating liquors for the maker's own use, as a beverage, would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. . . . Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use, as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage." Undoubtedly it is for the legislative branch of the state governments to determine whether the manufacture of particular articles of traffic, or the sale of such articles, will injuriously affect the public, and it is not for Congress to determine what measures a State may properly adopt as appropriate or needful for the protection of the public morals, the public health or the public safety; but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon Congress, so far as the regulation of interstate [12 commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action.

Prior to 1888 the statutes of Iowa permitted the sale of foreign liquors imported under the laws of the United States, provided the sale was by the importer in the original casks or packages, and in quantities not less than those in which they were required to be imported; and the provisions of the statute to this effect were declared by the Supreme Court of Iowa, in *Pearson* v. *International Distillery*, 72 Iowa, 354, to be "intended to conform the statute to the doctrine of the United States Supreme Court, announced in *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 678], and *License Cases*, 46 U. S. 5 How. 504 [12: 256], so that the statute should not conflict with the laws and authority of the United States." But that provision of the statute was repealed in 1888, and the law so far amended that we understand it now to provide that, whether imported or not, wine cannot be sold in Iowa except for sacramental purposes, nor alcohol except for specified chemical purposes, nor intoxicating liquors, including ale and beer, except for pharmaceutical and medicinal purposes, and not at all except by citizens of the State of Iowa, who are

registered pharmacists and have permits obtained as prescribed by the Statute, a permit being also grantable to one discreet person in any township where a pharmacist does not obtain it.

The plaintiffs in error are citizens of Illinois, are not pharmacists, and have no permit, but import into Iowa beer which they sell in original packages, as described. Under our decision in *Bowman* v. *Chicago & N. W. R. Co., supra*, they had the right to import this beer into that State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that, in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation
25] and sale by the foreign nonresident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the State Legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create. Undoubtedly there is difficulty in drawing the line between the municipal powers of the one government and the commercial powers of the other, but when that line is determined, in the particular instance, accommodation to it, without serious inconvenience, may readily be found, to use the language of *Mr. Justice* Johnson in *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 238 [6: 23, 80], in "a frank and candid co-operation for the general good."

The legislation in question is to the extent indicated repugnant to the third clause of section 8 of Art. I. of the Constitution of the United States, and therefore *the judgment of the Supreme Court of Iowa is reversed and the cause remanded for further proceedings not inconsistent with this opinion.*

Mr. Justice **Gray**, with whom concurred *Mr. Justice* **Harlan** and *Mr. Justice* **Brewer**, dissenting:

Mr. Justice Harlan, *Mr. Justice* Brewer and myself are unable to concur in this judgment.
26] As our dissent is based on the previous decisions of this court, the respect due to our associates, as well as to our predecessors, induces us to state our position, as far as possible, in the words in which the law has been heretofore declared from this bench.

The facts of the case, and the substance of the Statutes whose validity is drawn in question, may be briefly stated.

It was an action of replevin of sundry kegs and cases of beer, begun in an inferior court of the State of Iowa against a constable of Lee County in Iowa, who had seized them at Keokuk in that county under a search warrant issued by a justice of the peace pursuant to the Statutes of Iowa, which prohibit the sale, the keeping for sale or the manufacture for sale of any intoxicating liquor (including malt liquor) for any purpose whatever, except for pharmaceutical, medicinal, chemical or sacramental purposes, and under an annual license granted by the district court of the proper county, upon being satisfied that the applicant is a citizen of the United States and of the State of Iowa, and a resident of the county, and otherwise qualified.

The plaintiffs were citizens and residents of the State of Illinois, engaged as brewers in manufacturing beer at Peoria in that State, and in selling it in the States of Illinois and Iowa. The beer in question was manufactured by them at Peoria, and there put up by them in said kegs and cases; each keg being sealed, and having upon it, over the plug at the opening, a United States internal revenue stamp; and each case being substantially made of wood, containing two dozen quart bottles of beer, and sealed with a metalic seal which had to be broken in order to open the case. The kegs and cases owned by the plaintiffs, and so sealed, were transported by them from Peoria by railway to Keokuk, and there sold and offered for sale by their agent, in a building owned by one of them, and without breaking or opening the kegs or cases.

The Supreme Court of Iowa having given judgment for the defendant, the question presented by this writ of error is whether the Statutes of Iowa, as applied to these facts, contravene section 8 of article 1, or section 2 of article 4, of the Constitution of the United States, or section 1 of article 14 of the Amendments to the Constitution.

By section 8 of article 1 of the Constitution, "the Congress shall have power," among other things, "to regulate commerce with foreign nations, and among the several States," and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

By section 2 of article 4, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

By section 1 of the Fourteenth Amendment, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

By the Tenth Amendment, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Among the powers thus reserved to the several States is what is commonly called the police power—that inherent and necessary

power, essential to the very existence of civil society, and the safeguard of the inhabitants of the State against disorder, disease, poverty and crime.

"The police power belonging to the States in virtue of their general sovereignty," said *Mr. Justice* Story, delivering the judgment of this court, "extends over all subjects within the territorial limits of the States, and has never been conceded to the United States. *Prigg* v. *Pennsylvania*, 41 U. S. 16 Pet. 539, 625 [10: 1060, 1093]. This is well illustrated by the recent adjudications that a statute prohibiting the sale of illuminating oils below a certain fire-test is beyond the constitutional power of Congress to enact, except so far as it has effect within the United States (as, for instance, in the District of Columbia) and without the limits of any State; but that it is within the constitutional power of a State to pass such a statute, even as to oils manufactured under letters-patent from the United States. *United States* v. *Dewitt*, 76 U. S. 9 Wall. 41 [19: 593]; *Patterson* v. *Kentucky*, 97 U. S. 501 [24: 1115].

128] The police power includes all measures for the protection of the life, the health, the property and the welfare of the inhabitants, and for the promotion of good order and the public morals. It covers the suppression of nuisances, whether injurious to the public health, like unwholesome trades, or to the public morals, like gambling houses and lottery tickets. *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 62, 87 [21: 394, 404, 412]; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 [24: 1036]; *Phalen* v. *Virginia*, 49 U. S. 8 How. 163, 168 [12: 1030, 1032]; *Stone* v. *Mississippi*, 101 U. S. 814 [25: 1079].

This power, being essential to the maintenance of the authority of local government, and to the safety and welfare of the people, is inalienable. As was said by *Chief Justice* Waite, referring to earlier decisions to the same effect, "No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot devest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." *Stone* v. *Mississippi*, 101 U. S. 814, 819 [25: 1079, 1080]. See also *Butchers Union S. H. & L. L. Co.* v. *Crescent City L. L. & S. H. Co.* 111 U. S. 746, 753 [28: 585, 587]; *New Orleans Gaslight Co.* v. *Louisiana Light & Heat Co.* 115 U. S. 650, 672 [29: 516, 524]; *New Orleans* v. *Houston*, 119 U. S. 265, 275 [30: 411, 414].

The police power extends not only to things intrinsically dangerous to the public health, such as infected rags or diseased meat, but to things which, when used in a lawful manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the life, the health or the morals of the people. Gunpowder, for instance, is a subject of commerce, and of lawful use, yet, because of its explosive and dangerous quality, all admit that the State may regulate its keeping and sale. And there is no article, the right of the State to control or to prohibit the sale or manufacture of which within its limits is better established, than intoxicating liquors. *License* [12
Cases, 46 U. S. 5 How. 504 [12: 256]; *Downham* v. *Alexandria*, 77 U. S. 10 Wall. 173 [19: 829]; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 [21: 929]; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 [24: 989]; *Tiernan* v. *Rinker*, 102 U. S. 123 [26: 103]; *Foster* v. *Kansas*, 112 U. S. 201 [28: 629]; *Mugler* v. *Kansas* and *Kansas* v. *Ziebold*, 123 U. S. 623 [31: 205]; *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346]; *Eilenbecker* v. *Plymouth County*, 134 U. S. 31 [33: 801].

In *Boston Beer Co.* v. *Massachusetts*, above cited, this court, affirming the judgment of the Supreme Judicial Court of Massachusetts, reported in 115 Mass. 153, held that a statute of the State, prohibiting the manufacture and sale of intoxicating liquors, including malt liquors, except as therein provided, applied to a corporation which the State had long before chartered, and authorized to hold real and personal property, for the purpose of manufacturing malt liquors. Among the reasons assigned by this court for its judgment were the following:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State."

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract, devest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

"Since we have already held, in the case of *Bartemeyer* v. *Iowa*, that, as a measure of police regulation looking to the preservation of pub- [13
lic morals, a state law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States, we see nothing in the present case that can afford any sufficient ground for disturbing the decision of the Supreme Court of Massachusetts." 97 U. S. 32, 33 [24: 991, 992].

In *Mugler* v. *Kansas* and *Kansas* v. *Ziebold*, above cited, a statute of Kansas, prohibiting the manufacture or sale of intoxicating liquors as a beverage, and declaring all places where such liquors were manufactured or sold in violation of the statute to be common nuisances, and prohibiting their future use for the purpose, was held to be a valid exercise of the police power of the State, even as applied to persons who, long before the passage of the

statute, had constructed buildings specially adapted to such manufacture.

It has also been adjudged that neither the grant of a license to sell intoxicating liquors, nor the payment of a tax on such liquors, under the Internal Revenue Laws of the United States; affords any defense to an indictment by a State for selling the same liquors contrary to its statutes. *License Tax Cases*, 72 U. S. 5 Wall. 462 [18: 497]; *Pervear* v. *Massachusetts*, 72 U. S. 5 Wall. 475 [18: 608].

The clause of the Constitution, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," has no bearing upon this case. The privileges and immunities thus secured are those fundamental rights and privileges which appertain to citizenship. *Conner* v. *Elliott*, 59 U. S. 18 How. 591, 593 [15: 497, 498]; Curtis, *J.*, in *Dred Scott* v. *Sandford*, 60 U. S. 19 How. 393, 580 [15: 691, 773]; *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168, 168, 180 [19: 357, 360]; *McCready* v. *Virginia*, 94 U. S. 391, 395 [24: 248, 249]. As observed by the court in *Bartemeyer* v. *Iowa*, "The right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States." 85 U. S. 18 Wall. 133 [21: 930].

Nor is the case affected by the Fourteenth Amendment of the Constitution. As was said in the unanimous opinion of this court in *Barbier* v. *Connolly*, after stating the true scope of that Amendment, "But neither the Amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." 113 U. S. 27, 31 [28: 923, 924].

Upon that ground, the Amendment has been adjudged not to apply to a state statute prohibiting the sale or manufacture of intoxicating liquors in buildings long before constructed for the purpose, or the sale of oleomargarine lawfully manufactured before the passage of the statute. *Mugler* v. *Kansas*, 123 U. S. 623, 663 [31: 205, 211]; *Powell* v. *Pennsylvania*, 127 U. S. 678, 683, 687 [32: 253, 256, 257].

The remaining and the principal question is, whether the Statute of Iowa, as applied to the sale within that State of intoxicating liquors in the same cases or kegs, unbroken and unopened, in which they were brought by the seller from another State, is repugnant to the clause of the Constitution granting to Congress the power to regulate commerce with foreign nations and among the several States.

In the great and leading case of *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1 [6: 23], the point decided was that Acts of the Legislature of New York, granting to certain persons for a term of years the exclusive navigation by steamboats of all waters within the jurisdiction of the State, were, so far as they affected such navigation by vessels of other persons licensed under the laws of the United States, repugnant to the clause of the Constitution empowering Congress to regulate foreign and interstate commerce.

Chief Justice Marshall, in delivering judgment, after speaking of the inspection laws of the States, and observing that they had a remote and considerable influence on commerce, but that the power to pass them was not derived from a power to regulate commerce, said: "They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass. No direct general power over these objects is granted to Congress; and consequently they remain subject to state legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given." pp. 203, 204 [71, 72]. Again, he said that quarantine and health laws "are considered as flowing from the acknowledged power of a State to provide for the health of its citizens," and that the constitutionality of such laws had never been denied. p. 205 [72].

Mr. Justice Johnson, in his concurring opinion, said: "It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions or the same ship that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated are no more intended as regulations on commerce, than the laws which permit their importation are intended to inoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision." p. 235 [79].

That *Chief Justice* Marshall and his associates did not consider the constitutional grant of power to Congress to regulate foreign and interstate commerce as, of its own force, and without national legislation, impairing the police power of each State within its own borders to protect the health and welfare of its inhabitants, is clearly indicated in the passages above quoted from the opinions in *Gibbons* v. *Ogden*, and is conclusively proved by the unanimous judgment of the court delivered by the chief justice five years later in *Willson* v. *Black Bird Creek Marsh Co.*, 27 U. S. 2 Pet. 245 [7: 412].

In that case, the Legislature of Delaware had authorized a dam to be erected across a navigable tide-water creek which opened into Delaware Bay, thereby obstructing the navigation of the creek by a vessel enrolled and licensed under the Navigation Laws of the United States. The decision in *Gibbons* v. *Ogden* was cited by counsel, as conclusive against the validity of the Statute of the State. But its validity was upheld by the court, for the following reasons:

"The Act of Assembly, by which the plaintiffs were authorized to construct their dam, shows plainly that this is one of those many creeks, passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this Act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.

"The counsel for the plaintiffs in error insists that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several States.'

"If Congress had passed any Act which bore upon the case, any Act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a state law coming in conflict with such Act would be void. But Congress has passed no such Act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, a power which has not been so exercised as to affect the question.

"We do not think that the Act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." 27 U. S. 2 Pet. 251, 252 [7: 414].

[134]

In *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 [6: 678], the point decided was that an Act of the Legislature of Maryland, requiring all importers of foreign goods by the bale or package, or of spirituous liquors, and "other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce," to first take out a license and pay fifty dollars for it, and imposing a penalty for failure to do so, was, as applied to sales by an importer of foreign liquors in the original packages, unconstitutional, both as laying an impost, and as repugnant to the power of Congress to regulate foreign commerce.

The Statute there in question was evidently enacted to raise revenue from importers of foreign goods of every description, and was not an exercise of the police power of the State. And *Chief Justice* Marshall, in answering an argument of counsel, expressly admitted that the power to direct the removal of gunpowder, or the removal or destruction of infectious or unsound articles which endanger the public health, "is a branch of the police power, which unquestionably remains, and ought to remain, with the States." pp. 443, 444 [687].

Moreover, the question there presented and decided concerned foreign commerce only, and not commerce among the States. *Chief Justice* Marshall, at the outset of his opinion, so defined it, saying: "The cause depends entirely on the question, whether the Legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State, before he shall be permitted to sell a bale or package so imported." p. 436 [684].

It is true that, after discussing and deciding that question, he threw out this brief remark: "It may be proper to add, that we suppose the principles laid down in this case to apply equally to importations from a sister State." p. 449 [689]. But this remark was *obiter dictum*, wholly aside from the question before the court and having no bearing on its decision, and therefore extrajudicial, as has since been noted by *Chief Justice* Taney and *Mr. Justice* McLean in the *License Cases*, 46 U. S. 5 How. 504, 575, 578, 594 [12: 256, 288, 289, 296], and by *Mr. Justice* Miller in *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123, 139 [19: 382, 387].

To a remark made under such circumstances are peculiarly applicable the warning words of *Chief Justice* Marshall himself in an earlier case, where, having occasion to explain away some dicta of his own in delivering judgment in *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137 [2: 60], he said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles, which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264, 399, 400 [5: 257, 290]. Another striking instance in which that maxim has been applied and acted on is to be found in the opinion of the court at the present term in *Hans* v. *Louisiana*, 134 U. S. 1, 20 [33: 842, 849].

But the unanimous judgment of this court in 1847 in *Peirce* v. *New Hampshire*, reported together with *Thurlow* v. *Massachusetts* and *Fletcher* v. *Rhode Island* as the *License Cases*, 46 U. S. 5 How. 504 [12: 256], is directly in point, and appears to us conclusively to govern the case at bar. Those cases were elaborately argued by eminent counsel, and deliberately considered by the court, and *Chief Justice* Taney, as well as each of six associate justices, stated his reasons for concurring in the judgment.

The cases from Massachusetts and Rhode Island arose under statutes of either State, prohibiting sales of spirituous liquors by any person, in less than certain quantities, without first having obtained an annual license from municipal officers; in the one case, from county commissioners, who by the express terms of the statute were not required to grant any licenses when in their opinion the public good did not

require them to be granted; and in the other
36] case, from a town council, who were forbidden to grant licenses whenever the voters of the town in town meeting decided that none should be granted. Mass. Rev. Stat. 1836, chap. 47, §§ 3, 17, 23-25; Stat. 1837, chap. 42, § 2; R. I. Pub. Laws of 1844, p. 496, § 4; Laws of 1845, p. 72; 46 U. S. 5 How. 506-510, 540 [12: 257, 258, 272]. Those Statutes were held to be constitutional, as applied to foreign liquors which had passed out of the hands of the importer; while it was assumed that, under the decision in *Brown* v. *Maryland*, those Statutes could be allowed no effect as to such liquors while they remained in the hands of the importer in the original packages upon which duties had been paid to the United States. 46 U. S. 5 How. 576, 590, 610, 618 [12: 288, 295, 304, 308].

The case of *Peirce* v. *New Hampshire* directly involved the validity, as applied to liquors brought in from another State, of a statute of New Hampshire, which imposed a penalty on any person selling any wine, rum, gin, brandy or other spirits, in any quantity, "without license from the selectmen of the town or place where such person resides." N. H. Laws of 1838, chap. 369; 46 U. S. 5 How. 555 [12: 279]. The plaintiffs in error, having been indicted under that Statute for selling to one Aaron Sias in the Town of Dover in the State of New Hampshire one barrel of gin without license from the selectmen of the town, at the trial admitted that they so sold to him a barrel of American gin; and introduced evidence that "the barrel of gin was purchased by the defendants in Boston in the Commonwealth of Massachusetts, brought coastwise to the landing at Piscataqua Bridge, and from thence to the defendants' store in Dover, and afterwards sold to Sias in the same barrel and in the same condition in which it was purchased in Massachusetts." The defendants contended that the Statute was unconstitutional, because it was "in violation of certain public treaties of the United States with Holland, France and other countries, containing stipulations for the admission of spirits into the United States," and because it was repugnant to the clauses of the Constitution of the United States restricting the power of the States to lay duties on imports or exports, and granting the power to Congress to regulate commerce with foreign nations and among the several States.
37] *Chief Justice* Parker instructed the jury "that this State could not regulate commerce between this and other States; that this State could not prohibit the introduction of articles from another State with such a view, nor prohibit a sale of them with such a purpose; but that, although the State could not make such laws with such views and for such purposes, she was not entirely forbidden to legislate in relation to articles introduced from foreign countries, or from other States; that she might tax them the same as other property, and might regulate the sale to some extent; that a State might pass health and police laws, which would, to a certain extent, affect foreign commerce, and commerce between the States; and that this Statute was a regulation of that character, and constitutional." After a verdict of guilty, exceptions to this instruction were overruled by the highest court of the State. 46 U. S. 5 How. 554-557 [12: 278-280]; 13 N. H. 536.

In that case, as in the case at bar, the Statute of the State prohibited sales of intoxicating liquors by any person without a license from municipal authorities, and authorized licenses to be granted only to persons residing within the State; and the liquors were sold within the State by the importer, and in the same barrel, keg or case, unbroken and in the same condition, in which he had brought them from another State. Yet the judgment of the highest court of New Hampshire was unanimously affirmed by this court.

Chief Justice Taney, *Mr. Justice* Catron and *Mr. Justice* Nelson were of opinion that the Statute of New Hampshire was a regulation of interstate commerce, but yet valid so long as it was not in conflict with any Act of Congress.

Chief Justice Taney, after recognizing that "spirits and distilled liquors are universally admitted to be subjects of ownership and property, and are therefore subjects of exchange, barter and traffic, like any other commodity in which a right of property exists; and Congress, under its general power to regulate commerce with foreign nations, may prescribe what article of merchandise shall be admitted and what excluded, and may therefore admit, or not, as it shall deem best, the importation of ardent spirits; and inasmuch as the laws of Congress authorize their importation, no State has a right to prohibit their introduction;" and yet [13
upholding the validity of the Statutes of Massachusetts and Rhode Island, as not interfering with the trade in ardent spirits while they remained a part of foreign commerce, and were in the hands of the importer for sale, in the cask or vessel in which the laws of Congress authorized them to be imported (p. 577 [289]), proceeded to state the case from New Hampshire as follows:

"The present case, however, differs from *Brown* v. *Maryland* in this,— that the former was one arising out of commerce with foreign nations, which Congress has regulated by law; whereas the present is a case of commerce between two States in relation to which Congress has not exercised its power. Some Acts of Congress have indeed been referred to in relation to the coasting trade. But they are evidently intended merely to prevent smuggling, and do not regulate imports or exports from one State to another. This case differs also from the cases of Massachusetts and Rhode Island; because, in these two cases, the laws of the States operated upon the articles after they had passed beyond the limits of foreign commerce, and consequently were beyond the control and power of Congress. But the law of New Hampshire acts directly upon an import from one State to another, while in the hands of the importer for sale, and is therefore a regulation of commerce, acting upon the article while it is within the admitted jurisdiction of the general government, and subject to its control and regulation." p. 578 [289]. And he concluded his opinion thus: "Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and Congress have clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the sub-

ject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue." p. 586 [292].

139] *Mr. Justice* Catron expressed similar views. While he was of opinion that the ultimate right of determining what commodities might be lawful subjects of interstate commerce belonged to Congress in the exercise of its power to regulate commerce, and not to the States in the exercise of the police power, he was equally clear that the Statute of New Hampshire was a valid regulation, in the absence of any legislation upon the subject by Congress. After pointing out the difficulties standing in the way of any attempt by Congress to make the special and various regulations required at different places at the maritime or inland borders of the States, he said: "I admit that this condition of things does not settle the question of contested power; but it satisfactorily shows that Congress cannot do what the States have done, are doing and must continue to do, from a controlling necessity, even should the exclusive power in Congress be maintained by our decision." p. 606 [302]. "Congress has stood by for nearly sixty years, and seen the States regulate the commerce of the whole country, more or less, at the ports of entry and at all their borders, without objection; and for this court now to decide that the power did not exist in the States, and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of state legislation on the particular subject. We would by our decision expunge more state laws and city corporate regulations than Congress is likely to make in a century on the same subject; and on no better assumption than that Congress and the State Legislatures had been altogether mistaken as to their respective powers for fifty years and more. If long usage, general acquiescence and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage by the courts." p. 607 [303]. And finally, in summing up his conclusions, he said: "That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and convicted; but that the state law was constitutionally passed, because of the power of the State thus to regulate; there being no regulation of Congress, special or general, in existence, to which the state law was repugnant." pp. 608, 609 [303].

140] *Mr. Justice* Nelson expressed his concurrence in the opinions delivered by the chief justice and *Mr. Justice* Catron. p. 618 [308].

Justices McLean, Daniel, Woodbury and Grier, on the other hand, were of opinion that the License Laws of New Hampshire, as well as those of Massachusetts and Rhode Island, were merely police regulations and not regulations of commerce, although they might incidentally affect commerce.

Mr. Justice McLean, in the course of his opinion in *Thurlow* v. *Massachusetts*, said: "The License Acts of Massachusetts do not purport to be a regulation of commerce. They are essentially police laws. Enactments similar in principle are common to all the States. Since the adoption of its Constitution they have existed in Massachusetts." p. 588 [294]. Mass. Stat. 1786, chap. 68; 1792, chap. 25; 7 Dane, Abr. 43, 44. "It is the settled construction of every regulation of commerce, that, under the sanction of its general laws, no person can introduce into a community malignant diseases, or anything which contaminates its morals or endangers its safety. And this is an acknowledged principle applicable to all general regulations. Individuals in the enjoyment of their own rights must be careful not to injure the rights of others. From the explosive nature of gunpowder, a city may exclude it. Now this is a article of commerce, and is not known to carry infectious disease; yet, to guard against a contingent injury, a city may prohibit its introduction. These exceptions are always implied in commercial regulations, where the general government is admitted to have the exclusive power. They are not regulations of commerce, but acts of self-preservation. And though they affect commerce to some extent, yet such effect is the result of the exercise of an undoubted power in the State." pp. 589, 590 [294, 295]. "A discretion on this subject must be exercised somewhere, and it can be exercised nowhere but under the state authority. The State may regulate the sale of foreign spirits, and such regulation is valid, though it reduce the quantity of spirits consumed. This is admitted. And how can this discretion be controlled? The powers of the general government do not extend to it. It is in every aspect a local regulation, and relates [14
exclusively to the internal police of the State." p. 591 [295]. "The police power of a State and the foreign commercial power of Congress must stand together. Neither of them can be so exercised as materially to affect the other. The sources and objects of these powers are exclusive, distinct and independent, and are essential to both governments." p. 592 [296].

In his opinion in *Peirce* v. *New Hampshire*, he declared that the same views were equally applicable to that case; and added: "The tax in the form of a license, as here presented, counteracts no policy of the federal government, is repugnant to no power it can exercise, and is imposed by the exercise of an undoubted power in the State. The license system is a police regulation, and, as modified in the State of New Hampshire, was designed to restrain and prevent immoral indulgence, and to advance the moral and physical welfare of society." "If this tax had been laid on the property as an import into the State, the law would have been repugnant to the Constitution. It would have been a regulation of commerce among the States, which has been exclusively given to Congress." "But this barrel of gin, like all other property within the State of New Hampshire, was liable to taxation by the State. It comes under the general regulation, and cannot be sold without a license. The right of an importer of ardent spirits to sell in the cask, without a license, does not attach to the plaintiffs in error, on ree unt of their having transported this property from Massachusetts to New Hampshire." pp. 595, 596 [297].

Mr. Justice Daniel said: "The License Laws

of Massachusetts, Rhode Island and New Hampshire, now under review, impose no exaction on foreign commerce. They are laws simply determining the mode in which a particular commodity may be circulated within the respective jurisdictions of those States, vesting in their domestic tribunals a discretion in selecting the agents for such circulation, without discriminating between the sources whence commodities may have been derived. They do not restrict importation to any extent; they do not interfere with it, either in appearance or reality; they do not prohibit sales, either by [42] wholesale or retail; they assert only the power of regulating the latter, but this entirely within the sphere of their peculiar authority. These laws are therefore in violation neither of the Constitution of the United States, nor of any law nor treaty made in pursuance or under authority of the Constitution." p. 617 [307].

Mr. Justice Woodbury repeated and enforced the same views, saying, among other things: "It is manifest also, whether as an abstract proposition or practical measure, that a prohibition to import is one thing, while a prohibition to sell without license is another and entirely different. The first would operate on foreign commerce, on the voyage. The latter affects only the internal business of the State after the foreign importation is completed and on shore." p. 619 [308]. "The subject of buying and selling within a State is one as exclusively belonging to the power of the State over its internal trade, as that to regulate foreign commerce is with the general government, under the broadest construction of that power." "The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me either logical or founded in fact. For, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also, if a merchant extensively engaged in commerce, often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another State, or abroad." p. 620 [309]. "But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State and become component parts of its property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States can interfere in regulation of foreign commerce." p. 625 [311]. "Whether [43] such laws of the States as to licenses are to be classed as police measures, or as regulations of their internal commerce, or as taxation merely, imposed on local property and local business, and are to be justified by each or by all of them together, is of little consequence, if they are laws which from their nature and object must belong to all sovereign states. Call them by whatever name, if they are necessary to the well-being and independence of all communities, they remain among the reserved rights of the States, no express grant of them to the general government having been either proper, or apparently embraced in the Constitution. So, whether they conflict or not, indirectly and slightly, with some regulations of foreign commerce, after the subject matter of that commerce touches the soil or waters within the limits of a State, is not perhaps very material, if they do not really relate to that commerce, or any other topic within the jurisdiction of the general government." p. 627 [312].

Mr. Justice Grier did not consider the question of the exclusiveness of the power of Congress to regulate foreign and interstate commerce as involved in the decision, but maintained the validity of the Statutes in question under "the police power, which is exclusively in the States." pp. 631, 632 [314].

The other members of the court at that time were *Mr. Justice* Wayne and *Mr. Justice* McKinley, who do not appear by the report to have taken part in the decision of those cases, although the former appears at page 545 [274] to have been present at the argument, and by the clerk's minutes to have been upon the bench when the judgments were delivered. It is certain that neither of them dissented from the decision of the court.

The consequences of an opposite conclusion in the case from New Hampshire, regarding liquors brought from one State into another, were forcibly stated by several of the judges.

Mr. Justice McLean said: "If the mere conveyance of property from one State to another shall exempt it from taxation, and from general state regulation, it will not be difficult to avoid the police laws of any State, especially by those who live at or near the boundary." p. 595 [297].

Mr. Justice Catron said: "To hold that the State License Law was void, as respects spirits [144] coming in from other States as articles of commerce, would open the door to an almost entire evasion, as the spirits might be introduced in the smallest divisible quantities that the retail trade would require; the consequence of which would be, that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained market in the neighboring States having similar license laws to those of New Hampshire." p. 608 [308].

Mr. Justice Woodbury said: "If the proposition was maintainable, that, without any legislation by Congress as to the trade between the States (except that in coasting, as before explained, to prevent smuggling), anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad, or from a neighboring State. And the more especially can it be done from the latter, as imports may be made in bottles of any size, down to half a pint, of spirits or wines; and if its sale cannot be interfered with and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuitable persons, with perfect impunity." pp. 625, 626 [311].

Mr. Justice Grier, in an opinion marked by

his characteristic vigor and directness of thought and expression (after saying that he mainly concurred with *Mr. Justice* McLean), summed up the whole matter as follows:

"The true question presented by these cases, and one which I am not disposed to evade, is, whether the States have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism and crime. I do not consider the question of the exclusiveness of the power of Congress to regulate commerce as necessarily connected with the decision of this point.

"It has been frequently decided by this court, 'that the powers which relate to merely [45] municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the Constitution of the United States; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category.

"As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to recede, when they come in conflict or collision; '*salus populi suprema lex.*'"

"If the right to control these subjects be 'complete, unqualified and exclusive' in the State Legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

"It is for this reason that quarantine laws, which protect the public heath, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, though in the service of the government, are arrested, imprisoned and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power which the States assume to regulate commerce or to interfere with the regulations of Congress, but because police laws for the preservation of health, prevention of crime and protection of the public welfare must of necessity have full and free operation, according to the exigency which requires their interference.

[46] "It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the States, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good; and if a loss of revenue should accrue to the United States from a diminished consumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth and happiness of the people." pp. 631, 632 [314].

This abstract of the *License Cases* shows (what is made yet clearer by an attentive reading of the opinions as a whole) that the difference of opinion among the judges was upon the question whether the State Statutes, which all agreed had some influence upon commerce, and all agreed were valid exercises of the police power, could properly be called regulations of commerce.

While many of the judges said or assumed that a State could not restrict the sale by the importer and in the original packages of intoxicating liquors imported from a foreign country, which Congress had authorized the importation of, and had caused duties to be levied upon, all of them undoubtingly held that, where Congress had not legislated, a State might, for the protection of the health, the morals and the safety of its inhabitants, restrict or prohibit, at its discretion and according to its own views of policy, the sale by the importer of intoxicating liquors brought into it from another State, and remaining in the barrels or packages in which they were brought in.

The ability and thoroughness with which those cases were argued at the bar and on the bench, the care and thought bestowed upon their consideration, as manifested in the opinions delivered by the several judges, and the confidence with which each judge expressed his concurrence in the result, make the decis- [14 ion of the highest possible authority. It has been accepted and acted on as such by the Legislatures, the courts and the people, of the nation and of the States, for forty years. It has not been touched by any Act of Congress; it has guided the legislation of many of the States; and it has been treated as beyond question by this court in a long series of cases. *Veazie* v. *Moor* (1852) 55 U. S. 14 How. 568, 575 [14: 545, 548]; *Sinnot* v. *Davenport* (1859) 63 U. S. 22 How. 227, 243 [16: 243, 247]; *Gilman* v. *Philadelphia* (1865) 70 U. S. 3 Wall. 713, 730 [18: 96, 101]; *Pervear* v. *Massachusetts* (1866) 72 U. S. 5 Wall. 475, 479 [18: 608, 609]; *Woodruff* v. *Purham* (1868) 75 U. S. 8 Wall 123, 139 [19: 382, 387]; *United States* v. *Dewitt* (1869) 76 U. S. 9 Wall. 41, 45 [19: 593, 594]; *Henderson* v. *New York City* (1875) 92 U. S. 259, 274 [23: 543, 549]; *Boston Beer Co.* v. *Massachusetts* (1877) 97 U. S. 25, 33 [24: 989, 992]; *Patterson* v. *Kentucky* (1878) 97 U. S. 501, 503 [24: 1115, 1116]; *Mobile County* v. *Kimball* (1880) 102 U. S. 691, 701 [26: 238, 241]; *Brown* v. *Houston* (1885) 114 U. S. 622, 631 [29: 257, 260]; *Walling* v. *Michigan* (1886) 116 U. S. 446, 461 [29: 691, 696]; *Mugler* v. *Kansas* (1887) 123 U. S. 623, 657, 658 [31: 205, 209].

In the *Passenger Cases*, 48 U. S. 7 How. 283 [12: 702], decided in 1849, two years after

the *License Cases*, Statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving from abroad, were adjudged to be repugnant to the Constitution and laws of the United States, and therefore void, by the opinions of *Justices* McLean, Wayne, Catron, McKinley and Grier, against the dissent of *Chief Justice* Taney and *Justices* Daniel, Nelson and Woodbury, each of the judges delivering a separate opinion. The decision in the *License Cases* was relied on by each of the dissenting judges; pp. 470, 483, 497, 518, 524, 559 [780, 786, 792, 801, 803, 818]; and no doubt of the soundness of that decision was suggested in the opinions of the majority of the court, or in any of the subsequent cases in which the judgment of that majority was afterwards approved and followed. *Henderson* v. *New York City* and *Commissioners of Immigration* v. *North German Lloyd*, 92 U. S. 259 [23: 543]; *Chy Lung* v. *Freeman*, 92 U. S. 275 [23: 550]; *New York* v. *Compagnie Générale Transatlantique*, 107 U. S. 59 [27: 383]; *Head-Money Cases*, 112 U. S. 580 [28: 798].

When *Mr. Justice* Grier, in the *Passenger Cases*, 48 U. S. 7 How. 462 [12: 777], said, "And to what weight is that argument entitled, which assumes, that, because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?"—the context shows that he had in mind cases in which the policy to leave commerce free had been manifested by statute or treaty; and he had already (p. 457 [775]) made it manifest that he did not intend to retract or to qualify his opinion in the *License Cases*.

An intention on the part of Congress that commerce shall be free from the operation of laws passed by a State in the exercise of its police power cannot be inferred from the mere fact of there being no national legislation upon the subject, unless in matters as to which the power of Congress is exclusive. Where the power of Congress is exclusive, the States have, of course, no power to legislate; and it may be said that Congress, by not legislating, manifests an intention that there should be no legislation on the subject. But in matters over which the power of Congress is paramount only, and not exclusive, the power of the State is not excluded until Congress has legislated; and no intention that the States should not exercise, or continue to exercise, their power over the subject can be inferred from the want of congressional legislation. *Parkersburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 702-704 [27: 584, 589].

The true test for determining when the power of Congress to regulate commerce is, and when it is not, exclusive, was formulated and established in *Cooley* v. *Philadelphia Board of Wardens*, 53 U. S. 12 How. 299 [13: 996], concerning the validity of a state law for the regulation of pilots and pilotage, in which *Mr. Justice* Curtis, in delivering judgment, said: "When the nature of a power like this is spoken of, when it is said that the nature of the power requires that it should be exercised exclusively by Congress, it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive legislation by Congress. Now, the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that [149] diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable but to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." He then stated that the Act of Congress of August 7, 1789, chap. 9, § 4 (1 Stat. 54), in regard to pilotage, manifested the understanding of Congress, at the outset of the government, that the nature of the subject was not such as to require its exclusive legislation, but was such that, until Congress should find it necessary to exercise its power, it should be left to the legislation of the States, because it was local and not national, and was likely to be best provided for, not by one system or plan of regulation, but by as many as the legislative discretion of the several States should deem applicable to the local peculiarities of the ports within their limits; and he added, in words which appear to us equally appropriate to the case now before the court: "The practice of the States, and of the national government, has been in conformity with this declaration, from the origin of the national government to this time; and the nature of the subject, when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants." "We are of opinion that this state law was enacted by virtue of a power residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action." 53 U. S. 12 How. 319-321 [13: 1005].

In *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713, 730 [18: 96, 101], this court, speaking by *Mr. Justice* Swayne, applying the same test, and relying on *Willson* v. *Black Bird Creek Marsh Co.* and *Cooley* v. *Philadelphia Board of Wardens*, above cited, upheld the validity of a statute of Pennsylvania authorizing the construction of a bridge across the Schuylkill [15 River, so as to prevent the passage of vessels with masts; and, after stating the points adjudged in *Brown* v. *Maryland* and in the *Passenger Cases*, said: "But a State, in the exercise of its police power, may forbid spirituous liquor imported from abroad, or from another State, to be sold by retail, or to be sold at all, without a license; and it may visit the violation of the prohibition with such punishment as it may deem proper. *License Cases*, 46 U. S. 5 How. 504 [12: 256]."

By the same test and upon the authority of *Willson* v. *Black Bird Creek Marsh Co.*, a statute of Wisconsin, authorizing the erection of a dam across a navigable river, was held to be constitutional in *Pound* v. *Turck*, 95 U. S. 459, 463 [24: 525, 526]. To the like effect are *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 8-12 [31: 629, 631-633], and other cases there cited.

Upon like grounds, it was held, in *Mobile County* v. *Kimball*, 102 U. S. 691 [26: 238], that a statute of Alabama, authorizing the improvement of the Harbor of Mobile, did not trench upon the commercial power of Congress; and the court, after pointing out that some expressions of *Chief Justice* Marshall in *Gibbons* v. *Ogden* as to the exclusiveness of the power of Congress to regulate commerce were restricted by the facts of that case, and by the subsequent judgment in *Willson* v. *Black Bird Creek Marsh Co.*, said: "In the *License Cases*, which were before the court in 1847, there was great diversity of views in the opinions of the different judges upon the operation of the grant of the commercial power of Congress in the absence of congressional legislation. Extreme doctrines upon both sides of the question were asserted by some of the judges; but the decision reached, so far as it can be viewed as determining any question of construction, was confirmatory of the doctrine that legislation of Congress is essential to prohibit the action of the States upon the subjects there considered." 102 U. S. 700, 701 [26: 240, 241].

In *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123 [19: 382], a state statute, imposing a uniform tax on all sales by auction within it, was held constitutional, as applied to sales of goods the product of other States and sold in the original
151] and unbroken packages. In *Hinson* v. *Lott*, 75 U. S. 8 Wall. 148 [19: 387], decided at the same time, it was adjudged that a state statute which prohibited any dealers, introducing any intoxicating liquors into the State, from offering them for sale, without first paying a tax of fifty cents a gallon, and imposed a like tax on liquors manufactured within the State, was valid, as applied to liquors brought from another State, and held and offered for sale in the same barrels or packages in which they were brought in; because, in the words of *Mr. Justice* Miller, who delivered the opinion of the court in both cases, it was not "an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State." 75 U. S. 8 Wall. 153 [19: 389]. These two cases were cited by the court in *Low* v. *Austin*, 80 U. S. 13 Wall. 29, 34 [20: 517, 519], and in *Cook* v. *Pennsylvania*, 97 U. S. 566, 573 [24: 1015, 1017], in which, in accord with the opinions in the *License Cases*, state taxation upon original cases of wines imported from a foreign country, and upon which duties had been paid under Acts of Congress, was held to be invalid.

In *Welton* v. *Missouri*, 91 U. S. 275 [23: 347], the point decided was that a state statute, requiring the payment of a license tax from persons selling, by going from place to place within the State for the purpose, goods not the growth or manufacture of the State, and not from persons so selling goods which were the growth or manufacture of the State, was unconstitutional and void, by reason of the discrimination; and in *Howe Machine Co.* v. *Gage*, 100 U. S. 676 [25: 754], a state statute imposing a like tax, without discriminating as to the place of growth or produce of material or manufacture, was adjudged to be constitutional and valid, as applied to machines made in and brought from another State.

In *Brown* v. *Houston*, 114 U. S. 622 [29: 257], it was decided that coal mined in Pennsylvania and brought in boats by river from Pittsburg to New Orleans to be there sold by the boatload on account of the Pennsylvania owner, and remaining afloat in its original condition and original packages, was subject, in common with all other property in the city, to taxation under the General Tax Laws of Louisiana; and the court referred to *Woodruff* v. *Parham*, above cited, as upholding the validity of a "tax laid on auction sales of all property indiscriminately," and "which had no relation to the movement of goods from one State to another." 114 U. S. 634 [29: 261]. [1

In *Walling* v. *Michigan*, 116 U. S. 446 [29: 691], the Statute of Michigan, which was held to be an unconstitutional restraint of interstate commerce, imposed a different tax upon persons engaged within the State in the business of selling or soliciting the sale of intoxicating liquors to be sent into the State, from that imposed upon persons selling or soliciting the sale of such liquors manufactured within the State; and the court declared that the Statute would be perfectly justified as "an exercise by the Legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people," "if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the National Legislature." 116 U. S. 460 [29: 695].

In *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 [30: 244], the only point decided was that a State had no power to regulate the rates of freight of any part of continuous transportation upon railroads partly within the State and partly in other States. In *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489 [30: 694], a state law requiring the payment of a license tax by drummers and persons not having a regularly licensed house of business within the taxing district, offering for sale or selling any goods by sample, was decided to be unconstitutional as applied to persons offering to sell goods on behalf of merchants residing in other States, because, as the majority of the court held, its effect was "to tax the sale of such goods, or the offer to sell them, before they are brought into the State." 120 U. S. 497 [30: 697]. Neither of those cases appears to us to tend to limit the police power of the State to protect the public health, the public morals and the public peace within its own borders.

As was said by this court in *Sherlock* v. *Alling*, 93 U. S. 99, 103 [23: 819, 820]: "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, [1
though the legislation might indirectly affect

the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it, without constituting a regulation of it, within the meaning of the Constitution." It was accordingly held in that case that an action against a carrier engaged in interstate commerce might be maintained under a state statute giving a civil remedy, unknown to the common law, for negligence causing death; and in subsequent cases that what a State might punish or afford redress for, it might seek by proper precautions to prevent; and consequently, that a state statute requiring, under a penalty, engineers of all railroad trains within the State to be examined and licensed by a state board, either as to their qualifications generally, or as to their capacity to distinguish between color signals, was not in its nature a regulation of commerce, but was a constitutional exercise of the power reserved to the States, and intended to secure the safety of persons and property within their territorial limits, and, so far as it affected interstate commerce, not in conflict with any express enactment of Congress upon the subject, nor contrary to any intention of Congress to be presumed from its silence. *Smith* v. *Alabama*, 124 U. S. 465 [31: 508]; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96 [32: 352].

In *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527], it was expressly conceded, in the opinion of the court delivered by *Mr. Justice* Strong, that a State, in the exercise of its police power, could "legislate to prevent the spread of crime, or pauperism, or disturbance of the peace," as well as "justify the exclusion of property, dangerous to the property of citizens of the State; for example, animals having contagious or infectious diseases." 95 U. S. 471 [24: 530]. And the decision, by which the Statute of Missouri, forbidding the introduction of any Texas, Mexican or Indian cattle into the State, was held to be an unconstitutional interference with interstate commerce, rested, as clearly appears in the opinion in that case, and has since been distinctly recognized by the court, upon the ground that the Statute made no distinction in the transportation forbidden, between cattle which might be diseased and those which were not. *Kimmish* v. *Ball*, 129 U. S. 217, 221 [32: 695, 696].

154] The authority of the States, in the exercise of their police power, and for the protection of life and health, to pass laws affecting things which are lawful subjects or instruments of commerce, and even while they are actually employed in commerce, has been expressly recognized by Congress in the Acts regulating the transportation of nitro-glycerine, as well as in the Acts for the observation and execution of the quarantine and health laws of the States. Rev. Stat. §§ 4278–4280, 4792–4796.

In *Morgan's Steamship Co.* v. *Louisiana Board of Health*, 118 U. S. 455, 465 [30: 237, 242], the system of quarantine laws established by the State of Louisiana was held, in accordance with earlier opinions, to be a constitutional exercise of the police power; and it was said by the court: "Quarantine laws belong to that class of state legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect, and which are valid until displaced or contravened by some legislation of Congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities. The practice which should control a quarantine station on the Mississippi River, a hundred miles from the sea, may be widely and wisely different from that which is best for the Harbor of New York." It was added that in this respect the case fell within the principle of *Willson* v. *Black Bird Creek Marsh Co.*, *Cooley* v. *Philadelphia Board of Wardens*, *Gilman* v. *Philadelphia*, *Pound* v. *Turck* and other cases.

In *Mugler* v. *Kansas*, 123 U. S. 623 [31: 205], the court said: "In the *License Cases*, 46 U. S. 5 How. 504 [12: 256], the question was, whether certain Statutes of Massachusetts, Rhode Island and New Hampshire, relating to the sale of spirituous liquors, were repugnant to the Constitution of the United States. In determining that question it became necessary to inquire whether there was any conflict between the exercise by Congress of its power to regulate commerce with foreign countries, or among the several States, and the exercise by a State of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the Statutes then under examination were not inconsistent with the Constitution of the United States, or with any Act of Congress." 123 U. S. 657, 658 [31: 209].

In *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 465 [31: 700], the point, and the only point, decided was that a Statute of Iowa, which forbade common carriers to bring intoxicating liquors into the State from any other State, without first obtaining a certificate from a county officer of Iowa that the consignee was authorized by the laws of Iowa to sell such liquors, was an unconstitutional regulation of interstate commerce. While *Mr. Justice* Field, in his separate opinion (p. 507 [714]), intimated, and three dissenting justices (pp. 514, 515 [717]) feared, that the decision was in effect inconsistent with the decision in the *License Cases*, *Mr. Justice* Matthews, who delivered the judgment of the majority of the court, not only cautiously avoided committing the court to any such conclusion, but took great pains to mark the essential difference between the two decisions. On the one hand, after making a careful analysis of the opinions in the *License Cases*, he said: "From this analysis it is apparent that the question presented in this case was not decided in the *License Cases*. The point in judgment in them was strictly confined to the right of the States to prohibit the sale of intoxicating liquor after it had been brought within their territorial limits. The right to bring it within the States was not questioned." On the other hand, in stating the reasons for holding the Statute of Iowa, prohibiting the transportation of liquors from another State, not to be a legitimate exertion of the police power of the State of Iowa, he said: "It is not an exercise of the jurisdiction of the State over persons and property within its limits. On the contrary, it is an attempt to exert that jurisdiction over per-

sons and property within the limits of other States. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation for the conduct of commerce before the merchandise is brought to its border." "But the right to prohibit sales, [56] so far as conceded to the States, arises only after the act of transportation has terminated, because the sales which the State may forbid are of things within its jurisdiction. Its power over them does not begin to operate until they are brought within the territorial limits which circumscribe it." 125 U. S. 479, 498, 499 [31: 704, 711, 712].

In the opinion of the majority of the court in that case, it was noted that the omission of Congress to legislate might not so readily justify an inference of its intention to exclude state legislation in matters affecting interstate commerce, as in those affecting foreign commerce; *Mr. Justice* Matthews saying: "The organization of our state and federal system of government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties. The same necessity perhaps does not exist equally in reference to commerce among the States. The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms, and the two powers are undoubtedly of the same class and character and equally extensive. The actual exercise of its power over either subject is equally and necessarily exclusive of that of the States, and paramount over all the powers of the States; so that state legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, or its intention reasonably implied from its silence, in respect to the subject of commerce of both kinds, must fail. And yet in respect to commerce among the States, it may be, for the reason already assigned, that the same inference is not always to be drawn from the absence of congressional legislation as might be in the case of commerce with foreign nations. The question, therefore, may be still considered in each case as it arises, whether the fact that Congress has failed in the particular instance to provide by law a regulation of commerce among the States is conclusive of its intention that the subject shall be free from all positive regulation, or that, [157] until it positively interferes, such commerce may be left to be freely dealt with by the respective States." 125 U. S. 482, 488 [31: 706].

In *Kidd* v. *Pearson*, 128 U. S. 1 [32: 346], a Statute of Iowa, prohibiting the manufacture or sale of intoxicating liquors, except for mechanical, medicinal, culinary and sacramental purposes only, and authorizing any building used for their unlawful manufacture to be abated as a nuisance, was unanimously held to be constitutional, as applied to a case in which the liquors were manufactured for exportation and were sold outside the State; and the court, in showing how impracticable it would be for Congress to regulate the manufacture of goods in one State to be sold in an other, said: "The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent." A situation more paralyzing to the state governments, and more provocative of conflicts between the general government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine." 128 U. S. 21, 22 [32: 350, 351].

The language thus applied to congressional supervision of the manufacture within one State of intoxicating liquors intended to be sold in other States appears to us to apply with hardly less force to the regulation by Congress of the sale within one State of intoxicating liquors brought from another State. How far the protection of the public order, health and morals demands the restriction or prohibition of the sale of intoxicating liquors is a question peculiarly appertaining to the Legislatures of the several States, and to be determined by them upon their own views of public policy, taking into consideration the needs, the education, the habits and the usages of people of various races and origin, and living in regions far apart and widely differing in climate and in physical characteristics. The local option laws prevailing in many of the States indicate the judgment of as many Legislatures that the sale of intoxicating liquors does not admit of regulation by a uniform rule over so large an area as a single State, much less over the area of a continent. It is manifest that the regulation of the sale, as of the manufacture, of such liquors manufactured in one State to be sold in [1 another, is a subject which, far from requiring, hardly admits of a uniform system or plan throughout the United States. It is, in its very nature, not national, but local; and must, in order to be either reasonable or effective, conform to the local policy and legislation concerning the sale or the manufacture of intoxicating liquors generally. Congress cannot regulate this subject under the police power, because that power has not been conceded to Congress, but remains in the several States; nor under the commercial power, without either prescribing a general rule unsuited to the nature and requirements of the subject, or else departing from that uniformity of regulation which, as declared by this court, in *Kidd* v. *Pearson*, above cited, it was the object of the commercial clause of the Constitution to secure.

The above review of the judgments of this court since the decision in the *License Cases* appears to us to demonstrate that that decision, while often referred to, has never been overruled or its authority impugned.

It only remains to sum up the reasons which have satisfied us that the judgment of the Supreme Court of Iowa in the case at bar should be affirmed.

The protection of the safety, the health, the morals, the good order and the general welfare of the people is the chief end of government. *Salus populi suprema lex.* The police power is inherent in the States, reserved to them by the Constitution, and necessary to their existence as organized governments. The Constitution of the United States and the laws made

in pursuance thereof being the supreme law of the land, all statutes of a State must, of course, give way, so far as they are repugnant to the National Constitution and laws. But an intention is not lightly to be imputed to the framers of the Constitution, or to the Congress of the United States, to subordinate the protection of the safety, health and morals of the people to the promotion of trade and commerce.

The police power extends to the control and regulation of things which, when used in a [159] lawful and proper manner, are subjects of property and of commerce, and yet may be used so as to be injurious or dangerous to the public safety, the public health or the public morals. Common experience has shown that the general and unrestricted use of intoxicating liquors tends to produce idleness, disorder, disease, pauperism and crime.

The power of regulating or prohibiting the manufacture and sale of intoxicating liquors appropriately belongs, as a branch of the police power, to the Legislatures of the several States, and can be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and cannot practically, if it can constitutionally, be wielded by Congress as part of a national and uniform system.

The Statutes in question were enacted by the State of Iowa in the exercise of its undoubted power to protect its inhabitants against the evils, physical, moral and social, attending the free use of intoxicating liquors. They are not aimed at interstate commerce; they have no relation to the movement of goods from one State to another, but operate only on intoxicating liquors within the territorial limits of the State; they include all such liquors without discrimination, and do not even mention where they are made or whence they come. They affect commerce much more remotely and indirectly than laws of a State (the validity of which is unquestioned), authorizing the erection of bridges and dams across navigable waters within its limits, which wholly obstruct the course of commerce and navigation; or than quarantine laws, which operate directly upon all ships and merchandise coming into the ports of the State.

If the statutes of a State, restricting or prohibiting the sale of intoxicating liquors within its territory, are to be held inoperative and void as applied to liquors sent or brought from another State and sold by the importer in what are called "original packages," the consequence must be that an inhabitant of any State may, under the pretext of interstate commerce, and without license or supervision of any public authority, carry or send into, and sell in, any or all of the other States of the Union intoxi- [160] cating liquors of whatever description, in cases or kegs, or even in single bottles or flasks, despite any legislation of those States on the subject, and although his own State should be the only one which had not enacted similar laws. It would require positive and explicit legislation on the part of Congress to convince us that it contemplated or intended such a result.

The decision in the *License Cases*, 46 U. S. 5 How. 504 [12: 256], by which the court, maintaining these views, unanimously adjudged that a general statute of a State, prohibiting the sale of intoxicating liquors without license from municipal authorities, included liquors brought from another State and sold by the importer in the original barrel or package, should be upheld and followed, because it was made upon full argument and great consideration; because it established a wise and just rule, regarding a most delicate point in our complex system of government, a point always difficult of definition and adjustment, the contact between the paramount commercial power granted to Congress and the inherent police power reserved to the States; because it is in accordance with the usage and practice which have prevailed during the century since the adoption of the Constitution; because it has been accepted and acted on for forty years by Congress, by the State Legislatures, by the courts and by the people, and because to hold otherwise would add nothing to the dignity and supremacy of the powers of Congress, while it would cripple, not to say destroy, the whole control of every State over the sale of intoxicating liquors within its borders.

The silence and inaction of Congress upon the subject, during the long period since the decision in the *License Cases*, appear to us to require the inference that Congress intended that the law should remain as thereby declared by this court, rather than to warrant the presumption that Congress intended that commerce among the States should be free from the indirect effect of such an exercise of the police power for the public safety, as had been adjudged by that decision to be within the constitutional authority of the States.

For these reasons we are compelled to dissent from the opinion and judgment of the majority of the court.

HENRY LYNG, *Plf. in Err.*,
v.
THE PEOPLE OF THE STATE OF MICHIGAN.

(See S. C. Reporter's ed. 161-167.)

State cannot tax interstate commerce—right to sell intoxicating liquors by importer or his agent—burdens on commerce—conviction for selling liquor.

1. No State has the right to lay a tax on interstate commerce, by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.
2. The right of importation of ardent spirits, distilled liquors, ale and beer from one State into another, includes the right of sale in the original packages at the place where the importation terminates.
3. A State cannot exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, regulate such commerce, without congressional permission.

NOTE.—*As to power of Congress to regulate commerce*, see *note* to Gibbons v. Ogden, 6: 23; also *note* to Brown v. Maryland, 6: 678.

As to interstate commerce, regulation of; power of Congress, how far conclusive,—see *note* to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

4. A representative of the importers into a State of malt or brewed liquors cannot be convicted for selling, in original casks, at the place where the transportation terminated, the liquors imported, without having paid a tax imposed by the State on the business.

[No. 1219.]

Submitted March 19, 1890. Decided April 28, 1890.

IN ERROR to the Supreme Court of the State of Michigan to review a judgment affirming a judgment of the Circuit Court for Iron County, Michigan, convicting Henry Lyng for selling as agent of the importers into the State brewed and malt liquors at wholesale, without having paid the state tax upon the business. *Reversed.*

Statement by *Mr. Chief Justice* **Fuller:**

Plaintiff in error was prosecuted and convicted in the Circuit Court for Iron County, Michigan, under an information alleging "that on the 19th day of July, in the year of our Lord one thousand eight hundred and eighty-eight, at the Village of Iron River, in said Iron County, Henry Lyng, then and there being, was a person whose business consisted in part of selling at wholesale brewed and malt liquors (not proprietary patent medicine), as agent for Franz Hagemeister and Henry Hagemeister, copartners doing business in the City of Green Bay, Wisconsin, under the firm name of Hagemeister & Son, without he or they having paid in full or in part the tax required by law to be paid upon the business, neither he nor they being druggists selling liquors for chemical, medicinal or sacramental purposes only and in strict compliance with the law."

The case went to the Supreme Court of Michigan on exceptions and the conviction was affirmed, and the case remanded to the circuit court with instructions to proceed to judgment. This was done accordingly, and the supreme court having affirmed the judgment, the cause was thereupon brought to this court by writ of error.

The opinion of the supreme court is to be found in 42 N. W. Rep. 139.

The trial in the circuit court was had upon the following facts agreed:

"1. Franz Hagemeister and Henry Hagemeister are citizens of the United States of America and reside at the City of Green Bay, in the State of Wisconsin, and are engaged in the manufacture of lager beer, under the name of 'Hagemeister & Son,' at Green Bay aforesaid, where they have a brewery for the manufacture thereof. [162]

"2. Such lager beer is brewed liquor within the meaning of Act No. 313 of the Laws of Michigan for 1887.

"3. Said Hagemeister & Son own a warehouse in the Village of Iron River, in the Township of Iron River, in the County of Iron and State of Michigan, where they store quantities of their lager beer so made by them at Green Bay aforesaid, and from there shipped to their said warehouse in said Village of Iron River, to be there stored and disposed of.

"4. The defendant, Henry Lyng, is employed by said Hagemeister & Son as their agent, on a regular salary, to look after their said warehouse, to take orders for and deliver said beer, so manufactured and stored, in quantities exceeding three gallons, and to collect and remit the proceeds of the sales thereof to said Hagemeister & Son, and was so employed on the 19th day of July, 1888.

"5. On the 19th day of July, 1888, at the Village of Iron River, in the County of Iron and State of Michigan, said defendant, in the course of his said employment by Hagemeister & Son, did deliver from said warehouse to Martin Lally and to divers other persons, all of whom paid him therefor, certain of said lager beer, so made and shipped by Hagemeister & Son from Green Bay aforesaid, in quantities exceeding three gallons. All of said lager beer was so delivered in the original packages in which it had been shipped. The defendant sold no other liquors.

"6. Neither the said defendant nor the said Hagemeister & Son, or either of them, have paid any tax in the Village of Iron River aforesaid on the business of selling or keeping for sale malt liquors at wholesale or at wholesale and retail, nor given any bond such as is mentioned in Act No. 313 of the Public Acts of Michigan for 1887."

Sections 1, 2, 4, 7 and 24 of Act No. 313 of Public Acts of Michigan 1887, p. 445 *et seq.*, are as follows:

"Section 1. *The People of the State of Michigan enact*, That in all townships, cities and villages of this State there shall be paid annually the following tax upon the business of manufacturing, selling or keeping for sale, by all persons whose business, in whole or in part, consists in selling or keeping for sale, or manufacturing, distilled or brewed or malt liquors or mixed liquors, as follows: upon the business of selling or offering for sale spirituous or intoxicating liquors, or mixed liquors by retail, or any mixture or compound, excepting proprietary patent medicines, which in whole or in part consist of spirituous or intoxicating liquors, and any malt, brewed or fermented liquors, five hundred dollars per annum; upon the business of selling only brewed or malt liquors at wholesale or retail, or at wholesale and retail, three hundred dollars per annum; upon the business of selling spirituous or intoxicating liquors at wholesale, five hundred dollars, or at wholesale and retail, eight hundred dollars, per annum; upon the business of manufacturing brewed or malt liquors for sale, sixty-five dollars per annum; upon the business of manufacturing for sale spirituous or intoxicating liquors, eight hundred dollars per annum. No person paying a tax on spirituous or intoxicating liquors under this Act shall be liable to pay any tax on the sale of malt, brewed or fermented liquors. No person paying a manufacturer's tax on brewed or malt liquors under this Act shall be liable to pay a wholesale dealer's tax on the same. [16

"Sec. 2. Retail dealers of spirituous or intoxicating liquors, and brewed, malt and fermented liquors, shall be held and deemed to include all persons who sell any of such liquors by the drink, and in quantities of three gallons or less, or one dozen quart bottles or less, at any one time, to any person or persons. Wholesale dealers shall be held and deemed to mean and include all persons who sell or offer for

sale such liquors and beverages in quantities of more than three gallons, or more than one dozen quart bottles, at any one time, to any person or persons. No tax imposed under this Act shall be required from any person for selling any wine or cider made from fruits grown or gathered in this State, unless such wine or cider be sold by the drink as other beverages are.

"Sec. 4. Every person engaged in, or intending to engage in, any business named in section one of this Act, and requiring the payment of any tax mentioned in said section one, shall, on or before the first day of May in each year, make and file with the county treasurer in the county where it is proposed to carry on such business, a statement in writing and on oath, showing the name and residence of such person, the ward, village or township in which it is proposed to carry on such sale or manufacture, and the nature of the business which such person is engaged in, or is intending to engage in; and shall, on or before the first day of May in each year, pay to the said county treasurer, in advance, the taxes required by said section one for such business for the year commencing on said first day of May and ending on the thirtieth day of April next thereafter."

164]

"Sec. 7. If any person or persons shall engage or be engaged in any business requiring the payment of a tax under section one of this Act without having paid in full the tax required by this Act, and without having the receipt and notice for such tax posted up as required by this Act, or without having made, executed and delivered the bond required by this Act, or shall in any manner violate any of the provisions of this Act, such person or persons shall be deemed guilty of a misdemeanor, and, upon conviction thereof, if there is no specific penalty provided therefor by this Act, shall be punished by a fine of not more than two hundred dollars and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than ninety days, or both such fine and imprisonment, in the discretion of the court. And in case such fine and costs shall not have been paid at the time such imprisonment expires the person serving out such sentence shall be further detained in jail until such fine and costs shall have been fully paid: *Provided*, That in no case shall the whole term of imprisonment exceed six months. And any person or persons engaged in any business requiring the payment of a tax under section one of this Act, who, after paying the tax so required, shall be convicted of the violation of any of the provisions of this Act, shall thereby, in addition to all other penalties prescribed by this Act, forfeit the tax so paid by him or them, and be precluded from continuing such business for the remainder of the year or time for which said tax was paid, and be debarred from again engaging in any business requiring the payment of a tax under section one of this Act, or from becoming a surety or sureties upon any bond required under section seven of this Act, for the period of one year from the time of such conviction. Each violation of any of the provisions of this Act shall be construed to constitute a separate and complete offense, and for each violation on the same day, or on different days, the person or persons offending shall be liable to the penalties and forfeitures herein provided, and be precluded and debarred from continuing or engaging in any business requiring the payment of a tax under this Act as aforesaid. And it shall be the duty of sheriffs, marshals, constables and police officers to forthwith close all saloons and other places where the business of manufacturing, selling or keeping for sale any of the liquors mentioned in section one of this Act is being conducted upon which business the tax required by said section one has not been paid in full, and in which the receipt mentioned in section five of this Act shall not be posted up and displayed."

165]

"Sec. 24. All persons engaged in the business of selling or keeping for sale any of the liquors mentioned in this Act, whether as owner or as clerk, agent or servant or employé, shall be equally liable as principals for any violation of any of the provisions of this Act, and any person or principal shall be liable for the acts of his clerk, servant, agent or employé for any violation of the provisions of this Act."

Further facts are stated by the counsel.

Mr. **Howard E. Thompson**, for plaintiff in error:

Franz and Henry Hagemeister, of Green Bay, Wisconsin, are citizens of the United States, engaged in the manufacture of lager beer at Green Bay, where they have a brewery for the manufacture thereof. They own a warehouse in the Village of Iron River, Michigan, to which they ship quantities of their beer made at Green Bay, and there store it until it is disposed of. The plaintiff in error is employed by them to take care of this warehouse, sell and deliver the beer therein and collect and remit the proceeds of sales. The beer was always sold in the original casks in which it was brought into the State. Plaintiff in error, by his counsel, requested the court to charge the jury to find a verdict of not guilty, upon the ground that the law under which the prosecution was had, being Act No. 313 of the Public Acts of Michigan for 1887, is repugnant to section 8 of article 1 of the Constitution of the United States, for the reason that it operates as a regulation of commerce among the States, in a matter within the exclusive power of Congress. The request was refused. The constitutionality of the Statute in question was before the court, and was passed upon, and the Statute declared valid.

The Statute is in conflict with the Constitution of the United States. The tax is imposed on the business, and therefore on the principal, not on the agents or employés.

Walling v. *Michigan*, 116 U. S. 459 (29: 695); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 475, 496, 507 (31: 703, 710, 714); *Mobile County* v. *Kimball*, 102 U. S. 697 (26: 239); *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 497 (30: 697); *Leloup* v. *Mobile*, 127 U. S. 640-648 (32: 311-314); *Asher* v. *Texas*, 128 U. S. 129 (32: 368); *Brown* v. *Houston*, 114 U. S. 631 (29: 260); *Welton* v. *Missouri*, 91 U. S. 282 (23: 350).

Intoxicating liquors are recognized articles of commerce to which the same rules are applicable as to other commodities.

Hinson v. *Lott*, 75 U. S. 8 Wall. 150 (19: 388); *Henderson* v. *New York City*, 92 U. S. 259 (23: 543).

Mr. **Edward Cahill**, for defendant in error:

Hagemeister & Son come within the term "wholesale dealer" as provided by the Act. If they come within the terms of the Statute and within the meaning of the Statute as wholesale dealers, then the respondent must be liable. When this property of Hagemeister & Son was stored in the warehouse at Iron River, it was stored there for the purpose of wholesale, and when it was so stored it became, for the purpose of taxation, a portion of the property of the State, and the provision of the Federal Constitution for the regulation of commerce between the States was at an end and it at once became subject to the laws which the State had enacted, whether the sales were made or to be made in the original packages or not.

People v. *Lyng*, 42 N. W. Rep. 142.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Under the Statute in question, which is entitled "An Act to Provide for the Taxation and Regulation of the Business of Manufacturing, Selling, Keeping for Sale, Furnishing, Giving or Delivering Spirituous or Intoxicat- [166] ing Liquors, and Malt, Brewed or Fermented Liquors or Vinous Liquors in this State, and to Repeal all Acts or Parts of Acts Inconsistent with the Provisions of this Act," an annual tax is levied "upon the business of selling only brewed or malt liquors at wholesale or retail, or at wholesale and retail," of three hundred dollars, and "upon the business of manufacturing brewed or malt liquors for sale, sixty-five dollars per annum." The manufacturer of malt or brewed liquors made outside of the State of Michigan cannot introduce them into the hands of consumers or retail dealers in that State without becoming subject to this wholesale dealer's tax of three hundred dollars per annum in every township, village or city where he attempts to do this. The manufacturer in the State need only pay the manufacturer's tax of sixty-five dollars, and is then exempt from paying the tax imposed on the wholesale dealer.

We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress. *Leloup* v. *Mobile*, 127 U. S. 640, 648 [32: 311, 314], and cases cited. In *Bowman* v. *Chicago & N. W. R. Co.*, 125 U. S. 465 [31: 700], it was decided that a section of the Code of the State of Iowa forbidding common carriers to bring intoxicating liquors into the State from any other State or Territory, without first being furnished with a certificate as prescribed, was essentially a regulation of commerce among the States, and not being sanctioned by the authority, express or implied, of Congress, was invalid because repugnant to the Constitution of the United States; and in *Leisy* v. *Hardin* [*ante*, p. 128], the judgment in which has just been announced, that the right of importation of ardent spirits, distilled liquors, ale and beer from one State into another, includes, by necessary implication, the right of sale in the original packages at the place where the importation terminates; and that the power cannot be conceded to a State to exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, to regulate such commerce, without congressional permission. The same rule that applies to the sugar of Louisiana, the cotton of South Carolina, the wines of California, the hops of Washington, the tobacco of Maryland and Connecticut, or the products, natural or manufactured, of any State, applies to all commodities in which a right of traffic exists, recognized by the laws of Congress, the decisions of courts and the usages of the commercial world. It devolves on Congress to indicate such exceptions as in its judgment a wise discretion may demand under particular circumstances. Lyng was merely the representative of the importers, and his conviction cannot be sustained, in view of the conclusions at which we have arrived.

The judgment of the Supreme Court of the State of Michigan is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Justices **Harlan, Gray** and **Brewer** dissented upon the grounds stated in their opinion in *Leisy* v. *Hardin*, *ante*, p. 138.

JOSEPH LODGE ET AL., *Appts.*,
v.
AMANDA TWELL.

(See S. C. Reporter's ed. 232-236.)

Decree, when not final—when appeal allowed.

1. Where something more than the mere ministerial execution of the decree as rendered is left to be done the decree is interlocutory, and not final, even though it settles the equities of the bill.
2. A decree to be final for the purposes of an appeal must leave the case in such a condition that, if there be an affirmance here, the court below will have nothing to do but to execute the decree it has already entered.

[No. 284.]

Submitted Apr. 18, 1890. Decided Apr. 28, 1890.

APPEAL from a decree of the Supreme Court of the Territory of Montana, affirming a judgment of the District Court of that Territory setting aside transfers of property and appointing a receiver to sell the property and pay moneys from the avails of the sale. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller**:

Amanda Twell brought her action in equity in the District Court, Second Judicial District,

NOTE.—*What is final decree or judgment of state or other court, from which appeal lies. See note to* Gibbons v. Ogden, 5:302.

Deer Lodge County, Montana Territory, against Richard Twell, Joseph Lodge and Samuel Beaumont, to set aside certain transfers of property by Twell to Lodge and Beaumont, on the ground that they were made with intent to defraud the appellee in the matter of alimony awarded her by a decree of divorce, and to have the property applied to the payment of such alimony. The divorce decree was entered December 17, 1883, and adjudged that defendant Twell pay to complainant, during her natural life or until further order of the court, the sum of $50 per month, and that he give security therefor.

The bill averred that defendant Twell had failed to obey said decree in that he had not paid the monthly installments for alimony and had failed to give the required security; that he had departed from the Territory without making any provision for the payment, and leaving unpaid the sum of $150; that on December 22, 1883, being the owner of real estate situated in Deer Lodge County of the value of [233] $1,200 and of personal property worth $5,000, to avoid the process of the court for the enforcement of said decree, he made a pretended sale and assignment of his property to the defendants Lodge and Beaumont; and that said sale and assignment were fraudulent and void, and were intended and made for the purpose of delaying and hindering and defrauding the plaintiff, to the knowledge of defendants Lodge and Beaumont, who made the purchase to enable Twell to so defraud the plaintiff of her rights. The bill also alleged that said Twell had no other property within the jurisdiction of the court, and prayed that the sale and assignment be declared fraudulent and void as against the plaintiff; that a receiver be appointed; that Lodge and Beaumont be required to account for all the property received by them, with the rents, issues and profits, and all proceeds arising from sales thereof; that the defendants be enjoined from disposing of any of said property or its proceeds; and that the receiver be directed to sell the property, and pay the $150 then due and whatever sum might be due at the time of the sale, holding the balance subject to the order of the court to pay on the aforesaid decree. A decree by default was entered against the defendant Twell. Lodge and Beaumont demurred, which demurrer was overruled and the defendants excepted. They also filed their separate answer denying the allegations of the bill touching fraud. The cause came on for trial on the 6th of December, 1884, and the defendants Lodge and Beaumont, by leave of court, amended their answer, and denied "that the value of the property sold or assigned to these defendants, Lodge and Beaumont, as specified in complainant's complaint, was, at the time of the purchase thereof, of the value of six thousand two hundred dollars, or any greater value than about three thousand five hundred dollars." This amendment was verified by Lodge and Beaumont.

The trial court found that the sale was fraudulent and void, and made with intent to hinder, delay and defraud the plaintiff, and that plaintiff was entitled to the relief asked for in her complaint, and, among other facts, "that the property sold by defendant Twell to defendants Lodge and Beaumont was, at the time of [234] said sale, of the value of at least $4,200, and that defendants Lodge and Beaumont have realized from the personal property sold, since said sale, the sum of about twenty-five hundred dollars, and still have all the real estate and personal property, of the value of at least $600, in their hands." The defendants Lodge and Beaumont moved the court for judgment, notwithstanding the findings, which motion was overruled and the defendants excepted. A decree was then entered in favor of the plaintiff, setting aside the sale and assignment by Twell to Lodge and Beaumont, and appointing a receiver of the property and effects of Twell, which he had at the time of the entry of said decree of divorce, and sold and conveyed to Lodge and Beaumont on or about December 22, 1883, which property was described as consisting at that date of personalty of the value of at least $4,200, and real estate of the value of $600; and it was further decreed that Lodge and Beaumont account for all property received by them or either of them under either the sale or assignment above mentioned, and for all proceeds arising from any sale or sales thereof, and for the rents, issues and profits thereof; that they deliver possession of the same to the receiver; that the receiver sell the property delivered; and that out of the proceeds he pay the costs and expenses of the sale and receivership, and all sums due by defendant Twell to the plaintiff under and by virtue of the decree of divorce, and hold the balance of the proceeds of such sales, subject to the order of the court in the above-mentioned decree of divorce between plaintiff and defendant Twell, and for costs. From this decree Lodge and Beaumont appealed to the Supreme Court of the Territory, which affirmed the judgment, and they then appealed to this court, which appeal was allowed February 25, 1886, and an appeal bond then given and approved. An affidavit of value was filed as stated in the opinion.

Mr. **S. S. Burdett** for appellants.
Mr. **Jas. I. Brownson, Jr.,** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It will be perceived that the decree did not [235] identify the particular property to be delivered nor specify the amount of money to be paid or collected. The court had found that Lodge and Beaumont had sold part of the original property and realized therefrom about twenty-five hundred dollars, but the exact amount was not determined by the decree, nor the amount of the rents, issues and profits received by them, nor that Lodge and Beaumont, while directed to account for the property, should respond, as of the date of the invalidated sale, for the value of so much as they had disposed of, or for the proceeds only. The receiver was directed to sell the property delivered to him, but what that property would be, necessarily could not appear, until what had been sold by Lodge and Beaumont had been ascertained. Until these matters were adjusted, and the account taken, it was impossible to tell for what

amount an order of payment or a money decree should go against the defendants Lodge and Beaumont, after the delivery of the property they had on hand to the receiver. What was left to be done was something more than the mere ministerial execution of the decree as rendered. The decree was interlocutory, and not final, even though it settled the equities of the bill. *Craighead* v. *Wilson*, 59 U. S. 18 How. 199 [15: 332]; *Young* v. *Smith*, 40 U. S. 15 Pet. 287 [10: 741]; *Keystone Manganese & Iron Co.* v. *Martin*, 132 U. S. 91 [33: 275].

In *North Carolina R. Co.* v. *Swasey*, 90 U. S. 23 Wall. 405, 409 [23: 136, 137], *Mr. Chief Justice* Chase in passing upon a decree of foreclosure and sale observed that an appeal may be taken from such a decree "when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. This has long been settled. The sale in such a case is the execution of the decree. By means of it the rights of the parties, as settled, are enforced. But to justify such a sale, without consent, the amount due upon the debt must be determined and the property to be sold ascertained and defined. Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the court." "The authorities are uniform," said *Mr. Chief Justice* Waite, in *Dainese* v. *Kendall*, 119 U. S. 53, 54 [30: 305], "to the effect that a decree to be final for the purposes of an appeal must leave the case in such a condition that if there be an affirmance here the court below will have nothing to do but to execute the decree it has already entered."

[236]

Upon applying for the allowance of an appeal to this court, Lodge and Beaumont made affidavit that, by the judgment and decree of the district court, it had been found that the personal property sold to them by Twell was of the value of forty-two hundred dollars, and that the real estate was of the value of six hundred dollars, and they stated in effect that they had received, up to the rendition of the judgment of the supreme court, rents and profits sufficient, if added to those sums, to make an aggregate in excess of $5,000. But, as we have seen, the decree referred to the value of the property as of the date of the alleged sale and assignment, and did not in terms require Lodge and Beaumont to account at that value, so that until the entry of another decree it would remain problematical whether the money which might thereby be decreed to be paid and the value of the property recovered in specie, together, would be equal to the amount necessary to give us jurisdiction.

Taking this decree as a whole, we are satisfied that the appeal from the judgment affirming it will not lie, and *it is accordingly dismissed.*

THE IRON SILVER MINING COMPANY, [28
Plff. in Err.,
v.
PETER CAMPBELL ET AL.

(See S. C. Reporter's ed. 286-303.)

Second government patent for same land—placer claim and lode mining claim—effect of second patent—secs. 2325, 2326, U. S. Rev. Stat.—impeachment of title.

1. The government of the United States, having issued a patent, cannot, by the authority of its own officers, invalidate that patent by the issuing of a second one for the same property.
2. Where a patent is issued for fifty acres of placer claim and a subsequent patent is issued for a lode mining claim within the fifty acres, in any conflict between the titles conferred by the two patents, the holder of the title under the elder patent has a right to require that the existence of the lode and his knowledge thereof when he obtained his patent shall be established.
3. It cannot be presumed, from the issuing of the lode patent, that the lode claim had been discovered, located and recorded within the boundaries of the land described in the placer patent, before the application for the placer patent.
4. Sections 2325 and 2326 of the Revised Statutes, concerning adverse claims, were not intended to apply to a party who, before the publication first required, had gone through the required proceedings to obtain a patent for mineral land from the United States, had established his right to the land and received his patent.
5. One who has obtained a patent from the government cannot be called to answer in regard to that patent before the officers of the Land Department. The only way in which his title can be impeached is by suit.

[No. 22.]

Argued Mar. 26, 27, 1890. Decided Apr. 28, 1890.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment for plaintiffs in an action brought by Peter Campbell and others against the Iron Silver Mining Company to recover possession of a lode mining claim. *Reversed.*

The facts are stated in the opinion.

This case was formerly argued March 21, 1889, by *Messrs.* **E. O. Wolcott** and **Ashley Pond** for plaintiff in error and **H. M. Teller** for defendants in error.

On April 1, 1889, a re-argument was ordered before a full bench.

Messrs. **E. O. Wolcott, L. S. Dixon** and *Frank W. Owers* for plaintiff in error on final argument.

Messrs. **H. M. Teller, T. M. Patterson** and *C. S. Thomas*, for defendants in error:

The construction of a grant is always in favor of the government and against the grantee.

8 Washb. Real Prop. 171, 172; *Kennedy* v. *McCartney*, 4 Port. (Ala.) 141; *Allegheny* v.

NOTE.—*When patents for land may be set aside for fraud.* See *note* to Miller v. Kerr, 5: 381.

Ohio & P. R. Co. 26 Pa. 355; *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 88 (16: 509).

Where two patents issued by the government for distinct interests in the same land can both be made to stand, and can be reconciled with each other, due credit will be given to both and both will be upheld.

Maguire v. *Tyler*, 75 U. S. 8 Wall. 650 (19: 320); *Sicard* v. *Davis*, 31 U. S. 6 Pet. 124 (8: 342); *Bryan* v. *Forsyth*, 60 U. S. 19 How. 334 (15: 674).

When the authority to issue a patent depends upon the existence of particular facts or upon the performance of certain antecedent acts, and it is the duty of the Land Department to ascertain whether the facts existed or the acts have been performed, its determinations are conclusive of the existence of the authority against any collateral attack.

Hoofnagle v. *Anderson*, 20 U. S. 7 Wheat. 212 (5: 437); *Boardman* v. *Reed*, 31 U. S. 6 Pet. 328 (8: 415); *Bagnell* v. *Broderick*, 38 U. S. 13 Pet. 436 (10: 235); *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); *Moore* v. *Robbins*, 96 U. S. 530 (24: 848); *Marquez* v. *Frisbie*, 101 U. S. 473 (25: 800); *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 644 (26: 878); *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447 (27: 226); *French* v. *Fyan*, 93 U. S. 169 (23: 812); *Quinby* v. *Conlan*, 104 U. S. 420 (26: 800); *Vance* v. *Burbank*, 101 U. S. 514 (25: 929); *Quinn* v. *Chapman*, 111 U. S. 445 (28: 476); *Reichart* v. *Felps*, 73 U. S. 6 Wall. 160 (18: 849); *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87 (3: 665).

[287] *Mr. Justice* **Miller** delivered the opinion of the court:

This is a writ of error to the Circuit Court of the United States for the District of Colorado. The action was brought in that court by Peter Campbell *et al.*, plaintiffs, against The Iron Silver Mining Company, defendant, and was in the nature of an ejectment to recover possession of a mineral lode called The Sierra Nevada lode mining claim. The pleadings merely set up that the plaintiffs were the owners of said lode or claim, describing it, and that defendants had intruded upon their possession. The defendants denied that plaintiffs were the owners of the claim, and asserted their own title. The case was submitted to the court without a jury. The court made the following finding of facts and conclusions of law on which it rendered a judgment for the plaintiffs:

"This cause coming on for trial before the court, and the parties appearing by their attorneys, and having, in open court and by their stipulation in writing filed with the clerk, waived a trial by jury, and the court, having duly heard and considered the evidence, oral and documentary, offered by the respective parties, and having duly deliberated thereon, finds the following facts and conclusions of law, viz.:

"That the defendant, The Iron Silver Mining Company, is a corporation created and organized and existing under and by virtue of the laws of the State of New York, and has complied with the laws of the State of Colorado, so as to entitle it to do business and sue and be sued in the State of Colorado.

"That the mining ground and property described in the pleadings in this action were a part of the public domain of the United States until the title thereof passed out of the United States by the issuing of patents, as hereinafter set forth.

"That the said patent of the Sierra Nevada lode mining claim was issued to the said plaintiffs and their grantors and predecessors in interest at the time thereto stated, and by duly executed and recorded deeds of conveyance the title to the land mentioned and described in the said patent and the complaint in this action has been conveyed to and is seised, owned and possessed by the said plaintiffs, and was so seised, owned and possessed by them at the time of the commencement of this action.

"That on the 13th day of November, 1878, said William Moyer duly made application in the proper United States land office to be allowed to enter and pay for a patent for said William Moyer placer mining claim, being survey lot No. 300 and mineral entry No. —; that on the 2.st day of February, 1879, said William Moyer was allowed to and did make entry in said land office of the United States and paid for the said placer claim, and that on the 30th day of January, 1880, the said William Moyer placer patent was issued to the said William Moyer for the tract of land described in said placer patent, and that by virtue of duly executed and recorded deeds of conveyance the said defendant Company has become the owner of and seised of all the right, title and interest in and to the said tract of land described in and conveyed by the said placer patent.

"That the ground described in said patent of plaintiffs for the said Sierra Nevada lode claim is principally located or situated within the exterior boundaries of the tract of land described in said placer patent for the said William Moyer placer claim and is a part of the same land, and the maps introduced in evidence and contained in the bill of exceptions and record correctly delineate the surface of the ground comprised within the exterior boundary lines of the said placer patent and the said lode patent, respectively.

"And the court finds as conclusions of law from the foregoing findings of fact, that it is conclusively presumed and found, from the face of said Sierra Nevada lode patent, that the said Sierra Nevada lode claim had been duly discovered, located and recorded, and owned by the said patentees in said Sierra Nevada lode patent and their predecessors in interest (the said plaintiffs), within the exterior boundaries of the said tract of land described in said William Moyer placer patent, before the time of the said application for the said placer patent, and the mining ground described in the said complaint and conveyed by the said lode patent is excepted out of the grant of the land described in and conveyed by the said placer patent.

"And the court finds that the plaintiffs were, at the time of the commencement of this action, and still are, the owners and seised of said tract of land described in said complaint and called the Sierra Nevada lode mining claim; that the said defendant Company wrongfully withheld, and still does wrongfully withhold, the possession thereof from the said plaintiffs.

"It is therefore ordered and adjudged that

the State of Missouri, or to the railroad company, by the Act of 1852. The latter Act contained a reservation from the grant for the railroad of all lands theretofore conveyed or disposed of by the United States. Here then were two grants of the same lands by the United States, these grants operating as effectually as patents to convey title to the property described in them. It became necessary in the suit to ascertain which of these was the superior title. The elder grant prima facie, to wit, the grant of the swamp lands to the States, which we have said was a grant *in præsenti*, was the better title. But the question arose as to how it could be shown that this was swamp land within the meaning of the Act of 1850, and therefore passed by that Statute, and could not afterwards be transferred by the Act of 1852.

The Act of Congress granting these swamp lands had made it the duty of the Secretary of the Treasury, a duty afterwards transferred to the Secretary of the Interior, to ascertain what were swamp lands, and to make certificate of the fact to the States that were entitled to them. This duty had not been performed by either the Secretary of the Treasury or the Secretary of the Interior. There was no record or documentary evidence, therefore, by which the State claiming those swamp lands, or its grantee claiming under it, could establish the fact that the land which he was occupying was swamp land under the grant of 1850.

The case was brought in a state court of Missouri, and that court permitted Smith to show by parol evidence, the evidence of parties familiar with the land, that it was swamp and overflowed land at the time the grant of 1850 was made by Congress, and had been ever since, and on this testimony a judgment was rendered for the defendant Smith, which [8] was affirmed by the Supreme Court of the State. From that court it was brought to this court by a writ of error. This court said that "by the second section of the Act of 1850, it was made the duty of the Secretary of the Interior to ascertain this fact (namely, whether it was swamp land or not) and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the Act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the Land Department with the state officers, he must, if he attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed lands, and so excluded from the grant under which plaintiff claims, a grant which was also a gratuity? The matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose."

The subsequent case of *French* v. *Fyan*, 93 U. S. 169 [23: 812], as shown by a careful reading of it, is not in conflict with this decision, because in that case the Secretary having acted upon the matter and certified that the lands then in controversy were swamp and overflowed lands, it was not permitted, in a trial before a jury, to contradict this certificate by oral testimony. And in the still later case of *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039], the principle we are stating is clearly laid down in a case almost identical with the present one.

It is urged upon us, in answer to this view [29 of the subject, that by sections 2325 and 2326 of the Revised Statutes it is made the duty of a person seeking to avail himself of the discovery of a mineral lode and obtain a patent for the same, previous to making the application for a patent, to file the survey and field notes of the grant which he claims, and do certain other things showing him to be entitled to purchase the mineral land which he claims, all of which is to be under oath. The Statute then declares that the register, upon the filing of such application, field notes, etc., shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim, and at the end of this sixty days' publication, "if no adverse claim shall have been filed with the register and the receiver" of the land office, "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it is shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 then proceeds to enact that where an *adverse claim* is filed it shall be upon oath of the person making the claim, and shall set out the boundaries, nature and extent of such adverse claim, and all proceedings shall be stayed in the land office until the controversy shall be settled or decided by a court of competent jurisdiction. It makes it the duty of the adverse claimant, "within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, *to determine the question of the right of possession*, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof," may "file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five [29 dollars per acre for his claim, together with the

own manner, and establishes his own claim, and the officers of the government frequently do not know that there is any other party claiming the same land, while there may be such a party who has also taken proper steps, and whose rights are superior to those of the party presenting himself before the officers of the government. It is this *ex parte* proceeding which is supposed to bind the claimants under the Moyer patent conclusively and forever in regard to their knowledge of the existence of this Sierra Nevada lode at the time they made application for their patent within its limits.

We are not ignorant of the many decisions by which it has been held that the rulings of the land officers in regard to the facts on which patents for land are issued are decisive in actions at law, and that such patents can only be impeached in regard to those facts by a suit in chancery brought to set the grant aside. But those are cases in which no prior patent had been issued for the same land, and where the party contesting the patent had no evidence of a superior legal title, but was compelled to rely on the equity growing out of frauds and mistakes in issuing the patent to his opponent.

Where each party has a patent from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, we think it is competent, in any judicial proceeding where this question of superiority of title arises, to establish it by proof of these facts. We do not believe that the government of the United States, [293] having issued a patent, can by the authority of its own officers invalidate that patent by the issuing of a second one for the same property. If it be said that the question of the reservation of this vein as a known lode under the law on that subject makes a difference in this respect, and that the land office has a right to inquire whether such lode existed, and whether its existence was known to the patentee of the first patent, we answer that a patent issued under such circumstances to the claimant of the lode claim may possibly be such prima facie evidence of the facts named as will place the parties in a condition to contest the question in a court.

But we are of opinion that it is always and ultimately a question of judicial cognizance. The first patent conferred upon Moyer the right to this vein and to all other veins within the limits of his fifty acres of placer claim. There is excepted from that grant any lode existing and known at the time application was made for his patent. Whether such a lode did exist, and whether it was known to him, is a question which he has a right to have tried by a court of justice, and from which he cannot be excluded by the subsequent action of the officers of the Land Department. It is not necessary to consider whether there may not be reservations of a character which could be thus disposed of by the proper land offices; for instance, a reservation of any land heretofore patented or granted to other parties. There is nothing there to decide but to look at the records of the land office and see whether any land within that boundary ever had been granted. A reservation of a specific boundary, laid down so as to be identified, in the first patent, needs no judicial action to determine what it is that is reserved.

But in the present case, two facts requiring judgment, discretion, knowledge of the law and the balancing of testimony are essential to the exercise of the right to grant the property to some other party. One of these, the existence of such a vein, is a question often of great conflict of evidence, requiring the weighing of testimony. The other, the most important of all, the most difficult to decide, the least likely to be decided correctly by *ex parte* testimony or in *ex parte* proceedings, is the question whether, if such mine existed, it was known to the party who applied for the patent at the time application was made. And while we are not prepared to say at this time that the land officers cannot, on a prima facie case, decide the right of the applicant to such vein and give him a patent for it, we are satisfied that in any conflict between the title conferred by two patents, whether it be in law or in equity, the holder of the title under the elder patent has a right to require that the existence of the lode, and the knowledge of its existence on the part of the grantee of the elder patent, should be established. Here we have a remarkable fact, the absence of any evidence of a contest before the Land Department on that subject, and of any hearing on the part of the owner of the elder title. We have no finding or assertion of the existence of such fact in the junior patent, or that it was established even by *ex parte* proceedings before the officers of the government; and the introduction of evidence, on the trial in this case, on that subject, was ignored as any part of the case on which the judgment of the court was based. It rests solely, and, as the court says, conclusively, on the presumption that the officers of the government did their duty in the matter, and that what they decided is incapable of contradiction.

The case in this court bearing the nearest analogy to the one before us is that of *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19: 599]. By the Act of September 28, 1850, all the swamp and overflowed lands belonging to the United States were given to the States within which they laid. The Secretary of the Interior was directed by the Statute to ascertain and distinguish these lands and certify them to the several States, and it has been repeatedly held by this court that the Act itself was a present grant of all such lands. Congress subsequently, by the Act of June 10, 1852, granted the right of way and a portion of the public lands to the State of Missouri, in aid of the construction of railroads. This grant was accepted by the Legislature of Missouri, which, by a statute, vested the land granted in the Hannibal and St. Joseph Railroad Company, the company having located its road, whereby the even-numbered sections and quarter-sections granted to the State for the use of said road were ascertained. The railroad company, finding Smith, the defendant, residing upon and claiming one of these quarter-sections, brought an action of ejectment to recover possession. Smith defended on the ground that the land was swamp land, and the title passed from the United States by the Act of 1850, and could not be granted to

the State of Missouri, or to the railroad company, by the Act of 1852. The latter Act contained a reservation from the grant for the railroad of all lands theretofore conveyed or disposed of by the United States. Here then were two grants of the same lands by the United States, these grants operating as effectually as patents to convey title to the property described in them. It became necessary in the suit to ascertain which of these was the superior title. The elder grant prima facie, to wit, the grant of the swamp lands to the States, which we have said was a grant *in præsenti*, was the better title. But the question arose as to how it could be shown that this was swamp land within the meaning of the Act of 1850, and therefore passed by that Statute, and could not afterwards be transferred by the Act of 1852.

The Act of Congress granting these swamp lands had made it the duty of the Secretary of the Treasury, a duty afterwards transferred to the Secretary of the Interior, to ascertain what were swamp lands, and to make certificate of the fact to the States that were entitled to them. This duty had not been performed by either the Secretary of the Treasury or the Secretary of the Interior. There was no record or documentary evidence, therefore, by which the State claiming those swamp lands, or its grantee claiming under it, could establish the fact that the land which he was occupying was swamp land under the grant of 1850.

The case was brought in a state court of Missouri, and that court permitted Smith to show by parol evidence, the evidence of parties familiar with the land, that it was swamp and overflowed land at the time the grant of 1850 was made by Congress, and had been ever since, and on this testimony a judgment was rendered for the defendant Smith, which was affirmed by the Supreme Court of the State. From that court it was brought to this court by a writ of error. This court said that "by the second section of the Act of 1850, it was made the duty of the Secretary of the Interior to ascertain this fact (namely, whether it was swamp land or not) and furnish the State with the evidence of it. Must the State lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the State did not depend on his action, but on the Act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the Land Department with the state officers, he must, if he attempted it, rely, as he did in many cases, on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed lands, and so excluded from the grant under which plaintiff claims, a grant which was also a gratuity? The matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose."

The subsequent case of *French* v. *Fyan*, 93 U. S. 169 [23: 812], as shown by a careful reading of it, is not in conflict with this decision, because in that case the Secretary having acted upon the matter and certified that the lands then in controversy were swamp and overflowed lands, it was not permitted, in a trial before a jury, to contradict this certificate by oral testimony. And in the still later case of *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039], the principle we are stating is clearly laid down in a case almost identical with the present one.

It is urged upon us, in answer to this view [29 of the subject, that by sections 2325 and 2326 of the Revised Statutes it is made the duty of a person seeking to avail himself of the discovery of a mineral lode and obtain a patent for the same, previous to making the application for a patent, to file the survey and field notes of the grant which he claims, and do certain other things showing him to be entitled to purchase the mineral land which he claims, all of which is to be under oath. The Statute then declares that the register, upon the filing of such application, field notes, etc., shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim, and at the end of this sixty days' publication, "if no adverse claim shall have been filed with the register and the receiver" of the land office, "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it is shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 then proceeds to enact that where an *adverse claim* is filed it shall be upon oath of the person making the claim, and shall set out the boundaries, nature and extent of such adverse claim, and all proceedings shall be stayed in the land office until the controversy shall be settled or decided by a court of competent jurisdiction. It makes it the duty of the adverse claimant, "within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, *to determine the question of the right of possession*, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof," may "file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five [29 dollars per acre for his claim, together with the

proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment rolls to the commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

The argument we are considering assumes, as a matter of law, that all that was required of the owners of the Sierra Nevada claim, and all that was required of the register and receiver of the land office in regard to these publications, was done and had, and that therefore the owners of the Moyer patent are concluded by the proceedings which are thus supposed to have taken place. There are two substantial objections to this view of the subject. The first is, that if such proceedings were had, and resulted either in the trial of the adverse claim before a court of justice, or in the failure of Moyer or anybody else to assert an adverse claim, those proceedings are matters of public record, and as, in this case, they must constitute the main reliance of those claiming under the Sierra Nevada patent, for the superiority of their title, this record should have been produced on the trial of the case; and that the mere opinion of the register and receiver of the land office as to what those proceedings are and their effect upon the prior patent of Moyer, should not be substituted for the production of those proceedings themselves, copies of which were easily obtainable at the land-office department.

Another reason, which we think more satisfactory, is that a careful examination of this Statute concerning adverse claims leads us to the conviction that it was not intended to affect [299] a party who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States, had established his right to the land claimed by him, and received his patent, and was reposing quietly upon its sufficiency and validity. It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but throughout the whole of these sections and the original Statute from which they are transferred to the Revised Statutes, the words "claim" and "claimant" are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent. And the purpose of the Statute seems to be, that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the Statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the Land Department in determining which of these *claimants* shall have the patent, the final evidence of title, from the government. This view is consistent with the entire Statute on the subject, and some of its language is inconsistent with the idea that any contest to be thus decided is between a party who already has the legal title to the property which he claims and some other party who is only setting up a claim to the same property.

In the first place, its inapplicability to the present case is shown by the requirement that in all cases the successful party shall pay five dollars per acre before he can get his patent. This argues that it has no reference to a placer patent, because for the land conveyed by a placer patent the party is only required to pay two dollars and a half an acre.

Again, the following language seems inconsistent with the idea that one of the contesting parties may already have a patent for the land in controversy, namely: "After such judgment shall have been rendered, the party entitled to the *possession* of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the General Land Office, and a *patent shall issue thereon for the claim*, or such portion thereof as the applicant shall appear, from the decision of the courts, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the *claim*, each party may pay for his portion of the claim, . . . and patents shall issue to the several parties according to their respective rights."

It is too obvious to escape comment that by this proceeding there are brought before the court adverse *claimants* to mineral land, and that the party who succeeds in establishing the superior right to the *possession* shall have a patent. This may be the party who institutes the original proceeding or it may be the party who sets up the adverse claim. Whichever of these two establishes his better right to the possession, gets the patent. How can this apply to a case where one of the parties already has a patent? How can he be required to pay again for the land for which he has already paid all that the law requires? How can he be required to establish before the land office his right to the possession of a mine for which that office has already granted him a patent?

And again, how can such a case be brought within the terms of a statute which provides that, where "several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim,

with the proper fees," etc., "and patents shall issue to the several parties according to their respective rights." Why should a patent issue to a party for that for which he already has a patent? These expressions of the Statute, so
1] clearly applicable to parties who are only claimants and have no title, show what the purpose of Congress was in passing the law, and that it was not intended that a party who had already gone through all these proceedings and established his right to the mine which he claims, and received his patent for it, shall be put upon the same level with mere claimants, who have yet to establish their claim and prove their right even to the possession, and that he is to be brought before a judicial tribunal to make a contest with a party who has no legal standing in court to contest with him, who has the legal title from the government.

And this is just and is sound policy. Why should a party who has the legal title from the government of the United States, on which he relies with safety, be called upon to answer every adventurer who digs a hole in the ground thus conveyed to him and asserts a right to mineral found in that ground? When he has once obtained the patent of the United States for his land, he should be only required to answer persons who have some established claim, and to contest with this party not before the administrative departments, but in courts of justice, by the regular proceedings which determine finally the rights of parties to property. For these reasons we do not believe that these sections, 2325 and 2326, are intended to apply to the case of a party who has a prior patent for the land which may be the subject of controversy before the register and receiver of the land office. Is it fair and just that the party who has gone through all the processes which the laws of the United States require of him to obtain title to its lands, and has obtained that title, shall be subjected by the officers of the government of the United States to defend that title before them from the attacks of an outsider?

We have more than once held that when the government has issued and delivered its patent for lands of the United States, the control of the Department over the title to such land has ceased, and the only way in which the title can be impeached is by a bill in chancery; and we do not believe that, as a general rule, the man who has obtained a patent from the government can be called to answer in regard to that
2] patent before the officers of the Land Department of the government. *U. S.* v. *Schurz*, 102 U. S. 378 [26: 167].

For these reasons we are of opinion that the circuit court in refusing to consider the testimony found in the case in regard to the known existence of the vein of the Sierra Nevada claim at the time of the application for the Moyer patent, was in error; and also that it was erroneous to hold that, on the face of the patent for the Sierra Nevada mine, the existence of this vein and the knowledge of its existence were to be conclusively presumed in this action.

The judgment is reversed, and the case is remanded to the Circuit Court, with a direction to grant a new trial.

Mr. Justice **Brewer**, dissenting:

I am unable to agree with the opinion of the court, delivered by *Mr. Justice* Miller.

A placer patent and the Statute under which it is issued expressly provide that it shall not include any known lode or vein. So, if within the limits of placer ground there be a vein or lode bearing gold or other mineral of precious value, and that vein or lode was known at the time of the application for the placer patent, it did not pass under the patent. It was as much excepted from its terms as though it were in an adjoining State. It was territory carved out by the very language of the patent and the Statute, and, not passing to the patentee, remained the property of the government, and subject to location and patent, as fully and in the same manner and upon the same terms, as any other mineral vein. Suppose a patent for agricultural lands by virtue of the Statute excepted all lakes, ponds and other bodies of water, who would doubt that the title to any lake or pond, within the territory described in such patent, remained in the government and subject to sale by it in any manner it deemed best; or that a title thereto, obtained in the manner prescribed by law, was paramount. So here. There is only one way and one tribunal provided for obtaining title to any vein [303]
or lode, whether within or without the limits of placer ground, and that is by application in the land office. That way was pursued in this case, and a patent obtained. Whether this lode or vein was or was not within the limits of the placer patent depends upon no matter of law, but upon two questions of fact: first, Was there a vein bearing gold or other precious mineral within the limits of the placer territory? and, second, Was it known at the time of the application for the placer patent? These two questions of fact determine the question whether the placer patent took the whole surface ground, and all veins and lodes within its territory. Provision is made by statute for putting such questions of fact in issue. The adverse proceedings prescribed by statute are of common occurrence. It is the ordinary procedure. We have had cases involving such procedure before us this term. But I fear that this decision is equivalent to holding that such statutory adverse proceedings amount to nothing and are unworthy of notice. From *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 [20: 485], to the present time, the uniform ruling of this court has been, that questions of fact passed upon by the Land Department are conclusively determined, and that only questions of law can be brought into court.

The right to this patent solely depends upon these two questions of fact, which were considered by the land office when the original patent was issued. I think that its determination upon them was conclusive.

I am authorized by the chief justice to say that he concurs in these views.

326] HOWARD MANSFIELD, *Plf. in Err.*,
v.
THE EXCELSIOR REFINERY COMPANY.

(See S. C. Reporter's ed. 326-342.)

Recitals in trustee's deed, error in—quitclaim deed—recording—Illinois law—recording trust deed, effect of—priority of lien on distillery—effect of collector's sale—leasehold interest—forfeiture for fraud.

1. Neither error in mere recitals in a trustee's deed, nor its silence as to the hour of the day when the sale occurred, makes the deed void or ineffectual as a conveyance of the title by a trustee invested with power to sell and to convey the title.
2. In Illinois, a quit-claim deed is effectual to transfer title to land and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded.
3. In Illinois, an unrecorded deed will pass the title, except as to creditors and subsequent purchasers without notice.
4. The recording of a trust deed gives notice of its existence to subsequent claimants of the equity of redemption, and of what may be done in pursuance of the deed, and they are bound to take notice of proceedings thereunder.
5. A priority of lien acquired by the government on a distillery by the waiver of prior liens upon it under sec. 3262, U. S. Rev. Stat., can only be enforced in equity.
6. When the collector distrains and sells property for taxes, his certificate transfers to the purchaser only the right, title and interest of the delinquent in the property sold. Sec. 3194, U. S. Rev. Stat.
7. Where that interest is only a leasehold interest, the purchaser at the collector's sale acquires nothing more.
8. Forfeiture of distillery premises for nonpayment of taxes cannot occur unless the distiller has defrauded, or attempted to defraud, the government of the taxes due from him.

[No. 239.]

Submitted and Argued March 28, 1890. Decided May 5, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment for defendant in an action to recover possession of land on which was a distillery. *Reversed.*

The facts are stated in the opinion.

Mr. **Henry B. Mason,** for plaintiff in error:

Government seizure and sale invalid for lack of preliminary notice and demand for payment of taxes.

U. S. Rev. Stat. §§ 3185, 3186; *Parker* v. *Rule*, 13 U. S. 9 Cranch, 65, 71 (3: 658, 660).

Also invalid for lack of notice of such seizure and proposed sale.

U. S. Rev. Stat. §§ 3197, 3198; Mo. Gen. Stat. 1865, chap. 13, § 112; *Spurlock* v. *Allen*, 49 Mo. 178, 180; Ill. Rev. Stat. chap. 77, *Judgments and Executions*, § 14.

Government sale and deeds executed thereunder operated at most only to convey the leasehold of Hinds, which expired May 1, 1877.

U. S. Rev. Stat. §§ 3186, 3196, 3199, 3251; *U. S.* v. *Van Slyke*, 8 Biss. 227, 230; *Windsor* v. *McVeigh*, 93 U. S. 274, 277 (23: 914, 915); *McVeigh* v. *U. S.* 78 U. S. 11 Wall. 259 (20: 80); *Henderson's Distilled Spirits*, 81 U. S. 14 Wall. 44 (20: 815); *Thacher's Distilled Spirits*, 103 U. S. 679 (26: 535); *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627 (24: 858).

Government seizure and sale invalid as to plaintiff and his grantors, because no notice given to them.

U. S. Rev. Stat. §§ 3197, 3207; 1 Bouvier, Law Dict. title *Estate*, p. 605; U. S. Const. 5th Amendment; *Windsor* v. *McVeigh*, 93 U. S. 274, 277 (23: 914, 915).

Waivers of plaintiff's grantors did not waive notice, but simply gave government a first lien, which could only be enforced upon due notice.

U. S. Rev. Stat. §§ 3197, 3251, 3262.

Collector's deed invalid to devest plaintiff's title, because it does not purport to pass the title of any party or parties delinquent; at most it merely assigned the lien of the United States.

U. S. Rev. Stat. § 3199; *Einstein* v. *Gay*, 45 Mo. 62; *Clarke* v. *Strickland*, 2 Curtis, 439, 443 *et seq.*; *Hedger* v. *Union Ins. Co.* 17 Fed. Rep. 498.

Objections to defendant's tax deed can be properly raised in an action of ejectment.

Beatty v. *Mason*, 30 Md. 409, 416; *Parker* v. *Rule*, 13 U. S. 9 Cranch, 64, 71 (3: 658, 660); *Ronkendorff* v. *Taylor*, 29 U. S. 4 Pet. 349, 359 (7: 882, 885); *Slater* v. *Maxwell*, 78 U. S. 6 Wall. 268, 276 (18: 796, 799); *Schenck* v. *Peay*, 1 Dill. 267, 1 Woolw. 175.

Trustee's deed to plaintiff's grantor was valid.

Ill. Rev. Stat. chap. 95, *Mortgages*, § 17; *Koester* v. *Burke*, 81 Ill. 436, 439; *Graham* v. *Anderson*, 42 Ill. 514, 517.

Mr. **W. E. Blake,** for defendant in error:

A special authority must be strictly, literally and precisely pursued.

Powell v. *Tuttle*, 3 N. Y. 401; *Sharp* v. *Johnson*, 4 Hill, 99; *Sears* v. *Livermore*, 17 Iowa, 297; *Gebhard* v. *Sattler*, 40 Iowa, 152; *Waldron* v. *Chasteney*, 2 Blatchf. 62; *Simmons* v. *Baynard*, 30 Fed. Rep. 532.

A trustee is disqualified from purchasing or acquiring an interest adverse to that of his *cestui que trust* in the trust property.

Wormley v. *Wormley*, 21 U. S. 8 Wheat. 421 (5: 651); *Walden* v. *Bodley*, 39 U. S. 14 Pet. 156 (10: 398); *Allan* v. *Gillet*, 21 Fed. Rep. 273.

In Illinois a quit-claim deed is as effectual to transfer title to land as a deed of bargain and sale.

McConnel v. *Reed*, 5 Ill. 117; *Brown* v. *Banner Coal & Coal Oil Co.* 97 Ill. 214; *Delano* v. *Bennett*, 90 Ill. 533.

When the only object of the proceeding is to appropriate the land to the satisfaction of the government lien, no reason can exist for notifying a trustee, who prior thereto had fully discharged his trust.

Johnson v. *Foster*, 68 Iowa, 140.

NOTE.—*As to record of deed; its effect as notice; as to whom not necessary to record,*—see note to Stebbins v. Duncan, 27: 641.

A second incumbrancer is not a necessary party to a proceeding instituted by a prior lienholder.

Brewster v. *Wakefield*, 22 How. 128, 129 (16: 304).; *Donnelly* v. *Rusch*, 15 Iowa, 99.

[327] *Mr. Justice* **Harlan** delivered the opinion of the court:

This is an action in the nature of ejectment. It was brought by the plaintiff in error, December 24, 1879, to recover from the defendant in error the possession of a tract of land in Henderson County, Illinois, containing ten acres more or less, and upon which was a distillery. The plea was, not guilty of unlawfully withholding the premises described in the declaration. There were three trials of the case, each time by the court, pursuant to a written stipulation of the parties waiving a jury. Upon the first trial there was a judgment for the defendant. At the instance of the plaintiff a new trial was granted, in conformity with a statute of Illinois which provides that at any time within one year after a judgment, either upon default or verdict in an action of ejectment, the party against whom it is rendered, his heirs or assigns, shall be entitled, upon the payment of all costs, to have the judgment vacated and a new trial granted,—no more, however, than two new trials to be granted to the same party under the Statute. Rev. Stat. Ill. 1845, p. 208, § 30; 1874, p. 447, § 35; 1 Starr & Curtis' Anno. Stat. 989. The first new trial under this Statute is the right of the unsuccessful party, and is not dependent upon the discretion of the court. *Vance* v. *Schuyler*, 6 Ill. 160; *Riggs* v. *Savage*, 9 Ill. 129; *Emmons* v. *Bishop*, 14 Ill. 152; *Chamberlain* v. *McCarty*, 63 Ill. 262; *Lowe* v. *Foulke*, 103 Ill. 58. These statutory provisions govern the trials of actions of ejectment in the courts of the United States sitting in Illinois. *Equator M. & S. Co.* v. *Hall*, 106 U. S. 86 [27: 114]. At the second trial there was a judgment for the plaintiff. The defendant then took a new trial under the Statute, and when the case was last tried the court ruled that upon all the evidence the law did not authorize a recovery by the plaintiff, and gave judgment for the defendant. The present writ of error brings up that judgment for review.

The parties entered into a written stipulation as to the principal facts. The main question in the case arises out of a sale by a collector of internal revenue of the premises in dispute, including the distillery thereon, for taxes due from the distiller.

The facts, so far as it is necessary to state them, may be thus summarized:

On the 20th of September, 1873, the Bank of Chicago was the owner in fee of the premises. It executed to the United States, April 22, 1874, in conformity with the statute of the United States, what is called a waiver, which recited that George E. Hinds intended to carry on the business of distilling and manufacturing high wines in the distillery on these premises, and contained the following provisions: "And whereas the undersigned, the Bank of Chicago, a corporation organized and existing under the laws of the State of Illinois, of the County of Cook and the State of Illinois, has an interest in the title of said lot of land and distillery and appurtenances: Therefore, in order to enable the said George E. Hinds to carry on said business on said lot of land in said distillery, and to comply with the requirements of the eighth section of the Act of Congress, approved July 20th, A. D. 1868, and in consideration thereof, the said bank does hereby express and give its consent that said distillery and premises may be used by said Hinds for the purpose of distilling spirits, subject to the provisions of law; and the said bank does hereby expressly stipulate that the lien of the United States for taxes and penalties [32 shall have priority of any and all its interest and claims to said distillery and premises, and that in case of the forfeiture of the distillery premises or any part thereof the title of the same shall vest in the United States, discharged from any such claim or interest which the said bank has or may have in and to the same, and with the express understanding that this waiver shall take effect and be in force on and after this date." This document was recorded the day succeeding its execution, in the office of the recorder of the county where the land lies.

The bank, on the 10th of July, 1874, executed to Isaac P. Coates a deed or instrument, which was duly recorded on the 30th of March, 1875, conveying various parcels or tracts of land, including the one in controversy, in trust to dispose of the same at public or private sale, and apply the proceeds to the payment of its debts and liabilities. Coates executed, May 3, 1875, under section 3262 of the Revised Statutes, a waiver similar to the one above referred to, and which by its terms was to take effect May 10, 1875. This was also placed on record. By quitclaim deed executed on the same day—May 3, 1875—Coates, as assignee, conveyed the premises in dispute to Elisha H. Turner, of Burlington, Iowa. The consideration recited was $8,500, paid by the grantee. This deed was recorded May 6, 1875, together with the waiver that Coates had executed. Turner also on the same day executed and placed upon record a similar waiver to the United States.

On May 6, 1875, Turner conveyed the premises to George F. Westover, of Chicago, in trust to secure the payment of three promissory notes given by Turner for the price of the premises, all dated May 6, 1875, and payable to the order of Isaac P. Coates, assignee,—one for $1,500 due July 1, 1875; one for $3,000 due May 1, 1876, and one for $3,000 due May 1, 1877,—each note drawing interest at the rate of eight per cent per annum until due, and ten per cent after maturity. This deed provided, among other things, for a sale by the trustee upon default by Turner in the payment of the notes or any part thereof, or of the interest accruing thereon, and for a conveyance to the purchaser. It gave the trustee power to adjourn the sale from time to time, at discretion, and [33 constituted him attorney for the grantor to execute and deliver deeds to the purchaser or purchasers; applying the proceeds to the

payment of the notes and for other purposes specified, and reconveying to the grantor, after the objects of the trust were accomplished, such part of the premises as remained unsold. This deed was recorded the day of its execution, and at the same time with the deed from Coates to Turner.

In conformity with the terms of the trust deed, Westover, on the 1st day of September, 1876, advertised the premises to be sold, at public vendue, on the 7th day of October, 1876, to the highest bidder for cash, together with all the right, title, benefit and equity of redemption therein of Turner, his heirs and assigns. The advertisement stated that the sale was because of default in the payment of the first two above-described notes of Turner to Coates, and of the interest due thereon, and because of the application by the legal holders of the notes to the trustee to sell and dispose of the premises under the authority conferred by the trust deed. A sale was made by the trustee on the day and at the place named in the notice. By quit-claim deed, dated October 9, 1876, and duly acknowledged the next day, Westover conveyed the premises to Coates, as purchaser at the trustee's sale. The deed described the default, on account of which the sale was made, as having occurred "in the payment of the second of said notes, and the interest on the second and third notes," and stated that the premises were sold, under the advertisement, on the day and year and at the place mentioned, and that Coates became the purchaser. This deed was duly acknowledged on the 10th day of October, 1876, but was not filed for record and recorded until December 22, 1879. By quit-claim deed, dated December 18, 1879, acknowledged the succeeding day, and filed for record December 22, 1879, Coates and wife conveyed the premises to the plaintiff, Howard Mansfield.

The stipulation between the parties states that "December 16, 1876, the said real estate in controversy was seised, and afterwards a sale made by the United States collector of internal revenue for the 4th District of Illinois, for the nonpayment of taxes and assessment of internal revenue against George E. Hinds, a distiller operating under a lease expiring May 1, 1877, the distillery on the said property in controversy, sufficient goods, chattels or other effects to satisfy such taxes and assessments not having been found by said collector;" also, "that George F. Westover and Isaac P. Coates received no notice of such seizure and sale (prior to said sale) and only knew of such seizure and sale by reports long after such seizure and sale occurred." The collector's advertisement was on December 21, 1876, and was for the sale, on the 10th of January, 1877, of "the property generally known as the Sagetown or Turner distillery, lately operated by George E. Hinds, consisting of 10 acres, more or less, with the distillery buildings thereon," etc. The report of that sale shows that Albert W. Parsons, of Burlington, Iowa, became the purchaser of the property sold by the collector, at the price of $2,240, the amount of the assessments, liabilities and costs claimed by the government. The property not having been redeemed within the time prescribed by the laws of Illinois, and T. W. Barhydt, trustee for the Merchants' National Bank of Burlington, Iowa, having become the owner, by assignment of the certificate of purchase given to Parsons, the collector, November 4, 1878, made a deed to Barhydt, trustee, conveying all the right, title and interest of the United States. That deed was acknowledged November 14, 1878, and recorded December 22, 1879. The defendant claims title under the collector's sale and deed. It also claims under a quit-claim deed executed to it by Elisha H. Turner and wife, of date May 14, 1878, which was acknowledged on that day, and filed for record October 28, 1878. This last deed purported to have been given "for the consideration of good and valuable considerations hereby acknowledged, and one dollar," and to "convey and quitclaim" Turner's interest in the premises.

Our attention will be first directed to certain objections urged by the defendant to the plaintiff's title. Its contention is that the power conferred upon Westover by the trust deed of May 6, 1875, was not so executed as to pass the title to Coates, the purchaser at the trustee's sale of October 7, 1876. This [332 objection is based upon two grounds, the first of which is that the trustee's advertisement stated that the sale was by reason of the default in the payment of the first two promissory notes given by Turner to Coates, and of the interest due on those notes, whereas the deed from Westover to Coates recites that the default was in respect to the second note, and the interest on the second and third notes. The second ground is, that the trust deed authorized the trustee, upon default in the payment of the notes or of any part thereof, or of the interest accruing thereon, and after advertisement, to sell the premises and all the right and equity of redemption of the grantor "at public vendue, to the highest bidder for cash, at the premises or at the front door of the court-house," in the county where the premises were, "at the time appointed in said advertisement, or may adjourn the sale from time to time, at discretion;" and that while the advertisement fixed the hour of 11 o'clock of the forenoon of October 7, 1876, as the time of the sale, the deed to Coates, although reciting that the sale occurred "upon the day and year and at the place" mentioned in the advertisement, was silent as to the hour of the day on which the sale took place. These objections—if, under any circumstances, available to Turner or to those claiming under him—are of no consequence in this action involving simply the legal title to the premises. The trustee had power to sell upon notice, and to convey the legal title to the purchaser. He did sell upon notice which described the nature of the default upon the part of Turner that made a sale necessary. While the deed does not accurately state the particulars of such default, it does recite a sale pursuant to the notice, and makes that notice a part of the deed. Neither this error in its mere recitals, nor its silence as to the precise hour of the day when the sale occurred, made the deed

void upon its face, or ineffectual as a conveyance of the legal title by a trustee invested with power to sell upon notice, and to convey the title to the purchaser. *Koster* v. *Burke*, 81 Ill. 436, 439; *Graham* v. *Anderson*, 42 Ill. 514, 517.

Another contention of the defendant is that, independently of any right acquired under [333] the collector's sale and conveyance, its title, as derived from Turner's quit-claim deed of May 14, 1878, filed for record October 28, 1878, must prevail in this action against the plaintiff's title, derived from the deed of Westover to Coates, not filed for record until December 22, 1879. This contention is based upon that provision of the Statute of Illinois which declares that "all deeds, mortgages and other instruments of writing which are authorized to be recorded shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice; and all such deeds and title papers shall be adjudged void as to all creditors and subsequent purchasers without notice, until the same shall be filed of record." Rev. Stat. Ill. 1845, p. 108, § 23; 1874, p. 278, chap 30, § 30; 1 Starr & Curtis, p. 591, § 31. The defendant claims to be a subsequent purchaser from Turner without notice of the prior sale and conveyance by Westover to Coates. It relies upon those cases in the Supreme Court of Illinois which hold that "a deed of release and quit-claim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such a deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect there is no distinction between different forms of conveyance. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the *same* lands which had previously been conveyed." *McConnel* v. *Reed*, 5 Ill. 117. See also *Kennedy* v. *Northup*, 15 Ill. 154; *Holbrook* v. *Dickenson*, 56 Ill. 497; *Harpham* v. *Little*, 59 Ill. 509. So in *Brown* v. *Banner Coal & Coal Oil Co.*, 97 Ill. 214, 219: "The land being within the description the grantees under the quit-claim deedare purchasers; and, nothing indicating bad faith or notice of the former sale, the unrecorded deed, as to them, was inoperative until recorded, and not being recorded until after the record of the deed of release, by the very words of the Statute, cannot prevail."

We do not perceive that these cases sustain [334] the position of the defendant. Turner did not have the legal title to the premises at any time after the execution of his deed to Westover. The legal title was in Westover from the date of Turner's conveyance to him, May 6, 1875, until the former's deed to Coates of the 9th of October, 1876. Granting that the defendant, when it received the quit-claim deed of 1878, was a purchaser—although it does not appear affirmatively that it paid anything of value to Turner—it was not, within the meaning of the Statute, a purchaser without notice; for it was informed by the record of deeds that the legal title was in Westover in trust to secure the notes held by Coates, and that Turner's interest in the property, after the execution of that deed, arose out of the clause requiring the trustee, after the objects of the trust were attained, to reconvey to him such of the premises as remained unsold. Turner's deed to the defendant, as we have seen, only purported to pass his interest in the premises. The defendant did not acquire by that deed the legal title; for the legal title had long before that been conveyed to Westover. In Illinois an unrecorded deed will pass the title, except as to creditors and subsequent purchasers without notice. But as the deed of trust to Westover was recorded before Turner's conveyance to the defendant, the latter took with notice of what might be done under the trust deed. *Snapp* v. *Peirce*, 24 Ill. 157. In *Farrar* v. *Payne*, 73 Ill. 82, in which the title of one of the parties arose out of a sale under an attachment levied on the interest of the grantor in certain real estate, covered by a trust deed, after that deed was recorded—the deed to the purchaser at the sale under the attachment being filed for record before the deed to the purchaser at the trustee's sale—the court said: "The trust deed had been recorded previous to the attachment, and that was enough. The published notice of the sale was all the required notice of any proceeding under the trust deed. The recording of the trust deed gave notice of its existence to subsequent claimants of the equity of redemption, and pointed out the source of information of what might be done in pursuance of the deed, and they were bound to take notice of the proceedings thereunder. The title of Cranston [the purchaser at the trustee's sale] [335] related back to the execution of the deed of trust. The subsequent proceedings under the deed of trust were connected with and in aid of the title conveyed by that deed." This language was cited with approval in *Heaton* v. *Prather*, 84 Ill. 330, 333, the court adding: "It was also held in *Rupert* v. *Mark*, 15 Ill. 540, and *Hankinson* v. *Barbour*, 29 Ill. 80, that whatever is sufficient to put a purchaser of land on inquiry is sufficient notice of an unrecorded deed." It results that, as between Westover, Coates and Turner, the legal title passed to Coates before the execution of Turner's quit-claim deed; and that title, being of record when this action was brought, relates back to the date of the trust deed to Westover, and was not affected by the intermediate deed made by Turner to the defendant.

This disposes of all the questions arising out of the plaintiff's chain of title that we deem important to notice.

We come now to the examination of the question relating to the seizure, sale and conveyance by the collector of internal revenue. We have seen that such seizure occurred on the 16th day of December, 1876, previous to which time there had been placed upon record a deed by Turner, conveying the premises to Westover in trust to secure the payment of three notes, aggregating $7,500, given by Turner to Coates for the price of the property, two of which notes were past

due when the collector made his seizure; and previous to which time, also, the legal title had been, by deed duly acknowledged, conveyed to Coates as the purchaser at the sale made by the trustee. This deed to Coates not having been recorded at the time of the seizure and sale by the collector, what interest in the premises passed by the collector's sale and deed? If, as contended, the collector's sale and deed passed, and, under the Statute, could have passed, nothing more than the distiller's interest in the premises—which was a leasehold interest ceasing May 1, 1877—then the court below erred in not rendering judgment for the plaintiff, as the holder of the legal title. This question depends upon the meaning to be given to numerous sections of the Revised Statutes to be found in title 35, *Internal Revenue.*

336] Those statutory provisions must be considered as a whole in order that the purpose of Congress in enacting them may be understood. The material ones are as follows: If any person "liable to tax" fails to pay the taxes assessed against him within the time prescribed, the collector may "make distraint therefor as provided by law." § 3185. The tax so due from any person "liable to pay" it, together with the interest, penalties and costs that may accrue in addition thereto, is a lien in favor of the government upon all property and rights of property "belonging to such person." § 3186. The goods, chattels and effects, including stocks, securities and evidences of debt "of the person delinquent as aforesaid," may be distrained and sold for such taxes in the manner provided. § 3187. The collector's certificate of the sale of such personal property, securities and evidences of debt transfers to the purchaser all right, title and interest therein "of such delinquent." § 3194. In case of the insufficiency of such goods, chattels or effects of the delinquent, to satisfy the taxes due from him, the collector may seize and sell real estate. § 3196. Besides making publication in a newspaper of the county, and posting at the nearest post-office, notice of sale, in the case of the seizure of real estate by the collector, must be given by the officer to the person "whose estate it is proposed to sell," by giving "him in hand, or leaving at his last or usual place of abode, if he has any such within the collection district where said estate is situated, a notice, in writing, stating what particular estate is to be sold, describing the same with reasonable certainty, and the time when and the place where said officer proposes to sell the same." § 3197. When real estate is sold by the collector, he must give to the purchaser a certificate of purchase describing the real estate purchased, for whose taxes it was sold, the name of the purchaser and the price paid for the property, which shall be followed by a deed to the purchaser if the property is not redeemed in due time. § 3198. Such deed shall be prima facie evidence of the facts therein stated, and, if the proceedings of the officer, as set forth, have been substantially in accordance with the provisions of law, shall be considered and operate as a conveyance of all the right, title and interest

337] "the party delinquent" had in and to the real estate thus sold at the time the lien of the United States attached thereto. § 3199. When the property, real and personal, so seized and sold, is insufficient to satisfy the claim of the government, other property, liable to seizure, "of the person against whom such claim exists," may be seized and sold, until the amount due "from him," together with all expenses, is fully paid. § 3205. When real estate is seized for taxes, the commissioner of internal revenue may direct the institution of a suit in chancery, in a district or circuit court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned "by the delinquent," or in which "he" has any right, title or interest, to the payment of such tax; to which suit all persons having liens upon, or claiming any interest in, the real estate sought to be subjected as aforesaid "shall be made parties," and "be brought into court as provided in other suits in chancery;" and in which suit the court shall adjudicate all matters involved therein, and finally determine "the merits of all claims to and liens upon the real estate in question, and, in all cases where a claim or interest of the United States therein is established, shall decree a sale of such real estate, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States." § 3207. Every proprietor or possessor of, and every person interested in the use of, any still, distillery or distilling apparatus, are jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures and tools therein, "the lot or tract of land whereon the said distillery is situated, and on any building thereon, from the time said spirits are in existence as such until the said tax is paid." § 3251. If the distiller "defrauds or attempts to defraud the United States of the tax on the spirits distilled by him, or any part thereof," he shall "forfeit the distillery and distilling apparatus used by him, and all distilled spirits and all raw materials for the production of distilled spirits found in the distillery and on the distillery premises," and shall be fined not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than three years. § 3257. The bond of the distiller shall not be approved "unless he is the owner in fee, unincumbered by any mortgage, judgment or other lien, of the lot or tract of land on which the distillery is situated, or unless he files with the collector, in connection with his notice, the written consent of the owner of the fee, and of any mortgagee, judgment-creditor or other person having a lien thereon, duly acknowledged, that the premises may be used for the purpose of distilling spirits, subject to the provisions of law, and expressly stipulating that the lien of the United States for taxes and penalties shall have priority of

such mortgage, judgment or other incumbrance, and that in case of the forfeiture of the distillery premises, or of any part thereof, the title of the same shall vest in the United States, discharged from such mortgage, judgment or other incumbrance." § 3262.

What effect did the above waivers in favor of the United States have upon the title to the tract of land on which the distillery stood? That is the vital question in this case. The contention of the defendant is, that those waivers entitled the government, when enforcing its claim for taxes, to treat the premises just as if they were owned by the delinquent distiller. This view is based upon that part of § 3262 requiring the waiver to show the consent of the owner of the fee or of the mortgagee, judgment-creditor or other person having a lien thereon, that the premises be used for the purpose of distilling spirits, "subject to the provisions of law." But this does not mean that an interest in the premises passes by the waiver to the distiller, even for a time. It is true that the person executing the waiver, whether he owns the fee or holds simply a lien upon the premises, consents that the taxes accruing to the government shall be a first lien on the distillery and on the lot or tract of land on which it stands. This construction is supported by the requirement that the waiver shall expressly stipulate that the lien of the United States for taxes and penalties shall have *priority* of any mortgage, judgment or other incumbrance held by the person giving the waiver. In other words, if the person executing the waiver owns the fee, the government, with his consent, is to have a first lien on the distillery premises; if he holds an incumbrance simply, then the lien of the United States is to have priority over that incumbrance. But in neither case does the distiller acquire an interest in the premises; in neither does the government acquire anything more than a first or prior lien.

But in what mode may the government enforce its prior lien? In order to collect the taxes due from Hinds, the distiller, it might have instituted a suit in equity to which not only the distiller, who had simply a leasehold interest, but all persons having liens upon, or claiming any interest in, the premises could be made parties; in which suit it would have been the duty of the court to determine finally the merits of all claims to and liens upon the property and to order a sale distributing the proceeds among the parties according to their respective interests. Of course, the United States having, by stipulation, priority of lien, would have been first paid out of the proceeds. But no such course was pursued. The officers of the government preferred to adopt the summary method of sale by the collector upon notice and publication, as provided for in § 3197. It may be conceded that if the distiller had been the owner of the fee, a sale in that mode would have passed *his* interest subject to the rights of any prior incumbrancer, and subject to the right of any subsequent incumbrancer to redeem the premises. But the delinquent distiller had no interest except a leasehold interest, and that expired, as we have seen, on the 1st of May, 1877. We are of opinion that the collector's sale in the summary mode prescribed in § 3197 passed, and under the Statute could have passed, nothing more than the interest of the delinquent distiller. When the collector distrains and sells personal property for taxes, his certificate, by the express words of the Statute (§ 3194), transfers to the purchaser the right, title and interest of the *delinquent* in the property sold. When he sells real estate for taxes, the Statute, in [340 terms equally explicit (§ 3199), declares that his certificate of purchase shall be considered and operate as a conveyance of the right, title and interest the *party delinquent* had in the real estate so sold. Now, if Congress intended to invest the collector with authority to sell, by the summary process of notice and publication, the interest of any other person than the delinquent distiller, the Statute would have prescribed a certificate that would pass the interest of such person in the property sold. The provision that the certificate of purchase shall pass the interest of the delinquent in the property sold by the collector excludes, by necessary implication, the interest of any other person. This is made clear by the fact that the Statute, in the case of a sale by the collector, requires notice to "the person whose estate it is proposed to sell" (§ 3197), which person is, of course, the one who is delinquent in the matter of taxes. Any other construction would impute to Congress the purpose, in order that the taxes against the delinquent distiller, having only a leasehold interest, might be collected, to seize and sell the interest of the owner of the fee, and to destroy the lien of an incumbrancer, without giving either an opportunity to be heard.

It is said that, under this interpretation of the Statute, the execution of the waiver was a useless requirement, since, without such waiver, the government had the right to sell the leasehold interest of the tenant distiller. This view is more plausible than sound. By the waiver the government acquired one thing it would not have had without it, namely, a lien upon the premises prior to that held by Coates as security for the notes specified in the deed of trust to Westover. And it acquired the right, by a suit in equity, to have sold, under the decree of a court, not only the distiller's leasehold interest, but the fee in the premises, and to have obtained priority in the distribution of the proceeds over the person giving the waiver, whatever his interest might have been. It is of no consequence that the collector's notice of sale did not specify the leasehold interest as the thing he proposed to sell. His authority to sell, upon notice and publication, was given by the Statute, [341 and was fettered by the condition that he could give a certificate of purchase passing the interest of the delinquent. He had no authority, in that summary mode, to sell and convey the interest of one who was not a delinquent. His deed—if construed as conveying anything more than the interest of the government—shows upon its face, in connec-

tion with the Statute, that he attempted to convey what he had no power to convey, the fee in the premises. As a conveyance of such fee, it was a nullity. The government neglected to pursue the only mode by which the fee could be sold, namely, a suit in equity, in which all persons interested in the property could have been made parties. When the distiller was in default in respect to taxes it was for the proper officers of the government to elect whether they would seek satisfaction of its demand by means of a seizure and sale by the collector of the distiller's interest only, or by a suit to which all persons having claims upon the premises on which the government had a lien should be made parties. They chose to adopt the former method, under which only the interest of the delinquent distiller could be seized and sold. That interest being only a leasehold interest, the purchaser at the collector's sale acquired nothing more.

Some stress is laid upon the fact that the property was not redeemed from the collector's sale within the time prescribed by the laws of Illinois. It is sufficient to say that no redemption was necessary. All that the purchaser got was the leasehold interest of the distiller, and that, it is agreed, ceased in May, 1877.

It is proper to say that the proceedings for the sale of these premises were not taken under any provision of the Statute relating to the title vesting in the United States in case of the forfeiture of the distillery premises. A forfeiture could not have occurred unless the distiller defrauded, or attempted to defraud, the government of the taxes due from him. Sec. 3257; *United States* v. *Stowell*, 133 U. S. 1 [33: 555]. It is admitted that there was no ground for forfeiture by reason of the nonpayment of the taxes due from the distiller, Hinds.

[342] Upon the whole case we are of opinion that the legal title of the plaintiff must prevail in this action.

The judgment is reversed and the cause remanded with directions to enter judgment for the plaintiff.

---

[342] THE YALE LOCK MANUFACTURING COMPANY ET AL., *Appts.*,
v.
THE BERKSHIRE NATIONAL BANK ET AL.

THE BERKSHIRE NATIONAL BANK ET AL., *Appts.*,
v.
THE YALE LOCK MANUFACTURING COMPANY ET AL.

(See S. C. Reporter's ed. 342-408.)

Reissued patent—abandoned claim cannot be included—improvements in time-locks.

NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 433.

As to patentability of inventions, see *notes* to Thompson v. Boisselier, 29: 76, and to Corning v. Burden, 14: 683.

What reissue may cover. See *note* to O'Reilly v. Morse, 14: 601.

1. Where a claim is abandoned in the application for a patent, on a reissue of the patent the claim cannot be enlarged so as to include the abandoned claim.
2. A clear mistake, inadvertently committed, in the wording of a claim, is necessary, without reference to the length of time, to make valid an enlargement of the claim on a reissue of the patent.
3. Claim three of reissued letters-patent No. 7,947, granted Nov. 3, 1877, to James Sargent, for an improvement in combined time-lock, combination-lock and bolt-work for safes, is invalid.
4. Claims one and seven of reissued letters-patent No. 8,550, granted to the Yale Lock Manufacturing Company Jan. 21, 1879, for an improvement in time-locks, are not infringed by the lock of the defendants.

[Nos. 261, 262.]

Argued April 11, 14, 15, 1890. Decided May 5, 1890.

APPEALS from a decree of the Circuit Court of the United States for the District of Massachusetts affirming a judgment in favor of plaintiffs for damages for the infringement of letters-patent and dismissing the suit as to other letters-patent. *Affirmed as to the Sargent reissue and reversed as to the Little reissue.*

The facts are stated in the opinion.

Opinions below, 17 Fed. Rep. 531, 26 Fed. Rep. 104.

Messrs. **Geo. Ticknor Curtis** and **Edmund Wetmore**, for Yale Lock Mfg. Co. *et al.*:

Points in No. 261.

The utility of the result Sargent accomplished creates the presumption of invention. *Forbush* v. *Cook*, 2 Fish. Pat. Cas. 668, 672.

One new and operative agency in the production of the desired result will give novelty to the entire combination.

Le Roy v. *Tatham*, 63 U. S. 22 How. 132 (16: 366).

The combination was novel, and produced a highly useful and novel result.

Hoffman v. *Young*, 18 Pat. Off. Gaz. 794; *Williams* v. *Rome, W. & O. R. Co.* 15 Blatchf. 200.

On the question of patentable novelty the appellants refer to the following cases:

Morley Sewing Mach. Co. v. *Lancaster*, 129 U. S. 263 (32: 715); *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 536 (29: 954); *Imhaeuser* v. *Buerk*, 101 U. S. 647-660 (25: 945-947); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516, 548 (20: 33, 40); *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486 (23: 952); *Winans* v. *Denmead*, 56 U. S. 15 How. 330 (14: 717).

Points in No. 262.

The seventh claim of the reissue is not an enlargement of the second claim of the original. *Adair* v. *Thayer*, 17 Blatchf. 468; *Davis* v *Brown*, 9 Fed. Rep. 647; *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 (26: 783); *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 536 (29: 954); *Gage* v. *Herring*, 107 U. S. 640 (27: 601); *Gould* v. *Spicer*, 15 Fed. Rep. 344.

A patentee, after having by reissue unduly expanded a claim contained in his original

patent, may, by another reissue, correct the error and resume such original claim.

Celluloid Mfg. Co. v. *Zylonite B. & C. Co.* 27 Fed. Rep. 291; *Giant Powder Co.* v. *Safety Nitro Powder Co.* 19 Fed. Rep. 509.

There has been no abandonment of the seventh claim of the present reissue.

Yale Lock Mfg. Co. v. *New Haven Sav. Bank*, 32 Fed. Rep. 167.

The patents referred to by the defendants fail to show any anticipation of Little's invention.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); Curtis, Patents (4th ed.) §§ 378 *a*, 378 *b*.

A rejected application is neither a publication nor a patent, and is, of itself, no proof to anticipate a patent.

Northwestern Fire Extinguisher Co. v. *Philadelphia Fire Extinguisher Co.* 6 Pat. Off. Gaz. 34, 1 Bann. & Ard. 177; *Cornplanter Patent*, 90 U. S. 23 Wall. 210 (23: 165); *Lyman Vent. & Ref. Co.* v. *Chamberlain*, 10 Pat. Off. Gaz. 588; *Lyman Vent. & Ref. Co.* v. *Lalor*, 12 Blatchf. 303; *Barker* v. *Stowe*, 15 Blatchf. 49, 54; *Howes* v. *McNeal*, 15 Blatchf. 103, 121; *Herring* v. *Nelson*, 14 Blatchf. 293.

The appellants failed to prove that what was done by Harris was more than an abandoned experiment, which, under familiar authorities, cannot anticipate the patent.

Parkhurst v. *Kinsman*, 1 Blatchf. 494; *Cahoon* v. *Ring*, 1 Cliff. 592, 608-610; *Agawam Co.* v. *Jordan*, 74 U. S. 7 Wall. 583, 602 (19: 177, 181); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Ellithorpe* v. *Robertson*, 2 Fish. Pat. Cas. 83, 85; *Johnson* v. *McCullough*, 4 Fish. Pat. Cas. 170, 175; *Winans* v. *New York & H. R. Co.* 4 Fish. Pat. Cas. 1, 9; *Bignall* v. *Harvey*, 18 Blatchf. 353, 354; *Hicks* v. *Otto*, 19 Fed. Rep. 749, 752; *Allis* v. *Buckstaff*, 13 Fed. Rep. 890, 891; Walker, Pat. § 61.

The claim is entitled to such liberal construction as the law gives to pioneer claims for generically new results.

Morley Sewing Mach. Co. v. *Lancaster*, 129 U. S. 263, 273 *et seq.* (32: 715, 719); *McCormick* v. *Talcott*, 61 U. S. 20 How. 402, 405 (15: 930); *Chicago & N. W. R. Co.* v. *Sayles*, 97 U. S. 554, 556 (24: 1053, 1054); *Clough* v. *Barker*, 106 U. S. 166, 177 (27: 134, 138); *Consolidated Safety Valve Co.* v. *Crosby Steam G. & V. Co.* 113 U. S. 157 (28: 939).

Mr. **William C. Cochran**, for the Bank *et al.*:

Points in No. 261.

The enlarged claim is invalid, being for a different invention from that claimed in the original patent.

Sargent made such a claim in May, 1874, and abandoned it. The legal effect of such abandonment is stated in—

Leggett v. *Avery*, 101 U. S. 256, 259 (25: 865, 866); *Mahn* v. *Harwood*, 112 U. S. 359 (28: 667); *Union Metallic Cartridge Co.* v. *U. S. Cartridge Co.* 112 U. S. 644, 645 (28: 834); *Shepard* v. *Carrigan*, 116 U. S. 597, 598 (29: 724); *Roemer* v. *Peddie*, 132 U. S. 313, 317 (33: 382).

Mere association or juxtaposition of objects is not patentable combination.

Reckendorfer v. *Faber*, 92 U. S. 347, 356 (23: 719, 723); *Hailes* v. *Van Wormer*, 87 U. S. 20 Wall. 353, 367, 368 (22: 241, 248); *Pickering* v. *McCullough*, 104 U. S. 310, 318 (26: 749, 751).

In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. It must form either a new machine of a distinct character or function, or produce a result due to the joint and co-operating action of all the elements.

Stimpson v. *Woodman*, 77 U. S. 10 Wall. 117 (19: 866); *Slawson* v. *Grand Street R. Co.* 107 U. S. 649 (27: 576); *Atlantic Works* v. *Brady*, 107 U. S. 192, 199, 200 (27: 438, 441); *Double-Pointed Tack Co.* v. *Two Rivers Mfg. Co.* 109 U. S. 117, 120, 121 (27: 877, 878); *Bussey* v. *Excelsior Mfg. Co.* 110 U. S. 132, 146 (28: 95, 100); *Morris* v. *McMillin*, 112 U. S. 244 (28: 702); *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286, 294 (30: 942, 945); *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 166, 167 (33: 298); *Royer* v. *Roth*, 132 U. S. 201, 206 (33: 322, 324); *Stephenson* v. *Brooklyn Crosstown R. Co.* 114 U. S. 149, 155-158 (29: 58, 60, 61); *Mosler Safe & L. Co.* v. *Mosler*, 127 U. S. 354, 361, 363 (32: 182, 185); *Hendy* v. *Golden State & M. Iron Works*, 127 U. S. 370, 375 (32: 207, 209); *Holland* v. *Shipley*, 127 U. S. 396, 398 (32: 185, 186).

Points in No. 262.

The drawings and specification furnish the best evidence of the construction and mode of operation of a patent and are competent for that purpose, in connection with the oral testimony showing actual embodiment of the invention in an operative device.

Rev. Stat. § 892; *Coffin* v. *Ogden*, 85 U. S. 18 Wall. 120, 121, 123 (21: 821, 822, 823); *Emerson* v. *Hogg*, 2 Blatchf. 1, 12; *Toohey* v. *Harding*, 5 Bann. & Ard. 195; *Northwestern Fire Extinguisher Co.* v. *Philadelphia Fire Extinguisher Co.* 6 Pat. Off. Gaz. 34.

The reissue is evidence to aid in the proper construction of Little's original claim, and in the determination of the question whether or not claims one and seven of the original are improperly expanded.

Grier v. *Wilt*, 120 U. S. 412, 429 (30: 712, 717); *Brown* v. *Piper*, 91 U. S. 37, 41 (23: 200, 201); *Eachus* v. *Broomall*, 115 U. S. 429, 434 (29: 419, 421).

Claim two of Little's original patent was void for want of patentable novelty.

Tucker v. *Spalding*, 80 U. S. 13 Wall. 453, 455 (20: 515, 516); *Roberts* v. *Ryer*, 91 U. S. 150, 157, 159 (23: 267, 270); *Pennsylvania R. Co.* v. *Locomotive E. S. Truck Co.* 110 U. S. 490, 494 (28: 222, 223); *Morris* v. *McMillin*, 112 U. S. 244, 248 (28: 702, 703); *Blake* v. *San Francisco*, 113 U. S. 679, 682, 683 (28: 1070, 1072); *Leggett* v. *Avery*, 101 U. S. 256, 259 (25: 865, 866); *Washing Mach. Co.* v. *Tool Co.* 87 U. S. 20 Wall. 342, 351 (22: 303, 306); *Aron* v. *Manhattan R. Co.* 132 U. S. 84, 88, 90 (33: 272, 274); *Royer* v. *Roth*, 132 U. S. 201, 206 (33: 322, 324); *Mahn* v. *Harwood*, 112 U. S. 354, 359 (28: 665, 667); *Union Metallic Cartridge Co.* v. *U. S. Cartridge Co.* 112 U. S. 624, 644, 645 (28: 828, 834); *Shepard*

proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment rolls to the commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights."

The argument we are considering assumes, as a matter of law, that all that was required of the owners of the Sierra Nevada claim, and all that was required of the register and receiver of the land office in regard to these publications, was done and had, and that therefore the owners of the Moyer patent are concluded by the proceedings which are thus supposed to have taken place. There are two substantial objections to this view of the subject. The first is, that if such proceedings were had, and resulted either in the trial of the adverse claim before a court of justice, or in the failure of Moyer or anybody else to assert an adverse claim, those proceedings are matters of public record, and as, in this case, they must constitute the main reliance of those claiming under the Sierra Nevada patent, for the superiority of their title, this record should have been produced on the trial of the case; and that the mere opinion of the register and receiver of the land office as to what those proceedings are and their effect upon the prior patent of Moyer, should not be substituted for the production of those proceedings themselves, copies of which were easily obtainable at the land-office department.

Another reason, which we think more satisfactory, is that a careful examination of this Statute concerning adverse claims leads us to the conviction that it was not intended to affect [299] a party who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States, had established his right to the land claimed by him, and received his patent, and was reposing quietly upon its sufficiency and validity. It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but throughout the whole of these sections and the original Statute from which they are transferred to the Revised Statutes, the words "claim" and "claimant" are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the government by way of a patent. And the purpose of the Statute seems to be, that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same property, in the manner prescribed in the Statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the Land Department in determining which of these *claimants* shall have the patent, the final evidence of title, from the government. This view is consistent with the entire Statute on the subject, and some of its language is inconsistent with the idea that any contest to be thus decided is between a party who already has the legal title to the property which he claims and some other party who is only setting up a claim to the same property.

In the first place, its inapplicability to the present case is shown by the requirement that in all cases the successful party shall pay five dollars per acre before he can get his patent. This argues that it has no reference to a placer patent, because for the land conveyed by a placer patent the party is only required to pay two dollars and a half an acre.

Again, the following language seems inconsistent with the idea that one of the contesting parties may already have a patent for the land in controversy, namely: "After such judgment shall have been rendered, the party entitled to the *possession* of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the General Land Office, and a *patent shall issue thereon for the claim*, or such portion thereof as the applicant shall appear, from the decision of the courts, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the *claim*, each party may pay for his portion of the claim, . . . and patents shall issue to the several parties according to their respective rights."

It is too obvious to escape comment that by this proceeding there are brought before the court adverse *claimants* to mineral land, and that the party who succeeds in establishing the superior right to the *possession* shall have a patent. This may be the party who institutes the original proceeding or it may be the party who sets up the adverse claim. Whichever of these two establishes his better right to the possession, gets the patent. How can this apply to a case where one of the parties already has a patent? How can he be required to pay again for the land for which he has already paid all that the law requires? How can he be required to establish before the land office his right to the possession of a mine for which that office has already granted him a patent?

And again, how can such a case be brought within the terms of a statute which provides that, where "several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim,

tional anticipation of the Little patent, proofs were taken thereon, and the case was reheard, before *Judge* Colt, on the new evidence. He affirmed the former decree, in an opinion reported in 26 Fed. Rep. 104.

The master reported $60 damages in favor of the plaintiffs, and both parties excepted
45] to the report. A final decree was entered on the 12th of February, 1886, confirming the report, overruling the exceptions of both parties, and adjudging a recovery in favor of the plaintiffs for $60 damages and certain costs, dismissing the bill as to the Sargent reissue, No. 7,947, and awarding a perpetual injunction as to claims 1 and 7 of the Little reissue, No. 8,550. From this decree both parties have appealed. Joseph L. Hall having died, his executors and trustees have been made parties in his place.

The respective specifications and claims of the original Sargent patent, No. 195,539, and of its reissue, No. 7,947, are set forth below in parallel columns, the parts in each which are not found in the other being in italic. The drawings are the same in both.

Original patent No. 195,539.	*Reissue No.* 7,947.
"Be it known that I, James Sargent, of the City of Rochester, in the County of Monroe and State of New York, have invented a certain new and useful improvement in locks; and I do hereby declare that the following is a full, clear and exact description of the construction and operation of the same, reference being had to the accompanying drawings, in which figure 1 *is an elevation of my improvement applied to* a safe-door. Fig. 2 *is a section of the* bolt *of the* time-lock. Fig. 3 *is* an inside view of *the same.* Fig. 4 represents detached views of the *dial*, pallet and escape-wheel. Fig. 5 *is a* bolt *constructed as integral with the holding-latch.*	"Be it known that I, James Sargent, of the City of Rochester, in the County of Monroe and State of New York, have invented a certain new and useful improvement in *combined time*-locks, *combination-locks and bolt-work for safe and vault doors;* and I do hereby declare that the following is a full, clear and exact description of the construction and operation of the same, reference being had to the accompanying drawings, in which figure 1 *illustrates a portion of* a safe *or vault* door *having thereon a time-lock and a combination-lock, both of said locks being represented in a locked condition, with the bolt-work projected and locked.* Fig. 2 *illustrates one form of lock*-bolt *or obstruction for use in a* time-lock. Fig. 3 *illustrates* an inside view of *said lock-bolt or obstruction.* Fig. 4 represents detached views of the pallet and escape-wheel, *and a portion of one of the revolving dials.* Fig. 5 *illustrates another form of lock*-bolt *or obstruction for use in connection with the time-lock for admitting of locking or unlocking of the bolt-work.*
46]	"*My invention consists, first, in the combination with the bolt-work of a safe or vault-door, of a time-lock and a combination or key-lock, both constructed to be applied on a safe, vault or other door, so as to rest against or connect with the bolt-work on said door, and provided with a device whereby the bolt-work may be retained in the unlocked position for shutting the door, and be automatically locked by the lock-bolt or obstruction of the time-lock, and mechanically by the combination or key-lock, the whole so arranged that the bolt-work cannot be withdrawn when locked till both locks have been unlocked; second, in the combination of a time-lock and a combination or key-lock, both constructed to be applied on a safe, vault or other door, so as to rest* [34 *against the bolt-work, each of said locks being provided with a lock-bolt or obstruction, that of the combination-lock or key-lock being of the usual construction, while that of the time-lock has an opening or offset, which is automatically brought into and out of coincidence with the tongue of the bolt-work, whereby the bolt-work may be retained in the unlocked position for shutting the door, and prevented from being retracted when locked, until both locks have been unlocked; third, in the combination, with the bolt-work of a safe or vault-door, of a combination-lock, controllable mechanically from the exterior of said door, with a time-lock, controllable automatically for unlocking by the operation of its time mechanism, both of said locks arranged to control the locking and unlocking of the bolt-work,*

"*My improvement relates to that class in which two independent*
[348] *locks are employed upon a safe, vault or other door for the purpose of preventing the unlocking of the door-bolts until both locks have been unlocked.* Combination or key-locks have *only* heretofore been used for *this* purpose, *so far as I am aware.* As such locks are set on combinations, or operated by means of keys, burglars can force the holders of the combination or key to unlock the *door, and hence* such locks are not a *perfect* safeguard against robbery. Clock-locks have also been used upon doors for the purpose of opening the door *only* at a determined hour, thus placing it beyond the power of any person to open the door *until that hour arrives;* but *so* far as I am aware, such locks have either been used singly on a door (*in which case* when *the* lock *releases* the bolt or other fastening the door *is* unlocked and *may* be opened by anyone), or *else* a time-movement *has* been combined *directly* with a lock in such a manner that the two really *constitute* but a single lock, *in which case* if violence *is* applied to *the* lock *it at once destroys* the efficiency of the time-movement.

[349] "*My invention consists, primarily, in the combination, with the door-bolt, of a clock-lock and a combination or key-lock applied separately upon the door, having each an independent action, whereby the clock-lock will not so that said safe or vault door cannot be opened when locked until both of said locks have been unlocked or released their dogging action to enable the door to be opened, substantially as hereinafter described.*

"*The construction and arrangement of the time-lock will be more fully hereinafter described; but it is evident that any form or construction of a time-lock may be used as a part constituting one element of the combination called for in my claims.*

"Combination or key-locks have heretofore been used *by bankers and others* for *the* purpose *of preventing the unlocking of the bolt-work of a safe or vault door; but* as such locks are 'set on' combinations, or operated by means of keys, burglars can force the holders of the 'combination' or key to unlock the *combination-lock or locks, and thus admit of the bolt-work being retracted and the door thrown open. Therefore* such locks are not a safeguard against robbery.

"Clock-locks have also been used upon *safe or vault*-doors for the purpose of opening the door at a *pre*-determined hour, thus placing it beyond the power of any person, *until the arrival of the appointed time,* to open the door; but *as* far as I am aware such *clock*-locks have either been used singly on a *safe*-door, *so that,* when *said* lock *released* the bolt-*work* or other fastening *of* the *said* door *it was* unlocked, and *the door could* be opened by anyone, or, *in another instance, when* a time-movement *had* been combined with a *combination*-lock in such a manner that the two really *constituted* but a single lock, *the time mechanism constructed release its bolt until a certain determined hour, and when it does release its bolt the combination or key-lock still remains locked and secures the door.*

"*My invention further consists in combining a clock-lock with a combination or key-lock, both constructed to be applied on a safe, vault or other door, to operate in connection with the bolt-work of such door, said clock-lock being provided with a lock-bolt constructed with an opening or offset, which is automatically brought in and out of coincidence with the tongue of the door-bolt in such a manner that the door-bolt may be retained in an unlocked condition for shutting, and prevented from being withdrawn when locked until both locks have been unlocked, the prime object being that each lock shall have an independent action, so that the clock-lock will not release the bolt until a certain determinate hour, and when it does release its bolt the combination or key-lock still remains locked and secures the door.*

"A *represents the* combination or key-lock, and B the *clock*-lock. These locks are *provided with* bolts C D, *of any desired kind, against which strike the* studs *a a' of the tie-piece* E. *When the locks are locked, the bolts hold said studs out, and both locks have to be unlocked to allow the door-bolt to retract.*

and provided with a lever to engage with the fence or dog of the combination-lock, so that the entire mechanism of the time-movement and combination-lock really constitute but a single lock, as aforesaid, the result being that, if violence *be* applied to *such a* lock *through the dial spindle or otherwise,* the efficiency of the time-movement *will be destroyed.*

"*Referring to the drawings, the letter* A *designates a* combination or key-lock, and B the *time*-lock. These locks are *illustrated as being upon a portion of a safe or vault-door, with the bolt-work projected and locked, the lock-bolts or obstructions being in a locked position. The lock*-bolts *or obstructions* C D *are, in the present example, shown as being constructed each with a notch or recess, so that, when said notches or recesses are brought in line with the tongue-pieces or* studs *a a', arranged upon the carrying-bar* E *of the bolt-work, they (the said tongue-pieces or studs) can, by a movement of the bolt-work, be made to enter said notches or recesses, and thus the*

bolt-work can be retracted and the safe or vault-door thrown open. When the bolt-work is projected or cast so as to lock the safe or vault-door, the lock-bolts or obstructions can be brought into a locked position, the lock-bolt or obstruction of the combination-lock being placed in a locked position by mechanically operating the dial-spindle, which controls the movements of the tumblers and other portions of the lock, while the lock-bolt or obstruction of the time-lock will automatically bring itself into a locked position after the door is closed, whereby the door of the safe or vault will be locked and guarded by two locks, one of which is operated from the exterior mechanically, while the other operates on the interior automatically, there being no hole through the door whereby it might be operated upon by any mechanical means.

"The *combination-lock and the time-lock* are separate *from* each other *in performing their office or function with respect to the bolt-work on the safe or vault-door*, and *each of said locks should be* complete in *itself*, and *so constructed that they* may be *placed* at any position on *a safe or vault*-door.

"The combination or key-lock *should* be located in line with the *dial*-spindle *or key which* operates it, but the *time*-lock may be *located* anywhere *on the safe or vault-door* where *sufficient* space is *present* for it, and the *tongue-pieces or studs on the carrying-bar* of the bolt-*work may be of any required length, bent or otherwise arranged so as to connect* with *or* rest against the lock-*bolts or obstructions, when the latter is moved to the proper* position *for obstructing or dogging the bolt-work, and prevent its retraction or unlocking, thus retaining the door in a locked position until both locks have been unlocked.*

"*In locking* the safe or vault door some device *is necessary* to *allow* the *door*-bolt *to remain back in the* unlocked position *until* the door *is* closed, *without interfering with the clock-lock.*

"*When it is desired to lock or fasten the bolt-work of* the *safe* or vault-door *by means of a combination-lock and a time-lock*, some *mechanical arrangement or* device *should be employed* to *enable* the *lock*-bolt *or obstruction of the time-lock to be set or adjusted while the safe-door is open and the bolt-work in a retracted or* unlocked position, *so that* the door *can be* closed *to admit of the bolt-work being projected or cast. The lock-bolt or obstruction will, as hereinafter set forth, present its lock-bolt or obstruction automatically, thus securing the door in a locked position until the arrival of the time determined by the time mechanism or register, at which time the lock-bolt or obstruction will be automatically moved and brought into a position for admitting of the releasing and unlocking of the bolt-work, so that said door can be opened.*

"*To accomplish such* [35
mechanical arrangement or devices in the time-lock, a lock-bolt or obstruction is employed in the time-lock itself, or by means of an adjustable tongue-piece or stud connected with the carrying-bar of the bolt-work—such, for instance, as those illustrated in Figs. 1, 2, 3, 5 of the accompanying sheets of drawings.

"*The lock-bolt or obstruction D, illustrated in Figs. 1, 2 and 3, is one of the devices that should be employed to enable the time-lock to be set while the bolt-work remains in a retracted or unlocked position, so that the bolt-work will remain in such retracted position without interfering with the time-lock, the combination-*

1] "The *locks A B* are separate *and independent of* each other, and complete in *themselves*, and may be *located* at any position on *the* door. The combination or key-lock *will naturally* be located in line with the spindle *that* operates it; but the *clock*-lock may be *placed* anywhere where space is *best found* for it *on the door*, and the *stud a'* of the *door*-bolt, *which connects* with *it, may be lengthened, bent or otherwise arranged to* rest against the lock-*bolt in whatever* position *it may be, as shown in Fig. 1.*

3]

"*In Fig. 1* the bolt *D* of the *clock*-lock is constructed in two parts, D′ D², *turning* independently on the same *bearings c*. The inner part, D², has *the socket d*, into which the stud *of the door-bolt* enters *in drawing back. It* is connected to the outer part, D′, by a *coiled* spring, *f, Fig. 3*, resting in a cavity in the side of the outer part. The outer part is also connected by a *similar coiled* spring, *g*, with the *fixed* bearing *c. Instead of the spring g it may have a counterweight, g′, Fig. 5.* The spring *g* causes the outer part, D′, to *turn back or fall*, so that the *socket d* of the inner part *comes in* position to allow the *stem a′* of the *door-bolt* to enter *therein*. When *this is done*, the outer part is turned *up* to engage the *dog* (*presently to be described*), while the inner part remains stationary *on the stem of the door-bolt. The door is then shut and the door-bolt thrown out, and the tension of the spring g causes the part D² to turn when released, thereby locking the door-bolt.* The parts D¹ D² are *provided* with suitable stops, by which *the* motion is *gaged* to bring the *socket* of the part D² in proper position in its *throw*.

[354]

"*The device above described forms a part of the clock-lock, being the bolt of the same. In Fig. 1 is shown another lock, of course, during such interval, being in an unlocked position, and through such mediums the bolt-work when projected for closing the door will be held in a locked position by the automatic movement of the lock-bolt or obstruction of the time-lock, and by the lock-bolt of the combination-lock, which is brought into a locked position by the mechanical operation of the dial-spindle.*

[355]

"The *lock*-bolt *or obstruction* of the *time*-lock is constructed in two parts, D¹ D², *adapted to turn* independently *of the other* on the same *bearing c*. The inner part, D², has *a notch or recess, d*, into which the *tongue-piece or* stud *on the carrying-bar* enters *when the bolt-work is retracted, so as to open the safe or vault-door if the combination-lock be unlocked. The said inner part D²* is connected to the outer part D¹ by a spring, *f*, resting in a cavity *or recess* in the side of the outer part. The outer part *D¹* is also connected by a spring, *g*, with the bearing *c*. The spring *g being connected with the outer part D¹, and with its bearing c*, causes the outer part D¹ to *be moved or turned on its axis*, so that the *notch, recess or offset d* of the inner part *D² is brought into a* position to allow the *tongue or stud a′* of the *carrying-bar* to enter *it, and thus the bolt-work can be retracted, and* when *so retracted* the outer part *D¹* is turned *or moved, and made* to *connect and* engage *with* the *portion of a yoke*, while the inner part *D²* remains stationary, *being prevented from moving or turning on its axis by the tongue-piece or stud on the carrying-bar resting in the notch or recess of the part D² of the lock-bolt or obstruction.*

device for the same purpose, situated outside the lock, which is the subject matter of a separate application. It consists of a socket or bearing, h, attached to the tie-piece E of the door-bolt and sliding on an independent stud, a′, resting against the lock-bolt. A spring locking-pin, i, is used to connect the parts when the door-bolt is thrown forward to connect with the jamb. In this case the lock-bolt D may be made solid, and may be either of the turning or sliding kind.

"*The parts constituting the lock-bolt or obstruction, and forming a part of the time-lock, being thus constructed, arranged and adjusted, the time mechanism having been previously wound, and the dials set for a certain predetermined time, the bolt-work is projected or cast, when the lock-bolt or obstruction of said time-lock will automatically be brought into a locked position, and the door of the safe or vault securely guarded by a combination-lock, if it be locked, and a time-lock, and the bolt-work be prevented from being retracted, or the safe or vault-door opened, until both locks have been unlocked.*

[3

"The parts D¹ D² *composing the lock-bolt or obstruction* are *supplied* with suitable stops, by which *their* motion *or throw* is *limited so as* to bring the *notch, recess or offset* of the part D² in proper position in its *rotation to coincide with the tongue-piece or stud on the carrying-bar of the bolt-work.*

"*In lieu of forming the lock-bolt or obstruction in two parts, as above described, it has been found eminently practical and successful to employ a lock-bolt or obstruction made in a single piece, or as an integral. Such a lock-bolt or obstruction is*

shown in Fig. 5 of the drawing, and, as it will be perceived, it is constructed with a notch, recess or offset, to admit of a tongue-piece or stud entering it when the bolt-work is retracted for unlocking the safe or vault-door, and said lock bolt or obstruction is likewise provided with an arm, g', having a pin or stud for connecting or engaging with a yoke in such a manner that when said arm and yoke are in connection the lock-bolt or obstruction will be placed so as to prevent the retraction of the bolt-work, and when said arm and yoke are disconnected through the medium of revolving dials, to be hereinafter mentioned, the lock-bolt or obstruction will be automatically brought to a position for allowing the bolt-work to be retracted, and such automatic movement of the lock-bolt or obstruction is due to the action of the arm g' acting as a counterweight.

"When a lock-bolt or obstruction of the character last described is employed, some provision must be made for adjusting and setting the time-lock or the lock that measures time, prior to closing the safe or vault-door, and this must be accomplished while the bolt-work is in a retracted position; therefore to enable such to be done, there is arranged on the carrying-bar of the bolt-work a socket or bearing, which is provided with a movable tongue-piece and a spring-bolt, constructed and arranged in such a manner that when the spring-bolt is moved out of contact with the socket or bearing of the movable tongue-piece or stud of the carrying-bar, it, together with the bolt-work, can be retracted as the socket or bearing on said carrying bar moves or slides along the tongue-piece or stud in a longitudinal direction, one end of it bearing upon the lock bolt or obstruction of the time-lock, and in such condition the safe or vault-door can be closed, and when the bolt-work is projected or cast into the jamb of the door, the socket or bearing moves along the tongue-piece until the spring-bolt engages with it, when it—the socket or bearing—will be automatically locked in place, and the bolt-work, performing its office, will securely fasten the safe or vault-door, upon which the combination-lock is placed, together with the time-lock.

"From the foregoing it will be seen that the lock-bolt or obstruction shown in several figures are each stationary except during the brief interval of time when locking or unlocking is being effected, and that each is adapted to be turned on its pivot or bearing for obstructing or dogging the bolt-work for preventing its retraction or for releasing the bolt-work at the time appointed, so that it can be retracted; and it should be noticed that the lock-bolt or obstruction of the time-lock is so located in the time-lock that if pressure be exerted upon the lock-bolt or obstruction by force applied to the bolt-work, such pressure will not be transmitted to the delicate workmanship forming part of the time-lock, for the lock-bolt or obstruction, so to speak, is isolated from the time mechanism, in order to bring and retain the lock-bolt or obstruction in a position to have the same obstruct and prevent the retraction of the bolt-work, or to move it to release the bolt-work, whereby the same may be retracted. [359

"There is arranged within the time lock a yoke, G, which is capable of being oscillated or turned on its axis or

"G is a dog for holding the lock-bolt D up in the locked position. It turns on an axis, k, and its point engages

under a stop, *l*, preferably a roller, *of the bolt when the latter is raised. It is held in engagement by a light spring, j. The dog has two branching arms, m m, projecting inward over the faces of the dial-wheels H H. The dial-wheels have pins n n projecting out from their faces, and when they or either of them strike the levers m m they release the dog from its engagement with the bolt and the latter turns back or falls, thereby unlocking the lock, as before described.*

360]

"*I prefer* to use two independent time-

361] *movements or clocks, pivot, said yoke being acted on by two rotating dials, H H, in such a manner that said yoke will be operated by either or both of said dials at the predetermined time for which said revolving dials have been set.*

"*In the example shown in the time-lock in Fig.* 1, *the yoke* engages under a stop, *l*, preferably a roller, *arranged on the lock-bolt or obstruction, and when the latter is brought into a position for obstructing the bolt-work, to prevent its retraction until the arrival of the predetermined time, while in the example shown in Fig.* 5 *said yoke connects or engages with the bolt-lock or obstruction.*

"*In both examples the yoke retains the lock-bolt or obstruction in a position for obstructing and preventing the retraction of the bolt-work until the arrival of the predetermined time for which the revolving dials carrying pins have been set.*

"*The arms or members m m of the aforesaid yoke extend over a portion of the revolving dials, from which project pins, and when either of said pins come in contact with the arms or members of said yoke, which will occur at the arrival of the time previously determined upon when setting the revolving dials, it (the said yoke) will be operated or turned on its axis or pivot, and release the lock-bolt or obstruction, and leave the same to be brought into a position to permit the bolt-work to be retracted, which is accomplished by turning the knob or handle connected with the carrying-bar, said knob or handle being on the outside of the safe or vault-door.*

"*It is preferred* to use two independent time *mechanisms*, each

each connected with and operating one of the *dial-wheels H*, so that if one *movement* should accidentally stop, the other would be sure to *unlock the lock.*

"The *dial-wheels* are indexed or marked with a scale *of hours* from 0 to 48, or any other number corresponding with the longest interval the lock is to *remain locked* at one time—say from Saturday night to Monday morning. This scale is used in conjunction with a pointer, *e, at the top of the wheel.* In setting the lock the *dial-wheels* are moved backward from 0 to any number in the scale that will indicate the number of hours the safe or vault is to remain closed; and the pins *n n* must be so *located* with reference to the *scale* as to *strike* the *levers m m and* release the bolt when the 0 mark *comes forward to* the pointer. *The time-*

connected with and operating one of the *revolving dials*, so that if one of *the time mechanisms* should accidentally stop the other would be sure to *operate the yoke, and by its movement release the lock-bolt or obstruction, which would automatically assume such a position as to present an unobstructed pathway for the tongue-piece or stud to move in, and thus the bolt-work could be released and be left free to be withdrawn or retracted.*

"*The revolving dials are cogged—that is, provided with teeth, which engage with the arbor o of the main-spring-barrel, either directly or by means of the pinion p attached to said arbor, or through intermediate gearing—so that the setting of the time mechanism for operating the yoke at any given time will necessarily wind up the time mechanism, to the extent, at least, that it will unwind by the arrival of the predetermined time at which the lock-bolt or obstruction is to be released for enabling the bolt-work to be retracted.*

"The *revolving dials* are indexed or marked with a scale from *zero* (0) *upward* to 48, or any other number corresponding with the longest interval the *time*-lock is to *present its lock-bolt or obstruction to obstruct the bolt-work* at one time—say, from Saturday night to Monday morning. This scale is used in conjunction with a pointer *or index, e, arranged in the time-lock above the revolving dials.*

"In setting the *time*-lock the *revolving dials* are *turned or* moved backward from *zero* (0) to any number in the scale that will indicate the number of hours the safe or vault-*door* is to remain closed *or locked*, and the pins *n*

movements or mechanism may be of any ordinary construction to measure time.

"*Each of the dial-wheels H H is cogged, and engages with* the arbor *o* of the mainspring-barrel *either directly by means of the pinion p attached to said arbor or through intermediate gearing. The arbor o is the stem by which the clock is wound.*

"*When the clock is finished, it is fully wound up before the dial-wheel is adjusted in place. The motion is then imparted to the dial-wheel, which runs forward to unlock the lock, and in moving the dial-wheel back to reset the lock the clock is re-*
[363] *wound.*

"The dial-wheel is turned back to *reset* the lock by a key applied at the winding-arbor *o*.

"By the means above described I obviate a great objection to common clock-locks, which run on until they run down, thus subjecting the lock to the danger of *being locked in* by neglect of winding By *of the revolving dials* must be so *adjusted* with reference to the *yoke* as to *come in contact with* the *arms or members m m of the yoke, so that either or both of the said arms or members will act upon the yoke, causing it to move so as to* release the *lock*-bolt *or obstruction of the time-lock* when the *zero* (0) mark *arrives at* the *index or* pointer.

"*The winding up of the time mechanism and the setting of the revolving dials is performed simultaneously by imparting proper motion to* the arbor *o* of the mainspring-barrel.

"*The revolving dials are provided* with a pin, *r, as shown in* Fig. 4, *the same serving as* a stop.

"On the pallet *s*, which engages with the *escape*-wheel *t*, is a pin, *u*, which projects out through a slot, *v*, of the stationary *time-mechanism* frame, *the whole arranged in such a manner that* as soon as the *revolving* dial has acted upon the *yoke for causing it* to *release* the lock-*bolt or obstruction*, the pin *r* of the *said revolving* dial *will strike* the pin *u* of the pallet, and *lock* the latter in the *escape*-wheel, thereby stopping the *time mechanism, so that* there *will be* no loss of *power, as it is intended that the time-lock should be wound up when first finished, prior to adjusting in place the revolving dials; and, further, by stopping the time mechanism, as above described, the revolving dials cannot* get out of position with respect to the *index or* pointer.

"*By my invention the time-lock cannot be reset without winding, for the pins of the revolving dials, resting in contact with the arms or members of the yoke, prevent it from being brought into action with the lock bolt or ob-* this means the lock cannot be *reset* without winding, for the pins *n n*, resting in contact with the *levers m m, prevent the dog G from being* engaged with the bolt until the dial-wheels have been moved back, as described. The *relocking* of the lock *therefore* requires rewinding of the *clock* as a necessity.

"*On the back of the dial-wheel H is* a pin, *r*, Fig. 4, *forming* a stop. On the pallet *s*, which engages with the *escape*-wheel *t*, is a pin, *u*, which projects out through a slot, *v*, of the stationary *clock*-frame. As soon as the dial-*wheel* has acted upon the *lever m* to *unlock* the lock the pin *r* of the dial-*wheel strikes* the pin *u* of the pallet and *locks* the latter in the *scape*-wheel, thereby stopping the *clock*. There *is therefore* no loss of *motion, nor can the dial-wheel* get out of position with respect to the pointer.

"By combining an independent *clock*-lock and combination or key-lock *with the door-bolt, as described*, I produce an effect which cannot be produced by a *clock*-lock alone or by two or more combination-locks together. The *clock*-lock serves as a safeguard by night *and the combination-lock by day. If the holder of* the combination *is* forced to open the combination-lock *at night*, the *clock*-lock *remains* intact, and cannot be opened by the burglars or the *holder* of the combination. *On the other hand, when the clock-lock releases its bolt in the morning, the combination-lock still remains locked, and burglars cannot make an entrance to the safe.*

struction until the revolving dials have been moved back the number of hours for which it is designed to obstruct the [364
bolt-work. Thus the *resetting* of the *time*-lock requires rewinding of the *time mechanism* as a necessity, *and hence no danger of it being unlocked accidentally during the period of hours for which it is set.*

"The dial-wheel is turned back to *set* the *time*-lock by a key applied at the winding-arbor *o*.

"By the means above described I obviate a great objection to common clock-locks, which run down, until they run down, thus subjecting the lock to the danger of *a 'lock out,' caused* by neglect of winding.

"By this means the *time*-lock cannot be *set* without winding, for the pins *n n*, resting in contact with the *arms of the yoke, it (the yoke) cannot be* engaged with the *lock*-bolt *or obstruction* until the dial-wheels have been moved back *to set the lock*, as *before* described.

"By combining an independent *time*-lock *of the character described*, and *a* combination or key-lock, I produce an effect *or result* which cannot be produced by a *time*-lock alone, or by two or more combination-locks together.

"The *time*-lock [365
serves as a safeguard by night, *in connection with the combination-lock, for holding the bolt-work in a locked condition; but when the time-lock releases the bolt-work at the appointed hour, the bolt-work will remain locked, and the safe or vault-door closed, until the combination-lock is unlocked by the holder of the combination on which said lock is set, when the bolt-work can be retracted and the*

Such results cannot be accomplished by a *clock*-lock alone, because when it releases its bolt the safe is absolutely unlocked; nor by two or more combination-locks together, because the holders of the *combination* may be taken to the bank and forced to open the *lock*. Neither can tampering with the combination-lock affect the *clock*-lock.

"The combination-lock may be punched from *place*, but the *clock*-lock, being separate and independent from it, *and having no opening through the door*, cannot be affected. It is therefore superior to a lock which has the time movement combined directly with the combination-lock, both forming one lock, in which case any

door opened, thus leaving the time-lock free from performing any locking action, which leaves the combination-lock free for use during the day for locking or unlocking the safe or vault-door—an important desideratum present in my invention.

"*If the time-lock present on the safe or vault-door is set for holding the bolt-work from the time the bank closes in the afternoon to release the bolt-work at a certain hour the next morning, it will admirably and with certainty perform its office, leaving the combination-lock to be opened before the bolt-work can be retracted; and should the officer of the bank holding* the combination *be seized during the night, carried to the bank, and* forced to open the combination-lock, the *time*-lock *will remain* intact, and cannot be opened by the burglars or the *officer in charge* of the combination. Such results cannot be accomplished by a *time*-lock alone, because when it releases its bolt-*work* the safe *or vault-door* is absolutely unlocked, *and no lock present for use during the day;* nor by two or more combination-locks together, because the holders of the *combinations* may be taken to the bank and forced to open the *locks*. Neither can tampering with the combination-lock affect the *time*-lock.

"The combination-lock may be punched from *its position by burglars;* but *then* the *time*-lock, being separate and independent from it, cannot be affected *or disturbed, because there is no opening through the door by which it can be reached.* It is therefore superior to a lock which has the time-movement combined directly with

violence to the lock-work disarranges the *clock*. Another advantage of *this* invention is the capability of the separate locks *of* being applied on different parts of the door indifferently. The bolt-work on different doors is frequently such that the *two locks* cannot be applied together. The *clock*-lock *in such case may be attached at the most convenient location, as before described. It can also* be applied with facility *on* old safes having the combination or key-lock already on, thus securing the advantage of a *clock*-lock and combination-lock without the necessity of removing the old lock *and substituting a new one having a time-movement combined directly with the lock.*

366]

"I do not claim, broadly, a *clock*-lock; nor do I claim two or more combination-locks combined with the *door*-bolt; *but* I claim—

"1. The combination, with *a door*-bolt *E*, of a *clock*-lock, *B*, and a combination or key-lock, *A*, applied independently on a safe, vault or other door, so as to rest against or connect with *said door*-bolt, and provided with a device whereby the *door*-bolt may be retained in the unlocked position for shutting the door, the whole arranged *so* that the *door*-bolt cannot be withdrawn, when locked, *until* both

the combination-lock, both forming one lock, in which case any violence to the lock-work disarranges the *time-movement*.

"Another advantage of *my* invention is the capability of the separate locks being applied on different parts of the *safe or vault*-door, *with respect to the bolt-work*, indifferently.

"The bolt-work on different *safe or vault*-doors is frequently such that the *time-lock and the combination or key-lock* cannot be applied together; *but in such case the time-lock may be attached at the most convenient location, as no opening through the door is requisite.*

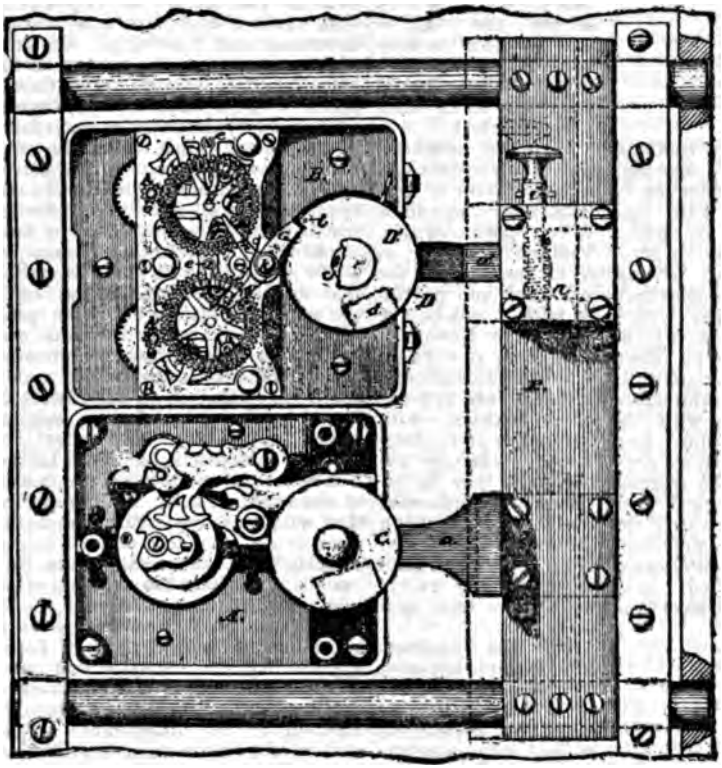
"The *time*-lock *can* be applied with *ease and* facility *to the doors of* old safes *or vaults* having the combination or key-lock already *thereon*, thus securing the advantage of a *time*-lock and *a* combination *or key*-lock without the necessity of removing the old lock.

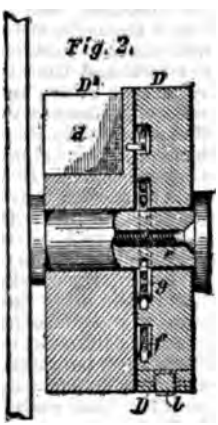
"I do not claim, broadly, a *time*-lock *of any peculiar construction;* nor do I claim two or more combination-locks combined with the bolt-*work of a safe or vault-door, as such are old and well known.*

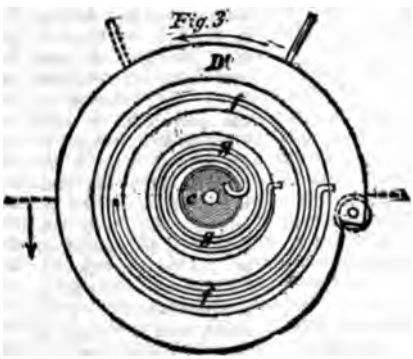
"*What* I claim, *and desire to secure by letters-patent, is*—

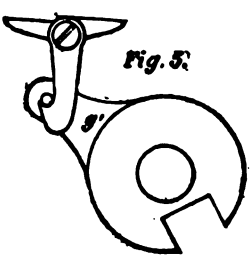
"1. The combination, with *the* bolt-*work of a safe or vault-door*, of a *time*-lock and a combination or key-lock, *both* applied independently on a safe, vault or other door, so as to rest against or connect with *the* bolt-*work on said door*, and provided with a device whereby the bolt-*work* may be retained in the unlocked position for shutting the door, *and be automatically locked by the time-lock and mechanically by the*

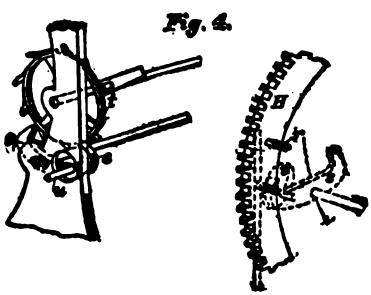
Fig. 1.











locks have been unlocked.

"2. The combination of a *clock*-lock and a combination or key-lock, both constructed to be applied on a safe, vault or other door, so as to rest against the *door*-bolt, and provided with a lock bolt having an opening or *an* offset, which is automatically [370] brought *in* and out of coincidence with the tongue of the *door*-bolt, whereby the *door*-bolt may be retained in the unlocked position for shutting the door and prevented from being *withdrawn*, when locked, until both locks have been unlocked."

combination or key-lock when the bolt-work is cast, the whole *so* arranged that the bolt-*work* cannot be withdrawn when locked *till* both locks have been unlocked.

"2. The combination of a *time*-lock and a combination or key-lock, both constructed to be applied on a safe, vault or other door, so as to rest against the bolt-*work*, and provided with a lock-bolt *or obstruction* having an opening or offset, which is automatically brought *into* and out of coincidence with the tongue of the bolt-*work*, whereby the bolt-*work* may be retained in the unlocked position for shutting the door, and prevented from being *retracted* when locked, until both locks have been unlocked.

"3. *The combination, with the bolt-work of a safe or vault-door, of a combination or key-lock controllable mechanically from the exterior of said door, with a time-lock having a lock-bolt or obstruction for locking and unlocking controllable from the interior of the door, both of said locks being arranged so as to rest against or connect with the bolt-work, the time-lock being automatically unlocked by the operation of the time-movement, both of said locks being independent of each other, and arranged to control the locking and unlocking of the bolt-work, so that said safe or vault-door cannot be opened when locked until both of said locks have been unlocked or have released their dogging action, to enable the door to be opened, substantially as described.*"

Claim 8 of reissue No. 7,947 was passed upon by *Judge* Shipman, in the Circuit Court for the District of Connecticut, in March, 1881, in the suits of *Yale Lock Mfg. Co.* v. [371] *Norwich Nat. Bank* and *Yale Lock Mfg. Co.* v. *New Haven Sav. Bank*, reported in 19 Blatchf. 123, and 6 Fed. Rep. 377. He held that claim 8 covered a new and patentable invention and was valid. On the question of the validity of the reissue as to claim 8, he said: "It is next urged that the third claim of the reissue is void, because it was abandoned by the patentee upon the objection of the Patent Office, when the original application was pending. In Sargent's original application he made one broad claim. The application was rejected by the examiner, whose decision was reversed by the board of examiners. The examiner then requested that a new application be made, upon the ground that the case presented to the board was not the same case which had been presented to him. A new application was made, containing only the first two claims of the reissue. Then followed a long and earnestly contested litigation in the Patent Office between various interfering applicants, in which, apparently, both patentability and priority were discussed. The Little application contained the broad claim, and the board of examiners said, at one stage of the litigation, whether this question was properly before them or not, that this claim was patentable; so that, when the question came before them upon appeal from the decision of the examiner against the Sargent reissue, the board say: 'The claim in controversy is the same, in substance, as the first claim of Little, whose application was once in interference with Sargent, and which was admitted to be patentable by the Office at the time of the declaration of the interference. The patentability of Little's claim has once been before us in the aforesaid interference, and, after full argument, we concluded that his claim was tenable, and held that someone who was first to combine with the bolt-work on a vault or safe-door, a key-lock and time-lock, acting independently of each other, but jointly upon the bolt-work, might have a valid patent therefor.' These facts exclude the third claim from the decision, or the dicta, in the case of *Leggett* v. *Avery*, 101 U. S. 256 [25: 865]. I do not understand that the objection that the reissue is for a different invention from the original was pressed by either of the counsel for the defendant. It is sufficient to say, that the claims of the original were for the combination of the third claim, provided with a device whereby the bolt-work may be retained in the unlocked position, for shutting the door, and be automatically locked by the time-lock and mechanically by the key-lock when the bolt-work is cast. The patentee had shown 'means whereby;' but, if I have been correct thus far, the gist of his invention consisted, not in that device, but in the triple combination. Other different 'devices whereby' could be introduced by other inventors, which would destroy the value of his patent if it was unduly limited. As said by the board of examiners, 'means whereby,' while being essential to the convenient use of this combination, is merely incidental to the main idea, and may be varied indefinitely without departing from the spirit and scope of the applicant's invention."

The only remark made by *Judge* Lowell, in his opinion in the present case, as to the validity of reissue No. 7,947, as respects claim 3, is, that the patent "was reissued so soon after its granting that it is not obnoxious to the objection of undue delay." The application for the reissue was filed 13 days after the original patent was issued, and the reissue was granted 36 days after the application for it was filed. *Judge* Lowell held claim 3 to be invalid, on the ground that, if it was a claim irrespective of any particular means for carrying it out, it was void as a patent for a principle, independently of the state of the art; and that, in view of the state of the art, it was void. He was of opinion that there was no patentable novelty in putting a time-lock, which was old, in place of one of two combination locks, where two combination locks had been before used to dog one combined bolt-work; that it was not patentable to substitute a well-known multiple bolt-work for two such bolt-works, where a time-lock and a combination-lock had been before combined in the use of two multiple bolt-works; and that there was no patentable novelty in combining two locks with a single door.

A history of the proceedings in the Patent Office in regard to patent No. 195,539 and reissue No. 7,947, shows that claim 3 of that reissue must be held to be invalid.

On the 9th of May, 1874, Sargent filed an application for a patent which claimed broadly the combination of a time-lock, an ordinary lock and a safe-bolt connected with both of them. The claim he made was as follows: "What I claim is the combination, with a clock or time-movement lock and an ordinary lock, attached independently to a safe or vault-door, of a safe-bolt constructed so as to rest against or connect with both of said locks, substantially as described, whereby the safe-bolt cannot be withdrawn till both locks have been unlocked."

In the specification he then filed he said: "This improvement belongs to that class in which two locks are applied upon a safe or vault-door for the purpose of preventing the withdrawal of the safe-bolt till both locks have been unlocked. . . . I employ one ordinary combination or key-lock and one time-movement or clock-lock, attached independently to the door, and employ in combination therewith a safe-bolt that bears against or connects with both of said locks in such a manner that though the ordinary lock may be picked or opened, yet the clock-lock cannot be reached, and the safe-bolt therefore cannot be released till the clock has performed its office and unlocked its lock at the predetermined hour. . . . But it is by no means essential to this invention that the circular form of lock-bolt should be used, as the ordinary style of sliding-bolt, or other forms of shifting bearings, could be employed if desired. . . . Clock-locks have before been used both separately and in connection with combination locks. Where used alone they are insecure, for the reason that burglars, ascertaining the hour upon which the lock is set, may, by confining or disabling the officers of the bank having control of the same, open the safe when the hour arrives. In my improvement such result cannot occur, because the combination lock still locks the safe. Where clock-locks have been combined with ordinary locks heretofore, so far as I am aware, the said locks have been connected by a lever or other connection, so that their actions are dependent on each other. In such case, if the combination or key-lock is injured by a lock-pick, by violence or otherwise, the clock-lock is liable to injury also. By making these independent, as described, I avoid these difficulties." [374

This application was rejected by the examiner, but, on appeal, his decision was overruled by the examiners-in-chief, February 17, 1875. The examiner then ascertained that the case had been argued before the examiners-in-chief on an invention which had not been before the examiner, and that another model was used before the examiners-in-chief in place of the one properly in the case. The new feature of invention was a device by which the time-lock could be properly set and the door then be closed; but that device, which made the invention an operative one, was not shown in the drawing, the specification or the model which had been before the examiner. In a communication made to Sargent by the examiner at the time, February 20, 1875, he said: "As far as the Office knows by the record of the case, this new invention may not have been contemporaneous with the first one. The examiner would suggest that a new case be at once filed embodying this invention, which makes the devices operative, and against the patentability of which no question will be raised. The claim, however, must be not broadly for A combined with C, which is not conceded to be entirely inoperative, but A and B combined either with C or some mechanical equivalent thereof, which alone makes A and B operative." He also said: "It is suggested to applicant that he file a new case introducing the new combining device which allows the door to be shut after the time-lock is set, and thus takes it out from the new reference cited, and the examiner will, in all proper ways, hasten the case forward upon a legitimate claim for A and B with suitable combining device to allow the door to be closed after the time-lock is set, inasmuch as no obstacle exists, as the examiner is at present advised."

In accordance with this suggestion, Sargent, on the 10th of March, 1875, filed a new application, which resulted in the granting of patent No. 195,539. The specification of this application said: "In locking the safe or vault-door, some device is necessary to allow the door-bolt to remain back in the unlocked position until the door is closed, without interfering with the clock-lock. [A variety of devices may be employed for this purpose.]" This clause in brackets was afterwards erased. [375

The specification of this application also said: "In Fig. 1 is shown another device for the same purpose, situated outside the lock, which is the subject matter of another application. It consists of a socket or bearing, *h*, attached to the tie-piece, E, of

the door-bolt, and sliding on an independent stud, *a'*, resting against the lock-bolt. A spring locking-pin, *i*, is used to connect the parts, when the door-bolt is thrown forward to connect with the jamb. In this case, the lock-bolt, D, may be made solid, and may be either of the turning or sliding kind. [Other devices might be used to allow the door to slut. I do not wish to confine myself to any particular form of the device."] The sentences in brackets were afterwards erased.

Sargent thus limited himself to combinations wherein one or the other of the peculiar devices invented by him should be an essential element, which is further evidenced by the fact that, in claim 1, as accepted by him, the combination of the clock-lock and combination lock, as applied to the door-bolt, was to be provided with a device whereby the door-bolt might be retained in the unlocked position for shutting the door; and in claim 2, the same combination was to be provided with a lock-bolt having an opening or an offset which was automatically brought in and out of coincidence with the tongue of the door-bolt, whereby the latter might be retained in the unlocked position for shutting the door.

On the 16th of March, 1875, the examiner rejected claim 1, saying that it was to be found substantially in the patent granted to Cornell, August 10, 1858, for "safe bolt-work," and referring also to three prior patents for time-locks, and adding that "merely to substitute either one of the above time-locks for one of the locks shown in Cornell's patent is not regarded as a patentable difference." To this Sargent's attorney replied, on the 17th of March, 1875: "The combination is such as to require something else to be done other than to simply substitute for one of the key-locks shown in Cornell's patent one of the time-locks cited by [376] the examiner." This referred to the devices invented by Sargent, by which his combination was made operative.

On the 19th of March, 1875, Sargent's attorney struck out the parts in brackets, before quoted, and also struck out claim 1 and substituted as claim 1 what is claim 2 in the original patent as granted. On March 20, 1875, the attorney reinstated claim 1, and added as claim 2 what is claim 2 in the original patent.

On the 22d of March, 1875, the examiner rejected both of the claims, on the references before made, and referred also to the English patent to W. Rutherford, of April 14, 1831. He added that "a rotating lock-bolt having an opening or an offset is not new," and referred especially to two prior patents, and said: "The second claim may possibly be allowed if amended by inserting the words 'constructed in two parts and' after 'lock-bolt.'"

An appeal was taken from this decision, and on the 27th of March, 1875, the board of examiners-in-chief reversed the decision of the examiner, doing so on the ground that the combination embracing Sargent's peculiar devices for retaining the door-bolt in an unlocked position, for shutting the door, were new and patentable. Before Sargent's patent could issue, he was put into interference with Stockwell, Burge and Little, and also with Pillard and Lillie. It is evident, from decisions made by the examiner of interferences, and by the commissioner of patents, in questions arising in some of these interferences, that Sargent was regarded as making no claim to a broad combination between the bolt-work of a door, and a time-lock, and an independent non-time-lock, which is the subject matter of claim 3 of reissue No. 7,947.

The examiner, the examiners-in-chief and the commissioner of patents decided priority of invention in favor of Sargent, as to the combination, by Sargent, of the bolt-work, with a time-lock, and a non-time-lock, and his device for retaining the door-bolt in its retracted position, for shutting the door without interfering with the lock mechanism. The patent No. 195,539 was then issued, on September 25, 1877, with the two claims before set forth, limited by the proceedings which so took place in the Patent Office.

The lock of the defendants did not infringe either of the two claims of the original patent, for it did not contain what is called in claim 1 "a device whereby the door-bolt may be retained in the unlocked position for shutting the door," after the time-lock is set; nor did it contain what is called in claim 2 "a lock-bolt having an opening or an offset which is automatically brought in and out of coincidence with the tongue of the door-bolt." This is apparent from the fact that it is not contended that the defendants' lock infringes either claim 1 or claim 2 of reissue No. 7,947, which two claims are substantially identical with claims 1 and 2 of the original patent.

On the 8th of October, 1877, Sargent filed an application for a reissue of patent No. 195,539. He inserted in his specification what is claim 3 of the reissue as granted. That claim is as broad as the claim made in his application of May 9, 1874, which, as before shown, he abandoned. The examiner rejected this claim twice, and after the second rejection, and on the 26th of October, 1877, Sargent appealed to the examiners-in-chief. In the statement of appeal his attorney said: "All time-locks used with bolt-work must have some mechanical arrangement to enable the bolt-work to be retracted for closing the door. Such is present in many old patents, and has never been claimed by my client; but what is claimed by him is for the union of such an old, well-known time-lock with a combination-lock and bolt-work all arranged on the same door." This shows the breadth of the claim, as compared with claims 1 and 2 of the original patent.

The examiner, in his answer to the reasons of appeal, said: "Leaving out the descriptive and recitative parts of the claim as well as all superfluous and misleading matter, we have, as the claim, the following elements and arrangements, viz.: a combination or key-lock, and a time-lock, combined with the bolt-work of a safe-door, both used independently and resting against or connect-

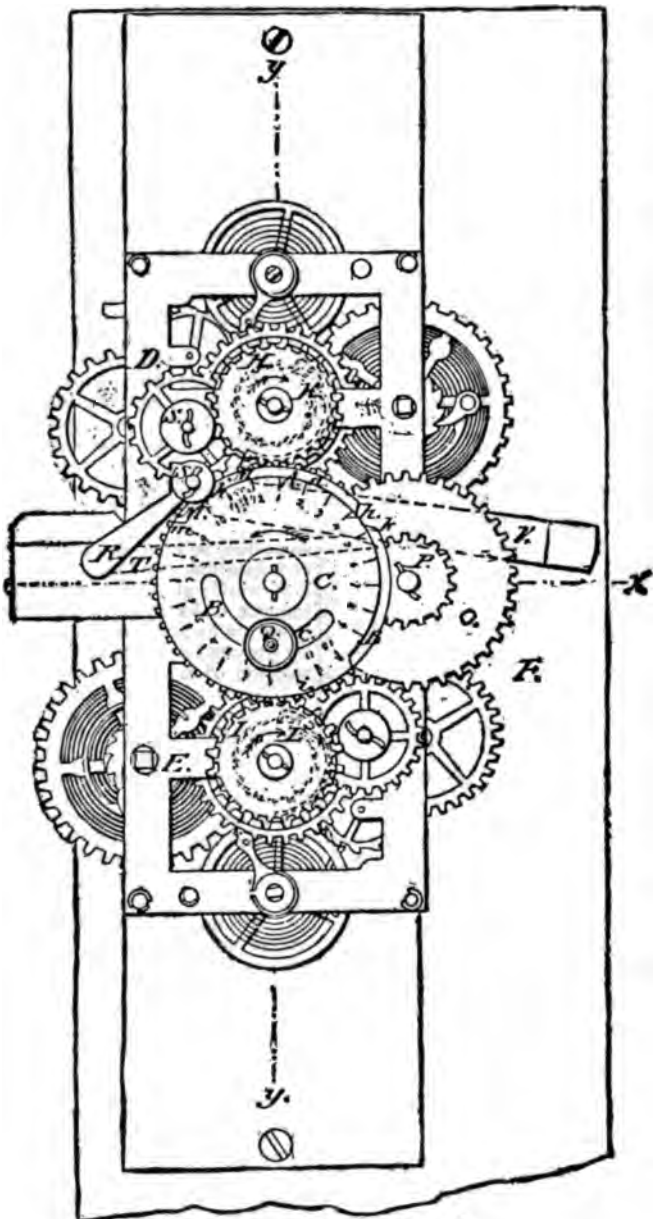


Fig. 2

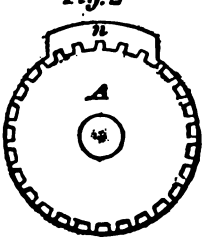
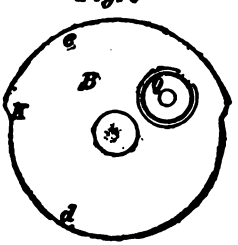
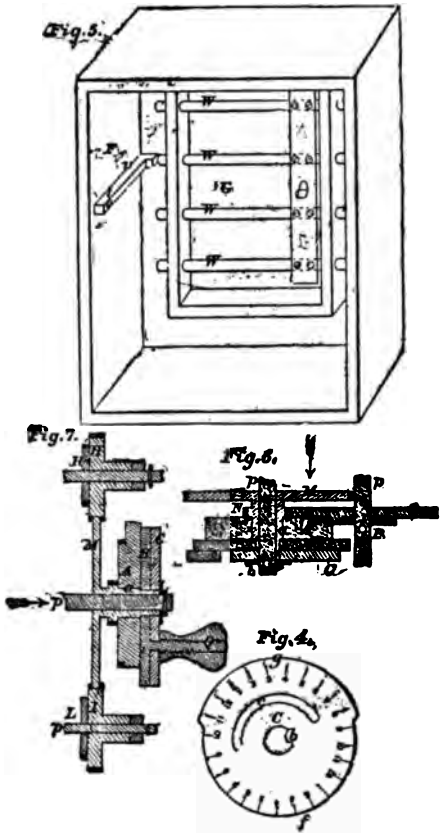


Fig. 3



4]



The specification, claims and drawings of reissue No. 8,550 are as follows:

"Be it known that I, Samuel A. Little, of Shelburne, in the County of Franklin and State of Massachusetts, have invented certain new and useful improvements in chronometric locks; and I do hereby declare that the following is a full, clear and exact description thereof, that will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, which form a part of this specification.

"The object of my invention is to construct a time-lock which shall dog and release the multiple bolt-work of a safe or vault at certain predetermined times, both the dogging
186] and releasing being caused by the operation of the time mechanism. By this means the time when the lock will dog the bolt-work depends entirely on the adjustment of the internal mechanism of the lock, hereinafter described.

"I provide adjustable devices, so that the periods when the lock shall be locked and unlocked may be varied at will; and I also provide a device whereby, at certain intervals—say on every seventh day—the lock will remain locked during the time when ordinarily it would be unlocked.

"It will thus be seen that I have constructed a lock which will, of itself, dog and release bolt-work at a regular hour each day, except on certain predetermined days—Sundays, for example—when it will remain in the locked position all day. My lock, when once adjusted, is therefore absolutely automatic, requiring no attention except winding, and it is, so far as I am aware, the first time-lock which locks at a time determined by the time mechanism, while at the same time the hours for locking and unlocking can be changed without altering the construction of the lock.

"To diminish the chances of accident from the stoppage of the time mechanism, I provide two independent movements, both of which assist in rotating the dial to actuate the lock; but should one stop the other will continue to rotate the dial.

"The particular construction of my lock is, that the two time-movements rotate a graduated dial so arranged that its motion oscillates, at certain regular determinable intervals, a pivoted bent lever, which in turn, in one instance, for automatic locking, lifts the free part of, and thus oscillates on its stationary pivot, a metallic dog or obstruction, so as to cause it to rest in the way, and prevent the retraction, of the sliding bolt-work; and in the other instance, for automatic unlocking, it withdraws its support from under and permits the dog to oscillate by gravity, so as to clear the way for the retraction of the bolt-work.

"The adjustability of my lock for locking and unlocking I obtain by means of my dial, which is so arranged that what I may call its 'bolt or dog-actuating points' can readily be changed from one position to another, so [3
that they will actuate the dogging mechanism at any desired hours for locking or unlocking; and it is to be noted that, in all continuously-running dials, the adjustability for unlocking or locking preferably will be obtained in substantially the same way—*i e.*, by varying the position of the dog-actuating points—because the dial itself should always be running on correct time.

"I cause the lock to remain locked on Sundays or other desired days, by means of a supplemental cam, which temporarily assumes one of the functions of my dial, and by which I can at any desired time cause the lock to remain locked during a greater period than twenty-four hours.

"Referring now to the drawings in aid of a description of my lock in detail, figure 1 is a front view of my improved time-lock attached to the inside of a safe, adjacent to the hinge part of the safe-door; Fig. 2, a view of the same, partly in elevation and partly in section, on the line 2 2 of Fig. 1; Fig. 3 a horizontal transverse section thereof on the line 3 3 of Fig. 1, with the upper time-movements removed, showing a plan of the locking mechanism proper; Fig. 4, a horizontal transverse section through the centre of the locking dials; Fig. 5, a perspective view of the interior of a safe, showing the door-bolts locked forward by the lever-dog; Fig. 6, a perspective view of the graduated dial (marked C in Fig. 1); Fig. 7, a similar view of wheel B in Fig. 1; Fig.

8, a similar view of a seventh-day wheel (marked A in Fig. 1).

"D and E designate two time-movements fastened to the inside, F, of a safe, adjacent to the hinged part of the safe-door G. These time-movements, through the wheels and ratchets K and L, propel the wheels H and I in the direction of the arrows thereon. These wheels H and I rotate once in twelve hours, and are both geared to the common wheel M, which has twice as many teeth as either of them, and they propel it in the direction of the arrow thereon, so that while wheels H and I are rotated once in twelve hours, wheel M is rotated only once a day.

"It will be seen that both time-movements [388] work together in turning the wheel M, and thereby operate the lock; but if either accidentally stops, the wheel H or I of the other will alone continue to rotate the wheel M and operate the lock, because each ratchet will allow free motion to either wheel I or H, in the absence of its normal impelling force.

"The toothed wheel N, forming part of the wheel M, is geared into and drives the toothed wheel O. The toothed wheel P, forming part of the wheel O, is geared into and drives the seventh-day wheel A, which turns loosely on the hub *a* of the wheel M. This wheel A has twice as many teeth as wheel P, and wheel O has three and a half times as many teeth as wheel N. Therefore, while wheel M revolves once in a day, it only causes wheel A to revolve once in seven days. The wheel C, which is graduated for the hours of the day, is fastened rigidly upon the hub *a* by means of the projection *b* and rotates with it. Loose on the same hub is the wheel B, which may be fastened by friction to the wheel C in different positions by the thumb-screw Q, that is attached to, or forms part of, the wheel B, and passes through the slot *c* of the wheel C.

"*p p p p p* designate pivots, on which the several wheels revolve. The wheel B is cut away on its periphery, leaving the depression *d* and the cam-projection *e*, and the periphery of the wheel C is similarly cut away, leaving the depression *f* and the cam-projection *g*, of the same form and size as the depression and projection of the wheel B. When these two wheels are fastened together by the thumb-screw Q side by side, they form one wheel or dial, having a depression *h*, which may be enlarged or diminished by rotating the wheel B by means of the thumb-screw, and then setting it, and also having a cam or projection, *i*, which may be enlarged or diminished in the same manner. Pivoted near its middle to the lock-case is the bent lever R, one arm of which carries the friction-roller S, and is lifted by the cam *i*, revolving under the roller at the cam's inclined plane *k*, and at the same time the other arm, T, of said lever lifts the dog V, pivoted at *l*, up behind the door-bolts W W W W into [389] the position shown in Fig. 5, hereby locking the bolts forward behind the jamb of the safe, so that the door cannot be opened. In due time, when the cam *i* is rotated entirely from under the roller S, the latter will drop into the depression *h* at the inclined plane *m*, which allows the dog V to fall from behind the safe-bolts, when they may be retracted and the safe opened.

"It will be noted that the dog always tends to turn on its pivot automatically by gravity, so as to present a free space for the retraction of the bolt-work, and it is held up only for predetermined periods, to be measured by the time mechanism, by the bent lever.

"The seventh-day wheel A has on its periphery a cam-projection, *n*, which rotates once while the depression *h* rotates seven times, as described, and it is so arranged relatively to the depression *h*, that on every seventh revolution thereof it is brought under the roller S and holds up the lever R, while the depression *h* passes under it, so that every seventh day this projection *n* prevents the safe from being unlocked.

"From the foregoing description the mode of operation will be obvious.

"The time-movements should be set to correct time by bringing the hour-mark on the dial C under the roller S, which is readily done by turning the dial, as the wheels A, B, C and M turn freely in the direction of the arrow on wheel C, because the ratchets behind wheels H and I do not interfere with motion in that direction, but take up, and, through the force of the time-movements, proceed with, whatever advance of said wheels may be made. The lock should then be set to lock up at any given hour by loosing the thumb-screw Q, and turning the inclined plane *k* of the wheel B to the mark of the required hour, and then fastening the wheels B and C together by setting the thumb-screw Q. The dial will then indicate the time of locking and unlocking, and the operation of the time-movements will cause the oscillation of the dog into position to obstruct the retraction of the bolt-work in a little time, or at whatever time may have been decided upon, and it will be held there until the time arrives for unlocking, when the continued operation of the time-movements will withdraw its support, and it will fall out of the way.

"If it is desired to have the safe opened [39 any given amount of time earlier than the set time—say 9 o'clock—the wheel C must be turned, as described, until the time indicated under the roller shall be that amount fast of the correct time, the closing-mark being altered, if desired, to suit the case. If it is desired to open later, the clocks must be stopped until they are slow of the time as much as it is desired the lock shall open later than the set time, correcting the closing-mark, if desired.

"If the wheels A B, C and M are turned, as described, until the cam part *n* of the wheel A shall be in a position to come under the roller S and keep the lock from opening on Sunday, it will continue to do so on Sunday each week, if the time-movements run on unchanged. Thus, the necessity for setting the mechanism on every Saturday, so that it shall keep the safe locked over Sunday, is obviated, which is a great convenience to bankers, and is, furthermore, a security against neglect to set the mechanism weekly,

which might sometimes occur. In case it shall be desired that the lock shall not open for a holiday or other day, the said wheels may be rotated until the cam-projection *n* is in position to come under the roller S and hold up the lever R on such day.

"The lock is affixed to the side F of the safe, as described, to avoid derangement or stoppage of the time-movements by concussion on the door; but it is obvious that it may be affixed to the door without modifying its construction, if desired, that being merely a change of location.

"It is evident that the dog V and the lever R may be one and the same piece. The object of making them in two parts is to save the weight of the part V, which depends upon the pivot *l*, from adding to the labor of the time-movements, and also to make the dog or obstruction entirely distinct from the time mechanism.

"I am aware of the patent granted to Williams and Cummings, No. 17,245, and dated May 5, 1857, and do not claim anything shown therein, but intend to limit my claims to comprehend only the improvements I have made over the peculiar combinations shown in that patent, whereby I reduce the number, modify the construction, change
[391] the relative position and mode of operation of the parts, and simplify my mechanical organization, as will fully appear by comparison.

"What I claim as my invention is—

"1. The combination of independent multiple bolt-work with the time mechanism and locking or dogging mechanism of a time-lock, automatically both dogging and releasing the bolt-work at predetermined times, substantially as described.

"2. The combination, in a time-lock, of a continuously revolving adjustable device for determining the time of operation of the unlocking mechanism, a pivoted arm or lever actuated by said device, and a dog or obstruction movable directly by said pivotal arm at regularly recurring periods, to permit the retraction of the bolt-work, substantially as described.

"3. In a time-lock, the combination of time mechanism, a revolving dial actuated thereby, a dog and suitable connecting mechanism, whereby the continuous revolution of the dial causes the dog to move into the locked and unlocked positions alternately, substantially as described.

"4. In a time-lock, the combination of a continuously-rotating dial and mechanism which causes the lock to lock and unlock automatically, substantially as described.

"5. In a time-lock, a continuously-rotating dial provided with an adjustable device for automatically determining the time of locking, substantially as described.

"6. In a time-lock, the combination, substantially as above set forth, of the time-movements and an adjustable device for automatically determining the time of locking.

"7. In the time-lock, the combination, substantially as above set forth, of the time-movements and two adjustable devices, one for determining the time of locking, and the other of unlocking.

"8. In a time-lock, the combination with the time mechanism and the locking or dogging mechanism, of an adjustable device which, through the continuous operation of the time mechanism, will periodically, or at required times, cause the lock to remain locked during a greater period than twenty-four hours, substantially as described.

"9. In a continuously-running automatic time-lock, the combination, with the time [39
mechanism and the locking or dogging mechanism, of an independent device adapted to be set to prevent, at any desired time, the unlocking of the lock for a greater period than twenty-four hours, substantially as described.

"10. The combination, substantially as above set forth, of the adjustable mechanism for continuously locking and unlocking daily the time-movements, and a device for preventing unlocking during a greater period than twenty-four hours.

"11. In a time-lock provided with two independent time-movements and an interlocking device common to both, the combination, with each of said movements, of a ratchet and pawl interposed between the last or driving arbor of each movement and the said common unlocking device, whereby the said device may be driven by either or both of the movements, and the stoppage of one movement will not necessarily cause the stoppage of the other, substantially as described.

"12. The combination, with the time-movements, of the wheels H and I, the ratchets K L, and the common wheel M, arranged substantially as described, for the purpose set forth.

"13. In combination with the dial, the seventh-day cam-wheel A, adjustable, as described, to prevent the falling of the bent lever R and dog V, either periodically or at required times, as described.

"14. The combination, in a time-lock, of time mechanism, a revolving graduated dial actuated thereby, a bent lever oscillated by the revolution of the dial on an immovable pivot, and a dog or obstruction, also oscillated on an immovable pivot, the lever and dog being so arranged that when one arm of the lever is pushed aside at a predetermined time by the revolution of the dial, the other arm withdraws its support from under and permits the dog to turn by gravity, thereby leaving a free space for the retraction of the bolt-work, substantially as described.

"15. The combination of multiple sliding bolt-work, a dog or obstruction oscillated on an immovable pivot, and tending, by gravity, to turn so as not to dog the bolt-work, a bent lever, oscillated also on an immovable pivot, for holding the dog in position [39
against gravity, to dog the bolt-work, a revolving graduated dial, which, by its revolution at a predetermined time, oscillates the bent lever, and time mechanism that actuates the dial, substantially as described.

"16. The combination, substantially as before set forth, by means of suitable connecting mechanism, of the following elements, adapted, as combined, so to secure the door of a safe or vault, and to automatically release the same at a predetermined time, viz.:

Fig 1

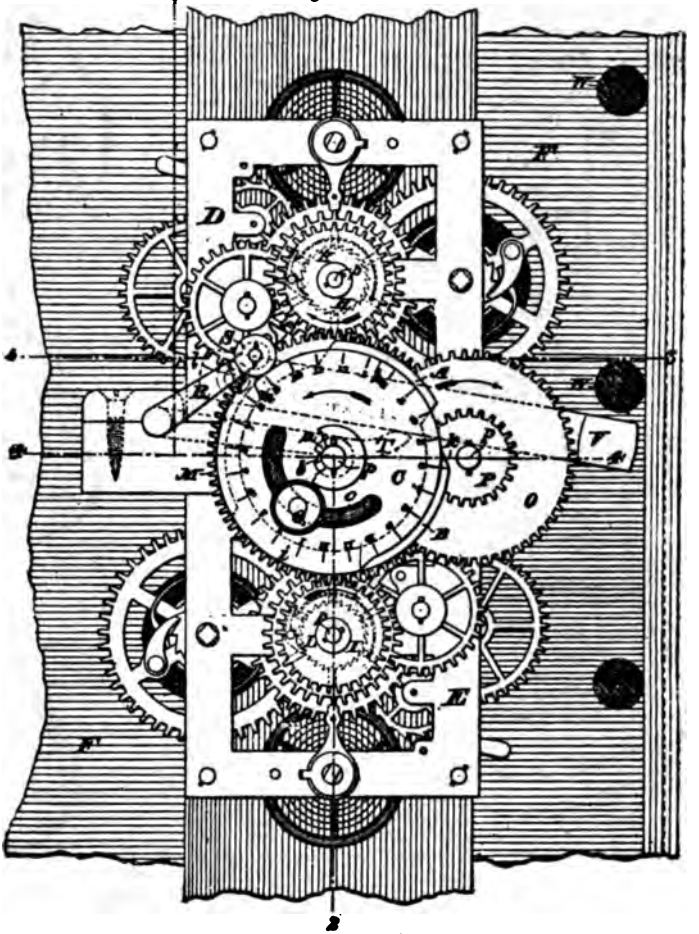
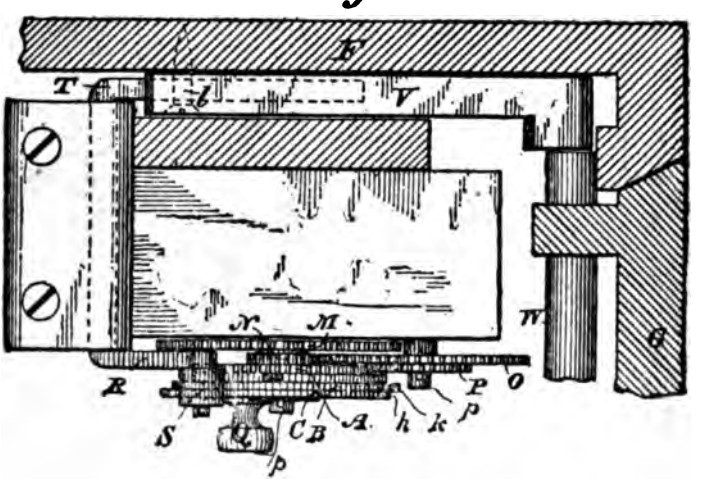


Fig. 3.



93]

Fig. 2.

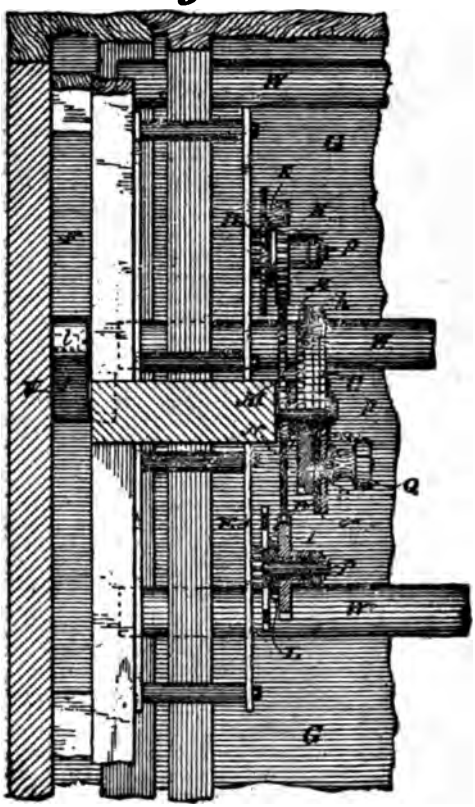


Fig. 7

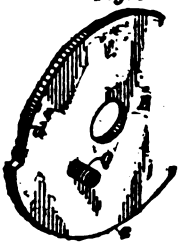


Fig 8.

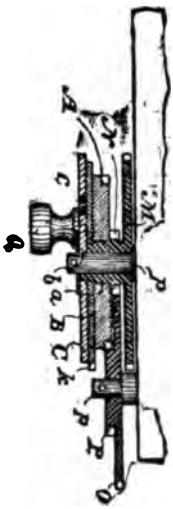
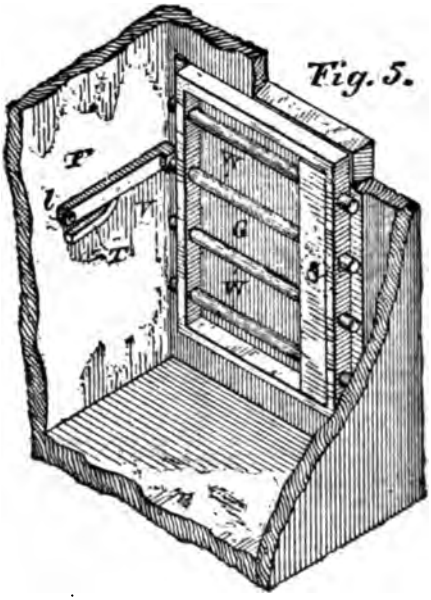


Fig 4

Fig. 5.



first, the multiple sliding bolt-work; second, the oscillating stop or dog, adapted to prevent the retraction of the bolt-work, and to be turned on its pivot to release the bolt-work at a time determined by the clock-work; third, the vibrating lever for holding the stop or dog in position to prevent the retraction of the bolt-work; and, fourth, the clock-work for determining the time when said lever shall be moved to permit the stop or dog to release the bolt-work.

"17. In a chronometric locking mechanism, the combination, substantially as before set forth, of the following elements adapted as combined, to guard or dog the bolt-work of a safe or vault-door, and to automatically release the same at a predetermined time, viz.: first, the oscillating stop or dog, adapted to prevent the retraction of the bolt-work, and to be turned on its pivot to release the bolt-work at a time determined by the clock-work; second, the vibrating lever for holding the dog in position to prevent the retraction of the bolt-work; third, the clock-work for determining the time when said lever shall be moved to permit the dog to fall to release the bolt-work; and, fourth, the graduated wheel or dial, rotated by the clock-work, and adapted to operate said lever, and to be set for varying and controlling the time when said lever shall be moved to permit the dog to release the bolt-work."

Only claims 1 and 7 of the reissue are alleged to have been infringed. They take the place of claim 2 of the original patent. They were before *Judge* Shipman in the cases in 19 Blatchf. and 6 Fed. Rep., above referred to, and he held that they covered new inventions and patentable improvements. *Judge* Lowell, in his opinion in the present case, states that he fully agrees with the views of *Judge* Shipman as to the novelty and patentability of claims 1 and 7. Although the defendants' lock has but one time-movement to control the lever which controls the dog, *Judge* Lowell held that that did not affect the question of the infringement of claims 1 and 7.

[397]

In September, 1887, in *Yale Lock Mfg. Co.* v. *New Haven Sav. Bank*, 32 Fed. Rep. 167, in the Circuit Court for the District of Connecticut, *Judge* Shipman had before him the question of a rehearing as to the validity of claims 1 and 7, and especially the question whether claim 7 was an enlargement of claim 2 of the original patent. He held that claim 7 "should be limited to the invention which was described and claimed in the original patent, which invention was not confined to a 'common cam,' or to a device which was connected with the compound wheel in the same way in which the cam was connected, but was broad enough to include equivalent means of connection with the dog." He held also that the owners of the patent had not abandoned, by proceedings in the Patent Office in respect to the two prior reissues of it, their right to claim, in reissue No. 8,550, a double or compound disc, and to obtain a valid patent therefor.

Claims 1 and 7 were sustained also by *Judge* Sage, in the Circuit Court for the Western Division of the Southern District of Ohio, in May, 1889, in the case of *Yale & Towne Mfg. Co.* v. *Consolidated Time-Lock Co.*, 38 Fed. Rep. 917.

This patent, as before stated, was reissued May 9, 1876, as No. 7,104, and again, January 8, 1878, as No. 8,035. The lock used by the defendants is made under letters-patent No. 173,121, granted to Henry Gross, February 8, 1876, for an "improvement in time-attachments for locks." This patent was issued prior to the granting of any reissue of the Little patent. While the original patent, No. 146,832, had only three claims, reissue No. 7,104 had eight claims, reissue No. 8,035 had six claims, and reissue No. 8,550 has seventeen claims. On comparing the various reissues with the original patent, it is found that the drawings and the description of them are substantially the same in all, with some changes in nomenclature; and it is quite apparent that the original patent was not inoperative or invalid by reason of a defective or insufficient specification, within the terms of the statute, so as to warrant the reissues.

There is in the record a copy of the file-wrapper and contents of reissue No. 8,035, applied for December 15, 1877, and granted January 8, 1878. The specification presented with the application contained only two claims, both of which made "a revolving dial" an essential element. On the 18th of December, 1877, an entirely new specification and claims were put in, the claims being ten in number. Claim 3 was as follows: "3. In a time-lock, the combination, substantially as above set forth, of the clock-work and two adjustable devices for determining, respectively, the times of locking and unlocking." That claim 3 is very similar to claim 7 of reissue No. 8,550. On the 21st of December, 1877, that claim 3 was amended by striking out the word "clock-work," and inserting the words "time-movements," so that it became almost exactly the same as claim 7 of reissue No. 8,550. On the 26th of December, 1877, that claim 3 was erased.

Claim 4 of reissue No. 8,035, as originally applied for, read as follows: "The combination with one or more time-movements of one or more wheels H I, one or more ratchets K L, and a common wheel M, arranged as described for the purposes set forth." This claim 4 was erased with claim 3 and in their place there was inserted the following as claim 3: "The combination with the time-movements of the wheels H I, the ratchets K L, and the common wheel M, arranged as described, for the purpose set forth."

Claim 5 of reissue No. 8,035, as applied for, was identical with claim 2 of the original patent No. 146,832, as granted. That claim 5 was rejected by the examiner, on the ground that it was old in valve-gear for steam engines, with a reference to a prior patent; and on the 26th of December, 1877, it was erased and abandoned. Therefore, more than a year before reissue No. 8,550 was granted, claim 2 of the original patent was abandoned by Little; and at the same time he also abandoned claim 3 of his appli-

cation, after he had put it in such shape that it became substantially the same as claim 7 [39] of reissue No. 8,550. Reissue No. 8,035 was taken out without those claims. No one of the six claims of reissue No. 8,035 was infringed by the lock of the defendants, which was applied to use during the existence of reissue No. 8,035. A little over nine months after it was granted, the application for reissue No. 8,550 was filed; and the present suit was brought eight days after that reissue was granted.

In the specification of reissue No. 8,035, the following statements were made: "The object of my invention is to construct a time-lock, and to combine it with the multiple sliding bolt-work of a safe or vault-door, so that, by the continuous movement of its time mechanism, locking and unlocking will be effected daily or periodically. . . . The gist of my invention, therefore, is the combination, in a time-lock, of time mechanism revolving a graduated dial, which serves to oscillate a pivoted bent lever, that, in turn, induces the oscillation of a pivoted dog or obstruction to the retraction of the multiple sliding bolt-work. Subordinate to this main principle or chief organization of my time-lock, I provide that my dial shall be composite in its construction, whereby I obtain what I term a 'differential cam' for convenience of adjustment." These statements do not appear in the specification of reissue No. 8,550. In the latter specification, what had been previously called "a revolving graduated dial" is called "adjustable devices;" the dial is said to have "bolt or dog-actuating points;" and a statement is made that the lock of Little "is, so far as I am aware, the first time-lock which locks at a time determined by the time mechanism, while at the same time the hours for locking and unlocking can be changed without altering the construction of the lock." So that, in this reissue, which was granted almost five years after the date of the original patent, and over three years after the Gross patent was issued, the attempt is made by Little to cover all devices for determining the time of locking and unlocking, on the view that he was the first to invent a lock that would lock up as well as unlock at a predetermined time. This attempt is embodied in claims 1 and 7 of reissue No. 8,550, which are here repeated: "1. The combination of independent multiple [40] bolt-work with the time mechanism and locking or dogging mechanism of a time-lock, automatically both dogging and releasing the bolt-work at predetermined times, substantially as described." "7. In a time-lock, the combination, substantially as above set forth, of the time-movements and two adjustable devices, one for determining the time of locking, and the other of unlocking."

Although the first reissue, No. 7,104, was applied for March 15, 1876, more than two months after the Gross patent was issued, no such claims as the above were applied for or taken, nor were they taken in reissue No. 8,035. Claims 3, 7 and 8 of reissue No. 7,104 were abandoned in reissue No. 8,035, and severally appear as claims 7, 16 and 17, in *reissue No. 8,550, claim* 7 in No. 8,550 being in these words, as claim 3, in No. 7, 104: "3. In a chronometric locking mechanism, the combination, substantially as before set forth, of the clock-work and two adjustable devices for determining, respectively, the time of locking and unlocking." Claims 1, 2, 3, 4, 5, 8, 9 and 11 in No. 8,550 are entirely new. Claim 2 of the original patent, No. 146,832, was not retained in No. 8,550, and only two claims out of the seventeen in No. 8,550 are found in the original patent.

Infringement is alleged of claim 1 of reissue No. 8,550, which is an entirely new claim, not found in the original patent or in any prior reissue, and of claim 7, which was claim 3 in reissue No. 7,104, and was first amended and then abandoned in the application for reissue No. 8,035. If claim 1 of reissue No. 8,550 is construed to cover only the specific devices of Little, operating in the mode described by him, and thus is no broader than claim 2 of the original patent, the defendants' lock does not infringe it. If it is not so limited, it is void, under numerous decisions of this court.

In Little's time-lock, there is a compound cam-wheel or disc, composed of two cam-wheels placed face to face on the same axis, each having a portion of its outer edge cut away, and so arranged that they can be turned with relation to each other so as to increase the length of their common projection or common depression, and be fastened together in any desired position by means of a slot [41] and a thumb-screw in one of them. When adjusted, this compound cam-wheel is revolved by clock-work and made alternately to lift up and let down a lever which in turns lifts up or lets down another lever, the end of which is supported in a position behind one of the bolts of the door, or is allowed to drop away from behind it, thus alternately dogging and releasing the bolt. It is the office of the common projection on the wheels to lift, and then hold up, the levers in the dogging position; and the length of time the bolts will remain dogged depends solely on the length of the common projection.

In the defendants' lock there is only one time-movement, and there are no wheels of any kind, much less wheels like the cam-wheels B and C of Little's original patent, with projections and depressions, which can be rotated so as to increase and diminish the surface of a common cam or depression; nor has it any cam-projection or cam-depression of any kind, formed in any manner, whose office is to lift and hold up and let fall a lever, and thus dog and release the bolt of a safe-door; nor has it a device of any kind capable of performing the function of Little's cam-wheels. Little does not describe or suggest, in his original patent, any way by which he can dispense with the use of his cam-projections to lift and hold up the dog; and he confines claim 2 of his original patent to a combination in which two cam-wheels, capable of being rotated and adjusted with relation to each other, so as to increase and diminish the surface of a common cam, for the purpose of lifting and holding up the dog, are essential.

Claim 7 of reissue No. 8,550 was evident-

ly drawn so as to cover the time-attachment of the defendants' lock, which does not itself lock up or unlock the bolt-work, but only determines the time when the bolt-work may be unlocked by the combination-lock. Claim 7 is not limited to devices which automatically lock and unlock, but extends to devices which merely interfere with mechanical locking and unlocking. Such a construction of claim 7, a claim once abandoned in the Patent Office and restored in this reissue, cannot be admitted in consistency with numerous de-
[102] cisions of this court on the subject of reissues. If, however, claim 7 is so construed as to be no broader than claim 2 of the original patent, then the defendants' lock, as it did not infringe the latter claim, does not infringe claim 7.

It is shown that it was old to use time-mechanism, revolving dials with adjustable devices, pivoted levers and dogs, to lock and unlock door-bolts; and that the combination of clock-work, adjustable cam-wheels and a two-armed lever oscillated thereby, was old. In this view, in his original patent, Little very properly limited his claims to his mode of connecting two clocks with a common wheel, so that both could act together in turning it, and either one could turn it alone in case the other stopped; and to the employment of the specific cam-wheels with depressions and projections so located as to increase and diminish the surface of a common cam by rotation on each other, so as to lift and hold up the dog behind the bolt of the door; and to the introduction of his Sunday wheel. The lock of the defendants did not infringe any of the claims of the original patent, because it did not have the two clocks, the Sunday wheel, the cam-wheels, or any mechanical equivalent therefor, and did not move the dog automatically into the dogging position.

The application for reissue No. 7,104 was made more than two years after the original patent was granted, and one month and seven days after the Gross patent was issued, containing the devices which are employed in the defendants' lock. Reissue No. 8,550 was applied for nearly four years and nine months after the original patent was granted, and more than two years and eight months after the Gross patent was issued, and after the lock of the defendants had been put into use. No excuse is shown for these delays; nor is there any defect or insufficiency in the specification of the original patent. In December, 1877, during the pendency of the application for reissue No. 8,035, Little acquiesced in the rejection, for want of novelty, of claim 2 of his original patent, and then abandoned a claim corresponding with claim 7 of reissue No. 8,550, and took out reissue No. 8,035 without such claim.

[103] The lock of the defendants did not infringe any claim of reissue No. 8,035. Claim 1 of reissue No. 8,550 is entirely new, and claim 7 of that reissue is the same as claim 3 of the application for reissue No. 8,035, which claim was first amended and then abandoned. It was not lawful to introduce claim 7 into reissue No. 8,550, after such formal abandonment of it. If either claim 1 or claim 7 of reissue No. 8,550 covers a device which would not have been covered by claim 2 of the original patent, or by any of the claims of reissue No. 8,035, it is invalid; and even if claims 1 and 7 could properly be restricted to the cam-wheels of the specification or their mechanical equivalents, operating as described, as claim 2 of the original patent was restricted, the lock of the defendants does not infringe either claim 1 or claim 7.

For these reasons, it must be held that the plaintiffs have no cause of action against the defendants under claims 1 and 7 of reissue No. 8,550.

It results that the decree of February 12, 1886, must be affirmed so far as it relates to the Sargent reissue, No. 7,947, and reversed so far as it relates to the Little reissue, No. 8,550, and the cause be remanded to the Circuit Court with a direction to dismiss the bill of complaint, with costs to the defendants. As the plaintiffs fail in this court on both appeals, they are to pay the costs of this court on both appeals.

CLARA O. BURNS, Adm'x., ET AL., *Appts.*, [44
v.
JULIUS W. ROSENSTEIN ET AL.

(See S. C. Reporter's ed. 449-456.)

Suit for dissolution of partnership—exceptions to master's report, when taken—decree not reviewed for costs—expenses.

1. In a suit for the dissolution of a partnership, the court may proceed in the distribution of the assets without decreeing such dissolution, where the consent of the defendants to a dissolution of the partnership is shown by their answer.
2. Where the decree below followed the report of the special master and that report was based upon statements drawn from the books of the parties, and defendants did not file with the master or in court any exceptions to the report, they cannot, in this court, for the first time, object that the master proceeded upon erroneous views as to the contract between the parties.
3. Ordinarily a decree will not be reviewed in this court for costs merely in a suit in equity.
4. Plaintiffs were properly allowed, as part of their costs, a reasonable amount for the expenses incurred in preserving the attached property for which they became primarily liable to the officer keeping it.

[No. 207.]

Argued Mar. 18, 1890. Decided Mar. 31, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Massachusetts in favor of plaintiffs in an action for the dissolution of a partnership and a settlement of its affairs and decreeing that the plaintiffs recover a certain amount according to the report of the master. *Affirmed.*

Statement by *Mr. Justice* **Harlan:** [45
Rosenstein Bros. (composed of the appellees Julius W. Rosenstein and Leo Rosenstein)

NOTE.—*As to how far partners are liable for each other's acts*, see *note* to Nelson v. Hill, 12: 81.

As to rights and powers of surviving partners, see *note to* Moore v. Huntington, 21: 642.

and Henry Sellman, of New York, and J. J. Burns & Co. (composed of Joseph J. Burns and Robert Tarr) formed a partnership in the business of canning fish, more particularly mackerel, and manufacturing pomace, or fish guano, to be conducted under the name of the Union Fish Company on premises owned and occupied by Burns & Co., at Gloucester, Massachusetts. It was provided, among other things, in the written agreement of partnership, that Rosenstein Bros. should furnish the capital to carry on the business, also all material at cost, and sell all the goods manufactured at the best obtainable prices; that Burns & Co. should have charge of and superintend the factory, and devote all necessary time to the business at Gloucester; that interest on the capital invested by Rosenstein Bros. should be computed at the rate of six per cent per annum; that Rosenstein Bros. and Henry Sellman, jointly, should be entitled to five eighths, and J. J. Burns & Co. to three eighths, of the net profits of the business (art. 21); that "all losses, if any, sustained [151] by reason of bad debts shall be charged to profit and loss account, and are to be borne by the parties jointly, in the ratio of their stipulated interest" (art. 22); that Burns & Co. might take from the business fifty dollars per week for individual use and account, and draw on Rosenstein Bros. for funds required in the business in sums of not over fifteen hundred dollars in any one draft; and that the contract of partnership should remain in force for the term of five years, commencing May 1, 1881, and ending April 30, 1886.

The present suit was commenced November 7, 1881, in the Supreme Judicial Court for the County of Essex, Massachusetts. An attachment was sued out against the property of Burns & Co., and levied upon all their right, title and interest in certain personal property, consisting of fish product, and in two schooners, and also upon a steam engine and other property in the buildings occupied by the Union Fish Company.

An amended bill of complaint was filed showing that the object of the suit was to obtain a decree for the dissolution of the partnership, and a settlement of its affairs under the direction of the court. The dissolution was asked mainly upon the ground that the defendants had violated the terms of partnership, and were improperly managing the business committed to their charge. The plaintiffs asked the appointment of a receiver to take charge of the goods and assets of the partnership, as well as an injunction restraining the defendants from disposing of its property or from collecting the proceeds of any that had been sold.

By agreement of the parties an order was entered appointing a receiver of all the personal property of the partnership, with power to put the same in proper condition and sell it for the best interests of all concerned, and to collect the amounts due from the trustees or garnishees named in the writ of attachment, depositing all amounts received in the registry of the court subject to its orders.

The defendants demurred to the bill on the ground of multifariousness, for want of equity, and because it contained causes of action in respect to which there was a full and complete remedy at law. The suit was removed into the circuit court of the United States upon the petition and bond of the defendants. In that court the demurrer to the bill was overruled, *Judge* Nelson saying: "The bill states a plain case for equitable relief. A partner is under no obligation to continue a member of a partnership when his copartner persistently and willfully violates the essential conditions upon which the contract of the partnership rests. He is not under the necessity of remaining in the firm and resorting to his action at law upon the partnership contract for redress. He is at liberty to withdraw himself and his capital from the concern whenever it becomes reasonably certain that the business can no longer be carried on at a profit, whether through the misconduct of his copartner or from a failure of the business itself; so, if he has been induced to enter into the partnership contract through the deceit of his copartner, he may withdraw whenever the fraud practiced upon him becomes known. In neither case is he required to continue in the firm until the partnership expires by limitation of time, but is at liberty at once to ask for a dissolution and a winding up of the affairs of the partnership. The bill is not multifarious. It has a simple purpose—the dissolution and winding up of the concern. Though several grounds for relief are stated, yet they arise out of the same series of transactions, relate to the same subject matter, and can be conveniently settled in one suit. They are all properly joined in one bill."

The defendants thereafter filed an answer controverting all the material allegations of the petition, particularly those charging them with dereliction of duty in the conduct of the business. But they averred "that said plaintiffs without cause published a notice that they would no further carry on the business under said contract, and that they by public notice dissolved, violated and put an end, so far as they could, to the same; and the defendants are entirely willing and desirous that all business connections between them and the plaintiffs should be dissolved and forever ended, because of the dishonest, fraudulent and unjust conduct and violations of said contract by the plaintiffs."

On the 21st of April, 1883, the court below made the following order: "On reading the pleadings in the above-entitled cause and hearing the counsel of the respective parties, and on consideration thereof, it is ordered that it be referred to George P. Sanger, Esq., as a master of this court, to hear the parties and their evidence and report as to all issues of fact made by the pleadings in said cause, and to take an account of the dealings and transactions between said parties and all claims for damages arising out of said transactions."

The special master on the 16th of October, 1885, made his report, from which it appears that when, in the course of the hearing before him, an examination of the books was reached, it was agreed by the parties that

the book-keeper of the plaintiffs, and an expert book-keeper and accountant who had examined the books on both sides for the defendants, should together go over the books of both plaintiffs and defendants and draw from them a statement of the condition of the Union Fish Company at the time the suit was brought, showing the indebtedness or otherwise of the parties to that company, giving the undisputed and disputed items of account in separate columns. Statements of that character were prepared and furnished to the special master, who made them a part of his report. After the testimony before him was concluded, but before arguments were heard, each party, at his request, presented a statement of the damages sustained by the alleged misconduct of the other party.

A copy of the master's report was furnished the parties before it was filed. He received no communication from the defendants or their counsel, but from the plaintiffs he received a statement of the objections upon their part to his draft of report. These objections were considered and overruled by him, and the report was filed October 16, 1885. On the 7th of December, 1885, no exceptions to it having been filed, it was confirmed under Equity Rule 83. And on the 6th of May, 1886, when the cause came on for further hearing, and after argument by counsel, it was adjudged by the court that the plaintiffs be paid the amount to the credit of the cause in the registry of the court, namely, $3,733.40, and the further sum of $1,679.14, with interest thereon from the date of the writ, that is, $2,131.94, and the costs of this suit to be taxed, with interest thereon from the date of the decree. It is suggested that the above result was reached in this wise: According to the report of the master the total liabilities of the Union Fish Company were $18,168.09—to Burns & Co. $3,784.87, and to Rosenstein Bros. $14,434.22. From this sum of $18,168.09 deduct the assets, that is, the money in court, $3,733.40, and the balance of such liabilities was $14,434.69, which was the net loss of the partnership. Charge three eighths of this net loss to Burns & Co., and deduct from such amount the liabilities of the company to them, there remained the sum of $1,679.14.

From the above decree the defendants prayed and were allowed an appeal to this court.

Messrs. Eugene J. Hadley, **Benj. F. Butler** and **O. D. Barrett** for appellants.

Mr. **William F. Slocum** for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

The special master reported that there was no sufficient evidence to establish misconduct or negligence upon the part either of the plaintiffs or of the defendants. This report having been confirmed, it is assigned for error that the court below did not dismiss the bill; and that, if a case was made for the dissolution of the partnership, it was error to proceed in the distribution of the assets without decreeing such dissolution. The consent of the defendants to a dissolution of the partnership, as shown by their answer, made it unnecessary for the plaintiffs to make proof of the special grounds set out in their bill for such dissolution, and authorized the court to proceed in the settlement of the accounts of the partners, and the distribution of the assets. And the fact that there was no formal decree of dissolution is immaterial in view of the pleadings, and the assent of the parties to a decree winding up the affairs of the partnership, and distributing its property.

It is also assigned for error that the court below erred in acting upon the master's interpretation of certain articles of the partnership contract as a valid part of his report; in construing the partnership contract as requiring losses of capital to be borne by the partners in the same proportion in which the contract provided for the distribution of net profits; in decreeing that any part of the capital put in by the appellees and not paid back by the assets should be paid by the appellants, and that the appellants should be paid back neither from the assets nor by the appellees for any part of the capital put in by them; and in not decreeing priority of payment, in respect of advances found by the master to have been made by J. J. Burns & Co. to the Union Fish Company, next after payment of the debts and liabilities due from that company to outside creditors. [45

These questions are not open to appellants in this court. The decree below followed the report of the special master. And that report was based, in part, upon statements drawn from the books of the parties by the accountants selected by them respectively. Those statements contained the undisputed and disputed items in separate columns. The defendants did not file with the master or in court any exceptions to the report. If the statements by the accountants, or the report of the special master, were based upon any particular interpretation of the articles of partnership that was prejudicial to the defendants, it was their right to file exceptions to the report. The master was directed to report all issues of fact made by the pleadings, and to take an account of the dealings and transactions between the parties, and all claims for damages arising out of said transactions. He could not intelligently discharge that duty without adopting some theory as to the scope and effect of the partnership agreement. If he went beyond the order of reference, or if the account taken by him involved a misconception of the provisions of that agreement, the defendants should have brought those matters to the attention of the court by exceptions to the report. Having failed to do this, they cannot, in this court, for the first time, object that the master proceeded upon erroneous views as to the contract between the parties. Equity Rule 83; *Brockett* v. *Brockett*, 44 U. S. 3 How. 692 [11: 786]; *McMicken* v. *Perin*, 59 U. S. 18 How. 504, 506 [15: 502, 503]; *Story* v. *Livingston*, 38 U. S. 13 Pet. 359, 366 [10: 200, 203]; *Medsker* v. *Bonebrake*, 108 U. S. 66, 71 [27: 654, 655]. [45

After the decree below there was a report by the clerk as to the taxation of costs. The

parties having been heard in respect thereto, an order was made allowing costs to the plaintiffs to the amount of $973.34. The report shows that the plaintiffs claimed a certain amount for expenses connected with the preservation and keeping of the personal property (not including the vessels) attached on the writ. The court disallowed five eighths of that sum. The only objection urged in this court to the taxation of costs was the allowance of any sum whatever to plaintiffs for the preservation of the attached property. This objection cannot be sustained. It was said in *Florida Int. Imp. Fund* v. *Greenough*, 105 U. S. 527 [26: 1157], that "ordinarily a decree will not be reviewed in this court for costs merely in a suit in equity, although the court has entire control of costs as well as the merits where it has possession of the case on appeal from final decree." There is nothing in the record to take the present case out of the general rule. The allegations of the original bill justified the issuing of the attachment. It was right that the property taken under it should be cared for, and, as the court found that the plaintiffs were entitled to a decree against the defendants, a judgment for costs properly followed; and we perceive no reason why the plaintiffs should not have been allowed, as part of their costs, a reasonable amount for the expenses incurred in preserving the attached property, and for which they became primarily liable to the officer keeping it. We cannot say, upon the record before us, that the court below exceeded its discretion in apportioning the expenses thus incurred.

Decree affirmed.

37] THE COUNTY OF UPSHUR, WEST VIRGINIA, *Appt.*,
v.
BENJAMIN RICH ET AL.

(See S. C. Reporter's ed. 467-477.)

Appeal from assessment, not a suit removable to federal court—suit against a State, not removable—proceeding by officers, not a suit—appeal to a board—when it may become a suit.

1. An appeal from an assessment of property for taxation is not a suit within the meaning of the law authorizing the removal of causes from a state court to the circuit court of the United States.
2. A suit against a State as well as a county is not within the category of removable cases. A State is not a citizen, if a county is.
3. A proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot in any just sense be called a suit.
4. An appeal in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit.
5. Such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.

[No. 81.]

Submitted Nov. 7, 1889. Decided Apr. 14, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of West Virginia correcting an assessment of land. *Reversed, with instructions to remand the cause to the state court.*

The facts are stated in the opinion.

Mr. **Alfred Caldwell** for appellant.

(No counsel for appellees.)

Mr. Justice **Bradley** delivered the opinion of the court:

Rich and others, the appellees, owned a tract of wild land in Upshur County, West Virginia, the exterior boundaries of which are supposed to contain 100,000 acres, and it was assessed for taxation for the year 1883 as containing 100,000 acres, at four dollars per acre. The owners, considering this assessment too high, applied to the County Court of Upshur County for a reduction, and after giving notice to the prosecuting attorney for the County on the 6th of November, 1883, filed the following petition:

"To the Honorable the County Court of the County of Upshur, in the State of West Virginia:

"The petition of Benjamin Rich, William F. Reynolds and George W. Jackson respectfully shows unto your honors that your petitioners are the owners in fee simple of a certain tract of land lying partly in said County of Upshur and in the adjoining Counties of Randolph and Braxton, but mostly in Upshur County, the exterior boundaries of which tract are said to contain [4 100,000 acres; that said tract of land has been charged and assessed on the land books of the proper district of the said County of Upshur for taxation for the year 1883 as containing 100,000 acres, whereas there are various parcels of land lying within said exterior boundaries which are properly to be deducted from the area therein, and thereby reduce the quantity to be charged to your petitioners for taxation.

"And your petitioners further show that the assessment of said tract of land on said land books is at a valuation of $400,000,

---

NOTE.—*As to removal of causes, under Act of 1875; citizenship,*—see *note* to Meyer v. Delaware R. Construction Co. 25: 593.

As to removal by one of two or more defendants; separable controversies,—see *note* to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see *note* to Gaines v. Fuentes, 23: 524; also *note* to Jefferson v. Driver, 29: 897.

As to removal of causes from state to federal courts where United States Constitution, Act of Congress or treaty comes in question, see *note* to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes; when denied,—see *note* to Civil Rights Cases, 27: 835.

As to removal of actions against officers; Rev. Stat., sec. 643,—see *note* to Davis v. South Carolina, 27: 574.

which they charge is unjust, extravagant, excessive and illegal, and, as compared with the valuation of lands of like character in said County, wild and unimproved, the said valuation of said tract of 100,000 acres is grossly above and beyond that of adjacent lands.

"Your petitioners therefore pray that the State of West Virginia and the County of Upshur may be made parties defendant to this their petition, and that the said erroneous and illegal assessment be corrected and the quantity charged them, as aforesaid, reduced; and they will ever pray, etc."

On the same day they filed a petition for the removal of the case to the Circuit Court of the United States for the District of West Virginia, alleging themselves to be citizens of Pennsylvania, and that the State of West Virginia and County of Upshur, in the said State, were necessary parties to the said controversy. The petition was grounded upon an affidavit of one of the parties that, from prejudice and local influence, the petitioners would not be able to obtain justice in the state court. The county court refused to order a removal; but on a petition being presented to the circuit court of the United States, with a transcript of the proceedings, that court took cognizance of the case, and denied a motion to remand it to the county court.

Thereupon the County Court of Upshur County, by two of its members (being a majority of the court), filed a plea to the jurisdiction, alleging for cause that the application of the petitioners for relief in the county court was not a suit, and did not involve a controversy between a citizen of West Virginia and a citizen of any other State; and
469] that, as to the taxes belonging to the State, the county court was merely the organ, under the law of West Virginia, to act upon the matter of relief asked for; and the same as to the taxes belonging to the County; and that neither the County nor the State was a party, by process or otherwise, to the said application.

This plea was rejected on motion of the petitioner.

Afterwards the case was heard, and the circuit court made the following decree:

"*Benjamin Rich, W. F. Reynolds and George W. Jackson*
v.
County of Upshur.

"Upon application to correct an erroneous assessment of lands in the County of Upshur, West Virginia, removed into this court December, 1883.

"This cause having been regularly docketed in this court, this day came the said Benjamin Rich, Wm. F. Reynolds and George W. Jackson, by their attorneys, and the said County of Upshur, in the State of West Virginia, by Messrs. John Brannon and A. M. Poundstone, who represent the County of Upshur and the prosecuting attorney for said County, and it appearing to the court that the application for correction of the assessment herein complained of was made within the time prescribed by law, to wit, on the 16th day of April, 1883, and that the prosecuting attorney had due notice thereof, and the court, having heard the evidence and seen and inspected the papers and records in the cause, and heard the arguments of counsel thereon, upon mature consideration, doth find—"

The court then finds the assessment erroneous; that it should have been for only 25,000 acres of land instead of 100,000, and should have been at $2½ per acre instead of $4; and ordered it to be corrected accordingly; and decreed further as follows:

"That said Benjamin Rich, Wm. F. Reynolds and George W. Jackson be, and they are hereby, relieved from the payment of so much and such part of the taxes and levies extended for said years 1883 and 1884 as may and do exceed the amount of taxes and levies proper to be assessed upon said lands, as [4
herein and hereby reduced in quantity and value.

"And it is further ordered that copies of this order be certified by the clerk of this court to the County Court of Upshur County, the sheriff of said County, the assessor of the first district thereof, and the auditor of West Virginia; and it is further ordered that no costs be taxed for or against either party."

This is the decree appealed from; and the principal objection taken to it is that the case was not properly removable from the state court to the circuit court of the United States. This objection is sought to be sustained on two distinct grounds:

1. That the case is not a suit within the meaning of the Removal Act.

2. That if it is a suit, within the said Act, the State of West Virginia is a necessary party to it.

The Act under which the case was removed was the third clause of section 639 of the Revised Statutes, which declares:

"*Third:* When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, . . . if . . . he makes and files . . . an affidavit, stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such state court."

It must be "a suit" between citizens of different States. Is this such a suit? We do not see how it can be called such. The original petition made the State of West Virginia and the County of Upshur parties defendant; and the petition of removal alleged that the State and County were necessary parties to the controversy. If, therefore, the proceeding could be called a suit at all, it was a suit against the State as well as the County, and such a suit is not within the category of removable cases. A State is not a citizen, if a county is.

But is an appeal from an assessment of property for taxation a *suit* within the meaning of the law? In ordinary cases it certainly is not. By the laws of all or most [4
of the States, taxpayers are allowed to appeal

from the assessment of their property by the assessor to some tribunal constituted for that purpose, sometimes called a board of commissioners of appeal; sometimes one thing and sometimes another. But whatever called, it is not usually a court, nor is the proceeding a suit between parties; it is a matter of administration, and the duties of the tribunal are administrative, and not judicial in the ordinary sense of that term, though often involving the exercise of quasi-judicial functions. Such appeals are not embraced in the Removal Act.

In this respect the law of West Virginia does not differ from that of most other States. It is true that the tribunal of appeal is called the "county court," but it has no judicial powers except in matters of probate. In all other matters it is an administrative board, charged with the management of county affairs. It formerly had general judicial powers, but by an amendment to the Constitution of West Virginia, adopted in 1880, in place of the VIIIth article of the Constitution of 1872, it was provided as follows:

"22. There shall be in each county of the State a county court, composed of three commissioners, and two of said commissioners shall be a quorum for the transaction of business. It shall hold four regular sessions in each year, at such times as may be fixed upon and entered of record by the said court. Provisions may be made by law for holding special sessions of said court."

To this court (so called) was given the custody of the county records, and it was further declared that—

"They shall have jurisdiction in all matters of probate, the appointment and qualification of personal representatives, guardians, committees, curators, and the settlement of their accounts, and in all matters relating to apprentices. They shall also, under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties, including the establishment and regulation of roads, ways, bridges, public landings, ferries and mills, with authority to lay and disburse the county levies. . . . [472] They shall, in all cases of contest, judge of the election, qualification and returns of their own members, and of all county and district officers, subject to such regulations, by appeal or otherwise, as may be prescribed by law. Such courts may exercise such other powers and perform such other duties, *not of a judicial nature*, as may be prescribed by law."

Under the power given by the last clause, the Legislature of the State on the 23d of February, 1883, passed an Act by which, amongst other things, it was declared as follows:

"(7.) Any person feeling himself aggrieved by the assessment of his real estate, made under provisions of this Act, may, within one year after the filing of a copy of such assessment with the clerk of the county court, apply, by himself or his agent, to the said court for redress, first giving reasonable notice in writing of his intention to the prosecuting attorney, and stating in such notice the character of the correction he desires. It shall be the duty of the prosecuting attorney, upon being so notified, to attend to the interests of the State, at the trial of such application. If, upon hearing the evidence offered, the county court shall be of opinion that there is error in the assessment complained of, or that the valuation fixed by the commissioners is excessive, the said court shall make such order correcting the said assessment as is just and proper."

It was under this Law that the appeal from the assessment in the present case was taken. In our judgment, it was not a suit within the meaning of the Removal Act—though approaching very near to the line of demarcation. We cannot believe that every assessment of property belonging to the citizen of another State can be removed into the federal courts. Certainly the original assessment, made by the township or county assessors, could not be called a suit, and could not be thus removed; and there is, justly, no more reason for placing an assessment on appeal within that category. It is nothing but an assessment in either case, which is an administrative act. The fact that the board of appeal may swear witnesses does not make the proceeding a suit. Assessors are often empowered to do this, without altering the character of their functions.

This view is in accord with that of the [473 Supreme Court of Appeals of West Virginia. In the case of *Low* v. *County Court of Lincoln County*, 27 W. Va. 785, they held that no appeal lies from a judgment of the county court rendered under the section above quoted refusing to correct the assessed valuation on land; and that such judgment can be reviewed, if at all, only by certiorari. In *Pittsburg, C. & St. L. R. Co.* v. *Board of Public Works*, 28 W. Va. 264, they held that where the board of public works fixed the valuation of the property of a railroad company under the statutes, it simply acted as a county assessor does in assessing the property of individuals; and that the acts of both are merely ministerial, and not judicial in any proper sense of the term. After referring to a number of authorities on the subject, the court says: "These authorities establish, beyond the propriety of controversy, that the action and decision of a designated officer or board, whether the same be a court or other body, in reviewing and correcting an assessment of corporate or other property for taxation, are no more judicial acts than the acts of the officer or authority making the original assessment. They also show that the decision or finding of such officer or board, even if the same be a court or other judicial tribunal, is not such a judicial act or judgment as can be reviewed by a supreme or appellate court possessing judicial powers only."

In these views we concur. At the same time we do not lose sight of the fact, presented by every day's experience, that the legality and constitutionality of taxes and assessments may be subjected to judicial ex-

amination in various ways,—by an action against the collecting officer, by a bill for injunction, by certiorari, and by other modes of proceeding. Then, indeed, a suit arises which may come within the cognizance of the federal courts, either by removal thereto, or by writ of error from this court, according to the nature and circumstances of the case. Even an appeal from an assessment, if referred to a court and jury, or merely a court, to be proceeded in according to judicial methods, may become a suit within the Act of Congress. But the ordinary acts and doings of assessors, or of appellate boards of assessors, in passing upon matters of mere valuation, appraisement or proportionate distribution of expense, belong to a different class of governmental functions, executive and administrative in their character, and not appertaining to the judicial department. If an illegal principle of valuation be adopted, or an unconstitutional assessment or tax be made or imposed, or fraud be practiced, it may be examined by one of the judicial methods referred to, and thus become the subject of a suit.

The question, What is a "suit" in the sense of the Judiciary Laws of the United States? has been frequently considered by this court. Reference may be made particularly to the following cases: *Weston* v. *Charleston*, 27 U. S. 2 Pet. 449, 464 [7: 481, 485]; *Kendall* v. *United States*, 37 U. S. 12 Pet. 524 [9: 1181]; *Holmes* v. *Jennison*, 39 U. S. 14 Pet. 540, 566 [10: 579, 585]; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 112 [18: 281, 291]; *Kohl* v. *United States*, 91 U. S. 367, 375 [23: 449, 452]; *Gaines* v. *Fuentes*, 92 U. S. 10, 21, 22 [23: 524, 527, 528]; *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 403, 406 [25: 206, 208]; *Ellis* v. *Davis*, 109 U. S. 485, 497 [27: 1006, 1010]; *Hess* v. *Reynolds*, 113 U. S. 73, 78 [28: 927, 929]; *Pacific Railroad Removal Cases*, 115 U. S. 1, 18 [29: 319, 325]; *Searl* v. *School Dist. No. 2*, 124 U. S. 197, 199 [31: 415, 417]; *Delaware County* v. *Diebold Safe & Lock Co.* 133 U. S. 473, 486, 487 [33: 674, 680].

In the four cases first cited this court determined that writs of prohibition, mandamus and habeas corpus, prosecuted for the attainment of the parties' rights, are suits within the meaning of the law, the judgments upon which, in proper cases, may be removed into this court by writ of error. In *Weston* v. *Charleston*, *Chief Justice* Marshall said: "Is a writ of prohibition a suit? The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit." This definition is quoted with approbation by *Chief Justice* Taney in *Holmes* v. *Jennison*, which was a case of habeas corpus, and by other judges in subsequent cases.

Mississippi & R. R. Boom Co. v. *Patterson*, *Pacific Railroad Removal Cases* and *Searl* v. *School Dist. No. 2* were cases of the assessment of the value of lands condemned for public use under the power of eminent domain. The general rule with regard to cases of this sort is, that the initial proceeding of appraisement by commissioners is an administrative proceeding, and not a suit; but that if an appeal is taken to a court, and a litigation is there instituted between parties, then it becomes a suit within the meaning of this Act of Congress. In *Mississippi & R. R. Boom Co.* v. *Patterson* the company was authorized by the state laws of Minnesota to take land for the purpose of its business and to have commissioners appointed to appraise its value. If their award was not satisfactory, either to the company or to the owner of the land, an appeal lay to the district court, where it was to be entered by the clerk "as a case upon the docket," the land owner being designated as plaintiff and the company as defendant. The court was then required to proceed to hear and determine the case in the same manner that other cases were heard and determined. Issues of fact were to be tried by a jury, unless a jury was waived. The value of the land being assessed by the jury or the court, as the case might be, the amount of the assessment was to be entered as a judgment against the company, subject to review by the Supreme Court of the State on writ of error. This mode of proceeding was followed. The boom company and the land owner both appealed from the award of the commissioners. When the case was brought before the district court, the owner, being a citizen of another State, applied for and obtained its removal to the circuit court of the United States, where it was tried before a jury and a judgment was rendered upon their award. We held that the appeal in that case was a suit within the meaning of the Act of Congress authorizing the removal of causes from the state to the federal courts. *Mr. Justice* Field, speaking for the court, said: "The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the State, the form [476
of a suit at law, and was thenceforth subject to its ordinary rules and incidents."

In *Delaware County* v. *Diebold Safe & Lock Co.* it was held that where a claim against a county is heard before county commissioners, though the proceedings are, in some respects, assimilated to proceedings before a court, yet they are not in the nature of a trial *inter partes*, but are merely the allowance or disallowance, by county officers, of a claim against the county, upon their own knowledge, or upon any proof that may be presented to them; but that an appeal from their decision, tried and determined by the circuit court of the county, is a suit removable to the circuit court of the United States.

In *Kohl* v. *United States* the whole proceeding for condemnation of land as a site for a post-office was held to be a suit. *Mr. Justice* Strong, delivering the opinion of the

court, said: "It is difficult to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court." This view of the proceeding as a whole, instituted and concluded in a court, and analogous to the proceeding of *ad quod damnum* at common law, perhaps, distinguished this case from the other cases before referred to.

Two of the other cases cited, *Gaines* v. *Fuentes* and *Ellis* v. *Davis*, arose out of proceedings to set aside the probate of wills; and although the granting of probate of a will is not ordinarily a suit, yet, if a contestation arises, and is carried on between parties litigating with each other, the proceeding then becomes a suit. As observed by *Mr. Justice* Matthews, speaking for the court in *Ellis* v. *Davis*, "Jurisdiction as to wills, and their probate as such, is neither included in, nor excepted out of, the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties." Similar views were expressed [477] by *Mr. Justice* Miller in *Hess* v. *Reynolds*, which was the case of a creditor instituting proceedings in a probate court against the estate of his deceased debtor, and then removing them into the circuit court of the United States.

The principle to be deduced from these cases is, that a proceeding, not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot, in any just sense, be called a suit; and that an appeal, in such a case, to a board of assessors or commissioners having no judicial powers, and only authorized to determine questions of quantity, proportion and value, is not a suit; but that such an appeal may become a suit, if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other.

Applying this principle to the facts of the present case, it does not seem difficult to come to a decision. We have seen that, although the appeal from the assessment was made to the "county court" *eo nomine*, yet that this is not a judicial body, invested with judicial functions, except in matters of probate; but is the executive or administrative board of the county, charged with the management of its financial and executive affairs. According to the principles laid down by the state court, the acts of this board, in matters of taxation, are as purely administrative as are those of the county assessors in making the original assessment. Although we are not concluded by this decision, it is so much in harmony with our own decisions on the same subject that we accept it as correct.

According to these views the proceeding below was not properly removable to the circuit court of the United States, and ought to have been remanded to the state court.

The decree of the Circuit Court is reversed, and the cause remanded with instructions to remand the same to the state court from which it was removed.

JOHN S. JENCKS ET AL., EX'RS., *Appts.*, [4
v.
THE QUIDNICK COMPANY ET AL.

(See S. C. *Randolph's Executor* v. *Quidnick Co.*, Reporter's ed. 457-466.)

Unconscionable transaction, equity will not carry out—speculative purposes—purchase of stock—transfer for benefit of creditors—long delay—scheme for personal gain—state decision, when followed—waiver of right.

1. Where the complainants ask the interposition of a court of equity to establish their title to property worth over half a million of dollars, obtained by purchase at execution sales for $275, the immense disproportion between the value and cost shocks the conscience and forbids the supporting action of a court of equity.
2. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law.
3. If the property, which was stock of a company, was worthless, the attempt to keep it afloat for speculative purposes is not such as should recommend it to a court of equity. The parties to such a transaction ought at least to be left to their remedies at law.
4. Where the purchase is one simply to speculate upon the chances of successfully attacking transfers of large property, made for the benefit of creditors, and to deprive them of the benefits of such transfers, equity refuses to be bound by the letter of legal procedure, or to lend its aid to such mere speculative purchase which threatens

---

NOTE.—*As to assignments for benefit of creditors, with preferences, when valid, when not*, see *note* to Marbury v. Brooks, 5: 522.

In what cases equity will relieve from mistake or ignorance of material fact. See *note* to M'Ferran v. Taylor, 2: 436.

Whether equity will relieve against a mistake of law. See *note* to Hunt v. Rousmanier, 7: 27; also *note* to Same v. Same, 5: 589.

When awards will be set aside by a court of equity, and when not. See *note* to Burchell v. Marsh, 15: 96.

As to cancellation of a deed or a contract, in equity, for fraud, concealment or misrepresentation, see *note* to Neblett v. MacFarland, 23: 471.

When deed avoided in equity, by fraud, insanity, drunkenness, duress, undue influence, fraud on marriage, from ward to guardian, from heir to executor, cestui que trust *to trustee; imbecility.* See *note* to Harding v. Handy, 6: 429.

When a judgment at law will be enjoined by a bill in equity. See *note* to Davis v. Tileston, 12: 366.

As to Statute of Limitations, as applicable to equity cases, see *note* to Thomas v. Brockenbrough, 6: 287.

As to Statute of Limitations, in cases of fraud, in equity, see *note* to Stearns v. Page, 12: 923.

injury and ruin to honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken.

5. Long delay is sufficient to justify a court of equity in refusing any assistance to such attack upon the validity or sufficiency of the transfers.

6. When there is a scheme for great personal gain at the expense of equally deserving creditors, coupled with long delay, equity will refuse to lend its aid to the accomplishment thereof.

7. When the highest court of a State affirms that a conveyance, made by a debtor to a trustee for the benefit of creditors, is valid under the statutes of that State, this court will follow that ruling, unless upon clear conviction that it was wrong, even though that statute was common to other States, in which a different ruling has obtained.

8. Where a debtor, having large and scattered properties, and being much embarrassed, transfers his property for the benefit of his creditors equally, equity requires that any creditor who is not satisfied with the provisions of such transfer shall act promptly in challenge thereof, or else be adjudged to have waived any right of challenge.

[No. 213.]

Argued Mar. 13, 14, 1890. Decided Apr. 14, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Rhode Island dismissing a suit in equity brought to establish the title of Evan Randolph to 4,022 shares of the capital stock of the Quidnick Company, purchased on execution sale. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Benj. F. Butler** and **O. D. Barrett,** for appellants:

The rules of property duly recognized by the state law furnish the guide to the courts of the United States upon questions of title. *Sims* v. *Irvine*, 3 U. S. 3 Dall. 425, 456 (1: 665, 670); *Waring* v. *Jackson*, 26 U. S. 1 Pet. 570 (7: 266); *Davis* v. *Mason*, 26 U. S. 1 Pet. 508 (7: 239); *Bank of Hamilton* v. *Dudley*, 27 U. S. 2 Pet. 492 (7: 496); *Hinde* v. *Vattier*, 30 U. S. 5 Pet. 398 (8: 168); *Clarke* v. *Smith*, 38 U. S. 13 Pet. 195 (10: 123); *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498 (10: 264); *Amis* v. *Smith*, 41 U. S. 16 Pet. 303 (10: 973); *Fisher* v. *Haldeman*, 61 U. S. 20 How. 186 (15: 879); *Miles* v. *Caldwell*, 69 U. S. 2 Wall. 35 (17: 755); *Bayerque* v. *Cohen*, 1 McAll. 113; *New England Screw Co.* v. *Bliven*, 3 Blatchf. 240.

The federal courts are bound to follow the course of decisions of the highest court of the State in the construction of its statutes, if the course has been uniform.

Townsend v. *Todd*, 91 U. S. 452 (23: 413); *Grafton* v. *Cummings*, 99 U. S. 100 (25: 366).

An unauthorized record of a deed is not constructive notice.

Story, Eq. Jur. § 404.

If the registry is not in compliance with the law, it is a mere nullity.

Frost v. *Beekman*, 1 Johns. Ch. 300; *Latouche* v. *Dunsany*, 1 Sch. & Lef. 157; *Carpenter* v. *Dexter*, 75 U. S. 8 Wall. 532 (19: 431); *Heister* v. *Fortner*, 2 Binney, 40; *Wood* v. *Cochrane*, 39 Vt. 549.

Recording of a deed defective in a statute requisite does not give notice.

Watson v. *Wells*, 5 Conn. 468; *Carter* v. *Champion*, 8 Conn. 555-558; *Dickinson* v. *Glenney*, 27 Conn. 111, 112.

The circuit court, having first acquired jurisdiction of the subject matter and of the parties, cannot be deprived of it by any subsequent suit in the state court or elsewhere. *Chapin* v. *James*, 11 R. I. 89; *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 400 (9: 470); *Wallace* v. *McConnell*, 38 U. S. 13 Pet. 136 (10: 95); *Smith* v. *McIver*, 22 U. S. 9 Wheat. 532 (6: 152); *Mallett* v. *Dexter*, 1 Curt. 178; *Buck* v. *Calbath*, 70 U. S. 3 Wall. 334 (18: 257).

The deed of Nov. 1, 1873, upon its face is void as against the Statute of Elizabeth. *De Wolf* v. *Sprague Mfg. Co.* 49 Conn. 282; *Stafford Nat. Bank* v. *Sprague*, 21 Blatchf. 473, 17 Fed. Rep. 791, 792; *Chaffee* v. *Blatchford*, 6 Mackey, 459; *Gardner* v. *Commercial Nat. Bank*, 95 Ill. 298, 308.

If a court has jurisdiction of a case for one purpose, it will retain it for all purposes, and grant such relief as the parties show themselves entitled to receive.

1 Story, Eq. Jur. § 699; *Downes* v. *Bristol*, 41 Conn. 274.

A deed containing provisions contrary to a statute is void *in toto*. *Hyslop* v. *Clarke*, 14 Johns. 458; *Mussey* v. *Noyes*, 26 Vt. 472; *Barnum* v. *Hempstead*, 7 Paige, 568; Bump, Fraud. Conv. 366.

A deed void in part is entirely void. *Weeden* v. *Hawes*, 10 Conn. 50.

The deed of Nov. 1, 1873, is valid as between the grantors and grantee, whatever may be its validity as to third parties.

Bump, Fraud. Conv. 442; *Bean* v. *Smith*, 2 Mason, 252, 274; *Randall* v. *Phillips*, 3 Mason, 378, 388; *Porter* v. *Williams*, 9 N. Y. 142; *Brownell* v. *Curtis*, 10 Paige, 210, 211; *Chapin* v. *Pease*, 10 Conn. 69; *Maiders* v. *Culver*, 1 Duv. (Ky.) 164.

The liability of any stockholder for the debts of a corporation is a statute liability only. *Whitman* v. *Cox*, 26 Me. 335; *Slee* v. *Bloom*, 19 Johns. 456.

Messrs. C. Frank Parkhurst, Arthur L. Brown, Augustus S. Miller, **Joseph C. Ely** and **William L. Putnam,** for appellees:

Randolph's title is invalid.

The provisions of statute as to advertisement must be followed and the statute must be strictly construed. *Wilcox* v. *Emerson*, 10 R. I. 270; *Titcomb* v. *Union Marine Fire Ins. Co.* 8 Mass. 326, 334; *Howe* v. *Starkweather*, 17 Mass. 240, 242; 248; *Henderson* v. *Hays*, 41 N. J. L. 387, 391; *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747 (30: 825).

The proceedings upon attachment and execution in Randolph's suit, involving 2,164 shares, are void. *Amy* v. *Watertown*, 130 U. S. 315 (32: 950); *Princeton Bank* v. *Crozer*, 22 N. J. L. 383; *Stamford Bank* v. *Ferris*, 17 Conn. 259; *Blair* v. *Compton*, 33 Mich. 414, 442, 443; *Van Norman* v. *Jackson Circuit Judge*, 45 Mich. 204; *Goss Mfg. Co.* v. *People*, 4 Ill. App. 510; *Sheldon* v. *Comstock*, 3 R. I. 84; *Whitaker* v. *Jenckes*, 9 R. I. 391; *Wilcox* v. *Emerson*, 10 R. I. 270.

Randolph's bill must therefore be dismissed, because he fails to establish his title.

even admitting that the prior conveyances of the stock were fraudulent.

Bump, Fraud. Conv. (3d ed.) 461, 462; *Wanamaker* v. *Bowes*, 36 Md. 42, 57; *Russell* v. *Dyer*, 40 N. H. 173; *Owen* v. *Dixon*, 17 Conn. 492, 497, 498; *Russ* v. *Butterfield*, 6 Cush. 242; *Henderson* v. *Hays*, 41 N. J. L. 387-391; *Wilcox* v. *Emerson*, 10 R. I. 270.

The Supreme Court of Rhode Island acquired prior jurisdiction and settled the title.

Attleborough Nat. Bank v. *Northwestern Mfg. Co.* 28 Fed. Rep. 113; *Heidritter* v. *Elizabeth Oil Cloth Co.* 112 U. S. 294 (28: 729); *Hoppin* v. *Buffum*, 9 R. I. 513; *Lippitt* v. *American Wood Paper Co.* 14 R. I. 301: *Sayles* v. *Bates*, 15 R. I. 342, 346.

By the law of Rhode Island the assent of creditors to such an assignment is presumed.

Smith v. *Millett*, 11 R. I. 528, 533; *Stone* v. *King*, 7 R. I. 358; *Sadlier* v. *Fallon*, 4 R. I. 490; *Spencer* v. *Jackson*, 2 R. I. 35.

The relief prayed for cannot be had by reason of Equity Rule No. 94, and principles akin thereto.

Taylor v. *Holmes*, 127 U. S. 489 (32: 179); *Brewer* v. *Boston Theatre Proprs.* 104 Mass. 378; *Dunphy* v. *Traveller Newspaper Asso.* 6 New Eng. Rep. 99, 146 Mass. 495.

Randolph is estopped, as against the bona fide purchasers, for full value, without notice.

The rule of *lis pendens* does not apply to these purchasers.

Green v. *Rick*, 121 Pa. 130; *Paine* v. *Root*, 121 Ill. 77; *Dovey's App.* 97 Pa. 153.

The mortgage, deed, special transfers of the Quidnick stock to Chafee, and the assignments of April 6, 1874, were properly executed.

Dent v. *Ferguson*, 132 U. S. 50-58 (33: 242); *Moulton* v. *Chafee*, 22 Fed. Rep. 27; Morawetz, Priv. Corp. (2d ed.) § 630; *Pittsburgh, C. & St. L. R. Co.* v. *Keokuk Bridge Co.* 131 U. S. 371, 381 (33: 157, 160).

The claim is barred in equity.

Carroll v. *Green*, 92 U. S. 509 (23: 788); *Chapin* v. *Freeland*, 142 Mass. 383; *Campbell* v. *Holt*, 115 U. S. 620 (29: 483).

Nothing can call forth a court of equity into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive, and does nothing.

Brown v. *Buena Vista County*, 95 U. S. 157, 160 (24: 422); *Speidel* v. *Henrici*, 120 U. S. 377-387 (30: 718-720); *Aldridge* v. *Muirhead*, 101 U. S. 397 (25: 1013); *Muirhead* v. *Aldridge*, 14 Nat. Bankr. Reg. 249; *Codman* v. *Rogers*, 10 Pick. 112; Angell, Lim. (6th ed.) § 96; Buswell, Lim. and Adverse Possession, § 159; Wood, Lim. § 118; *Sebring* v. *Sebring*, 43 N. J. Eq. 59; Pom. Eq. Jur. §§ 418, 419.

There is a direct bar by the Statute of Limitations.

Waterman v. *Sprague Mfg. Co.* 14 R. I. 43; Wood, Lim. § 41; *Lord* v. *Morris*, 18 Cal. 482, 490; *McDowell* v. *Goldsmith*, 24 Md. 214, 230; *Hodges* v. *Taylor*. 57 Tex. 196; *Schmucker* v. *Sibert*, 18 Kan. 104; Pom. Eq. Jur. § 816; *Ex parte Stray*, L. R. 2 Ch. 374.

Randolph, as a creditor of the firm of Hoyt, Spragues & Co., has no interest.

Micou v. *First Nat. Bank*, 104 U. S. 530 (26: 834); *Murrill* v. *Neill*, 49 U. S. 8 How. 414, 426 (12: 1140); *Smith* v. *Sele*, 13 West. Rep. 843, 114 Ind. 229.

The instrument of Nov. 1, 1873, was not fraudulent.

Brett v. *Carter*, 2 Low. 459; *Miller* v. *Jones*, 15 Nat. Bankr. Reg. 154; *Ex parte Mercer*, L. R. 17 Q. B. Div. 290-295; *Godfrey* v. *Poole*, L. R. 13 App. Cas. 503; *Warner* v. *Norton*, 61 U. S. 20 How. 460 (15: 953); *Cook* v. *Corthell*, 11 R. I. 482, 484; *Williams* v. *Briggs*, 11 R. I. 476; *Williams* v. *Winsor*, 12 R. I. 9; *Spencer* v. *Jackson*, 2 R. I. 35; *Halsey* v. *Whitney*, 4 Mason, 206.

The instrument of Nov. 1, 1873, is a common-law mortgage.

Chafee v. *Fourth Nat. Bank*, 71 Me. 523; *De Wolf* v. *Sprague Mfg. Co.* 49 Conn. 318, 320; *Austin* v. *Sprague Mfg. Co.* 14 R. I. 476; *Smith* v. *Millett*, 12 R. I. 59, 61; *Alton* v. *Harrison*, L. R. 4 Ch. 622, 626.

The deed was free from fraudulent intent.

Hazard v. *Griswold*, 21 Fed. Rep. 178, 179; *Huiskamp* v. *Moline Wagon Co.* 121 U. S. 310-319 (30: 971); *Emerson* v. *Senter*, 118 U. S. 10 (30: 51); *Nichols* v. *Reynolds*, 1 R. I. 30-37; *Spencer* v. *Jackson*, 2 R. I. 35, 45; *Brooks* v. *Marbury*, 24 U. S. 11 Wheat. 78, 90, 98 (6: 423, 429, 430); *Hartshorn* v. *Eames*, 31 Me. 98; *Pike* v. *Bacon*, 21 Me. 286; *Pickstock* v. *Lyster*, 3 Maule & S. 371; Wait, Fraud. Conv. (2d ed.) 21, 435; Burrill, Assignments (5th ed.) § 336; Bump, Fraud. Conv. (3d ed.) 187, 396; *Halsey* v. *Whitney*, 4 Mason, 206; *Sleeper* v. *Chapman*, 121 Mass. 404-409.

A trustee may safely do that, without a decree of the court, which the court, on a case made, would order or decree him to do.

Perry, Trusts, § 476; *Woodward* v. *Marshall*, 22 Pick. 475; Burrill, Assignments (5th ed.) § 396.

That the mortgagor remains in possession and enjoyment of the property, raises no presumption of fraud.

Robinson v. *Elliott*, 89 U. S. 22 Wall. 513, 523, 524 (22: 758, 762, 763); *Means* v. *Dowd*, 128 U. S. 273 (32: 429); *Fletcher* v. *Powers*, 131 Mass. 333, 334; *Williams* v. *Winsor*, 12 R. I. 9; *Williams* v. *Briggs*, 11 R. I. 476.

Assignments of April 6, 1874, cover all stock claimed in this case.

Fourth Nat. Bank v. *Franklyn*, 120 U. S. 747 (30: 825); *Jessup* v. *Hulse*, 21 N. Y. 168; *Janes* v. *Whitbread*, 11 C. B. 406; *Coates* v. *Williams*, 7 Exch. 205; *Boldero* v. *London & W. L. & D. Co.* L. R. 5 Exch. Div. 47; *Estes* v. *Gunter*, 122 U. S. 450 (30: 1228); *Chafee* v. *Fourth Nat. Bank*, 71 Me. 514.

Mr. Justice **Brewer** delivered the opinion of the court:

On August 2, 1883, Evan Randolph, the testator of complainants, filed his bill in equity in the Circuit Court of the United States for the District of Rhode Island, for the purpose of establishing his title to 4,023 shares of the capital stock of the Quidnick Company, claiming to have purchased these shares on execution sales in March, 1883, for $275. The Quidnick Company was a corporation organized under the laws of Rhode Island, in May, 1862, with a capital

stock of $500,000, divided into 5,000 shares. Prior to December 1, 1873, the corporation had purchased some of its own stock, so that there was then outstanding only 4,349 shares, of which 327 were held by the estate of Edward Hoyt, deceased; and the remainder, being the 4,022 shares in controversy, by Amasa, William, Fanny and Mary Sprague, and the A. & W. Sprague Manufacturing Company. At this time the Spragues, who were largely engaged in manufacturing and other business, became embarrassed, and executed the transfers hereinafter referred to, and which have become the source of much litigation. Notwithstanding the embarrassments of the Spragues, The Quidnick Company was entirely solvent, out of debt and the owner of large properties. Its stock was valued, by a committee of the creditors of the Spragues at that time, at $374 a share; and the dividends which, in the winter after the filing of this bill, the stock was entitled to as the proceeds of the sale of property and otherwise, amounted to over half a million of dollars. In other words, these complainants are asking the interposition of a [91] court of equity to establish their title to property worth over half a million of dollars, obtained by purchase at execution sales for $275. The immense disproportion between the value and the cost shocks the conscience of a chancellor and forbids the supporting action of a court of equity. Some rights must have suffered and some wrongs must have been done by such a transaction, and a court of equity properly says that it will not lend its aid to further such an unconscionable speculation. The case of *Mississippi & M. R. Co.* v. *Cromwell*, 91 U. S. 643 [23: 367], forcibly illustrates this rule. In that case, Harrison recovered a judgment in the Circuit Court of the United States for the District of Iowa, against Muscatine County, for $6,500. Under an execution on that judgment, the marshal assumed to levy on seventeen hundred and fourteen shares of the capital stock of the Mississippi and Missouri Railroad Company, belonging to Muscatine County, and sold the same at public auction to Cromwell, for the sum of $50. The latter filed his bill against the railroad company and the county to compel a transfer of this stock. The case was presented to this court in two aspects: By one, the stock in the company was worthless, and in reference to that the court observed: "The property of the company was gone; its franchises were gone; the amount which the stockholders had arranged to realize was gone; and consequently the stock could have been nothing but an empty name, and the attempt to keep it afloat for speculative purposes is not such as should recommend it to a court of equity. The parties to such a transaction ought at least to be left to their remedies at law. A court of equity should have no sympathy with any such contrivances to gain a contingent or speculative advantage, if any such is to be gained." By the other, it appeared that through certain arrangements between this railroad company and another there was a possibility of realizing sixteen per cent on the par value of the stock, which, with interest to the time of the bringing of the suit, amounted to over $32,000. And with reference to that, the court said: "He comes into court with a very bad grace when he asks to use its extraordinary powers to put him in possession of thirty thousand [46 dollars' worth of stock for which he paid only fifty dollars. The court is not bound to shut its eyes to the evident character of the transaction. It will never lend its aid to carry out an unconscionable bargain, but will leave the party to his remedy at law." No language could be more appropriate to the case before us. Either this stock had been so appropriated by prior transfers and transactions as to be absolutely worthless in the hands of the Spragues, or else it represented more than a half million of dollars.

It is doubtless true that property of large value, both real and personal, may be incumbered with mortgages or other liens to an amount something like its value, so that there remains in the owner but an equity of redemption of trifling value; and a creditor may, at execution sale, or otherwise, buy at a small price such equity, with a view to redemption from the liens; and a court of equity will then lend its aid to put him in a position where he may safely redeem. But, as will appear from facts to be narrated subsequently, this is not such a case. The purchase was purely speculative. If the transfers theretofore made by the Spragues for the benefit of their creditors are sustained, the purchaser takes nothing. If they are not to be sustained they fail *in toto*, and the entire value of the property belongs to this purchaser. So his purchase is one simply to speculate upon the chances of successfully attacking transfers of large property, made for the benefit of creditors, and with the view of depriving them of the benefits of such transfers. It is a case where equity, true to its ideas of substantial justice, refuses to be bound by the letter of legal procedure, or to lend its aid to a mere speculative purchase which threatens injury and ruin to a large body of honest creditors, who have trusted for the payment of their debts to the legal validity of proceedings theretofore taken.

Again, beyond the question of amount, is the matter of time. The transfers by the Spragues were in 1873. These execution purchases were in 1883. The transfers in 1873 were not made hastily, upon the judgment of the debtors alone or without consultation with creditors. On the contrary, all creditors were invited, committees were appointed by them, conferences had, and after weeks [46 of examination and deliberation the substantial features of the arrangements were agreed upon between the creditors and debtors. The interests involved were immense. The committee of creditors appointed to examine into the assets and liabilities reported the former at $19,495,247, and the latter at $11,475,443. These assets were various in character—manufacturing stocks, real estate, stock in banks and other corporations, bonds, etc. They were widely scattered—in Rhode Island, Maine, Connecticut and other States and Territories. These various properties were placed in the hands of a trustee, to be

managed and disposed of for the benefit of creditors; and the provisions of the arrangements were accepted by nearly all the creditors. By these arrangements it was provided that the trustee might continue the manufacturing business; and, in pursuance of the authority thus conferred, he did continue it, and before August, 1881, the amount of manufacturing business done by him was $29,802,286.10.

The executions under which the stock was purchased, as alleged, were issued upon two judgments—one in favor of Evan Randolph, and the other in favor of Horatio N. Waterman, each a creditor at the time of the transfers in 1873. Randolph commenced his action in October, 1875, as a personal action against the Spragues. After service of summons, nothing seems to have been done until the 14th of August, 1882, at which time an attachment was issued, and an attempted levy made upon the stock. Judgment was rendered March 7, 1883. Waterman commenced his action in October, 1882, and immediately thereafter placed an attachment on the stock. It will thus be perceived that these creditors made no attack upon the validity of the transfers until 1882, nearly nine years after they had been executed, when nearly all of the creditors had accepted the provisions of the transfers; and the trustee, in consequence of the duties imposed upon him by the transfers, had done nearly $30,000,000 of manufacturing business, besides managing and disposing of other properties transferred. The transfers contemplated no preference between creditors, and were for [462] the benefit of all alike who assented to their provisions. Indeed, if preferences had been contemplated, the Bankrupt Law of the United States was then in force, and might have been invoked to prevent any inequality between creditors. In fact, in the spring of 1874 bankrupt proceedings were commenced, but were withdrawn on the execution by the Spragues of additional conveyances deemed necessary to perfect full title in the trustee. Under the circumstances, the long delay is sufficient to justify a court of equity in refusing any assistance to this attack upon the validity or sufficiency of the transfers. True, Randolph and Waterman did not become parties to the proceedings by which the property of the Spragues was placed in the hands of the trustee, and therefore are not estopped by any affirmative action in support thereof; but their inaction for such a length of time equitably forbids their present attack. They knew of the transfers at the time they were made; that they contemplated equality between the creditors; that nearly all the creditors assented thereto; that the trustee, relying thereon, was carrying on a vast and extensive business; that the doors of the bankrupt court were open; and that, if they were dissatisfied with the arrangements, they could invoke the aid of that court, whose rulings and proceedings would assure absolute equality between all creditors, and the appropriation of all the property of the Spragues for the equal benefit of such creditors. Yet they did nothing; they waited until the Bankrupt Law was repealed, until the result of the arrangements between the Spragues and their creditors, voluntarily entered into, was fully developed; and then, at the end of nine years, attempt to place a legal levy on a part of the transferred property, and say that the arrangements were illegal and wrong, and now invoke the aid of a court of equity to give them, for a trifling amount, a valuable portion of the property. If they were not satisfied with the legality and equity of the proceedings, they should have antagonized them sooner. Equity loves equality; and if they did not believe that these proceedings were legal and equitable, they should promptly have invoked the aid of the bankrupt court or made other assertion of legal rights. They might not equitably wait the outcome of the proceedings, expecting to approve if they worked out full payment of all creditors, and ready to attack if the scheme proved a failure. Good faith to other creditors required that they act promptly. We do not rest this upon any mere Statute of Limitations. Equity, administering its remedies in accordance with its own rules, affirms that the best of rights may be lost by unreasonable delay in their assertion, and, when coupled with long delay is a scheme for great personal gain at the expense of equally deserving creditors, it refuses to lend its aid to the accomplishment thereof.

But we need not rest upon these considerations alone. The circuit court dismissed the bill, on the ground that the Supreme Court of the State of Rhode Island had decided that the first and principal conveyance by the Spragues to their trustee was valid under the state statute. *Austin* v. *Sprague Mfg. Co.* 14 R. I. 464. This ruling it had followed in an earlier case. *Moulton* v. *Chafee*, 22 Fed. Rep. 26. Unquestionably, if that conveyance and the transfers immediately following were valid, the complainant's testator took nothing by his purchase.

It is unnecessary to place our judgment solely upon the decision of the Supreme Court of Rhode Island, in the case cited; and yet it is worthy of most respectful consideration, both because it is a decision of the highest court of the State in which the transactions took place, and also because it reviews all the objections made to the conveyance with clearness and ability. As to the construction of a state statute, we generally follow the rulings of the highest court of the State (*Bacon* v. *Northwestern Mut. Life Ins. Co.* 131 U. S. 258 [33: 128], and cases cited in opinion); and as to other matters, we lean towards an agreement of views with the state courts. *Burgess* v. *Seligman*, 107 U. S. 20, 34 [27: 359]. So, when the highest court of a State affirms that a conveyance, made by a debtor to a trustee for the benefit of creditors, is valid under the statutes of that State, we should ordinarily, in any case involving the validity of such conveyance, follow that ruling, even though that statute was common to many States, and in others a different ruling had obtained.

Now, in 1873, as heretofore stated, the Spragues became embarrassed, all creditors were invited to a consultation, a committee

was appointed by them, frequent consultations were had, this committee reported the assets and liabilities and a plan to meet the emergency was devised and agreed upon. This contemplated a conveyance by the Spragues to three trustees selected; the creditors were to grant an extension, taking notes due in three years, and the debtors were to convey to the trustees all their property, except shares of capital stock in corporations. These the trustees were unwilling to accept, for fear of personal liability consequent upon such acceptance; but a provision was inserted by which these shares were to be transferred to the trustees upon a request by them, by way of pledge or collateral security. After all this had been arranged, and the conveyance signed and executed, the trustees named, before delivery of the instrument, declined to act; and Zechariah Chafee was, without consultation with the creditors, named as trustee, and the instrument delivered. The committee representing the creditors, however, subsequently approved his selection. Chafee assumed the trust, and thereafter extension notes were issued to the various creditors and accepted by 449, these being all except the holders of about $114,000 of direct indebtedness. A question is made here as to whether this conveyance was re-executed by the grantors, after the substitution of Chafee as trustee in place of the three selected by the creditors. Upon this question the testimony is contradictory. The disinterested testimony, and therefore the most reliable, is in favor of the re-execution; and this testimony is strongly supported by the issue and acceptance of the notes, and by the fact that many years passed without challenge by debtor or creditor of the validity of the conveyance, or the rights and powers of the trustee. If the case turned upon this question of fact, we should have little hesitation in finding that there was a due re-execution of the conveyance. A due execution being established, another question is as to the validity of the conveyance under the Statute of Frauds. Here we turn to the decision of the Supreme Court of Rhode Island, cited *supra;* and that decision is very persuasive. It would be unfortunate, to say the least, to have this conveyance sustained as to home creditors, and avoided as to foreign. So, that, if this case stood alone upon the question of the validity of that conveyance under the laws of the State of Rhode Island, we should be reluctant to depart from the rulings of the Supreme Court of that State; and should do so only upon a clear conviction that the decision of that court was wrong, and that thereby the rights of foreign creditors were sacrificed. While this conveyance has received a different construction, and its invalidity been declared, by the Supreme Court of the State of Connecticut (*De Wolf* v. *A. & W. Sprague Mfg. Co.* 49 Conn. 282), so that it must be conceded that its validity is a matter of doubt, yet preference should be given in matter of doubt to the ruling of the Supreme Court of the State in which the parties resided, where the conveyance was executed and in which was the bulk of the property. We do not feel called upon to decide, as a question of absolute law, whether the conveyance was or was not valid, and beyond challenge. It is enough for the purposes of this case that it was with the general acquiescence of the creditors; that its purpose was equality between them; that it was not challenged for many years; that the trustee, on the faith of its validity, carried on business to an enormous extent and assumed large liabilities; and that the creditors accepted payments made out of the proceeds of that business, and the trust created by this conveyance. Equity will not reach out its hand to disturb that which all parties have considered settled for so many years.

Another matter requires notice: The conveyance excepted shares of stock belonging to the grantors; but gave to the trustee a right to insist upon the transfer thereof, by way of pledge and collateral security. This exception was introduced into the instrument for fear that the trustees by accepting the stock would assume personal liability for the debts of the various corporations. Immediately after accepting this trust the trustee demanded a transfer of the stock in The Quidnick Company; and on December 2, 1873, the various grantors in this conveyance transferred on the stock transfer book of The Quidnick Company, to the trustee, their [466
shares of stock. These transfers, as expressed, were "by way of pledge and collateral security, to secure the performance of the conditions of the trust mortgage." Some question is made as to the meaning of these transfers; but obviously they were all collateral security for the payment of the debts of the transferrers, as provided for in the trust deed. Such was the conclusion reached by the Supreme Court of Rhode Island in the case cited; for they say, "with reference to the stock in question, it was transferred to be applied to creditors, according to the terms of the mortgage." So that we have the validity of the original conveyance by the Spragues, and the immediately subsequent transfers of the stock in question, affirmed by the Supreme Court of the State in which the grantors and transferrers resided, and where the corporation was situate whose stock was thus transferred. This affirmance of the legal validity stands behind and gives large support to the views which we have hitherto expressed. The law as declared by that court harmonizes with and indorses the equitable considerations which in this case impress us.

We deem it unnecessary to proceed further, or to consider the effect of the equitable suit instituted by the trustee, in the state courts, prior to these attachments, and the possession taken by those courts of the property of the Quidnick corporations, or the sales of that property in pursuance of proceedings had therein. Indeed, we have referred to all these proceedings in the state courts as in support of the equitable considerations upon which we affirm the ruling of the circuit court. In conclusion, it may be said that, generally, where a debtor, having large and scattered properties, and being much embarrassed, transfers his property for the benefit of his creditors equally, equity requires that

any creditor who is not satisfied with the provisions of such transfer shall act promptly in challenge thereof, or else be adjudged to have waived any right of challenge.

The decree of the Circuit Court is affirmed.

Mr. Justice **Blatchford** did not take any part in the decision of this case.

478] JULIUS FREIBURG ET AL., *Appts.*,
v.
JOSEPH DREYFUS ET AL.

(See S. C. Reporter's ed. 478-483.)

Pledge, what constitutes—necessary delivery—when pledge valid—bona fide pledgee.

1. Where notes given for money loaned contain the statement that they are each secured by a pledge of certain warehouse receipts for goods in store and authorize a sale thereof to pay the notes, the delivery of the receipts is a delivery of the property, and the transaction constitutes a pledge, within the law of Louisiana.
2. It is required, in order to create a pledge, not only that delivery should accompany the private writing, but that the instrument itself should exhibit the nature and extent of the rights and obligations of the contracting parties reciprocally.
3. Where the loan and pledge appear to be an ordinary business transaction, and the attendant circumstances were not such as to arouse suspicion, the pledge was not fraudulent or void.
4. Although the pledgor derived his title from one who was insolvent, by a transfer which was subject to be set aside by his creditors but was good between the parties, yet until it was so set aside the pledgor could create a valid pledge in favor of a bona fide party.

[No. 228.]

Argued Mar. 24, 25, 1890. Decided Apr. 14, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana in favor of defendants in an action to set aside a pledge of goods as fraudulent. *Affirmed.*

The facts are stated in the opinion.

Mr. **D. C. Labatt** for appellants.

Messrs. **R. H. Browne** and *C. B. Singleton* for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court for the Eastern District of Louisiana. 26 Fed. Rep. 824. The facts are these: On October 30, 1883, appellants, creditors of Joseph Dreyfus, commenced an action at law against their debtor, to recover the sum of $19,000, and sequestered certain goods in the warehouse of Meyer, Weill & Co.

These goods had been transferred by Dreyfus to Lehman Meyer, on October 27, as a "*dation en paiement.*" On November 6, Abraham Ermann, one of the appellees, filed in said suit what is known under the Louisiana Code of Practice as a petition of intervention and
479] third opposition, wherein he claimed that on October 29 he had loaned to said Lehman Meyer $15,000, evidenced by three notes of Meyer's, each for $5,000, and had received in security therefor a pledge of the sequestered goods. The appellants answered this petition, alleging in substance that no pledge existed; that if it did exist it was fraudulent and of no force against the creditors of Dreyfus; that Meyer's title and possession were fraudulent, and intended to shield the property from the claims of creditors of Dreyfus; and that therefore this transfer of the property in pledge to appellee conferred no privilege or lien under the Louisiana law. When this action came on for trial, the circuit court ruled that at law the only inquiry could be as to the reality of the pledge, and not as to its fraudulent character. Thereafter a bill in equity was filed by appellants against Dreyfus, Meyer and Ermann alleging the fraudulent nature of the pledge. Upon final hearing, a decree was entered in favor of the defendants.

Passing all mere matters of practice, we address ourselves to the two substantial questions: first, whether there was a real pledge, and not a simulated transaction; and, second, whether, if sufficient in form and real, it was in fact fraudulent and void. At the time of these transactions Dreyfus was insolvent, and under the circumstances, which it is unnecessary to state in detail, the transfer of the property from him to Meyer, though good between the parties and vesting title in Meyer, was subject to be set aside at the instance of Dreyfus' creditors. Until so set aside, the title being in Meyer, he could create a valid pledge in favor of a bona fide party. Meyer held warehouse receipts from Meyer, Weill & Co., with whom the goods had been stored, and the loan from Ermann and the pledge to him were evidenced by three notes of $5,000 each, alike excepting time of payment, of one of which the following is a copy:

"$5,000.00. New Orleans, Oct. 29th, 1883.

"Forty days after date I promise to pay to the order of A. Ermann, Esqr., five thousand dollars, for value received, with interest at the rate of eight per cent per annum from maturity until paid. Payable at the People's Bank of New Orleans. This note is secured by a pledge of the securities mentioned on the reverse hereof, and in case of its nonpayment the holder is hereby authorized to sell the said securities at public or private sale, without recourse to legal proceedings, and to make any transfers that may be required, applying proceeds of sale towards payment of this note. Margins to be kept good.

"L. Meyer."

Indorsement: "Five warehouse receipts, dated Oct. 28th, 1883, numbered 1, 2, 3, 4 & 5, issued by Meyer, Weill & Co. to L. Meyer, and by him indorsed to A. Ermann, payee. L. Meyer."

With the notes were transferred the warehouse receipts mentioned in the indorsement. These receipts were alike in form, though covering different properties, and the following is a copy of one:

"Received from L. Meyer, in apparent good order, on storage in our warehouse sub-

ject to the following conditions: goods deliverable on production of this receipt or on the written order of parties in whose favor it is given; goods when transferred deliverable only on return of this receipt:

"5-4 pipes B., D. &. Co. cognac.
"9 barrels Shmith Blair.
"2-8 pipes Cr. Gavi cognac.
"2-8 pipes Boston cognac.
"3-8 pipes kirschwasser.
"Meyer, Weill & Co."

Indorsed: "L. Meyer."

That these instruments were sufficient in form under the laws of the State of Louisiana, where this pledge was created, and that the transaction was real and not simulated, is clear. By title twenty of the Civil Code, which treats of pledges, the right to pledge or pawn is given. (Voorhies' Revised Civil Code of Louisiana, pages 553 and following.) Articles 3157 and 3158 read as follows:

[481] "Art. 3157. The pawn invests the creditor with the right of causing his debt to be satisfied by privilege and in preference to the other creditors of his debtor, out of the product of the movable, corporeal or incorporeal, which has been thus burdened.

"Art. 3158. But this privilege shall take place against third persons only in case the pawn is proved by an act made either in a public form or under private signature: *Provided*, Such act has been recorded in the manner required by law: *Provided also*, That whatever may be in the form of the act, it mentions the amount of the debt, as well as the species and nature of the thing given in pledge, or has a statement annexed thereto of its number, weight and measure.

"When a debtor wishes to pawn promissory notes, bills of exchange, stocks, obligations or claims upon other persons, he shall deliver to the creditors the notes, bills of exchange, certificates of stock or other evidences of the claims or rights so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith.

"All pledges of movable property may be made by private writing, accompanied by actual delivery; and the delivery of property or deposit in a warehouse shall pass by the private assignment of the warehouse receipt, so as to authorize the owner to pledge such property; and such pledge so made, without further formalities, shall be valid as well against third persons as against the pledgors thereof, if made in good faith."

The notes disclosed the amount of the debt, as well as the fact of the pledge, and the property which was pledged; and the delivery of the warehoure receipts, as stated in the last clause of article 3158, was a delivery of the property; so that the pledgee had possession of the property as security for an indebtedness whose amount, time and payment were stated in writing. In *Cater* v. *Merrell*, 14 La. Ann. 375, the court said that "the word 'pledge' is used in the Statutes of 1852 and 1855 in the sense of the definition of article 3100 of the Civil Code, which defines the contract of pledge, and as the second section of these Acts require the contract to be in writing, the private act between [482] parties must contain what is declared to be essential by this article, to constitute a pledge, that is, a declaration of the thing given in pledge, and of the particular debt for which the thing is pledged." And in *Martin* v. *Creditors*, 15 La. Ann. 165, the court observed: "The assignment of a warehouse receipt, in the absence of a stipulation that the property is given in pledge to secure the payment of a principal obligation, amount of which is specified, does not confer a privilege upon the transferee. *Cater* v. *Merrill*, 14 La. Ann. 375. Privileges are of strict right; and parties claiming them must conform to the requirements of the law. It is required, in order to create a pledge, not only that delivery should accompany the private deed, but that the instrument itself should exhibit the nature and extent of the rights and obligations of the contracting parties reciprocally."

The transaction at bar comes within the requirements of these authorities. The transfer of the warehouse receipts was a delivery of the property; and the full terms of the contract of the pledge were stated on the face of the notes. And as Ermann gave to the pledgor $5,000 in cash, as well as his two notes for $5,000 each, there is no room to doubt that the transaction was a real and not a simulated one; as well as that the pledge was made in conformity to the laws of the State of Louisiana. The first question therefore must be answered in favor of the appellees.

A like answer must also be given to the second. That Ermann gave the $5,000 and executed his two notes, and thereafter paid those notes, so that he is out the $15,000 of the loan, is not disputed. That he had no other security, and must rely for repayment solely on the pledge, is clear. That he was a man of means, and able to make such a loan, though before he had never made a single loan of that magnitude; that he had theretofore accommodated Meyer with loans; that his relations with Meyer were such as to justify him in loaning upon what seemed to be sufficient security; that he had no knowledge of whence the goods in question were obtained; that the attendant circumstances were not such as to arouse suspicion in the mind of a reasonably prudent man, and that the loan and pledge have all the [483] appearance of an ordinary business transaction,—are conclusions which the testimony satisfactorily establishes. It is objected that after notice by the action at law and sequestration he paid the notes which he had given to Meyer; in other words, that he unnecessarily paid a portion of this loan, after notice of the fraudulent character of the transactions by which Meyer acquired title, and after, by suit, his own rights under the pledge had been challenged. But the only attack by this litigation, up to the time of payment, was upon the reality of the pledge, and of that there was no question. While doubtless the failure of Dreyfus, the suits commenced against him and the facts con-

cerning Meyer's and Dreyfus' condition, as developed in litigation and otherwise, disclosed that the property which he had in pledge had come to him through a devious channel, yet, until some assertion of personal wrong was made against him, he was under no obligations to let his own paper go to protest, and thereby tacitly, at least, admit that his own conduct and good faith were objects of suspicion and inquiry.

We think that the conclusion of the Circuit Court on the question of bona fides was correct, and *the decree is affirmed.*

304] SOCIÉTÉ FONCÈIRE ET AGRICOLE DES ÉTATS UNIS, *Plff. in Err.*,
v.
SAM. H. MILLIKEN.

(See S. C. Reporter's ed. 304-309.)

Texas statute—service on foreign corporation—affidavit for attachment—application to set aside judgment—laches.

1. Article 1373, Rev. Stat. of Texas, as to new trials, applies only to cases in which judgment has been rendered upon service of process by publication.
2. In Texas, service of process against a foreign corporation may be made upon the local agent representing it in the county in which the suit is brought.
3. An affidavit for an attachment which follows the statute, and alleges that the defendant "is not a resident corporation, or is a foreign corporation, or is acting as such," is sufficient to sustain the attachment.
4. An application to set aside a judgment made nearly two years after its rendition and more than a year after the sale of land thereunder, where no excuse for such delay is shown, is too late, especially where the charge of wrong-doing is general, no distinct act being charged.

[No. 274.]

Submitted April 6, 1890. Decided May 5, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment dismissing an application to set aside certain judgments and the sales made thereunder. *Affirmed.*

The facts are stated in the opinion.

Mr. **John T. Hartcourt,** for plaintiff in error:

A judicial sale will be set aside for gross inadequacy of price, accompanied by fraud, or other unfairness in the conduct of the sale.

Davis v. *McGee*, 28 Fed. Rep. 867; *Hunt* v. *Fisher*, 29 Fed. Rep. 801.

When a plain, adequate and complete remedy may be had at law, a suit in equity will not be sustained.

U. S. Rev. Stat. § 723; *Wright* v. *Ellison*, 68 U. S. 1 Wall. 16 (17: 555); *Chittenden* v. *Darden*, 2 Woods, 437.

The attachment was invalid because the affidavit was in the disjunctive.

Hopkins v. *Nichols*, 22 Tex. 206.

Where there is no legal service or appearance, *the judgment* is void.

Witt v. *Kaufman*, 25 Tex. Sup. 384; *Galpin* v. *Page*, 85 U. S. 18 Wall. 364 (21: 962); *Pennoyer* v. *Neff*, 95 U. S. 714 (24: 565.)

An agent of a foreign corporation, upon whom service can be made, must be one actually appointed.

Lafayette Ins. Co. v. *French*, 59 U. S. 18 How. 404 (15: 451); *St. Clair* v. *Cox*, 106 U. S. 350 (27: 222).

Mr. **A. S. Lathrop,** for defendant in error:

The affidavit states but one ground of attachment and is not inconsistent.

Dunnenbaum v. *Schram*, 59 Tex. 281; *Carpenter* v. *Pridgen*, 40 Tex. 32; *Blum* v. *Davis*, 56 Tex. 423; *Dwyer* v. *Testard*, 65 Tex. 432.

Service of citation upon an agent of the corporation is sufficient.

St. Clair v. *Cox*, 106 U. S. 350 (27: 222); *Knott* v. *Southern L. Ins. Co.* 2 Woods, 479; *Angerhoefer* v. *Bradstreet Co.* 22 Fed. Rep. 305.

The judgment will not be set aside where there is no service, if there is no defense to the claim.

Gerrish v. *Hunt*, 66 Iowa, 682; *Schleicher* v. *Markward*, 61 Tex. 99; *Tilghman* v. *Werk*, 39 Fed. Rep. 680; *Lewis* v. *Cocks*, 90 U. S. 23 Wall. 466 (23: 70).

If this were a bill of review in equity it would not be sustained at the suit of a foreign receiver.

Thompson v. *Maxwell*, 95 U. S. 391 (24: 481).

Mr. Justice **Brewer** delivered the opinion of the court:

On June 8, 1883, two judgments were rendered in the Circuit Court of the United States for the Northern District of Texas, in favor of Sam. H. Milliken and against the Société Foncière et Agricole des États Unis.

On August 7, 1883, September 4, 1883, and April 1, 1884, a large number of lots and a body of lands were sold in satisfaction of an execution issued on these judgments, the bulk of the property being sold in 1883. Thereafter, and on June 6, 1885, an application was made by the defendant, the Société Foncière et Agricole des États Unis, and Edmond Moreau to set aside said judgments and the sales made thereunder. To this application demurrers, general and special, were filed by Milliken, and sustained; and the application was dismissed. From the order or judgment of dismissal this proceeding in error has been prosecuted; and the single inquiry is, whether the court erred in denying the application. It was made under article 1373, Revised Statutes of Texas, cited by counsel: "In cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by an attorney of his own selection, a new trial may be granted by the court upon the application of the defendant, for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment;" but obviously that article does not refer to a

case of this kind. It applies only to cases in which judgment has been rendered upon service of process by publication; but here there was no publication, no service of process attempted in that way. This is the only statutory provision referred to by counsel; and as that is not applicable, we must assume that there is no special statutory provision applicable to a case of this kind.

In the absence of the Statute, can a judgment under which property has been levied upon and sold, and which has stood unchallenged for nearly two years, be set aside otherwise than through proceedings in equity? Certainly the ordinary remedy is in equity; and that is one of the grounds of demurrer presented by defendant. But waiving this question, is any sufficient reason shown for setting aside the judgments?

It appears that the plaintiff in error is a foreign corporation organized under the laws of the Republic of France, and with its principal place of business in Paris; and organized with a special reference to business in the State of Texas, as shown by this statement from its charter: "This Society has for its object all real estate, agricultural and commercial operations of every nature whatsoever regarding the purchase, the acquisition in the way of grants or otherwise, and the improvement as owners or otherwise, of lands in the State of Texas, America; the [3] execution of public or private improvements, and improvements of every kind on the lands worked by the Society; the sale or transfer of all products, lands and other real or personal property belonging to the Society. "The Society may also consolidate with other companies and establishments, of same or different nature, situated in France or in America, acquire all rights and obligations of these companies, or take an interest therein." It had an agent in Texas, Henry P. du Bellet, who seems to have had and exercised all the powers of a general agent. As such agent he borrowed money from Milliken; and on July 9, July 21 and December 27, 1882, respectively, executed notes on behalf and in the name of the Society for the sums borrowed, and gave deeds of trust to secure the payment thereof. These notes not being paid on the 9th of January, 1883, the first suit was brought; and service of process made upon Du Bellet, as agent. On the 16th day of May, 1883, and after the commencement of the first suit, he borrowed more money from Milliken, and gave a new note in the named of the Society, upon which the second suit was brought; and, as heretofore stated, on June 8, 1883, judgments were rendered in both suits. At the commencement of the first suit, a writ of attachment was sued out and levied upon the lands above referred to.

The right of Du Bellet to borrow money in the name of the Society, and to execute the trust deeds in its behalf, is not questioned. The claim is that he had no authority to receive service of process on behalf of the company, and that usurious interest was included in the judgments; also that, at the time of the commencement of the suits, the Society had gone into liquidation in France, and that Moreau, the other petitioner, was the duly appointed liquidator.

That Du Bellet was an agent, with varied general powers,—in fact *the* agent of the Society in Texas,—is clear. His authority to borrow money, execute notes and trust deeds in the name and for the benefit of the Society, is conceded. So far as appears, he accepted service of process in each suit, without question; and after service of process in the first case, dealt with the plaintiff, and gave him the new note out of which the second suit arose. Not only that, he is the party by whom the present application is evidently controlled, for he verifies the application, and in it swears that he is the agent of the Society. [307]

Article 1223, Revised Statutes of Texas 1879, provides: "In suits against any incorporated company or joint-stock association, the citation may be served on the president, secretary or treasurer of such company or association, or upon the local agent representing such company or association in the county in which suit is brought, or by leaving a copy of the same at the principal office of the company during office hours." The language is, "any incorporated company,"—language broad enough to include foreign as well as domestic corporations; and that it was intended to include foreign corporations is evident from prior legislation, for which this is a substitute. Chapter 34, Laws 1874, provided as follows: "That hereafter any public or private corporation, including railroad companies, created by or under the laws of this State, or any other State or country, may be sued in any court in this State having jurisdiction of the subject matter, and in any county where the cause of action or any part thereof accrued, or in any county where such corporation has an agency or representative, or in the county in which the principal office of such corporation is situated. That service of process on any of such corporations may be had by delivering a copy of such process, with the certified copy of plaintiff's petition, if any, to the president, secretary, treasurer, principal officers or the agent." Article 1223 was evidently substituted for this Act, which is cited in the margin of the Revised Statutes, opposite the article. The Act of 1874 expressly named corporations created under the laws of other States or countries, as well as those created under the laws of Texas. Article 1223, reducing the number of words, expresses the same meaning by the words "any incorporated company." It matters not under what law the company is organized, or where its domicil is, service of process may be made upon the local agent representing it within the county in which the suit is brought. *Angerhoefer* v. *Bradstreet*, 22 Fed. Rep. 305. In what county suit may be brought is determined by other sections, which need not be cited here, as the [308] right to sue in the federal court is not questioned. So, the court having jurisdiction of the cause of action, service might be made upon the local agent representing the Society. Du Bellet was unquestionably such agent, and service upon him was sufficient to bring the Society into court.

Again, in the first suit an attachment was issued and levied on the lands. Article 152 of the Revised Statutes states twelve separate grounds therefor. The second is: "That the defendant is not a resident of the State or is a foreign corporation, or is acting as such." The affidavit in this case, which by such article is required as preliminary to the issue of attachment, follows the very language of the Statute, and alleges that the defendant "is not a resident corporation, or is a foreign corporation, or is acting as such." The disjunctive form of this averment is claimed to render it wholly invalid, and *Hopkins* v. *Nichols*, 22 Tex. 206, is cited as authority. That case held "that an attachment will be quashed, if issued upon an affidavit alleging in the disjunctive the one or the other of two distinct causes for the attachment." But that decision has no application. There are no distinct causes for an attachment stated in this affidavit. The single cause is nonresidence, the cause stated in clause two, quoted above; and while the language of the affidavit may be open to criticism, yet its meaning is clear. It describes only one cause for attachment, to wit, nonresidence, and was sufficient to sustain an attachment. There can be but little doubt, therefore, that the court had jurisdiction of the lands by attachment, and of the defendant by service upon its agent.

With regard to the question of usury. The application alleges that the usury up to the date of the judgment amounted to $1,179.08; it also alleges that the ten per cent attorney's fee, provided in the notes, was simply a cover for usurious interest, and the amount thereof, in fact, taken and received by Milliken. Assuming all this to be true, as it must be upon demurrer, the fact remains that the defendant waited two years, lacking two days, and until more than a year after all the sales had been made, before challenging the validity of the proceedings. No excuse for this delay is shown.
309] Obviously, the defendant was proceeding under the Statute, which we have seen has no application; and independently of the Statute, its delay unexcused is fatal. For, conceding the large amount of the judgment to be just, it attacks only an inconsiderable portion. Its agent being served with process, it is charged with knowledge, and some excuse for its long delay must be shown before the court would be justified in setting aside the judgment. The same observation may be made in reference to the matter of the sales; and, in addition, it must be noticed that no distinct act of wrong is charged. The allegation is, "that the said Sam H. Milliken, by his management, prevented fair competition, and discouraged and prevented other bidders, so that he could obtain the purchase of all of said property." No specific act of wrong-doing appears in this averment, and no fact is stated from which the court can deduce misconduct. With reference to the allegation, "that the Society was in liquidation, and had been placed by the French court in charge of Edmond Moreau, as liquidator," it is enough to say that that fact would not prevent Milliken from establishing his claim by suit in the courts of Texas against the corporation, and subjecting its property to the satisfaction thereof.

So, in conclusion, waiving any question of the form in which this application was presented, there was no error in denying it.

And *the judgment of the Circuit Court is affirmed.*

HENRY K. WILLARD, Adm'r., *Plf. in Err.*,

v.

MARY L. C. WOOD, Ex'rx.

(See S. C. Reporter's ed. 309-314.)

Lex fori—*suit to enforce payment of mortgage assumed by grantee—law of District of Columbia—remedy in equity—New York law—effect of payments—agreed statement—limitation.*

1. The *lex fori* governs as to the form of remedy, whether it must be in covenant or assumpsit, at law or in equity.
2. A suit against the grantee of a mortgagor to enforce the payment of the mortgage debt which he has, in his deed, assumed to pay, brought in the District of Columbia, is governed by its law, as to the form and nature of the remedy, although the deed and mortgage were made in New York and the land is situated there.
3. By the law of the District of Columbia, such agreement of the grantee, in his deed, to assume and pay the mortgage, is one made with the grantor only, and the mortgagee cannot sue there upon it at law, but his only remedy against the grantee is by suit in equity,—although in New York he can maintain such suit either in equity or at law.
4. Payments made by the grantee pursuant to his contract with the mortgagor and accepted by the mortgagee, on account of the mortgage debt, do not create, or warrant to be inferred, a new contract between the grantee and the mortgagee.
5. In the Supreme Court of the District of Columbia, as in the circuit courts of the United States, equitable relief cannot be granted in an action at law.
6. A statement of facts agreed by the parties, or a case stated, in an action at law, waives all questions of pleading, or of form of action, which may be cured by amendment; but does not enable a court of law to assume the jurisdiction of a court of equity.
7. If the grantee's liability is in assumpsit only, it is barred by the Statute of Limitations of the District of Columbia in three years.

[No. 286.]

Argued April 22, 1890. Decided May 5, 1890.

NOTE.—Lex loci *and* lex fori *as to interpretation, validity of, and defenses to, contracts.* See *note* to Slacum v. Pomery, 3: 205; also *note* to Bell v. Bruen, 11: 89.

Titles to land governed by lex loci rei sitæ. See *note* to Clark v. Graham, 5: 334; also *note* to Darby v. Mayer, 6: 367.

As to lex loci *in distribution of assets of deceased; also of domicil of testator as to validity of will.*—see *note* to Smith v. Union Bank of Georgetown, 8: 212.

Lex fori *governs in respect to Statute of Limitations.* See *note* to Townsend v. Jemison, 13: 194.

Assumption of mortgage by purchaser of premises; what constitutes; effect of; conveyance subject to mortgage. See *note* to Elliott v. Sackett, 27: 678.

IN ERROR to the Supreme Court of the District of Columbia, to review a judgment in favor of defendant, in an action at law by the administrator of the assignee of a mortgage against the executrix of the purchaser of the equity of redemption, to recover upon a clause in a deed by which the grantee assumed and covenanted to pay the mortgage. *Affirmed.*

Opinion below, 4 Mackey, 538.

[310] Statement by *Mr. Justice* **Gray:**

This was an action at law by the administrator of the assignee of a mortgage against the executrix of a purchaser of the equity of redemption to recover so much of the mortgage debt as remained unsatisfied after a foreclosure sale. The declaration set forth the substance of the facts afterwards agreed by the parties. The defendant pleaded: 1st. That the testator was never indebted as alleged; 2d. The Statute of Limitations of three years. The plaintiff joined issue on both pleas. The case was heard in the Supreme Court of the District of Columbia in general term upon an agreed statement of facts, in substance as follows:

On July 7, 1868, at Brooklyn in the State of New York, Martin Dixon executed and delivered to Charles Christmas a bond for the payment of $14,000 in five years, with interest, and a mortgage of land in Brooklyn to secure the payment of the bond.

On July 19, 1869, at Brooklyn, Dixon, by deed beginning with the words "This indenture," but otherwise in the form of a deed poll, and signed and sealed by him only, in consideration of $17,000 to him paid, conveyed the land in fee to William W. W. Wood, "subject, however, to the mortgage" aforesaid, "which said mortgage, with the interest due and to grow due thereon, the party of the second part hereby assumes and covenants to pay, satisfy and discharge, the amount thereof forming a part of the consideration herein expressed and having been deducted therefrom."

Wood immediately entered upon and took possession of the land, and afterwards made two payments of $2,000 each, one in 1873 and the other on February 16, 1874, on account of the principal of the mortgage debt, and also regularly paid the interest thereon until March 14, 1874, when he conveyed the land to one Bryan, by a deed in which it was recited that the balance due on the mortgage debt formed a part of the consideration and was deducted from the purchase money, and by the terms of which Bryan assumed and agreed to pay that balance. Wood made no other payment on the mortgage debt.

The bond and mortgage were duly assigned to Frederick L. Christmas and held by him until his death in 1876, after which, upon proceedings commenced in a court of competent jurisdiction in New York by his administrator, appointed in that State, for the foreclosure of the mortgage, a decree was made for the sale of the land, and on December 10, 1877, after due notice to Wood, the land was duly sold; and on January 5, 1878, the net amount of the proceeds, being the sum of $4,566.61, was applied to the payment of the mortgage debt; and on April 18, 1879, an order was made by a court of competent jurisdiction in that State, giving leave to said administrator to sue either Wood or Bryan for the deficiency of $6,865.63.

The plaintiff on October 25, 1880, took out ancillary letters of administration on the estate of Frederick L. Christmas in the proper court of the District of Columbia; and on December 30, 1884, brought this action against Wood's executrix, after demand and refusal of payment, to recover the sum remaining due upon the mortgage debt.

The statement of facts concluded as follows: "It is further stipulated that if upon the said facts the plaintiff is entitled to recover, then and in that case he is entitled to judgment against the defendant for the said sum of $6,865.63, being the balance remaining due after the application thereto of the net proceeds of said sale, together with interest on said balance from the said 5th day of January, 1878, assets in the hands of the said executrix (the present defendant) sufficient to pay all debts of said estate being hereby confessed; otherwise, judgment for said defendant."

The court gave judgment for the defendant. 4 Mackey, 538. The plaintiff sued out this writ of error.

Messrs. **Enoch Totten** and *Stephen Condit,* for plaintiff in error:

This is a New York contract and should be governed and construed according to the laws of New York. The parties all resided in New York, the contract was made there, the mortgaged property was situated there, the contract was to be performed and the money was payable there.

The rules of the State in which land is situated govern its descent, alienation and transfer, and the effect and construction of conveyances of it.

McGoon v. *Scales,* 76 U. S. 9 Wall. 27 (19: 546); *Orvis* v. *Powell,* 98 U. S. 176 (25: 238); *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627 (24: 858); *Pritchard* v. *Norton,* 106 U. S. 129 (27: 105); *Canada Southern R. Co.* v. *Gebhard,* 109 U. S. 527 (27: 1020); *Dennick* v. *Central R. Co. of N. J.* 103 U. S. 11 (26: 439).

By the law of New York, a purchaser of mortgaged real estate who accepts a deed thereof, by the terms of which he assumes, covenants and agrees to pay the mortgage as a part of the purchase money, is liable for the amount of the incumbrance, and his liability is the same whether he actually signs and seals the deed or not. He is bound by the covenants in the instrument, and an action at law may be maintained on the contract by the mortgagee.

Trotter v. *Hughes,* 12 N. Y. 74; *Burr* v. *Beers,* 24 N. Y. 178; *Thorp* v. *Keokuk Coal Co.* 48 N. Y. 257; *Hand* v. *Kennedy,* 83 N. Y. 149; *Atlantic Dock Co.* v. *Leavitt,* 54 N. Y. 35; *Vrooman* v. *Turner,* 69 N. Y. 280; *Bowen* v. *Beck,* 94 N. Y. 86.

At the common law the grantee in a deed of the kind in question here, who accepted the deed and took possession under it, was bound by the covenants contained therein, precisely as if he had signed and sealed it,

and the rule of the common law is in force in the District of Columbia.

1 Saunders, Pl. and Ev. 476; 1 Chitty, Pl. 119; *Ewre* v. *Strickland*, Cro. Jac. 240; *Bret* v. *Cumberland*, Cro. Jac. 399, 522; Coke, Litt. 231 *a*; *Hurst* v. *Rodney*, 1 Wash. C. C. 375; *Finley* v. *Simpson*, 22 N. J. L. 311; *Rose* v. *Poulton*, 2 Barn. & Ad. 822; *Vernon* v. *Jefferys*, 2 Strange, 1146; *Hutchinson* v. *Chicago & N. W. R. Co.* 37 Wis. 582; *Hubbard* v. *Marshall*, 50 Wis. 327; *Hawkins* v. *Sherman*, 3 Car. & P. 459; *Staines* v. *Morris*, 1 Ves. & B. 14; *Wilkins* v. *Fry*, 1 Meriv. 265; Finch, Book of the Law, 109; *Crawford* v. *Edwards*, 33 Mich. 354; *Unger* v. *Smith*, 44 Mich. 22; *Schmucker* v. *Sibert*, 18 Kan. 104; *Patchin* v. *Swift*, 21 Vt. 293; *Huyler* v. *Atwood*, 26 N. J. Eq. 504; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35.

If, notwithstanding the common law, an ink scrawl or an impression on paper is valid, why is not the acceptance of a deed and receiving the benefits of it the equivalent of a seal.

Pillow v. *Roberts*, 54 U. S. 13 How. 472 (14: 228); *Thrasher* v. *Everhart*, 3 Gill & J. 234; *Warren* v. *Lynch*, 5 Johns. 239; *Meredith* v. *Hinsdale*, 2 Caines, 362; *Adam* v. *Kerr*, 1 Bos. & P. 360; *State* v. *Buchanan*, 5 Har. & J. 355.

The plea of the defendant of the Statute of Limitations constitutes no defense.

Kilty, Laws Md. chap. 23, § 6; Thompson, Dig. 287, 289.

The form of the action is immaterial.

Chemung Canal Bank v. *Lowery*, 93 U. S. 73 (23: 806); *Locke* v. *Homer*, 131 Mass. 102.

Where the subject matter of a suit belongs to the class over which a court of equity has jurisdiction, the objection that the complainant has an adequate remedy at law, not made until the hearing in the appellate tribunal, is too late.

Reynes v. *Dumont*, 130 U. S. 354 (32: 934); *Dundee Mortgage & T. I. Co.* v. *Hughes*, 124 U. S. 157 (31: 357); *Ex parte Spies*, 123 U. S. 131 (31: 80); *Mays* v. *Fritton*, 87 U. S. 20 Wall. 414 (22: 389); *Crosby* v. *Buchanan*, 90 U. S. 23 Wall. 420 (23: 138); *Smith* v. *Elder*, 3 Johns. 113.

Messrs. **John Sidney Webb** and *W. B. & H. R. Webb*, for defendant in error:

This court is not bound by the New York decisions. The decision of the points involved turns upon the general principles and doctrines of commercial jurisprudence.

Swift v. *Tyson*, 41 U. S. 16 Pet. 1 (10: 865).

Federal courts are not bound by the decisions of the state courts upon questions of commercial law.

Oates v. *First Nat. Bank*, 100 U. S. 246 (25: 583); *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495 (10: 1044); *Watson* v. *Tarpley*, 59 U. S. 18 How. 517 (15: 509); *Venice* v. *Murdock*, 92 U. S. 494 (23: 583); *Myrick* v. *Michigan Cent. R. Co.* 107 U. S. 102 (27: 325); *Gloucester Ins. Co.* v. *Younger*, 2 Curt. 338.

The mortgagee could not sue at law.

Cragin v. *Lovell*, 109 U. S. 194 (27: 903).

In equity, as at law, the contract of the purchaser to pay the mortgage creates no direct obligation of the purchaser to the mortgagee.

Parsons v. *Freeman*, 2 P. Wms. 664, *note*, Ambler, 115; *Earl of Oxford* v. *Lady Rodney*, 14 Ves. Jr. 417, 424; *Re Empress Engineering Co.* L. R. 16 Ch. Div. 125; *Gandy* v. *Gandy*, L. R. 30 Ch. Div. 57, 67; *Coffin* v. *Adams*, 131 Mass. 133.

An action at law upon a stipulation in a deed by which the grantee assumes and agrees to pay a previous debt of the grantor, secured by mortgage of the granted premises, can be brought in the name of the grantor only.

Mellen v. *Whipple*, 1 Gray, 317; *Prentice* v. *Brimhall*, 123 Mass. 291; *Pettee* v. *Peppard*, 120 Mass. 522; *Meech* v. *Ensign*, 49 Conn. 191; *Osborne* v. *Cabell*, 77 Va. 462; *Biddel* v. *Brizolara*, 64 Cal. 354; *Crowell* v. *St. Barnabas Hospital*, 27 N. J. Eq. 650; *Culver* v. *Badger*, 29 N. J. Eq. 74; *Moore's App.* 88 Pa. 450; *Higman* v. *Stewart*, 38 Mich. 513; *Booth* v. *Conn. Mut. L. Ins. Co.* 43 Mich. 299; *Unger* v. *Smith*, 44 Mich. 22; *Hicks* v. *McGarry*, 38 Mich. 667; *George* v. *Andrews*, 60 Md. 26; Chitty, Pl. 3, 4; 1 Saunders, Pl. and Ev. 390; 1 Walford, Parties, 11; *Berkeley* v. *Hardy*, 5 Barn. & C. 355; *Metcalfe* v. *Rycroft*, 6 Maule & S. 75; *Barford* v. *Stuckey*, 2 Brod. & B. 333; *Southampton* v. *Brown*, 6 Barn. & C. 718; *Pigott* v. *Thompson*, 3 Bos. & P. 147; *Offly* v. *Warde*, 1 Lev. 235; *Dutton* v. *Poole*, 2 Lev. 210; *Tweddle* v. *Atkinson*, 1 Best & S. 393.

The benefit of the third person, to entitle him to sue, must have been the principal object of the contracting parties; it is not sufficient that it may incidentally benefit him.

Felton v. *Dickinson*, 10 Mass. 287; *Farley* v. *Cleveland*, 4 Cow. 432; *Garnsey* v. *Rogers*, 47 N. Y. 233; *Merrill* v. *Green*, 55 N. Y. 270; *Vrooman* v. *Turner*, 69 N. Y. 283; *Simson* v. *Brown*, 68 N. Y. 361; *Treat* v. *Stanton*, 14 Conn. 445; *Meech* v. *Ensign*, 49 Conn. 191; *Hendrick* v. *Lindsay*, 93 U. S. 147 (23: 856).

The mortgagee has a right of action against the grantee under such deed in equity.

Keller v. *Ashford*, 133 U. S. 610 (33: 667).

The question of the form of action or the remedy to be pursued in any given case depends solely upon the law of the forum where the case is brought and not upon the law or usage of the place where the contract is made.

Pritchard v. *Norton*, 106 U. S. 129 (27: 105); *Trasher* v. *Everhart*, 3 Gill & J. 234; *Bank of U. S.* v. *Donnally*, 33 U. S. 8 Pet. 371 (8: 978); *Andrews* v. *Herriot*, 4 Cow. 508, *note*; *Le Roy* v. *Beard*, 49 U. S. 8 How. 464 (12: 1158); *Douglas* v. *Oldham*, 6 N. H. 150.

Though the grantee enter into possession, yet if he does not execute the deed, he must be sued on his parol contract, and not upon the covenants contained in the deed.

1 Chitty, Pl. 104, *note 1*, 118, 119; 3 Rob. Prac. 362, 363, 393, 438; *Stabler* v. *Cowman*, 7 Gill & J. 286; *Howard* v. *Ramsay*, 7 Har. & J. 114; *Western Maryland R. Co.* v. *Orendorff*, 37 Md. 334, 335; *Hinsdale* v. *Humphrey*, 15 Conn. 431; *Foster* v. *Atwater*, 42 Conn. 244; *Johnson* v. *Muzzy*, 45 Vt. 420; *Maule* v. *Weaver*, 7 Pa. 329; *Taylor* v. *Glaser*,

2 Serg. & R. 502; *Hocking County Trustees* v. *Spencer*, 7 Ohio (pt. 2) 149; *Davis* v. *Judd*, 6 Wis. 85; *Bishop* v. *Douglass*, 25 Wis. 696; *Goodwin* v. *Gilbert*, 9 Mass. 513; *Guild* v. *Leonard*, 18 Pick. 516; *Nugent* v. *Riley*, 1 Met. 121; *Pike* v. *Brown*, 7 Cush. 133; *Newell* v. *Hill*, 2 Met. 181; *Parish* v. *Whitney*, 3 Gray, 516; *Maine* v. *Cumston*, 98 Mass. 317; *Martin* v. *Drinan*, 128 Mass. 515; *Carrol* v. *Green*, 92 U. S. 514 (23: 739); *Gale* v. *Nixon*, 6 Cow. 445; *Andrews* v. *Herriot*, 4 Cow. 508; *Le Roy* v. *Beard*, 49 U. S. 8 How. 451 (12: 1151); *Broadhead* v. *Noyes*, 9 Mo. 56.

The law of England is that covenant will not lie on an unsealed instrument.

Brown v. *McFarran*, 5 Irish L. R. 212; *Lock* v. *Wright*, 8 Mod. 40; *Burnett* v. *Lynch*, 5 Barn. & C. 602; Walford, Parties, 18, 19; Platt, Cov. 12; Abbott, Shipping (8th ed.) 242; *Moryan* v. *Pike*, 14 C. B. 473; *Northampton Gaslight Co.* v. *Parnell*, 15 C. B. 630.

This court seems to hold that the mortgagee could not sue upon such an instrument. *Hendrick* v. *Lindsay*, 93 U. S. 149 (23: 857).

[2] *Mr. Justice* **Gray** delivered the opinion of the court:

This action is brought by a mortgagee against the executrix of the grantee named in, and who has accepted, a deed executed by the mortgagor only, expressed to be "subject to the mortgage," and by the terms of which the grantee "assumes and covenants to pay, satisfy and discharge" the mortgage debt. After issue joined on the pleas of never indebted and the Statute of Limitations of three years, the case was submitted, and judgment rendered for the defendant, upon an agreed statement of facts.

By the Statute of Limitations of Maryland of 1715, chap. 23, §§ 2, 5, in force in the District of Columbia, all actions on simple contracts must be brought within three years, and actions on specialties may be brought within twelve years after the cause of action accrues. 1 Kilty's Statutes.

The decisions of the courts of New York, though proceeding upon various and not always consistent reasons, clearly show that, by the law of that State (in which the land is situated and the bond and mortgage, as well as the subsequent deed from the mortgagor, were executed and delivered) the mortgagee is entitled to maintain a suit, either in equity or at law, against the grantee of the mortgagor to enforce the payment of the mortgage debt. *Halsey* v. *Reed*, 9 Paige, 446; *King* v. *Whitely*, 10 Paige, 465; *Blyer* v. *Monholland*, 2 Sandf. Ch. 478; *Trotter* v. *Hughes*, 12 N. Y. 74; *Burr* v. *Beers*, 24 N. Y. 178; *Campbell* v. *Smith*, 71 N. Y. 26; *Pardee* v. *Treat*, 82 N. Y. 385; *Hand* v. *Kennedy*, 83 N. Y. 149; *Bowen* v. *Beck*, 94 N. Y. 86.

Assuming that the mortgagee has acquired by the law of New York a right to enforce [3] such an agreement against a grantee of the mortgagor, the form of his remedy, whether it must be in covenant or in assumpsit, at law or in equity, is governed by the *lex fori*, the law of the District of Columbia, where the action was brought. *Dixon* v. *Ramsay*, 7 U. S. 3 Cranch, 319, 324 [2: 453, 454]; *United States Bank* v. *Donnally*, 33 U. S. 8 Pet. 361 [8: 974]; *Wilcox* v. *Hunt*, 38 U. S. 13 Pet. 378 [10: 209]; *LeRoy* v. *Beard*, 49 U. S. 8 How. 451 [12: 1151]; *Pritchard* v. *Norton*, 106 U. S. 124, 130, 133 [27: 104, 106, 107].

Much of the argument at the bar was devoted to the question, whether an agreement of the grantee, in a deed signed and sealed by the grantor only, is, as has been held in New Jersey and New York, in the nature of a covenant under seal, and consequently a specialty (*Finley* v. *Simpson*, 22 N. J. L. 311; *Crowell* v. *St. Barnabas Hospital*, 27 N. J. Eq. 650, 652; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Bowen* v. *Beck*, 94 N. Y. 86); or, as held in other States, in the nature of an assumpsit or implied contract, arising from the acceptance of the deed, and consequently a simple contract. *Locke* v. *Homer*, 131 Mass. 93, 102; *Foster* v. *Atwater*, 42 Conn. 244; *Johnson* v. *Muzzy*, 45 Vt. 419; *Maule* v. *Weaver*, 7 Pa. 329; *Hocking County Trustees* v. *Spencer*, 7 Ohio (pt. 2) 149.

But we do not find it necessary to pass upon that question, since, by the law of the District of Columbia, whether the agreement of the grantee is or is not considered as under seal, it is an agreement made with the grantor only, and creates no direct obligation to the mortgagee, upon which the latter can sue at law.

If the agreement of the grantee is considered as under seal, by reason of the deed being sealed by the grantor, it falls within the settled rule of the common law, in force in the District of Columbia, that no one can maintain an action at law on a contract under seal to which he is not a party. *Hendrick* v. *Lindsay*, 93 U. S. 143, 149 [23: 855, 857]; *Southampton* v. *Brown*, 6 Barn. & C. 718; *Chesterfield & M. S. Colliery Co.* v. *Hawkins*, 3 Hurl. & C. 677; *Northampton* v. *Elwell*, 4 Gray, 81; *Crowell* v. *St. Barnabas Hospital*, 27 N. J. Eq. 650, 653.

If the agreement of the grantee is considered as in the nature of assumpsit, implied from his acceptance of the deed, still, being [314 made with the grantor only and for his benefit, upon a consideration moving from him alone, there being no privity of contract between the grantee and the mortgagee, and the latter not having known of or assented to the agreement at the time it was made, nor having since done or omitted any act on the faith of it, it follows that, by the law as declared by this court, and prevailing in the District of Columbia, the mortgagee cannot maintain an action at law against the grantee. *Keller* v. *Ashford*, 133 U. S. 610, 620–622 [33: 667, 672], and *Second Nat. Bank* v. *Grand Lodge*, 98 U. S. 123 [25: 75], there cited. The payments made by the grantee, and accepted by the mortgagee, on account of the mortgage debt, were made pursuant to the grantee's contract with the mortgagor, and did not create, or warrant to be inferred, a new contract between the grantee and the mortgagee. Morever, if the grantee's liability was in assumpsit only, it was, in any

view of the case, barred by the Statute of Limitations in three years.

In the District of Columbia, the only remedy of the mortgagee against the grantee was, as adjudged upon great consideration in *Keller* v. *Ashford*, above cited, by bill in equity, in which he might avail himself of the right of the mortgagor against his grantee, because in equity a creditor is entitled to avail himself of a security which his debtor holds from a third person for the payment of the debt.

In the Supreme Court of the District of Columbia, as in the circuit courts of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law. Rev. Stat. D. C. §§ 760, 800; *Fenn* v. *Holme*, 62 U. S. 21 How. 481 [16: 198].

A statement of facts agreed by the parties, or, technically speaking, a case stated, in an action at law, doubtless waives all questions of pleading, or of form of action, which might have been cured by amendment; but it cannot enable a court of law to assume the jurisdiction of a court of equity. *Scudder* v. *Worster*, 11 Cush. 573; *McRae* v. *Locke*, 114 Mass. 96; *West Roxbury* v. *Minot*, 114 Mass. 546.

For these reasons, this action cannot be maintained, and *the judgment for the defendant must be affirmed.*

---

[319] HERMAN ROYER, *Plff. in Err.*,
v.
THE SCHULTZ BELTING CO.

(See S. C. Reporter's ed. 319-325.)

Patent cases—questions for the jury—power of court.

1. The questions, whether a patented invention is one of a primary character, and whether the patent is a pioneer patent, and whether on a proper construction of the patent defendant's machine infringed it, are for the jury to determine on the evidence.

2. It is not a matter of mere judicial knowledge that the mechanical differences between the two machines are material, in view of the character of the patented invention and of the claims of the patent.

[No. 288.]

Argued Apr. 22, 23, 1890. Decided May 5, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review a judgment for the defendant in an action at law for the infringement of letters-patent. *Reversed.*

The facts are stated in the opinion.

Reported below, 28 Fed. Rep. 850, 29 Fed. Rep. 281.

Messrs. **M. A. Wheaton,** *Wm. M. Eccles* and *James O. Broadhead*, for plaintiff in error:

Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine.

Morley S. M. Co. v. *Lancaster*, 129 U. S. 263 (32: 715); *McCormick* v. *Talcott*, 61 U. S. 20 How. 402, 405 (15: 930, 931); *Chicago & N. W. R. Co.* v. *Sayles*, 97 U. S. 554, 556 (24: 1053, 1054); *Clough* v. *Barker*, 106 U. S. 166, 177 (27: 134, 138); *Duff* v. *Sterling Pump Co.* 107 U. S. 636, 639 (27: 517, 518); *Blake* v. *Robertson*, 94 U. S. 732, 733 (24: 246, 247).

The diversity or identity in principle of two mechanical instruments in suit at law must be submitted to the jury, if there is so much resemblance as raises the question at all.

Tucker v. *Spalding*, 80 U. S. 13 Wall. 453 (20: 515); *Bischoff* v. *Wethered*, 76 U. S. 9 Wall. 815 (19: 830).

Mr. **Chester H. Krum,** for defendant in error:

The patent sued upon is void. The device sought to be covered is not an invention within the meaning of the Patent Law.

Brown v. *Piper*, 91 U. S. 37 (23: 200); *Pickering* v. *McCullough*, 104 U. S. 318 (26: 751); *Stephenson* v. *Brooklyn C. T. R. Co.* 114 U. S. 149 (29: 58); *Reckendorfer* v. *Faber*, 92 U. S. 347 (23: 719); *Slawson* v. *Grand Street P. P. & F. R. Co.* 107 U. S. 649 (27: 576); *Phillips* v. *Detroit*, 111 U. S. 606 (28: 533); *Hailes* v. *Van Wormer*, 87 U. S. 20 Wall. 353 (22: 241); *Atlantic Works* v. *Brady*, 107 U. S. 192 (27: 438); *King* v. *Gallun*, 109 U. S. 99 (27: 870); *Gardner* v. *Herz*, 118 U. S. 180 (30: 158); *Preston* v. *Manard*, 116 U. S. 661 (29: 763); *Crescent Brewing Co.* v. *Gottfried*, 128 U. S. 158 (32: 390); *Pattes Plow Co.* v. *Kingman*, 129 U. S. 294 (32: 700); *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* 133 U. S. 161 (33: 295); *Aron* v. *Manhattan R. Co.* 133 U. S. 84 (33: 272); *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *Thompson* v. *Boisselier*, 114 U. S. 1 (29: 76).

Question upon, under general issue.

Dunbar v. *Myers*, 94 U. S. 197 (24: 33).

The machine or device used by the defendant in error is not an infringement upon either of the claims of the patent.

Courts will take judicial notice of faults of universal notoriety and common knowledge.

Brown v. *Piper*, 91 U. S. 37-42 (23: 200-202).

Rule invariable, that where combination is of old elements, to infringe, one must use all of the old elements thus combined.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 555 (20: 42); *Prouty* v. *Ruggles*, 41 U. S. 16 Pet. 341 (10: 987); *Eames* v. *Godfrey*, 68 U. S. 1 Wall. 78 (17: 547); *Case* v. *Brown*, 69 U. S. 2 Wall. 320 (17: 817); *Dunbar* v. *Myers*, 94 U. S. 187 (24: 34); *Fuller* v. *Yentzer*, 94 U. S. 297 (24: 106); *Vance* v. *Campbell*, 66 U. S. 1 Black, 430 (17: 172); *Union W. M. Co.* v. *Desper*, 101 U. S. 332 (25: 1024); *McMurray* v. *Mallory*, 111 U. S. 97 (28: 365); *Gage* v. *Herring*, 107 U. S. 640 (27: 601); *Voss* v. *Fisher*, 113 U. S. 213 (28: 975); *Werner* v. *King*, 96 U. S. 218 (24: 613); *Keystone Bridge Co.* v. *Phœnix Iron Co.* 95 U. S. 274 (24: 344); *Rowell* v. *Lindsay*, 113 U. S. 97 (28: 906); *Clark* v. *Beecher Mfg.*

Co. 115 U. S. 79 (29: 352); *Consolidated S. V. Co.* v. *Kunkle*, 119 U. S. 45 (30: 302); *Dryfoos* v. *Wiese*, 124 U. S. 32 (31: 362); *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 373 (29: 950); *Snow* v. *Lake Shore & M. S. R. Co.* 121 U. S. 617 (30: 1004); *Brown* v. *Davis*, 116 U. S. 237 (29: 659).

Device of defendant does not employ mechanical equivalent.

Burr v. *Duryea*, 68 U. S. 1 Wall. 573 (17: 658); *Werner* v. *King*, 96 U. S. 230 (24: 614); *Cochrane* v. *Deener*, 94 U. S. 789 (24: 142); *Cross* v. *Mackinnon*, 11 Fed. Rep. 601.

Mr. **Willmarth H. Thurston,** also for defendant in error:

When the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.

Randall v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003); *Schuylkill & D. I. & R. Co.* v. *Munson*, 81 U. S. 14 Wall. 442 (20: 867); *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 116 (22: 780); *Herbert* v. *Butler*, 97 U. S. 319 (24: 958); *Bowditch* v. *Boston*, 101 U. S. 16 (25: 980); *Griggs* v. *Houston*, 104 U. S. 553 (26: 840); *Anderson County* v. *Beal*, 113 U. S. 227 (28: 966); *Baylis* v. *Travelers Ins. Co.* 113 U. S. 316 (28: 989); *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 618 (29: 225); *Higgins* v. *McCrea*, 116 U. S. 683 (29: 768); *Marshall* v. *Hubbard*, 117 U. S. 415 (29: 919); *Goodlett* v. *Louisville & N. R. Co.* 122 U. S. 411 (30: 1234); *North Pennsylvania R. Co.* v. *Commercial Nat. Bank*, 123 U. S. 733 (31: 288); *Kane* v. *Northern C. R. Co.* 128 U. S. 94 (32: 341).

The court is authorized to direct a verdict if, after the evidence is in, it appears that the question upon which the case must turn is one of law.

Anderson County v. *Beal*, 113 U. S. 241 (28: 971); *Keyes* v. *Grant*, 118 U. S. 25 (30: 54).

In patent cases the construction of the patent in suit as a written instrument, and the extent and scope of its claim, is wholly a matter of law and entirely within the province of the court.

Curtis, Patents, § 452; *Davoll* v. *Brown*, 1 Woodb. & M. 53; *Washburn* v. *Gould*, 3 Story, 122; *Emerson* v. *Hogg*, 2 Blatchf. 1; *Bischoff* v. *Wethered*, 76 U. S. 9 Wall. 812 (19: 829).

Whether a re-issued patent and its original are for the same or different inventions is for the court as a matter of law.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Grant Powder Co.* v. *California Powder Works*, 98 U. S. 126 (25: 77); *Heald* v. *Rice*, 104 U. S. 737 (26: 910).

Where the terms of a claim are plain and explicit, the patentee is bound by it, whatever may have been his actual invention, or whatever claim he might have made had he seen fit.

Keystone Bridge Co. v. *Phœnix Iron Co.* 95 U. S. 274 (24: 344); *Burns* v. *Meyer*, 100 U. S. 671 (25: 738); *Union W. M. Co.* v. *Desper*, 101 U. S. 332 (25: 1024); *Wicke* v. *Ostrum*, 103 U. S. 461 (26: 409); *Lehigh Valley R. Co.* v. *Mellon*, 104 U. S. 112 (26: 639); *Gage* v. *Herring*, 107 U. S. 640 (27: 601); *Fay* v. *Cordesman*, 109 U. S. 408 (27: 979); *Yale Lock Mfg. Co.* v. *Greenleaf*, 117 U. S. 554 (29: 1052); *White* v. *Dunbar*, 119 U. S. 47 (30: 303); *Sargent* v. *Hall S. & L. Co.* 114 U. S. 85 (29: 75); *Electric R. S. Co.* v. *Hall R. S. Co.* 114 U. S. 87 (29: 96); *Brown* v. *Davis*, 116 U. S. 249 (29: 663); *Yale Lock Mfg. Co.* v. *Sargent*, 117 U. S. 373 (29: 950); *Snow* v. *Lake Shore & M. S. R. Co.* 121 U. S. 617 (30: 1004); *Joyce* v. *Chillicothe F. & M. W. Co.* 127 U. S. 557 (32: 171); *Hendy* v. *Golden State & M. I. Works*, 127 U. S. 375 (32: 209).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Eastern District of Missouri, by Herman Royer against The Schultz Belting Company, a Missouri corporation, for the infringement of letters-patent No. 77,920, granted May 12, 1868, to Herman Royer and Louis Royer, as inventors, for "an improved machine for treating raw hide." The patent expired on May 12, 1885, and this suit was brought on the 16th of November, 1885.

The specification, claims and drawings are as follows:

"The nature of our invention is to provide an improved machine for converting raw hides into leather, of that class which is used for belting, lacings and other purposes where it is necessary to preserve the native strength and toughness without destroying or impairing the natural fibres or grain of the leather. [3

"In order to accomplish our object, we employ a machine mounted on a suitable frame, having a vertical slotted shaft, to which is attached, at its base, a bevelled wheel between two bevelled pinions upon a horizontal shaft. Around the vertical shaft is placed a row of vertical pins or rollers, held in place by upper and lower rings, one of which is firmly bolted to the frame. An iron weight or press is employed for crowding the coil of hide down after it has received the forward and back action around the shaft.

"To more fully illustrate and describe our invention, reference is had to the accompanying drawings, of which figure 1 is a horizontal section through A B; figure 2, a side sectional elevation, showing central shaft; figure 3, a side sectional elevation; figure 4, a horizontal section, showing the hide around the shaft in the circle of pins.

"A represents the frame, of any suitable materials, up through which the vertical shaft B passes, having a slot, B′, through which the end of the hide is placed, where it is held in place by the set-screws *b b b b*. C C C are vertical pins or rollers set in the rings D and D′, the lower one, or D′, being firmly attached to the frame by bolts *c c*. A bevelled wheel, E, is attached to the vertical shaft B, which is actuated by the bevelled pinions F F placed on the horizontal driving-shaft G. This shaft has a pulley, H, for driving the machine. An iron weight, I, having an opening through its centre for the vertical shaft, and vertical grooves, *i i*, in it to prevent its turning, is placed upon the inside of the pins or rollers, and, by

pressing upon this weight, the hide is compressed edgewise, after the forward and backward stretching or pressing is performed lengthwise.

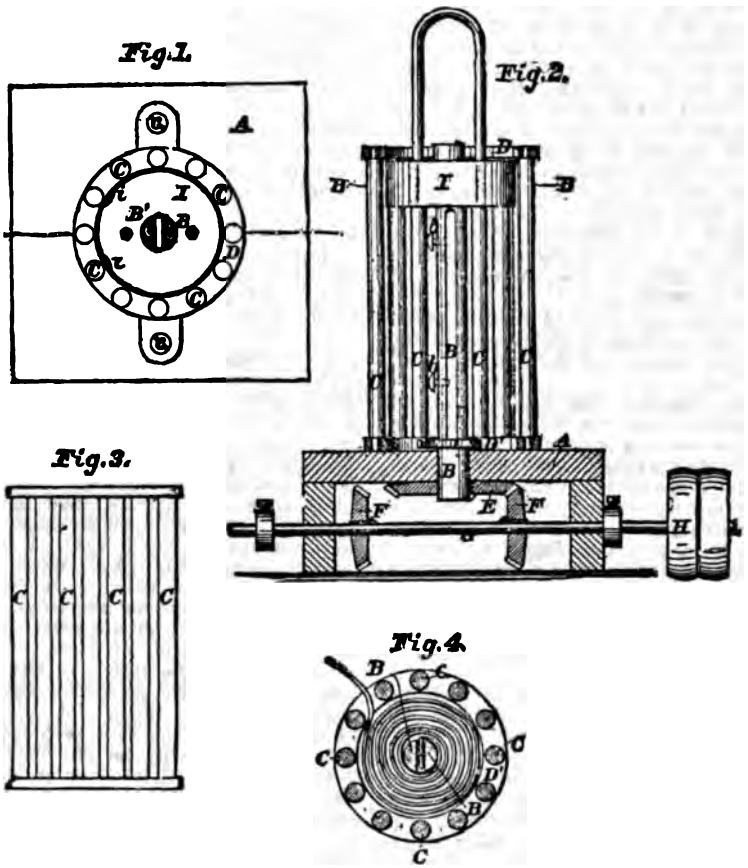
"The operation of our machine is as follows: The end of the raw hide, after it has
[1] been deprived of the hair, is introduced into the slot B′, and the set-screws *b b b* turned against it, when motion is imparted to the machine, and the hide is wound tightly around the vertical shaft. When this is accomplished, and sufficient time has elapsed, the shaft is slowly reversed by throwing the other pinion into gear, when the hide commences to uncoil, or doubling back from the shaft, which, with the folding back, and pressing against the pins or rollers, produces the desired result of stretching in one way, compressing, corrugating or roughing in the opposite direction, when the weight I
[2] is placed upon the top of the hide, and is pressed downward, which, in a measure, compensates for the stretching lengthwise. The hide so operated upon is then treated with oil and tallow in the usual way.

"By thus treating the hide in our machine, the leather is rendered very tough, and the fibres or grain are not injured, but it imparts to it a rough, corrugated and seamy appearance, making it more strong and lasting for the purpose designed than by any other machine or process.

"Having thus described our invention, what we claim and desire to secure by letters-patent is—

"1. The vertical shaft B with a slot B′, and set-screws *b b b*, said shaft having a forward and back motion, substantially as and for the purpose described.

"2. The pins or rollers C C C, set in the rings D and D′, together with the grooved weight I, substantially as and for the purposes described."



The defendant set up, in answer to the petition, that the machine was not the joint invention of the patentees; that it was in public use by one of the patentees for more than two years before the patent was applied for; and that it was not new, giving references on the question of novelty. The answer also denied every allegation in the petition. There was a reply, putting in issue the new matter in the answer. The case was tried by a jury.

The bill of exceptions shows that, after testimony had been put in by the plaintiff on the question of infringement, the defend-

ant demurred to the evidence introduced by the plaintiff on that question without itself putting in any evidence. The court sustained such demurrer and directed the jury to find for the defendant. The jury so found, and a verdict was rendered for it. The ruling of the court is reported in 28 Fed. Rep. 850. The plaintiff excepted to so much of such ruling as sustained the demurrer to the evidence, and to so much of the instruction of the court as directed the jury to find for the defendant. A motion for a new trial was made and overruled, the opinion thereon being in 29 Fed. Rep. 281. Judgment being rendered for the defendant, the plaintiff has brought a writ of error.

[23] The plaintiff's machine has a vertical crib of cylindrical bars standing in a circle around and concentric with a central shaft. The ends of these bars are fastened in appropriate discs or rings, and thus are held in proper position. The crib does not revolve, but the central shaft does. A vertical slot is made in the latter, in which one end of a hide is inserted and there held by set screws. Several hides can be treated in the machine at the same time. The ends of the hides being fastened, the central shaft is made to revolve, and in doing so it draws the hides into the crib through a space between two of the bars and winds them in a coil around the shaft. A sufficient number of hides is put into the machine at one time to fill entirely the diameter of the inside of the crib when they are compressed. When the hides are all drawn into the crib and the coil is compressed around the central shaft, filling the crib tightly, the motion of the central shaft is reversed, and the hides are unwound and wound up again around the shaft in the opposite direction, the hides being all the time under pressure. This operation of winding, unwinding and rewinding is continued, and the action on each hide is to bend every particle of it, whether thick or thin, alike and under the same degree of pressure. There is a weight on top of the coil of hides, so as to produce end pressure on them in the direction of the shaft, lengthwise of the crib.

The plaintiff contends that no other machine existed before, which wound hides in one direction and then rewound them in the other direction, while under pressure, and that this produced a new mode of operation in the treatment of hides, which was not the result of a mere improvement on the mechanism of any prior machine. He therefore urges that the case falls within the principle applied in *Morley S. M. Co.* v. *Lancaster*, 129 U. S. 263 [32: 715], that "where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up [24] the machine;" and that, the patentees having been the first persons to succeed in producing an automatic machine for treating raw hide in the manner in which their machine treats it, the claims of the patent must be construed liberally.

The plaintiff, who is one of the patentees, was examined as a witness on the trial, and fully explained the patented machine, its mode of operation and the improvement it effected in the conversion of raw hides into leather.

The defendant's machine has in it a cylinder which is arranged horizontally instead of perpendicularly, and corresponds to the cylindrical crib of the plaintiff's machine. The cylinder is constructed of two half-cylinders of iron, hinged together, inside of which are fixed semi-circular strips of wood, arranged lengthwise of the cylinder, so that the inside surface of the cylinder, when closed, is practically the same as the inside surface of the plaintiff's crib. The ends of the half-cylinders are secured in position rigidly. The general proportions of the two machines are in size about the same. The defendant's machine has a revolving central shaft, one half of the diameter of which is removable in that part of it to which the hides are fastened. This half is in sections, which are held to the other part of the shaft, when fastened to it, by screws. The edges of the hides are fastened to the shaft by unscrewing such sections and placing one edge of each hide upon the face of the solid half of the shaft. The sections are then screwed on over the edges of the hides, in which position they clamp the hides fast between the two halves of the shaft. There are grooves lengthwise along the face of the solid half of the shaft, and ribs along the faces of the removable sections, so that the edge of each hide which is fastened in the shaft is pressed down into the grooves, and is thus held more securely. There is a long opening in the side of the defendant's cylinder, through which the hides are drawn in by the revolution of the shaft, in like manner as they are drawn into the crib of the plaintiff's machine through one of the openings between the bars. As the defendant's machine is in a horizontal position, the end pressure on the coil of hides cannot be produced by a weight. Instead of that, it has two sliding discs, one at each end of the [3 horizontal coil of hides, which discs have a central hole in them for the central revolving shaft to pass through. There is an arrangement of screw-bolts, nuts and hand-wheels, so that the two discs may be drawn together to make end pressure upon the coil of hides, and retracted therefrom; and there are springs to make the pressure yielding.

The view taken by the circuit court was, in regard to claim 1, that the defendant's machine did not have the slot of that claim; and as to claim 2, that the defendant's machine could not be said to infringe it.

We think the circuit court erred in not submitting to the jury the question of infringement, under proper instructions. If the patented invention was, within the ruling in *Morley S. M. Co.* v. *Lancaster*, *supra*, "one of a primary character," and the patent was "a pioneer patent," which were questions of fact to be passed upon by the jury, then the question, on a proper construction

of the patent, whether the defendant's machine infringed its claims, was a question of fact for the jury to determine, on all the evidence which the case might present. *Tucker* v. *Spalding*, 80 U. S. 13 Wall. 453 [20: 515].

It was not a matter of mere judicial knowledge that the mechanical differences between the two machines were material, in view of the character of the patented invention and of the claims of the patent; and we are unable to concur with the view of the circuit court, in its opinion denying the motion for a new trial, that this is a case where, if the jury had found a verdict for the plaintiff, on the evidence put in by him on the question of infringement, all of which evidence the bill of exceptions states is set forth therein, it would have been proper for the court to set aside such verdict. *Keyes* v. *Grant*, 118 U. S. 25, 36, 37 [30: 54, 57, 58].

As there must be a new trial, we forbear remarking further on the questions involved.

The judgment of the Circuit Court is reversed and the case is remanded, with a direction to grant a new trial.

---

[315] THE NORTHERN PACIFIC RAILROAD COMPANY, *Plff. in Err.*,

v.

JACOB AUSTIN.

(See S. C. Reporter's ed. 315-318.)

Amendment—removal of cause—bad faith.

1. This court will not interfere with the action of the state court in allowing plaintiff to amend at the trial by increasing his claim for damages, although such increase would, if made before trial, have allowed defendant to remove the cause to the circuit court of the United States, where no application for such removal was made.
2. The only importance such amendment has, is in its bearing on the charge of bad faith in respect to the right of removal, and that question cannot arise in the absence of an application to remove.

[No. 289.]

Submitted Apr. 22, 1890. Decided May 5, 1890.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment of that court, affirming a judgment of the District Court of Otter Tail County, Minnesota, in favor of plaintiff, for damages for the burning of growing trees on his land, set on fire by an engine of the Northern Pacific Railroad Company. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller:**

Austin brought his action in the District Court of Otter Tail County, Minnesota, to recover damages for the burning of certain growing trees on his land by fire set by an engine of the Northern Pacific Railroad Company, his complaint alleging the trees to have been of the value of $475, and that he was damaged in that sum, and demanding judgment for that amount, with costs and disbursements. The defendant put in a general denial. The cause coming on for trial, the record states that "after the jury had been duly empaneled and sworn, and before the commencement of the trial, the plaintiff asked to amend his complaint by increasing the *ad damnum* clause therein from the sum of four hundred and seventy-five dollars, the amount originally stated and claimed in said complaint, to the sum of one thousand dollars. To this amendment the defendant objected upon the ground that to allow the same would be an abuse of discretion, and prevented defendant from securing the removal of said action from the above-named court to the circuit court of the United States, where it would be entitled to have the same tried had such amendment been moved for at the proper time and granted. The court took under consideration the matter of allowing said amendment." The trial was then proceeded with, and the evidence tended to show that the damages sustained were much greater than $500. Upon the conclusion of the plaintiff's case he renewed [316] his motion "to amend his complaint to make the same conform to the testimony. Whereupon the amendment was granted by the court allowing the plaintiff to claim damages in the sum of one thousand dollars, and to which amendment the defendant duly excepted. . . . Plaintiff also renewed his motion to amend the *ad damnum* clause of the complaint. The motion was granted, defendant excepting." The jury found a verdict for the plaintiff and assessed his damages at $750, and judgment was rendered accordingly. The defendant appealed to the Supreme Court of Minnesota, by which the judgment was affirmed, and thereupon a writ of error was sued out from this court.

Messrs. **James McNaught, W. P. Clough, A. H. Garland** and **H. J. May** for plaintiff in error.

Messrs. **M. D. Grover** and *J. W. Mason* for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The contention of plaintiff in error seems to be that the right to remove the suit into the Circuit Court of the United States for the District of Minnesota, under the Act of March 3, 1875, was specially set up or claimed by it; that the decision was against the right so set up or claimed; and that therefore this court has jurisdiction. But the difficulty with that view is, that when the amendment was permitted to be made, after the evidence had satisfied the trial court that its allowance was proper, the defendant filed no petition and made no application to remove the cause. It is true that, when the plaintiff first applied to amend, the defendant objected upon the ground that it would be an abuse of discretion, because the defendant would be obliged to submit to a trial when the amount actually involved would have entitled it to a removal, if that fact

NOTE.—*As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution, see notes to* Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

had appeared when the suit was commenced or if the amendment had been made at an earlier stage of the case. This was by way of argument, and upon the theory that the [317] plaintiff had purposely laid his damages in the first instance at a sum which did not permit a removal, and then sought to increase the *ad damnum* after the trial commenced and when it was assumed to be too late to remove.

The Supreme Court of Minnesota, in passing upon the action of the district court (*Austin* v. *Northern P. R. Co.* 34 Minn. 473), held that "in respect to the propriety of allowing amendments, the court can make no distinction between cases exclusively triable in the state court, and those claimed to be removable to the United States courts. If the case is one in which an amendment might properly be made in the former class of cases, then it may be made in the latter, because the action of the court is authorized by law, and, while a case remains in the state court and under its jurisdiction, no party can legally complain of proceedings which are in conformity with the laws of the State. There being no complaint that the case was not in itself a proper one for the exercise of the discretion of the court in the allowance of the amendment, under the practice in this State, we think the objection was properly overruled. . . . But there is nothing upon the record in this case to show the plaintiff's course was a device to prevent a removal. According to the practice as understood and actually prevailing in the United States courts of this circuit when this action was tried, the defendant would not have been entitled to a removal if the complaint had been amended before the case came to trial. *Myers* v. *Union P. R. Co.* 16 Fed. Rep. 292. But the Supreme Court of the United States subsequently held, by a divided court, that corporations, like the defendant, created and organized under the laws of the United States, were entitled to remove suits against them to the United States courts. *Pacific Railroad Removal Cases*, 115 U. S. 1 [29: 319]. Under the circumstances, therefore, we are not warranted in concluding that the allowance of the amendment was an abuse of discretion. If the facts were such as to warrant the inference that the plaintiff purposely brought the action for a smaller amount in order to prevent a removal, and afterwards secured the amendment, a different question would be presented."

[318] Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Spies* v. *Illinois*, 123 U. S. 131 [31: 80]; *Chappel* v. *Bradshaw*, 128 U. S. 132 [32: 369]. As the defendant did not apply for the removal of the cause, the right now claimed under the statute was not denied by the district court, nor by the supreme court in affirming the judgment. If the application had been made, the question would then have arisen whether it came too late under the circumstances. The defendant was not entitled to remove the suit as originally brought "before or at the term at which such cause could be first tried, and before the trial thereof." But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal (*Ayers* v. *Watson*, 113 U. S. 594, 598 [28: 1093, 1094]), it may, though obligatory to a certain extent, be waived. And as, where a removal is effected, the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him. If, on the other hand, the motives of the plaintiff could not be inquired into, or, if admitted, would not affect the result, as in most cases of remittitur (*Thompson* v. *Butler*, 95 U. S. 694 [24: 540]; *Pacific Postal Teleg. Co.* v. *O'Connor*, 128 U. S. 394 [32: 488]), the defendant would simply suffer for want of comprehensiveness in the Statute. The amendment here was held to have been properly allowed, and we have no power or disposition to interfere with the action of the court in regard to it. The only importance it has, is in its bearing upon the charge of bad faith in respect to the right of removal, and that question cannot properly arise in the absence of an application to remove.

The writ of error must be dismissed, and it is so ordered.

Ex parte:

In the Matter of CHARLES MASON LANE, Petitioner. [449

(See S. C. Reporter's ed. 443-449.)

Carnal knowledge of female under sixteen—Oklahoma not a Territory—jurisdiction of U. S. district court—indictment—second trial—error.

1. The words "except the Territories" in the Act of 1889 imposing punishment for carnally knowing a female under 16 years, have reference exclusively to Territories which have been erected into civil governments. Oklahoma is not of this class of Territories.
2. The District Court of the United States for the District of Kansas has jurisdiction to try and punish for the offense of carnal knowledge of a female under sixteen, committed in Oklahoma, a part of that district.
3. That the indictment contains the double charge of a rape at common law and of the statutory offense under the Act of 1889, was not an error which made the indictment fatally defective or which deprived the court of jurisdiction to try and sentence the prisoner on the latter charge.
4. A conviction under such indictment is a bar to a trial under a second indictment for the statutory offense.
5. That the indictment was not signed by the district attorney of the United States is not error which goes to the jurisdiction of the court.

[No. 12, Original.]

Argued April 15, 1890. Decided April 28, 1890.

PETITION for writ of habeas corpus, by Lane, held as prisoner in the Kansas penitentiary by virtue of a sentence of the District Court of the United States in and for the District of Kansas, upon conviction for the crime of carnal knowledge of a female under the age of sixteen years, committed in Oklahoma, a part of such district. *Denied.*

The facts are stated in the opinion.

Mr. Wm. M. Randolph, A. H. Garland and **H. J. May,** for petitioner:

Where Congress has denounced an offense by its common-law name, as rape, in section 5345 of the Revised Statutes, the common law must be resorted to for a definition of the crime.

United States v. *Coppersmith*, 4 Fed. Rep. 198; *United States* v. *Outerbridge*, 5 Sawy. C.C. 620; Whart. Cr. L. (8th ed.) 253; *Rice* v. *Minnesota & N. W. R. Co.* 66 U. S. 1 Black, 358 (17:147); *McCool* v. *Smith*, 66 U. S. 1 Black, 459 (17:218); 1 Russ. Cr. 675.

The charge that the female upon whom the offense was perpetrated was under sixteen years of age was not necessarily a part of the indictment, but was mere surplusage.

2 Russ. Cr. 786; Whart. Cr. Pl. and Pr. (8th ed.) §§ 90, 91, and *notes.*

No man shall be twice placed in jeopardy of life or limb for the same crime.

Ex parte Lange, 85 U. S. 18 Wall. 163 (21: 872).

In the United States courts there is no such thing as a common-law crime.

United States v. *Hudson*, 11 U. S. 7 Cranch, 32 (3:259); *United States* v. *Coolidge*, 14 U. S. 1 Wheat. 415 (4:124); *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 561 (8:1055); *Pennsylvania* v. *Wheeling & B. B. Co.* 54 U. S. 13 How. 518 (14:249); *United States* v. *Worrall*, 2 U. S. 2 Dall. 384 (1:426); *Ex parte Bollman*, 8 U. S. 4 Cranch, 75 (2:554); *United States* v. *Bevans*, 16 U. S. 3 Wheat. 336 (4:404); Spear, Fed. Jud. 223, 667 *et seq.*; *United States* v. *Barney*, 5 Blatchf. 294; *United States* v. *Wilson*, 3 Blatchf. 435; Whart. Com. Am. Law, 524; Whart. Cr. Law (8th ed.) 254; Cooley, Const. Lim. 19, 20; *United States* v. *Reese*, 92 U. S. 216 (24:563); *United States* v. *Hall*, 98 U. S. 345 (25: 180); *United States* v. *Terrel*, Hemp. C. C. 411, 422.

The district attorney must institute and prosecute all suits.

United States v. *Stone*, 8 Fed. Rep. 261; *Ex parte Bain*, 121 U. S. 1 (30:849).

Oklahoma is in effect a Territory of the United States within the meaning of the term "Territories," as contained in the Act.

Ex parte Morgan, 20 Fed. Rep. 304-307; *Ex parte Crow Dog*, 109 U. S. 556 (27:1030); *United States* v. *Le Bris*, 121 U. S. 278 (30: 946); Whart. Com. Am. Law, 645, and *note 1*; *United States* v. *Gratiot*, 39 U. S. 14 Pet. 537 (10:578); *Clinton* v. *Englebrecht*, 80 U. S 13 Wall. 434 (20:659); *American Ins. Co.* v. *356 Bales of Cotton*, 26 U. S. 1 Pet. 511 (7:242).

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, for respondent.

[444] *Mr. Justice* **Miller** delivered the opinion of the court:

This is a petition by Charles Mason Lane, addressed to the original jurisdiction of this court, for a writ of habeas corpus. Upon the filing of the petition a rule was issued upon Charles H. Case, warden of the penitentiary of the State of Kansas, who, it was alleged, held the petitioner in unlawful imprisonment. Case made a return to this rule, in which he said that the prisoner was held under a *mittimus* issued from the office of the clerk of the District Court of the United States in and for the District of Kansas, and accompanying the return was a certified copy of the proceedings in that court under which Lane was held. From this it appears that the following indictment was found in that court at its September Term, 1889:

"The United States of America, } *ss:*
"District of Kansas.

"In the District Court of the said United States in and for the said District, September Term, 1889.

"The United States of America
v.
"Charles Lane, whose more full Christian name is unknown. } Indictment for rape.

"At the term of the District Court of the United States of America in and for the said District of Kansas, begun and held at Wichita, in said district, on the 2d day of September, in the year of our Lord one thousand eight hundred and eighty-nine, the grand jurors of the United States of America duly empaneled and sworn and charged to inquire of offenses committed within that part of the said district lying north of the Canadian River and east of Texas and the one hundredth meridian, not set apart and occupied by the Cherokee, Creek and Seminole Indian tribes, upon their oaths do find and present that Charles Lane, whose more full Christian name is to the grand jurors aforesaid unknown, late of that part of the public domain acquired by the United States of America by the Act of Congress approved March 2, 1889, commonly known as Oklahoma and being a part of the District of Kansas aforesaid, on or about the 4th day of July, in the year of our Lord one thousand eight hundred and eighty-nine, at that part of the District of Kansas aforesaid, the same being a place and district of country under the exclusive jurisdiction of the United States and within the exclusive jurisdiction of this court, with force of arms in and upon one Frances M. Skeed, a female under the age of sixteen years, then and there being, violently and feloniously did make an assault, and her, the said Frances M. Skeed, then and there, forcibly and against her will, feloniously did ravish and carnally know, against the peace and dignity of the United States of America, and contrary to the form of the statute in such cases made and provided. [445]

"E. Hagan, Ass't U. S. Att'y.

"[Indorsed]: No.—; The United States *v.* Charles Lane; rape, sec. 5345; J. Hoopes, foreman; a true bill, J. Hoopes, foreman; witnesses, Wm. H. Skeed (Oklahoma City, I. T.), Frances M. Skeed, Dr. I. W. Benipe, N. T. Ross, Rosa Skeed, Dr. H. C. Hunter (Dodd City, Texas); filed September 6, 1889; J. C. Wilson, clerk."

Under the plea of not guilty, a trial was had

on this indictment, in which the jury rendered the following verdict: "We, the jury in the above-entitled cause duly impanceled [446] and sworn, upon our oaths find the defendant guilty of carnal and unlawful knowledge of Frances M. Skeed, a female under the age of sixteen years, as charged in the indictment." A motion for a new trial and in arrest of judgment was made, heard and overruled, and the following sentence pronounced by the court: "Thereupon it is now by the court here considered, ordered and adjudged that said defendant be imprisoned in the Kansas penitentiary for the period of five years. It is further ordered that the marshal deliver, or cause to be delivered, the body of said Charles Lane to the warden of said penitentiary within ten days from this date."

Some kind of certificate appears to have been made after this to transfer the case to the circuit court of the United States, where it came before Brewer, *Circuit Judge*, who delivered an opinion in it concurring informally with the judgment of the district court, which is found as an appendix to the brief of the counsel for the government.

The counsel for petitioner has argued the case before us as if every error that may possibly be found in the ruling of the district court in the progress of the case was a sufficient ground to release the prisoner on this writ of habeas corpus. It has been often reiterated in this court that the writ of habeas corpus cannot be converted into a writ of error, and that this court, when asked to issue a writ of habeas corpus as of its original jurisdiction, can do so only when the inferior court has acted without jurisdiction, or has exceeded its powers to the prejudice of the party seeking relief.

There is really but one question out of the several grounds of relief sought in this case that is a proper subject for this court. By the Act of Congress approved February 9, 1889, chap. 120 (25 Stat. 658), under which defendant is indicted and convicted, it is provided: "That every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact, in the District of Columbia or other place, *except the Territories*, over which the United States has exclusive jurisdiction, or on any vessel within the admiralty or maritime jurisdiction of the [447] United States, and out of the jurisdiction of any State or Territory, shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years, and for each subsequent offense not more than thirty years."

The offense with which the petitioner is here charged is alleged in the indictment to have been committed within that part of the Indian Territory commonly known as Oklahoma, and it is alleged in the indictment that this is a district of country under the exclusive jurisdiction of the United States and within the jurisdiction of the District Court of Kansas. The counsel for prisoner contend that this is a Territory within the exception of the Act of Congress of 1889; that therefore this Act does not apply to the case; and that, there being no other Act of Congress punishing a party for carnal and unlawful knowledge of a female under the age of sixteen years, the court was without jurisdiction to try or to sentence the prisoner. But we think the words "except the Territories" have reference exclusively to that system of organized government long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by Act of Congress, and their legislative Acts are subject to the disapproval of the Congress of the United States. They are not in any sense independent governments; they have no senators in Congress and no representatives in the Lower House of that body, except what are called delegates, with limited functions. Yet they exercise nearly all the powers of government, under what are generally called Organic Acts, passed by Congress, conferring such powers on them. It is this class of governments, long known by the name of Territories, that the Act of Congress excepts from the operation of this Statute, while it extends it to all other places over which the United States have exclusive jurisdiction.

Oklahoma was not of this class of Territories. It had no legislative body. It had no government. It had no established or [4 organized system of government for the control of the people within its limits, as the Territories in the United States have and have always had. We are therefore of opinion that the objection taken on this point by the counsel for prisoner is unsound.

It is next objected that the indictment is bad, inasmuch as it contains the double charge of a rape at common law and of the statutory offense under the Act of February 9, 1889; and it is quite obvious that both these offenses can be made out from the language of the indictment, which is in a single count. The allegation that the offense was by violence and against the will of the woman, with the other allegations in the indictment, describe the offense of rape. The allegation that the defendant had carnal knowledge of a female under sixteen years of age makes out the offense under the Statute of 1889. But the view of the court was, that the allegation that the carnal knowledge was against the will of the woman may be rejected as surplusage, and the rest of the indictment be good under the Statute referred to. And, as the court instructed the jury in accordance with that view of the subject, and as the jury found the prisoner guilty not of the crime of rape but of the smaller crime of carnal knowledge of a female under sixteen years of age, the action of the court on that subject was probably correct. At all events, the court had jurisdiction of the prisoner, and it had jurisdiction both of the offense of rape and of carnal knowledge of a female under sixteen years of age. It was its duty to de-

cide whether there was a sufficient indictment to subject the party to trial for either or for both of these offenses. As no motion was made to compel the prosecuting attorney to elect on which of the charges he would try the prisoner, we think that there was no error in its rulings on this subject. If there were, it was not an error which went to the jurisdiction of the court to try and sentence the prisoner.

It is urged that there is an indictment now pending against the prisoner for the same offense, charged only as carnal knowledge of a female under sixteen years of age, and that the present indictment is so ambiguous that
449] the trial and conviction under it would be no bar to the proceeding under the second indictment. We do not think the proposition is a sound one, as the prisoner was clearly convicted of the same offense which is charged in the second indictment.

An objection is made to the indictment that it was not signed by the district attorney of the United States; but, as the indictment was found by the grand jury, and indorsed as a true bill by the foreman, and filed in open court according to law, we do not see that there is any error on that subject, certainly none which goes to the jurisdiction of the court. See *Commonwealth* v. *Stone*, 105 Mass. 469.

It is said that the indictment was fatally defective because it did not sufficiently apprise the prisoner of the nature of the offense for which he was to be tried. But he was tried and convicted for carnally and unlawfully knowing a female under the age of sixteen years. This was succinctly and clearly set out in the indictment as the charge, or one of the charges, against him, which he must have known he was to meet, and we do not think the objection has any merit.

There may be other objections made by counsel to the proceedings under which the prisoner was convicted, but none of them rise to the dignity of questioning the jurisdiction of the court. *The rule upon the warden of the penitentiary is therefore discharged and a writ of habeas corpus denied.*

03] *In re:*

In the Matter of JACOB BAIZ, Petitioner.

(See S. C. Reporter's ed. 403-433.)

Privileges of foreign minister—suit against consul-general representing foreign minister in his absence—jurisdiction of district court—evidence of diplomatic character.

1. A citizen of the United States, a resident of New York, who is consul-general of a foreign government at New York, and is also authorized to communicate to the Secretary of State any matter in relation to that government, in the absence of its minister, is not its diplomatic representative or minister, during such absence, nor entitled to the diplomatic privileges of a foreign minister.

NOTE.—*Foreign ministers, or their attachés, not liable to answer civilly or criminally to tribunals of this country; not to arrests; assaults or outrages* [illegible] *to U. S. v. Ortega*, 6: 521.

2. The district court of the United States has jurisdiction of a suit against such consul-general for libel.

3. The certificate of the Secretary of State is evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States.

[No. 11, Original.]

Argued March 31, April 1, 1890. Decided May 5, 1890.

ON PETITION for a writ of prohibition or mandamus prohibiting the district court of the United States from proceeding further in a suit for libel against Jacob Baiz, who claims to be acting minister of the Republic of Guatemala in the United States. *Denied.*

Statement by *Mr. Chief Justice* **Fuller:** [404

On the 29th day of June, 1889, an action was commenced by one John Henry Hollander in the District Court of the United States for the Southern District of New York against Jacob Baiz, to recover damages for the publication of an alleged libel upon the plaintiff, and a summons was served upon him on the 2d day of July of that year. The defendant entered a general appearance in the action, which was filed July 17, 1889. On the 25th day of September, 1889, the defendant verified his answer, which contained a plea to the jurisdiction of the district court in the following language:

"The defendant alleges that he is now, and ever since the month of July, 1887, has been, the consul-general of the Republic of Guate- [40
mala at the City of New York, and that in or about the month of May, 1889, he received from the Republic of Guatemala a duly-authenticated copy of a decree in the English language, dated at the National Palace in Guatemala, May 14, 1889, with instructions in writing from said government to publish the same in the newspapers of the United States, and which said decree had previously been published in the official *Gazette*, or newspaper, published in said Republic, and that pursuant to such instructions, which were sent to him both by letter and by cable, and not otherwise, he did, on or about the 9th day of June, 1889, send to the managers of the Associated Press, in the City of New York, said authenticated copy of said decree, stating that it was possible that said managers would find it of sufficient interest to publish. That prior to the 10th day of January, 1889, one Señor Don Francisco Lainfiesta was envoy extraordinary and minister plenipotentiary of the Republic of Guatemala in the United States, and on or about that day he departed from the United States upon a temporary leave of absence, duly granted to him, and that from on or about that day, down to on or about the 10th day of July, 1889, this defendant became and was the acting minister and sole representative of the said Republic of Guatemala in the place, and during the absence, of the said envoy extraordinary and minister plenipotentiary, and was exclusively in charge of the diplomatic affairs of the said Republic in the United States.

"And by reason of the facts herein alleged

this defendant claims that this court has no jurisdiction of this action, and that if any jurisdiction for said act in fact exists in any court, it is vested solely in the Supreme Court of the United States, pursuant to the provisions of the Constitution and the statutes of the United States in such case made and provided."

In January, 1890, a motion was made "for an order setting aside the service of the summons and all subsequent proceedings in the action, and that the court dismiss the same, on the ground that it has no jurisdiction of this action, and had no jurisdiction over the defendant at the time of the commencement thereof." This motion was based on the defendant's affidavit and upon proofs consisting of original written communications from the State Department to Baiz, and on duly-certified copies of papers on file in said Department; and was resisted by the plaintiff on certain affidavits, and an original letter from the Department. On the 17th day of February the motion was denied, and an application was then made to this court for a rule to show cause why a writ of prohibition should not issue to the judge of the district court, prohibiting him from proceeding further in said action; or if a writ of prohibition could not issue, then for a rule to show cause why a writ of mandamus should not issue, commanding the judge to enter an order dismissing the cause, for the reason that the jurisdiction of said action existed solely in the supreme court under the Constitution and laws of the United States; or for such other and further relief as might be proper in the premises. The application was made upon the petition of the defendant in the action in the district court, and annexed to the petition and forming a part of it was a certified copy of the entire record in the district court, including every paper used upon the motion, and the opinion of the court. A rule having been issued, the judge of the district court returned thereto that the motion was denied upon the facts and considerations appearing in the record and opinion, copies of which were attached to the petition, and to the order to show cause, and submitted to this court whether the district court should take further cognizance of the said cause or should dismiss the same.

It appeared before the district judge, as it does here, that Mr. Baiz was and is a citizen of the United States and a resident of the City of New York, and that he has been since 1887 consul-general of Guatemala; that Señor Lainfiesta was, on the 16th day of January, 1889, the minister of Guatemala, of Salvador and of Honduras, in the United States, and that on that day Señor Lainfiesta addressed a note to the Secretary of State, advising him that he was compelled to go to Guatemala for a short time, and saying: "Meanwhile, I beg your excellency to please allow that the consul-general of Guatemala and Honduras in New York, Mr. Jacob Baiz, should communicate to the office of the Secretary of State any matter whatever relating to the peace of Central America, that should without delay be presented to the knowledge of your excellency."

The Secretary of State accordingly, on the 24th day of January, informed Señor Baiz, "consul-general of Guatemala and Honduras," that the note of Minister Lainfiesta had been received and that he would "have pleasure in receiving any communication, in relation to Central America, of which you may be made the channel, as intimated by Señor Lainfiesta." On the 6th of March, 1889, Mr. Blaine having been appointed Secretary of State, information of that fact was communicated by him to "Señor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador and Honduras," the receipt of which was acknowledged by the latter under date of March 7, the note of reply being signed, "Jacob Baiz, Consul-General." April 1, the Secretary of State addressed a communication to Señor Don Jacob Baiz, in charge of the business of the legations of Guatemala, Salvador and Honduras," informing him of the appointment of Mr. Mizner as envoy extraordinary and minister plenipotentiary of the United States to the Republics of Guatemala, Salvador and Honduras, and asking him to "kindly apprise the governments of Guatemala, Salvador and Honduras" of the appointment.

In the official circular issued by the Department of State, "corrected to June 13, 1889," concerning the "foreign legations in the United States," under the heads of Guatemala, Salvador and Honduras, mention is made of the absence of Mr. Lainfiesta, and a foot note is referred to which reads "Jacob Baiz, consul-general, in charge of business of legation, New York City." That circular shows that Russia, Austria and Corea were represented by ministers who were absent, and had *chargés d'affaires ad interim*, whose names are severally given, described as such, and the dates of their presentation. Brazil and Venezuela had no ministers, but were represented by a *chargé d'affaires* or a *chargé d'affaires ad interim*, the name of the incumbent and the date of his presentation being given in each of these instances. Portugal had no minister, and the name appears of "Baron d'Almeirim, consul, and acting consul-general, in charge of business of legation," and the fact and date of his presentation. Consul-General Baiz is alone referred to in a foot note, and is not shown to have been presented.

Señor Lainfiesta did not return as minister, and on or about the 10th day of July, 1889, Dr. Fernando Cruz arrived in this country and was presented by the Secretary of State to the President as the envoy extraordinary and minister plenipotentiary of the Republic of Guatemala to the United States.

Mr. Baiz answered in the action brought by Hollander September 25, 1889.

On the 3d of October, 1889, counsel for the plaintiff addressed to the State Department a letter, in which he inquired who was the minister of the State of Guatemala from January to August, 1889; and received an answer under date of October 4, 1889, signed by the second assistant secretary of state, as follows:

"I have to acknowledge the receipt of your letter of the 8d inst., and to say in reply that Señor Fernando Cruz presented his credentials as the envoy extraordinary and minister plenipotentiary of Guatemala here, July 11, 1889.

"Prior to that Señor Lainfiesta was the accredited and recognized minister, but had been for some time absent from the United States. During his absence the business of the legation was conducted by Consul-General Baiz, but without diplomatic character."

On the 11th of January, 1890, Señor Cruz sent the following communication to the State Department:

"Mr. Michael H. Cardozo, counsel for Don Jacobo Baiz, in the suit which has been brought against the latter by Mr. J. H. Hollander in New York, presented to your excellency a brief of the facts in the case and made application to you to be pleased to order that he be furnished with a certain certificate in regard to the character of Mr. Baiz during the absence of Don Francisco Lainfiesta, and until I arrived to take his place.

"It being urgent to possess this document, [409] since the day approaches to make use thereof, and the government of Guatemala having instructed Mr. Baiz to make the publication upon which the suit is brought under the belief that he was its representative in this country from the day of Señor Lainfiesta's departure, I take the liberty of begging your excellency to be pleased to order that the certificate applied for by Mr. Cardozo be issued as soon as possible and sent to me in order that I may forward it without loss of time."

The acting Secretary of State replied January 21, 1890, acknowledging the receipt of Señor Cruz's note of the 11th, and continuing thus:

"The facts are that on January 16, 1889, Mr. Lainfiesta informed the Department of his proposed departure from the United States for Guatemala on a leave of absence. In conveying this information to the Secretary of State, Mr. Lainfiesta said: 'In the meantime I beg your excellency to permit Mr. Jacob Baiz, consul-general of Guatemala and Honduras at New York, to communicate to the Department of State any information connected with the peace of Central America that may be of sufficient importance to be brought without delay to your excellency's notice.' Referring to this note the Department, on January 24, 1889, wrote to Mr. Baiz, saying: 'The Secretary of State will have pleasure in receiving any communication in relation to Central America, of which you may be made the channel, as intimated by Señor Lainfiesta.' The next communication of the Department to Mr. Baiz bears date March 6, 1889, in which he was informed of the accession to office of the present Secretary of State, which Mr. Baiz acknowledged on the following day.

"On April 1st, 1889, the Department addressed a communication to Mr. Baiz, 'in charge of the business of the legations of Guatemala, Salvador and Honduras,' in which he was informed of the recall of Mr. Henry C. Hall, as envoy extraordinary and minister plenipotentiary of the United States to the Republics of Guatemala, Salvador and Honduras, and of the appointment by the President, by and with the advice and consent of the Senate, of Mr. Lansing B. Mizner to that post. Mr. Baiz was requested to apprise the respective governments of this [410] appointment. This communication Mr. Baiz acknowledged on April 2d, 1889. On May 17th, 1889, Mr. Baiz announced to the Department your appointment by the government of Guatemala as its minister plenipotentiary at this Capital in place of Mr. Lainfiesta, which was duly acknowledged by the Department on the 20th of the same month. Subsequently correspondence took place between the Department and Mr. Baiz in relation to your entrance into the United States and to your reception as minister. On June 14, 1889, Mr. Baiz inclosed to the Department an autograph letter from the President of Guatemala dated May 20, 1889, to the President of the United States, relative to the recall of Mr. Hall as United States minister to the States of Central America. Of this communication the Department acknowledged the receipt, on June 25, 1889. This, it is believed, is a correct résumé of the facts in regard to Mr. Baiz' action as the representative of Guatemala in the absence of her duly accredited minister from the United States."

After the return to the rule, counsel appearing in opposition to granting the writ, moved for an order that the petitioner show cause why certain papers presented by him should not be submitted for the consideration of the court in the determination of the matter; and the petitioner, after objecting to the granting of the order and protesting against the receipt of the papers, submitted certain papers on his part. These papers taken in chronological order are as follows: a letter dated February 2, 1886, from the Minister of Foreign Affairs of the Republic of Honduras to Mr. Baiz, transmitting an appointment as *chargé d'affaires* of the Republic of Honduras to the government of the United States, and hoping that he will accept said appointment, "filling it to the best interests of the country, endeavoring principally to prevent filibustering expeditions," etc., etc. Accompanying it was a communication addressed to the State Department under date of February 1, 1886, and conveying information of the fact of the appointment. This was presented to Mr. Bayard, then Secretary of State, who replied on the 22d of March, 1886, as follows:

"Agreeably to the promise made to you in [411] person recently by Assistant-Secretary Porter, I have considered the questions involved in your nomination as *chargé d'affaires* of Honduras in the United States.

"A difficulty arises in the fact stated by you to Mr. Porter, that you are a citizen of the United States. It has long been the almost uniform practice of this government to

decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position. The very few past exceptions to this rule have served to show its propriety, especially when, as in your case, it has been sought to supplement the consular functions (which an American citizen may, if otherwise acceptable, hold with perfect propriety) by an added diplomatic rank and function.

"Were it merely a question of conducting public business with you as the *de facto chargé d'affaires ad interim* during the absence of a regularly accredited envoy of Honduras, there would be little difficulty. In fact, you now stand on that footing for all practical purposes, since the Department of State corresponds with you as consul-general, upon whatever diplomatic business may arise; but it is to be borne in mind that this is done because the office of the envoy is for the time being unfilled. Your substitutionary agency is cheerfully admitted, but this is different from recognizing you as invested with the diplomatic character as the incumbent of the mission.

"While this motive would alone constrain me, although with regret, from acceding to the expressed desire of the government of Honduras and receiving you as its diplomatic representative, I find another consideration in the phraseology of your official letter of credence."

The Secretary then considers the objection arising out of the fact that that instrument "announces that the office of *chargé d'affaires* is conferred upon you for the express purpose of negotiating with this government to prevent the organization in the United States of hostile expeditions against Honduras and causing certain persons named therein to be put under bonds, 'not to contrive in any way against the peace of Honduras.'"

The letter of credence and also the letter of the Honduranean Minister of Foreign Relations were returned.

On the 24th day of March, 1886, Consul-General Baiz acknowledged the receipt of the dispatch of the 22d, and said:

"I will lose no time to inform the government of Honduras of our correspondence, and that your excellency has kindly consented to admit my substitutionary agency in the absence of a minister by virtue of my being the consul-general.

"I thank you for this recognition, the extent of which I appreciate, but in order to fully satisfy the government of Honduras, which has conferred this honor on me, I take the liberty to ask whether, in the absence of a minister, the State Department will consider the consul-general *chargé d'affaires ad hoc*, or as diplomatic agent of Honduras, for all practical as well as official purposes, without relieving me of duties and responsibilities incumbent on a citizen of the United States.

"The declination of the State Department of my credentials on the ground that they express a purpose of a negotiation not admissible under the laws of the United States will, no doubt, be satisfactory to the government of Honduras."

On the 3d day of April, 1886, the Secretary of State answered the inquiry of Mr. Baiz in these words:

"I have received your letter of the 24th ultimo, in which, after referring to the willingness expressed in my letter to you of the 22d March to admit, in the absence of a minister of Honduras, your substitutionary agency in virtue of your office as consul-general, you inquire 'whether, in the absence of a minister, the State Department will consider the consul-general *chargé d'affaires ad hoc* or as a diplomatic agent of Honduras for all practical as well as official purposes, without relieving' you 'of duties and responsibilities incumbent on a citizen of the United States?'

"In reply, I have to inform you that it is [41
not the purpose of the Department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever. Your agency is admitted to be such only as is compatible with the continued existence of a vacancy in the diplomatic representation of Honduras in the United States. To recognize you as *chargé d'affaires ad hoc* would be to announce that the vacancy no longer existed, and that diplomatic representation was renewed in your person.

"It is a common thing to resort to a temporary agency, such as yours, in the conduct of the business of a mission. A foreign minister, on quitting the country, often leaves the affairs of his office in the friendly charge of the minister of another country, but the latter does not thereby become the diplomatic agent of the government in whose behalf he exerts his good offices. The relation established is merely one of courtesy and comity. The same thing occurs when the temporary good offices of a consul are resorted to. In neither case is a formal credence, *ad hoc* or *ad interim*, necessary."

Messrs. **Joseph H. Choate** and *Michael H. Cardozo*, for petitioner:

The judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls.

7 Ops. Atty-Gen. 186.

This court has power to issue a writ of prohibition in the case now before it.

Re Phenix Ins. Co. 118 U. S. 610, 625 (30: 274, 280); *Smith* v. *Whitney*, 116 U. S. 167, 173 (29: 601, 602).

This court may issue a writ of mandamus under section 688, Rev. Stat.

Virginia v. *Rives*, 100 U. S. 313, 323, 329 (25: 667, 671, 673); *Re Parker*, 131 U. S. 221 (33: 123); *Re Chateaugay O. & I. Co.* 128 U. S. 544 (32: 508); *Re Parker*, 120 U. S. 737 (30: 818); *Ex parte Morgan*, 114 U. S. 174 (29: 135); *Ex parte Burtis*, 103 U. S. 238 (26: 392); Ex parte

Denver & R. G. R. Co. 101 U. S. 711 (25: 872); *Ex parte Flippin*, 94 U. S. 350 (24: 195).

A foreign minister, temporarily leaving this country, may designate some one to act as *chargé d'affaires* for the government he represents during his absence, and he may be a citizen of the United States.

Mr. Evarts, Secretary of State, letter to Mr. Camacho, April 20, 1880, MSS. *notes*, Venezuela; 1 Whart. Inter. Law Dig. 628, § 1882.

Where the facts are not as strong as here, the courts of the United States have recognized that persons were acting in a diplomatic character.

United States v. *Ortega*, 4 Wash. C. C. 531; *United States* v. *Liddle*, 2 Wash. C. C. 205; *United States* v. *Benner*, Bald. C. C. 234.

The position which the petitioner occupied was one clothed with diplomatic functions.

Woolsey, Int. Law (4th ed.) 164; Wheaton, Int. Law (8th ed.) § 215; Kent, Com. on Int. Law, 123; Hall, Int. Law (2d ed.) 292, § 105; Davis, Int. Law, 144; Twiss, Law of Nations (new ed.) 350, § 209; Levi, Int. Law, 118; Pomeroy, Int. Law, § 331, p. 410; 2 Phillimore, Int. Law (2d ed.) § 220; 1 Halleck, Int. Law (new ed.) 274; Bouv. Law Dict. tit. *Chargé d'Affaires;* Heffter, Droit Int. Pub. de l'Europe, 283; Martens, Guide Diplomatique (5th ed.) § 16, p. 61; Kluber, Droit des Gens. Mod. § 182; 3 Pradier-Fodere, Traité de Droit Int. Public, 113, § 1284; Ferd De Cussy, Dictionnaire de Diplomat et du Consul, 129; 1 De Clercq et De Vallat, Guide Pratique des Consulats (4th ed.) 93; 3 Pasquale Fiore, Nouveau Droit Int. Public, traduit de l'Italien par Antoine, p. 49, § 1106; Das Europaische Volkerrecht der Gegenwart auf den bisherigen Grundlagen, von Dr. August Wilhelm Heffter (6th ed.) 395.

The documentary correspondence conclusively demonstrates that the petitioner was *chargé d'affaires ad interim.*

Mr. Clay, Secretary of State, report on the position of *chargés d'affaires*, House Doc. No. 452, 19th Cong. 2d sess.; 1 Wheaton, Int. Law Dig. § 88; Mr. Webster, letter to Mr. Hulsemann, June 8, 1852; Wheaton, Elements of Int. Law (8th Am. ed.) part III., § 214, *note* 122; Encyclop. Brit. (Last ed.) tit. *Ambassador.*

The question as to the jurisdiction of the district court was properly raised by motion.

Chapman v. *Barney*, 129 U. S. 677 (32: 800); *Börs* v. *Preston*, 111 U. S. 252 (28: 419); *Grace* v. *American C. Ins. Co.* 109 U. S. 278 (27: 932); *Robertson* v. *Cease*, 97 U. S. 646 (24:1057); *Ex parte McCardle*, 74 U. S. 7 Wall. 506, 515 (19: 264, 265).

The want of jurisdiction in the district court was properly pleaded in the answer.

N. Y. Code Civ. Proc. § 498; *Davis* v. *Packard*, 32 U. S. 7 Pet. 276 (8: 684); *Holbrook* v. *Henderson*, 4 Sandf. 619; *Magdalena Steam Nav. Co.* v. *Martin*, 28 L. J. N. S. Q. B. 310, 2 El. & El. 94.

Mr. **Robert D. Benedict,** for respondent:

This court is not authorized to issue a writ of prohibition to the district court except in the cases expressly provided for by the 13th section of the Judiciary Act of 1789 (now § 688, Rev. Stat.).

Ex parte Christy, 49 U. S. 8 How. 292 (11: 608); *Ex parte Gordon*, 66 U. S. 1 Black, 503 (17: 134); *Ex parte Graham*, 77 U. S. 10 Wall. 541 (19: 981); *Ex parte Easton*, 95 U. S. 71, 72 (24: 374).

The present case is not one in which a writ of mandamus is warranted by law.

Ex parte Crane, 30 U. S. 5 Pet. 190 (8: 92); *Ex parte Bradley*, 74 U. S. 7 Wall. 376 (19: 218); *Ex parte Secombe*, 60 U. S. 19 How. 9-15 (15: 565, 566); *Ex parte Morgan*, 114 U. S. 174 (29: 135); *Ex parte Flippin*, 94 U. S. 350 (24: 195); *Ex parte Loring*, 94 U. S. 418 (24: 165); *Ex parte Denver & R. G. R. Co.* 101 U. S. 720 (25: 875); *Ex parte Burtis*, 103 U. S. 238 (26: 392).

The general appearance of the defendant cured all defects and waived exemption.

Atkins v. *Fibre Disintegrating Co.* 85 U. S. 18 Wall. 298 (21: 843); *Taylor* v. *Best*, 14 C. B. 487, 494, 523; *Re Ulrich*, 3 Ben. 355; *Winans* v. *McKean R. & N. Co.* 6 Blatchf. 219; *Flanders* v. *Ætna Ins. Co.* 3 Mason, 158; *Taylor* v. *Longworth*, 39 U. S. 14 Pet. 172 (10: 405); *Irvine* v. *Lowry*, 39 U. S. 14 Pet. 293 (10: 462).

The Act of April 30, 1790, was brought to the consideration of the courts in three cases:

United States v. *Liddle*, 2 Wash. C. C. 205; *United States* v. *Ortega*, 4 Wash. C. C. 531; *United States* v. *Benner*, Baldw. C. C. 234.

The exemption claimed is one which the courts cannot look on with favor.

Mr. Fish, Secretary of State, to Mr. Jay, Nov. 29, 1874, MSS. Inst. Austria; Whart. Int. Law Dig. § 92, pp. 642, 643.

Mr. Chief Justice **Fuller** delivered the [417
opinion of the court:

The judicial power of the United States extends to "all cases affecting ambassadors, other public ministers and consuls." Const. art. III., sec. 2.

By section 687 of the Revised Statutes, it is provided that the supreme court "shall have exclusively all such jurisdiction of suits or proceedings against embassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the Law of Nations; and original, but not exclusive, jurisdiction [41
of all suits brought by embassadors, or other public ministers, or in which a consul or a vice-consul is a party." By section 563, it is provided that "the district courts shall have jurisdiction as follows: . . . Seventeenth. Of all suits against consuls or vice-consuls," except for certain offenses. The petitioner has been, since July, 1887, the consul-general of the Republic of Guatemala, and therefore the district court had jurisdiction of the action in question, unless he belonged to the class of official personages subject to suits or proceedings only in this court. This he insists was the fact, and avers in his petition, as he did in his plea in the district court, that at the time of the commencement of the action and until and including the 10th day of July, 1889, which was the eighth day after service of process upon him, he was "the acting minister and sole representative of said Republic (of Guatemala) in the United States," and for that reason came within the words of section 687, "other public ministers."

The exemption asserted ceased on the 10th of July, 1889, and on the 17th of July the petitioner gave a general notice of appearance

in the action, but did not set up the want of jurisdiction until the 25th of the following September. Suit could have been brought in that court against him on the 11th day of July, but as in his view this could not have been done on the 29th of June or the 2d of July, he contends that the district court should be ordered to dismiss the suit, though it could at once be recommenced therein. But it is said that the appearance did not waive the right to be sued in this court rather than in the district court, because that was the privilege of the country or government which he represented. Without pausing to inquire how far this is a correct application of the international privilege of not being sued at all, its assertion, even in this restricted form, serves to emphasize petitioner's contention that he was at that time the minister or diplomatic agent of the Republics of Guatemala, Salvador and Honduras in the United States, intrusted by virtue of his office with authority to represent those Republics in their negotiations and to vindicate their prerogatives.

419] Under section 2, art. II., of the Constitution, the President is vested with power to "appoint ambassadors, other public ministers and consuls," and by section 3 it is provided that "he shall receive ambassadors and other public ministers."

These words are descriptive of a class existing by the Law of Nations, and apply to diplomatic agents, whether accredited by the United States to a foreign power or by a foreign power to the United States, and the words are so used in section 2 of art. III. These agents may be called ambassadors, envoys, ministers, commissioners, *chargés d'affaires*, agents or otherwise, but they possess in substance the same functions, rights and privileges as agents of their respective governments for the transaction of its diplomatic business abroad. Their designations are chiefly significant in the relation of rank, precedence or dignity. (Atty-Gen. Cushing, 7 Ops. Atty-Gen. 186.)

Hence, when in subdivision fifth of section 1674 of the Revised Statutes we find "diplomatic officer" defined as including "ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, *chargés d'affaires*, agents and secretaries of legation, and none others," we understand that to express the view of Congress as to what are included within the term "public ministers," although the section relates to diplomatic officers of the United States.

But the scope of the words "public ministers" is defined in the legislation embodied in title XLVII., *Foreign Relations* (Rev. Stat. p. 783, 2d ed.). Section 4062 provides that "every person who violates any safe conduct or passport duly obtained and issued under authority of the United States; or who assaults, strikes, wounds, imprisons or in any other manner offers violence to the person of a public minister, in violation of the Law of Nations, shall be imprisoned for not more than three years, and fined, at the discretion of the court." Section 4063 enacts that whenever any writ or process is sued out or prosecuted by any person in any court of the United States, or of a State, or by any judge or justice, whereby the person of any public minister of any foreign prince or state, authorized and received as such by the President, or any domestic or domestic servant of any such minister, is arrested or imprisoned, or his goods or chattels are distrained, seized or attached, such writ or process shall be deemed void. Section 4064 imposes penalties for suing out any writ or process in violation of the preceding section; and section 4065 says that the two preceding sections shall not apply to any case where the person against whom the process is issued is a citizen or inhabitant of the United States "in the service of a public minister," and the process is founded upon a debt contracted before he entered upon such service; nor shall the preceding section apply to any case where the person against whom the process is issued is a "domestic servant of a public minister," unless the name of the servant has been registered and posted as therein prescribed.

Section 4130, which is the last section of the title, is as follows: "The word 'minister,' when used in this title, shall be understood to mean the person invested with, and exercising, the principal diplomatic functions. The word 'consul' shall be understood to mean any person invested by the United States with, and exercising, the functions of consul-general, vice-consul-general, consul or vice-consul."

Section 4062, 4063, 4064 and 4065 were originally sections 25, 26, 27 and 28 of the Crimes Act of April 30, 1790 (1 Stat. 118), and these were drawn from the Statute 7 Anne, chap. 12, which was declaratory simply of the Law of Nations, which *Lord* Mansfield observed, in *Heathfield* v. *Chilton*, 4 Burr. 2016, the Act did not intend to alter and could not alter.

In that case, involving the discharge of the defendant from custody, as a domestic servant to the minister of the Prince Bishop of Liege, *Lord* Mansfield said: "I should desire to know in what manner this minister was accredited—certainly, he is not an ambassador, which is the first rank—envoy, indeed, is a second class; but he is not shown to be even an envoy. He is called 'minister' 'tis true; but minister (alone) is an equivocal term." The Statute of Anne was passed in consequence of the arrest of an ambassador of Peter the Great for debt, and the demand by the Czar that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death (1 Bl. Com. 254); and it was in reference to this that *Lord* Ellenborough, in *Viveash* v. *Becker*, 3 Maule & S. 284, where it was held that a resident merchant of London, who is appointed and acts as consul to a foreign prince, is not exempt from arrest on mesne process, remarked: "I cannot help thinking that the Act of Parliament, which mentions only 'embassadors and public ministers,' and which was passed at a time when it was an object studiously to comprehend all kinds of public ministers entitled to these privileges, must be considered as declaratory, not only of what the Law of Nations is, but of the extent to which that law is to be carried."

Three cases are cited by counsel for petitioner arising under or involving the Act of 1790. In *United States* v. *Liddle*, 2 Wash. C. C. 205, in the case of an indictment for an assault and battery on a member of a foreign legation, it was held that the certificate of the Secretary of State, dated subsequently to the assault and battery, is the best evidence to prove the diplomatic character of a person accredited as a minister by the government of the United States. The certificate from the Secretary of State, Mr. Madison, stated that "when Mr. Feronda produced to the President his credentials as *chargé des affaires* of Spain, he also introduced De Lima, as a gentleman attached to the legation and performing the duties of secretary of legation, and the certificate was held to be the best evidence to prove that Feronda was received and accredited, and that at the same time De Lima was presented and received as secretary attached to the legation. In *United States* v. *Ortega*, 4 Wash. C. C. 531, there was produced in court an official letter from the Spanish minister to the Secretary of State, informing him that he had appointed Mr. Salmon *chargé d'affaires*; a letter from the minister to Mr. Salmon; a letter from the Secretary of State addressed to the Spanish minister, recognizing the character of Mr. Salmon; two letters from the Secretary of State addressed to Mr. Salmon as *chargé d'affaires*; and the deposition of the chief clerk of the State Department that Mr. Salmon was recognized by the President as *chargé d'affaires*, and was accredited by the Secretary of State. In *United States* v. *Benner*, Bald. C. C. 234, the court was furnished with a certificate from the Secretary of State
[422] that the Danish minister had by letter informed the Department that Mr. Brandis had arrived in this country in the character of attaché to the legation, and that said Brandis had accordingly, since that date, been recognized by the Department as attached to the legation in that character.

These cases clearly indicate the nature of the evidence proper to establish whether a person is a public minister within the meaning of the Constitution and the laws, and that the inquiry before us may be answered by such evidence, if adduced.

Was Consul-General Baiz a person "invested with and exercising the principal diplomatic functions," within section 4130, or a "diplomatic officer," within section 1674? His counsel claim in their motion that he was "the acting minister or *chargé d'affaires* of the Republics of Guatemala, Salvador and Honduras in the United States," and so recognized by the State Department, and that he exercised diplomatic functions as such and therefore was a public minister, within the Statute.

By the Congresses of Vienna and Aix-la-Chapelle four distinct kinds of representation were recognized, of which the fourth comprised *chargés d'affaires*, who are appointed by the minister of foreign affairs, and not as the others, nominally or actually by the sovereign. Under the regulations of this government the representatives of the United States have heretofore been ranked in three grades, the third being *chargés d'affaires*. Secretaries of legation act *ex officio* as *chargés d'affaires a l'interim*, and in the absence of the secretary of legation the Secretary of State may designate any competent person to act *ad interim*, in which case he is specifically accredited by letter to the minister for foreign affairs.

Wheaton says: "*Chargés d'affaires*, accredited to the ministers of foreign affairs of the court at which they reside, are either *charges d'affaires ad hoc*, who are originally sent and accredited by their governments, or *charges d'affaires per interim*, substituted in the place of the minister of their respective nations during his absence." Elements Int. Law (8th ed.) § 215.

Ch. de Martens explains that "*chargés* [423
d'affaires ad hoc on permanent mission are accredited by letters transmitted to the minister of foreign affairs. *Chargés d'affaires ad interim* are presented as such by the minister of the first or second class when he is about to leave his position temporarily or permanently." Guide Diplomatique, vol. 1, p. 61, § 16.

"They," observes Twiss in his Law of Nations, § 192, "are orally invested with the charge of the embassy or legation by the ambassador or minister himself, to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the minister of foreign affairs of the court to which he is accredited."

Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs (Calvo, Droit Int. 586); and among the numerous authorities on international law, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

"There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of a diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country." Guide Pratique des Consulats, vol. 1, p. 93.

That it may sometimes happen that consuls [42
are so charged is recognized by section 1788 of the Revised Statutes, which provides:

"No consular officer shall exercise diplomatic functions, or hold any diplomatic correspondence or relation on the part of the United States, in, with or to the government or country to which he is appointed, or any other country or government, when there is in such country any officer of the United States authorized to perform diplomatic functions therein; nor in any case, unless

expressly authorized by the President so to do."

But in such case their consular character is necessarily subordinated to their superior diplomatic character. "A consul," observed *Mr. Justice* Story, in *The Anne*, 16 U. S. 3 Wheat. 435, 445 [4: 428, 430], "though a public agent, is supposed to be clothed with authority only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives. There is no doubt that his sovereign may specially intrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it."

When a consul is appointed *chargé d'affaires*, he has a double political capacity; but though invested with full diplomatic privileges, he becomes so invested as *chargé d'affaires* and not as consul, and though authorized as consul to communicate directly with the government in which he resides, he does not thereby obtain the diplomatic privileges of a minister. Atty-Gen. Cushing, 7 Ops. Atty-Gen. 342, 345.

425] This is illustrated by the ruling of Mr. Secretary Blaine, April 12, 1881, that the consul-general of a foreign government was not to be regarded as entitled to the immunities accompanying the possession of diplomatic character, because he was also accredited as the "political agent" so-called of that government, since he was not recognized as performing any acts as such, which he was not equally competent to perform as consul-general.

1 Whart. Dig. Int. Law (2d ed.) § 88, p. 624.

We are of opinion that Mr. Baiz was not, at the time of the commencement of the suit in question, *chargé d'affaires ad interim* of Guatemala, or invested with and exercising the principal diplomatic functions, or in any view a "diplomatic officer." He was not a public minister within the intent and meaning of § 687, and the district court had jurisdiction.

The letter of Señor Lainfiesta of January 16, 1889, was neither an appointment of Mr. Baiz as *chargé d'affaires ad interim*, nor equivalent to such an appointment. It was a request in terms that the Secretary of State would "please allow that the consul-general of Guatemala and Honduras, in New York, Mr. Jacob Baiz," should communicate to the office of the Secretary of State any matters relating to the peace of Central America of which that Department ought to be informed without delay. This is not the language of designation to a representative position, and is the language designating a mere medium of communication; and the reply of Mr. Secretary Bayard so treats it, in declaring that the Department would be pleased to receive any communciation in relation to Central America of which Consul-General Baiz might be made the channel. This reply is addressed to Mr. Baiz as "Consul-General of Guatemala and Honduras," and not as *chargé d'affaires ad interim*. The mere fact that the usual note conveying the information to the legations of Mr. Secretary Blaine's accession chanced to be addressed to "Señor Don Jacob Baiz, in charge of the legations of Guatemala, Salvador and Honduras," was not a recognition that he was *chargé d' affaires ad interim* or exercising diplomatic functions; and Mr. Baiz in acknowledging the receipt of that announcement properly signs his letter "Consul-General." [4 It may be that such announcements are not sent to any but those exercising diplomatic functions; but this courtesy could not operate as in itself a deliberate recognition of the right to exercise such functions, nor that the person to whom the communication was addressed was in such exercise as a matter of fact. It was entirely proper, since Consul-General Baiz was the channel of communication between Guatemala, Honduras and Salvador and the State Department, that the notification should be sent to him, and even if that course had not been usual, the courtesy could not be availed of to impart a character which the recipient did not otherwise possess.

The proofs show that of ten letters from the State Department to Mr. Baiz, between January 16 and July 10, 1889, two were addressed to him as in charge of the legations, or the business of the legations, of Guatemala, Salvador and Honduras; two were addressed to him as consul of Honduras; and six as consul-general of Guatemala, or Guatemala and Honduras. Of seven letters from Mr. Baiz to the Department, one was signed Jacob Baiz and six, Jacob Baiz, Consul-General. The acknowledgment of notice of the accession of the Secretary of State, and of the appointment of Mr. Minzer, and the transmission of a letter from the President of Guatemala, and the announcement of the appointment of Minister Cruz, by the consul-general, can hardly be regarded as the performance of diplomatic functions as such.

The official circular issued by the Department of State, corrected to June 13, 1889, gives the names and description of the *chargés d'affaires ad interim*, in the case of countries represented by ministers who were absent and of countries having no minister, and the date of their presentation. In the instance of Portugal, the name is given of "consul and acting consul-general, in charge of business of legation," and the fact of the presentation with the date appears in the list; while in the instance of Guatemala, Salvador and Honduras, the name of Mr. Baiz is referred to in a foot note, with the title of consul-general only; nor does it appear, nor is it claimed to be the fact, that he was ever presented. As stated by counsel, Mr. Webster took the [4 ground, in the case of M. Hulsemann, that as *chargé d' affaires* he was not, as matter of strict right, entitled to be presented to the President; and this is in accordance with the regulations of the State Department (Reg. p. 13). But such presentation is undeniably

evidence of the possession of diplomatic character, and so would be the formal reception of a *chargé d'affaires ad interim* by the Secretary of State. The inference is obvious, that if the Department of State had regarded Mr. Baiz as *chargé d'affaires ad interim* or as "invested with and exercising the principal diplomatic functions," his name would have been placed in the list, with some indication of the fact, as the title of *chargé*, or, if he had been presented, the date of his presentation. Nor can a reason be suggested why the petitioner has not produced in this case a certificate from the Secretary of State that he had been recognized by the Department of State as *chargé d'affaires ad interim* of Guatemala, or as intrusted with diplomatic functions, if there had been such recognition. A certificate of his status was requested by the Guatemalan minister, and if the State Department had understood that Mr. Baiz was in any sense or in any way a "diplomatic representative," no reason is perceived why the Department would not have furnished a certificate to that effect; but instead of that, it contented itself with a courteous reply, giving what was in its judgment a sufficient résumé of the facts, the letter being in effect a polite declination to give the particular certificate desired, because that could not properly be done.

Mr. Baiz was a citizen of the United States and a resident of the City of New York. In many countries it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such and his obligations as a subject or citizen, is considered reason enough in itself. Wheaton (8th ed.) § 210; 2 Twiss, Law of Nations, 276, § 186; 2 Phill. Int. Law, 171. Even an appointment as consul of a native of the place where con-
[428] sular service is required, is, according to Phillimore, "perhaps, rightfully pronounced, by a considerable authority, to be objectionable in principle." Vol. II., p. 291, citing De Martens and De Cussey, Rec. de Trait. Index Explicatif, p. XXX., tit. *Consuls*.

"Other powers," says Calvo, vol. 1, p. 559 (2d ed.), "admit without difficulty their own citizens as representatives of foreign states, but imposing on them the obligation of amenability to the local laws as to their persons and property. These conditions, which, nevertheless, ought never to go so far as to modify or alter the representative character, ought always to be defined before or at the time of receiving the agent; for otherwise, the latter might find it impossible to claim the honors, rights and prerogatives attached to his employment." See also Heffter (8d Fr. ed.) 387.

In the United States, the rule is expressed by Mr. Secretary Evarts, under date of September 19, 1879, thus: "This government objects to receiving a citizen of the United States as a diplomatic representative of a foreign power. Such citizens, however, are frequently recognized as consular officers of other nations, and this policy is not known to have hitherto occasioned any inconvenience." And again, April 20, 1880, while waiving the obstacle in the particular instance, he says: "The usage of diplomatic intercourse between nations is averse to the acceptance, in the representative capacity, of a person who, while native born in the country which sends him, has yet acquired lawful status as a citizen by naturalization of the country to which he is sent." 1 Wharton, Dig. Int. Law (2d ed.) § 88a, p. 628. Of course the objection would not exist [42
to the same extent in the case of designation for special purposes or temporarily, but it is one purely for the receiving government to insist upon or waive at its pleasure. The presumption, therefore, would ordinarily be against Mr. Baiz's contention, and, as a matter of fact, we find that when in 1886 he was appointed *chargé d'affaires* of the Republic of Honduras to the Government of the United States, Mr. Secretary Bayard declined receiving him as the diplomatic representative of the government of that country because of his being a citizen of the United States, and advised him that, "It has long been the almost uniform practice of this government to decline to recognize American citizens as the accredited diplomatic representatives of foreign powers. The statutory and jurisdictional immunities and the customary privileges of right attaching to the office of a foreign minister make it not only inconsistent, but at times even inconvenient, that a citizen of this country should enjoy so anomalous a position." And in a subsequent communication rendered necessary by a direct question of Mr. Baiz, the Secretary informs him that "it is not the purpose of the Department to regard the substitutionary agency, which it cheerfully admits in your case, as conferring upon you personally any diplomatic status whatever." This correspondence disposes of the question before us. The objection which existed in 1886 to the reception of Mr. Baiz as *chargé d'affaires ad hoc* or *ad interim*, or according to him any diplomatic status whatever, whether temporary or otherwise, existed in 1889; and it is out of the question to assume that the State Department intended to concede the diplomatic status between January 16 and July 10, 1889, upon the request of Señor Lainfiesta that Consul-General Baiz might be allowed to be a medium of communication during his absence, which it had refused to accord to the Republic of Honduras itself. It is evident that the statement of the assistant secretary, October 4, 1889, was quite correct, that "the business of the legation (of Guatemala) was conducted by Consul-General Baiz, but without diplomatic character."

It is objected that we ought not to have allowed these official papers to come before [43
us, but should have prohibited the district court from exercising jurisdiction, because the evidence that established it had not all been before that court when the question was raised; but the rule governing this class of cases involves no such consequences. The district judge was of opinion that inasmuch as there were two kinds of direct evidence which would show that the defendant was a

"public minister," to wit: (1) a certificate of the Secretary of State that he was such, was received as such and was exercising such functions; or (2) proof of the exercise by the defendant of "the principal diplomatic functions," under some one of the titles of diplomatic office, as recognized by our statutes and the Law of Nations; and as such direct evidence had not been furnished, and the defendant was not required to produce his counter evidence on a motion like that under consideration instead of at the trial, he was justified in retaining jurisdiction until the issue raised by the pleadings was regularly determined. But to this latter suggestion, counsel for petitioner answered in argument: "At any rate, in this court, exercising its appropriate jurisdiction to entertain an application for a writ of prohibition or mandamus, the respondent here is called upon to produce any evidence that exists to countervail the petitioner's proof of his privilege." This is undoubtedly the correct view. The question here is whether the district court had jurisdiction, and not whether its order refusing to set aside the service of summons and the subsequent proceedings in the action, and dismissing the same, should be reversed.

The practice in prohibition was formerly to file a suggestion, an affidavit in support of which was required where the prohibition was moved for upon anything not appearing upon the face of the proceedings. Upon a rule to show cause, if it appeared to the court, on cause shown, that the surmise was not true, or not clearly sufficient to ground the prohibition upon, it would be denied, otherwise the rule would be made absolute; or, if the matter were doubtful, the party was ordered to declare, and issue joined on such declaration was regularly tried, being in the nature of an issue to inform the con-
[31] science of the court. 2 Sellon's Practice, 313, 321, 325. And in mandamus, if the case were not governed by the return to the alternative writ, but a traverse of the return was allowed, issues were made up and a trial had. If the matter can be disposed of upon the rule to show cause, that course may be pursued, but the applicable principles are the same. The alleged want of jurisdiction depends upon questions of fact. It was purely discretionary whether this evidence should be admitted at the time it was presented; and in a proceeding involving the inquiry under consideration, it was plainly our duty to permit it to come in, the petitioner being afforded, as he was, the opportunity for explanation and the introduction of such other evidence as he chose to produce.

In *Ex parte Hitz*, 111 U. S. 766 [28: 592], which was an application for a writ of certiorari, commanding the Supreme Court of the District of Columbia to certify to this court an indictment and the proceedings thereunder, on the ground that, when the indictment was filed and when the offenses therein charged were committed, he was the diplomatic representative of the Swiss Confederation, the court directed a preliminary inquiry, and, in doing so, *Mr. Chief Justice* Waite said: "As it is conceded that the petitioner is not now in the diplomatic service of Switzerland, and was not when all the proceedings in the Supreme Court of the District of Columbia subsequent to the indictment were had, counsel are directed to request the Secretary of State to certify whether John Hitz was at any time accredited to and recognized by the government of the United States as public or political agent or *chargé d'affaires* of the Republic of Switzerland, and if so, for what period of time and up to and including what date." The counsel having complied with that request, the court, upon receiving the information as to what the records of the Department showed, dismissed the petition.

Regarding the matter in hand as, in its general nature, one of delicacy and importance, we have not thought it desirable to discuss the suggestions of counsel in relation to the remedy, but have preferred to examine into and pass upon the merits.

We ought to add that while we have not [4
cared to dispose of this case upon the mere absence of technical evidence, we do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.

Our conclusion is, as already stated, that the district court had jurisdiction, and *we accordingly discharge the rule and deny the writs.*

THE NEW YORK ELEVATED RAIL- [43
ROAD COMPANY, *Plff. in Err.*,
v.
THE FIFTH NATIONAL BANK OF THE CITY OF NEW YORK.

(See S. C. Reporter's ed. 432-443.)

Acquiescence in rulings of court—damages to building from elevated railroad—time of trial.

1. A party who procures or acquiesces in the rulings under which a trial is conducted, thereby waives the right to object to them.
2. Where the court rules that damages to a building from the construction of an elevated railroad may be recovered to the time of trial, and neither party excepts to the ruling, both parties must be presumed to have assented to it.
3. Where defendant, by his objection sustained by the court, prevented plaintiff from introducing evidence of permanent injury to the building, and permitted the trial to proceed in accordance with the ruling of the court admitting evidence of injury to the time of the trial, without excepting either to that ruling or to the evidence admitted in accordance with it, he cannot afterward insist either that the damages must be assessed for the permanent injury, or that the damages must be limited to the time of the commencement of the action.

[No. 106.]

Argued Nov. 13, 1889. Decided May 5, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New

York to review a judgment for plaintiff in an action for damages for the construction of defendant's elevated railroad track and station house in front of plaintiff's banking house in a street in the City of New York. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

[433] This was an action brought March 5, 1880, by a National Bank against an Elevated Railroad Company to recover damages for the construction of the defendant's track and station house in front of the plaintiff's banking house at the southwesterly corner of Third Avenue and Twenty-third Street in the City of New York.

The complaint claimed damages for the interference with the use, enjoyment and value of the plaintiff's building, and the obstruction of light and air, by the construction of the defendant's track and station; and for the interference with the use, comfort and enjoyment of the building by the plaintiff, its officers, servants and tenants, caused by the noise, steam, smoke and noxious smells attending the running of the trains, and for the consequent lessening of the rents and profits of the building; and also for the permanent injury to the use of the building and to its market and rental value, by the construction of the track and station, and by the jarring and concussion attending the running of the trains.

The answer denied that the plaintiff had any interest in Third Avenue and Twenty-third Street, except as shared with the public at large; denied the other allegations of the complaint, except that it admitted the erection of the elevated railway and station; and alleged that these structures were authorized by and in conformity with the Statutes of New York of 1850, chap. 140; 1866, chap. 697; 1867, chap. 489; 1868, chap. 855; 1875, chaps. 595, 606.

A verdict recovered by the plaintiff at a trial in February, 1885, was set aside and a new trial ordered. 24 Fed. Rep. 114.

At the second trial, in June, 1886, it appeared that Third Avenue and Twenty-third Street were laid out many years ago under the Statute of New York of 1813, chap. 86, § 178, by which the city acquired the title [434] in fee of public streets, avenues, places and squares, "in trust, nevertheless, that the same be appropriated and kept open for and as part of a public street, avenue, square or place forever, in like manner as the other public streets, avenues, squares and places in the said city are, and of right ought to be;" that the plaintiff bought its land and erected its building in 1874; that the building was four stories high, with business offices in the basement, the plaintiff's banking house in the first story and apartments let to tenants in the stories above; and that the defendant, under and in conformity with the authority conferred upon it by the statutes of New York, constructed in 1878, and had since maintained, a railway track over and along Third Avenue, fifteen feet above the surface of the street, and fifteen feet wide, supported by iron columns, and the west side of the track being about thirty-five feet from the west side of Third Avenue; and also a station house, with stairs leading to and from it, at the intersection of Third Avenue and Twenty-third Street; and that locomotive engines and trains constantly passed over the track in front of the plaintiff's building.

The plaintiff's cashier, called as a witness in its behalf, testified, without objection by the defendant, that the track and station obstructed the access of light to and the circulation of air in the Bank on the first story and the apartments on the second story, and compelled the plaintiff to use gas by day in the Bank; and that this effect continued to the time of the trial.

He also testified, without objection, that "the structure, as it existed there, the elevated railway station and the platform and the bed of the road," reduced the rents of the building. He was then asked: "How much a year?" The defendant's counsel interposed, and asked for "an election on the part of the counsel for the plaintiff as to whether in this action they are claiming for loss of rents, or for injury in consequence of the erection of the road." The court declined to require the plaintiff's counsel to make an election, but directed them to confine themselves to proving in any proper way that the structure as a permanent thing, without regard to the running of trains upon it, injured the plaintiff's building. The cashier thereupon testi- [4
fied, without objection by the defendant, that there had been a loss in rents of $1,000 a year since the structure had been there, and down to the time of trial.

The plaintiff offered to prove the value of the building before and after the defendant's elevated railroad was built. This evidence was objected to by the defendant, and excluded by the court. Thereupon the following colloquy took place:

Defendant's counsel: "You only come down to the commencement of this action, I suppose? I will ask counsel to make a determination of what he is going for. I suppose I have a right to ask for an election at this point."

The Court: "For what length of time do you claim to recover?"

Plaintiff's counsel: "We claim for permanent injury."

The Court: "If you are entitled to recover, you claim damages should be assessed by the jury until now?"

Plaintiff's counsel: "No, sir; but until as long as grass grows and water runs."

The Court: "May be they will take it down; if they should, then you would not want to pay back anything. But you claim the right to recover prospectively. Counsel is entitled to know what you claim. I think the common law is, as I stated it, that where there is a consequential injury resulting from damages the damages may be recovered up to the time of the trial, and if they continue the right of recovery continues also. I think I will go by the common law, unless I see to the contrary before the trial closes."

Other witnesses were afterwards called and examined by both parties, without objection, as to the diminution of the light, air and rental of the building, from the time of the erection of the defendant's structures to the

time of the trial; and as to the causes of such diminution.

Evidence that the value of the plaintiff's property had increased since the erection of this railroad structure was offered by the defendant, and objected to by the plaintiff. The court sustained the objection, and excluded the evidence, and the defendant excepted. At the close of the evidence, the
5] court denied successive motions of the defendant to direct a verdict for the defendant because no facts had been shown sufficient to constitute a cause of action, and to direct the jury to render a verdict for the plaintiff for nominal damages only; and the defendant excepted to the denial of each of these motions.

The court instructed the jury that the plaintiff, having erected its building after Third Avenue and Twenty-third Street had been laid out as public streets, had the right to have those streets remain forever as open streets; and that if the structure erected by the defendant was such a permanent thing in the way of either street as an open street, as to make it cease to be an open street, or cease in a measure to be an open street, and so to subvert it from an open street into something else at that place, the plaintiff was entitled to recover "such damages as it has sustained by reason of the erection of this structure, which has subverted the street, from the time it was put up until now," taking into consideration the injury to the part of the building occupied as a bank, by hindering access to and egress from it, and by obstructing the admission of light and the circulation of air; and including not only an allowance for the expense caused by being compelled to use gas, but a fair compensation for other discomforts and inconveniences in its occupation in consequence of the defendant's structure; and also any diminution of the rents of the rest of the building, by reason of the defendant's permanent structure standing there in the two streets; but that no damages were "to be given on account of any inconvenience occasioned by the noise of the running of trains, or smoke, or cinders, or steam, or gas, or any of those things connected with the running of the trains."

The defendant excepted to the instruction that the plaintiff should be allowed such damages as it had sustained by the reason of the defendant's structure up to the present time; and also to that part of the charge which allowed a recovery for discomforts and inconveniences, other than being compelled to use gas, in so much of the building as was occupied by the Bank.

The defendant, at the end of the charge to
7] the jury, requested the court to instruct them as follows: "The plaintiff is not entitled to recover in this action for loss of rents or of rental value. The recovery in this action, if at all, must be for permanent injury to the plaintiff's property by the defendant's interference with the easement of light and air." The court refused so to instruct the jury, and the defendant excepted to the refusal.

The jury returned a verdict for the plaintiff in the sum of $5,000. A motion by the defendant for a new trial was overruled by the court. 24 Blatchf. 89; 28 Fed. Rep. 231 Judgment was thereupon entered for the plaintiff for the sum of $5,068.33, being the amount of the verdict and interest; and the defendant sued out this writ of error, which the plaintiff unsuccessfully moved to dismiss for want of a sufficient amount in dispute to give this court jurisdiction. 118 U. S. 608 [30: 259].

Messrs. Julien T. Davies and **Edward S. Rapallo,** for plaintiff in error:

It was error for the court to admit evidence and permit a recovery of damage to the defendant in error, accruing after the commencement of the action.

Mayne, Damages (ed. 1872) p. 63; 1 Sutherland, Damages, 198; Sedgwick, Damages, 144; Field, Damages, 602; Sedgwick, Lead. Cas. on Damages, 658, *note; Wightman* v. *Providence*, 1 Cliff. 524; *Bradley* v. *Washington, A. & G. S. P. Co.* 34 U. S. 9 Pet. 107 (9: 68); *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 322 (27: 739).

This is also the doctrine of the courts of the State of New York.

Uline v. *New York C. R. Co.* 2 Cent. Rep. 116, 101 N. Y. 98; *Blunt* v. *McCormick*, 3 Denio, 283; *Beckwith* v. *Griswold*, 29 Barb. 291; *Fettretch* v. *Leamy*, 9 Bosw. 524; *Whitmore* v. *Bischoff*, 5 Hun, 176; *Plate* v. *New York C. R. Co.* 37 N. Y. 475, 476; *Beach* v. *Crain*, 2 N. Y. 92; *Mahon* v. *New York C. R. Co.* 24 N. Y. 658; *Greene* v. *New York C. & H. R. R. Co.* 65 How. Pr. 154; *Hussner* v. *Brooklyn City R. Co.* 114 N. Y. 433.

The doctrine of the courts of England and of the other States of the Union is the same.

Battishill v. *Reed*, 18 C. B. 696; *Robinson* v. *Bland*, 2 Burr. 1077; *Cole* v. *Sprowl*, 35 Me. 161; *Delaware & R. C. Co.* v. *Wright*, 21 N. J. L. 469; *Powers* v. *Ware*, 4 Pick. 106; *Pierce* v. *Woodward*, 6 Pick. 206; *Duncan* ads. *Markley*, 1 Harp. (S. C.) 276.

The court erred in failing to instruct the jury that the damages which they should assess must be the permanent injury.

Story v. *New York E. R. Co.* 90 N. Y. 122; *Nicklin* v. *Williams*, 10 Exch. 259; *Bonomi* v. *Backhouse*, El. Bl. & El. 622; *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Lamb* v. *Walker*, L. R. 3 Q. B. Div. 389; *Mitchell* v. *Darley Main Colliery Co.* L. R. 14 Q. B. Div. 125; *Van Zandt* v. *New York*, 8 Bosw. 375; *Langdon* v. *Mayor*, 93 N. Y. 129; *Baltimore & P. R. Co.* v. *Reaney*, 42 Md. 117; *Troy* v. *Cheshire R. Co.* 23 N. H. 83; *Fowle* v. *New Haven & N. R. Co.* 107 Mass. 352; *Chicago & P. R. Co.* v. *Stein*, 75 Ill. 41; *Whitehouse* v. *Fellowes*, 10 C. B. N. S. 766; *Mahon* v. *New York C. R. Co.* 24 N. Y. 658.

The use of the street for a railroad is a public use, and the Acts of the Legislature are constitutional which authorize it.

Re New York E. R. Co. 70 N. Y. 327; *Re Gilbert E. R. Co.* 70 N. Y. 361; *Brooklyn Park Comrs.* v. *Armstrong*, 45 N. Y. 234; *Heyward* v. *Mayor*, 7 N. Y. 314; *McAulay* v. *Western Vermont R. Co.* 33 Vt. 320, 321.

Mr. **Wm. F. MacRae,** for defendant in error:

The verdict of the jury established that the railway's structure in the street was a taking

and interference with the rights of property of the Bank which entitled it to damages therefor.

Story v. *New York E. R. Co.* 90 N. Y. 122; *Lahr* v. *Metropolitan E. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 268; *Drucker* v. *Manhattan R. Co.* 8 Cent. Rep. 66, 106 N. Y. 160; *Mahady* v. *Bushwick R. Co.* 91 N. Y. 153; *Henderson* v. *New York C. R. Co.* 78 N. Y. 423; *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317 (27: 739); *Barney* v. *Keokuk*, 94 U. S. 324 (24: 224); *Rigney* v. *Chicago*, 102 Ill. 64; *Cairo & V. R. Co.* v. *People*, 92 Ill. 170; *Cox* v. *Louisville, N. A. & C. R. Co.* 48 Ind. 178; *Hinchman* v. *Paterson Horse Co.* 17 N. J. Eq. 75; *Atchison & N. R. Co.* v. *Garside*, 10 Kan. 552; *Elizabethtown, L. & B. S. R. Co.* v. *Combs*, 10 Bush (Ky.) 382; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 444, 2 Moak, Eng. Rep. 473.

The law of the State, as declared by its highest tribunal, becomes the rule of decision for the courts of the United States in civil actions at common law not arising under the laws of the United States.

U. S. Rev. Stat. § 721; § 34, Act of 1789; *Livingston* v. *Moore*, 32 U. S. 7 Pet. 469 (8: 751); *Owings* v. *Hull*, 34 U. S. 9 Pet. 607 (9: 246); *Pennington* v. *Gibson*, 57 U. S. 16 How. 65 (14: 847).

In administering the local law of the State the courts of the United States follow the settled decision of the courts of last resort of the State.

Mutual Assur. Society v. *Watts*, 14 U. S. 1 Wheat. 279 (4: 91); *Shipp* v. *Miller*, 15 U. S. 2 Wheat. 316 (4: 248); *New England Screw Co.* v. *Bliven*, 3 Blatchf. 240; *Scipio* v. *Wright*, 101 U. S. 665 (25: 1037); *Boyce* v. *Tabb*, 85 U. S. 18 Wall. 546 (21: 757).

The exceptions to the charge of the court as to the measure of damages came too late.

Thayer v. *Marsh*, 75 N. Y. 342; *Roberts* v. *Graham*, 78 U. S. 6 Wall. 578 (18: 791); *Marine Bank* v. *Fulton Bank*, 69 U. S. 2 Wall. 252 (17: 785); *Perkins* v. *Ingersoll*, 1 Dill. 417; *Lahr* v. *Metropolitan E. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 294; *Hussner* v. *Brooklyn City R. Co.* 114 N. Y. 436; *Distin* v. *Rose*, 69 N. Y. 126; *McGinley* v. *United States L. Ins. Co.* 77 N. Y. 495.

Damages may be recovered up to the time of trial.

Hussner v. *Brooklyn City R. Co.* 114 N. Y. 436; *Nicklin* v. *Williams*, 10 Exch. 259; *Stroyan* v. *Knowles*, 6 Hurl. & N. 454; *Backhouse* v. *Bonomi*, 9 H. L. Cas. 503; *Shortridge* v. *Lamplugh*, 2 Ld. Raym. 803; *Lamb* v. *Walker*, L. R. 3 Q. B. Div. 389; *Taylor* v. *Manhattan R. Co.* 53 Hun, 306; *Everson* v. *Powers*, 89 N. Y. 527; *Fowle* v. *New Haven & N. Co.* 112 Mass. 338; *New York Nat. Exch. Bank* v. *Metropolitan E. R. Co.* 11 Cent. Rep. 927, 108 N. Y. 660.

[440] *Mr. Justice* **Gray** delivered the opinion of the court:

The law of the State of New York, as declared by the court of appeals, appears to be as follows: An elevated railroad erected in and over a street pursuant to the statutes of the State, and with due compensation to the owners of property taken for the purpose, is a lawful structure. The owners of lands abutting on a street in the City of New York have an easement of way, and of light and air, over it; and, through a bill in equity for an injunction, may recover of the Elevated Railroad Company full compensation for the permanent injury to this easement; but, in an action at law, cannot, without the defendant's acquiescence, recover permanent damages, measured by the diminution in value of their property, but can recover such temporary damages only as they have sustained to the time of commencing the action. *Re New York E. R. Co.* 70 N. Y. 327; *Re Gilbert E. R. Co.* 70 N. Y. 361; *Story* v. *New York E. R. Co.* 90 N. Y. 122; *Lahr* v. *Metropolitan E. R. Co.* 104 N. Y. 268, 6 Cent. Rep. 371; *Pond* v. *Metropolitan E. R. Co.* 112 N. Y. 186. This rule of damages at law has not prevailed in analogous cases decided in other jurisdictions, and collected in the briefs of counsel; and in the case last above cited, the court observed that "it might be productive of less inconvenience on the whole, if an opposite rule could be adopted." 112 N. Y. 190.

But we are relieved from the necessity of laying down a general rule on the subject because in this case it clearly appears that the defendant procured or acquiesced in the rulings under which the trial was conducted, and thereby waived the right to object to them. *Lahr* v. *Metropolitan E. R. Co.* 104 N. Y. 268, 294, 6 Cent. Rep. 371; *Drucker* v. *Manhattan R. Co.* 106 N. Y. 157, 8 Cent. Rep. 66; *Hussner* v. *Brooklyn City R. Co.* 114 N. Y. 433; *Shaw* v. *Stone*, 1 Cush. 228, 243.

The complaint was framed in the double aspect of claiming damages for the injury accruing to the use and enjoyment of the plaintiff's property by the obstruction of light and air and the diminution of rents, as well as damages for the permanent injury to the market and rental value of the property.

The plaintiff began by introducing evidence, to the admission of which the defendant took no objection or exception, of the injury to the use and enjoyment of the property by obstructing the access of light and air, and by diminishing the rents, down to the time of trial.

When the plaintiff afterwards offered evidence of the value of the building, before and after the erection of the defendant's structure, the defendant objected to this evidence, and it was excluded by the court.

The defendant's counsel thereupon suggested that the plaintiff's damages should come down to the commencement of the action only; and the plaintiff's counsel replied that they claimed damages for the permanent injury. The court declined to adopt either of these views, and refused to allow damages to be recovered for the permanent injury, but ruled that damages might be recovered to the time of trial. Neither party having excepted to this ruling at the time, both parties must be presumed to have assented to it.

In accordance with that ruling, the trial proceeded upon the theory that damages were not to be awarded for permanent injury, but were to be assessed down to the time of trial;

and in accordance with that theory further evidence was introduced by both parties, without any objection or exception by either party to the admission of the evidence or to the rulings under which it came in.

The defendant having, by his objection sustained by the court, prevented the plaintiff from introducing evidence of permanent injury to the building, and having permitted the trial to proceed in accordance with the ruling of the court admitting evidence of injury to the time of the trial, without excepting either to that ruling or to the evidence admitted in accordance with it, could not afterwards be permitted to change front, and to insist either that the damages must be assessed for the permanent injury, or that the damages must be limited to the time of the commencement of the action.

The court therefore rightly declined to permit the defendant to introduce evidence (competent only upon the issue of injury to the permanent value of the property, which by the defendant's procurement had been excluded from the consideration of the jury) that the value of the property had been increased by the erection of the defendant's structure; and rightly refused the instruction, requested by the defendant after the charge, that the recovery could be only for the permanent injury to the plaintiff's property. For the same reason, the defendant's exception to so much of the charge as allowed damages to be recovered to the time of the trial cannot be sustained.

There can be no doubt that the court rightly declined to order a verdict for the defendant, or a verdict for the plaintiff with nominal damages; and that the instruction which allowed the jury to award a fair compensation for the discomforts and inconveniences in the occupation of the plaintiff's building, caused by the existence of the defendant's structure in front of it, independently of the running [13] of trains thereon, was sufficiently favorable to the defendant. *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317 [27:739]; *Duke of Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418.

As the damages recovered appear by the bill of exceptions, made part of the record, to have been assessed to the time of trial, the judgment in this case may be a bar to any subsequent action, at least for damages suffered before that time. *Hussner* v. *Brooklyn City R. Co.* 114 N. Y. 433, 438; *Warner* v. *Bacon*, 8 Gray, 397, 402; *Goslin* v. *Corry*, 7 Man. & Gr. 342, 345, 8 Scott, N. R. 21, 24. But that point is not now presented for adjudication.

Judgment affirmed.

Mr. Justice **Brewer**, not having been a member of the court when this case was argued, took no part in the decision.

WASHINGTON AND GEORGETOWN RAILROAD COMPANY, *Plf. in Err.*, [554
v.
LEWIS H. McDADE.

(See S. C. Reporter's ed. 554-575.)

Master's duty to servant—machinery—knowledge of defect—contributory negligence—question for jury—instructions to jury.

1. Individuals and corporations are bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter.
2. If the employer or master fails in this duty of precaution and care, he is responsible for an injury through the defect of machinery which is, or ought to have been, known to him, and is unknown to the employé or servant.
3. If the employé knew of the defect from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he assumes the risk of danger from such use.
4. If the employé himself was wanting in reasonable care and prudence, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through his negligence.
5. As a general rule, the question of contributory negligence is one for the jury, under proper instructions by the court, especially where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences.
6. It was not error to refuse to grant instructions prayed for which had already been covered by the instructions which the court had given.

[No. 137.]

Argued Dec. 2, 3, 1889. Decided May 19, 1890.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment for plaintiff for damages for injuries sustained by him as an employé of the defendant. *Affirmed.*

Opinion below, 5 Mackey, 144.

Statement by *Mr. Justice* **Lamar**: [555

This is an action on the case brought in the Supreme Court of the District of Columbia by Lewis H. McDade against the Washington and Georgetown Railroad Company, a district corporation, to recover damages for personal injuries sustained while employed by the Company, as a blacksmith, in its shops in Georgetown. The injury consisted in the loss of his left arm, which was caught in a belt used to propel a part of the machinery in the Company's shop, and thereby so broken and mangled that it had to be amputated near the shoulder immediately after the accident.

NOTE.—*Who are co-employés or co-servants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant.* See *note* to Hough v. Texas & P. R. Co. 25: 612.

As to negligence; responsibility of master to servant for carefulness and competency of co-servants,—see note Wabash R. Co. v. McDaniels, 27: 605.

The declaration alleges that the defendant is a corporation, and owns and operates a horse railway in the City of Washington and District of Columbia, and certain machinery for the construction and repair of the tracks, cars and other appliances and implements used in connection therewith; that on the 5th of February, 1883, the plaintiff was in the employ of the defendant as a blacksmith, and was required by defendant, from time to time, to put and place a certain belt upon a pulley attached to a counter-shaft, when the same was in motion, to communicate power [556] and motion from the machinery in the machine shop of the defendant to the fan and drill press used by the plaintiff in the blacksmith shop; that the said machinery and appliances were defective and dangerous, in that there was no loose pulley and lever or shifter for the purpose of putting the belt on and removing it from the first-named pulley, but that plaintiff had no notice or knowledge thereof, being unused to and unskilled in such machinery and appliances; that the defendant, its servants and agents knew that the same were defective and dangerous, but failed to notify the plaintiff thereof; that on the 5th of February, 1883, the plaintiff, while ignorant of such defect and danger as aforesaid, was, at the defendant's request, engaged in the act of putting said belt on the first-named pulley, and by reason of such defect and dangerous condition of the machinery, and without any fault or negligence on his part, was caught in or struck by said belt with great force, and his left arm was severed thereby, by means of which he was made very sick, sore and lame for a long space of time, and suffered great anguish of body and mind, and was crippled and disabled for life from the performance of his usual trade and labor as a blacksmith; that he was put to great expense and trouble in trying to be healed and cured of said wound and sickness; and that he paid large sums of money for medical attendance, medicines and nursing, to his damage the sum of twenty thousand dollars.

The defendant pleaded the general issue, and defended, mainly, upon the ground that the plaintiff was guilty of such contributory negligence as precluded a recovery for the injuries sustained.

The case coming on for trial before the court and a jury, the plaintiff, to maintain the issue on his part, testified, in substance, as follows: He entered the service of the defendant as a blacksmith, at its shops in Georgetown, on the 1st of May, 1881, and continued there until the time of the accident on February 5, 1883. When he first went there he worked at the same forge with a man named Eckrit, who was head blacksmith, but at a different fire, they making and repairing the irons used in the manufacture of [557] street cars. In the same room, which was about forty feet square, at a separate forge, a man named Morgan made horseshoe nails. Eckrit left the service of the defendant a few months afterwards, and one Parsons was then employed as an assistant to the plaintiff, who had been made chief blacksmith.

The blast of air used at their forge was supplied by a fan propelled by an engine which ran all the machinery in the shops by means of shafts, pulleys and belts, and was situated in an adjoining room connected with the blacksmith shop by a door in the partition wall. The main shaft was in the engine-room. In the blacksmith shop there was a counter-shaft, three and one half to four inches in diameter, about twelve feet from the ground and thirty inches from the wall, to which motion was communicated by means of a belt running on a fixed pulley attached thereto and on another fixed pulley on the main shaft, and passing through a small opening in the partition wall for that purpose. The belt which directly gave motion to the fan was about three or four inches wide, and ran on a small fixed pulley attached to the fan and on a fixed pulley about thirty inches in diameter attached to the counter-shaft by means of a screw projecting about an inch and a half above the hub of the pulley. The latter pulley, when the machinery was in motion, revolved about 180 times per minute. Another fan in the blacksmith shop, propelled in like manner, furnished a blast of air for the forge at which Morgan worked; and a drill press in the same room was propelled by means of a belt running on a pulley affixed thereto and on a fixed pulley on the counter-shaft.

Perhaps on an average once a week the engine and a portion of the machinery was run in the evening or at night, after work in the blacksmith shop had ceased for the day, and the belt used to propel the fan was then thrown off the pulley on the counter-shaft, sometimes by the plaintiff, but generally by someone else in the employ of the defendant. During the time that Eckrit and the plaintiff were both in the employ of the defendant, Eckrit always put the belt on when it had been taken off, except when it was taken off for repairs; and whenever such repairs were needed, one Moore, who kept in repair all the belting in the shop, would take it off and put it on again, but never at any other time. After Eckrit left, the plaintiff was directed to take the place of Eckrit at the forge, and all the time until the injury, a period of sixteen or eighteen months, he habitually put on the belt whenever he found it off except when it was taken off for repairs, supposing it to be a part of his duty. The first time it was off after Eckrit left, he called the attention of the engineer, Mr. Kline, to the fact that the belt was off, who said, "Can't you put it on?" to which plaintiff replied, "I suppose so," and then put it on. Hawk, the foreman of the shops, from whom plaintiff received his orders, never gave him any instructions what to do, except that he should take Eckrit's place, and both he and Saylor, the superintendent of the Company, often saw the plaintiff put the belt on, but never gave him any instructions about it or informed him that it was Moore's duty to put the belt on when it had been taken off, and not to do it himself. Plaintiff knew that it was Moore's duty to repair the belts, and put them on the first time after they had been repaired, but never knew that it was Moore's duty to put them on at any

other time, and Moore never did put on his belt at any other time.

He further testified that he was 53 years of age and had been a blacksmith since he was 17, having worked in Washington and Baltimore, the latter city being where he had learned his trade, but that he was ignorant of machinery, never before having been employed in a shop where the blast of air for the forge was created by machinery but once, and in that instance the fan was two hundred feet off, and not in the shop; and that the belt connected with the fan in the defendant's shop was the only belt he ever put on.

In order to put the belt on the large pulley on the counter-shaft it was necessary to use a movable ladder about twelve feet long, placed against the partition wall. In going up this ladder his back might touch the shaft, and the face of the pulley was nearer the wall than his own face; and in placing the belt on the pulley he would turn his face towards the pulley. On the morning of the accident the plaintiff went to the shop a few minutes before 7 o'clock to commence work, [9] Parsons and the engineer, Kline, both being there when he arrived. Observing the belt off and the machinery in motion, plaintiff ascended the ladder and attempted to put on the belt, but it came off immediately. He then came down the ladder and went into the engine-room, saying to Kline that there was something wrong with the belt, as it would not stay on. Kline then ascended the ladder and attempted to put the belt on, but it immediately came off as before. Kline then came down the ladder and said to the plaintiff that he would go and slow up the engine, and that plaintiff should then put on the belt. He says that he waited a sufficient length of time, as he supposed, for Kline to reach the engine and slow it up, and after the pulley had slacked somewhat in its revolutions, he again ascended the ladder and attempted to put the belt on, but it was thrown off towards and against him, and formed a loop, which caught on the set screw in the hub of the pulley, wound around the counter-shaft, and drew his left arm in between the belt and the counter-shaft, crushing and tearing it to such an extent that it was necessary to amputate it near the shoulder, immediately. When his arm was caught he screamed, and the engineer immediately stopped the engine.

The accident occurred on a Monday morning. On the preceding Friday or Saturday the belt had been repaired by Moore, who placed it on the pulley after it was repaired. It worked all right afterwards, and was still on the pulley when plaintiff quit work on Saturday evening.

The plaintiff further testified that he had suffered great physical and mental pain from the accident, having been confined to his room for six weeks, and most of that time to his bed; that his nervous system had been shocked to such an extent that for eighteen months thereafter he could not do any work; and that since that time, although better and stronger, he had suffered considerably, and was permanently disabled from working at his trade.

He further said that he never had had any experience with machinery, and he did not know that it was any more dangerous to put a belt on a pulley while it was in motion than it was to strike a piece of iron with a [5 hammer; that no one ever informed him that it was dangerous to put a belt on a pulley while it was in motion; that Eckrit, Moore and Kline always put the belts on while the machinery was in motion; that if he had known that it was dangerous to put a belt on a pulley while it was in motion he would not have done so; that he had never seen anyone put a belt on a pulley until he saw it in the defendant's shops; that in other parts of the shops, both before and at the time of the accident, the defendant had a loose pulley for the purpose of shifting belts, of which fact he was ignorant until afterwards; and that there were no loose pulleys in the blacksmith shop, and he did not know there were such things until after the injury, having afterwards seen one for the first time in Springman's blacksmith shop in Washington.

On cross-examination the plaintiff testified that "on the occasion of his injury, when Kline left him to go to the engine-room, he said he would go and slow up the engine, not stop it, and for plaintiff to put on the belt; that he stood at the foot of the ladder for about a minute after Kline left him, and until the speed of the machinery was somewhat slackened, and then went up the ladder, which took him about half a minute, and attempted to put on the belt; that when he was caught in the belt he screamed, and Kline came to the door of the blacksmith shop and then went back and stopped the engine."

Dr. Ritchie testified on behalf of the plaintiff that he attended him when he was injured, and amputated his arm; that his suffering was acute and the shock so great as to cause permanent nervous impairment and mental depression; and that the physical injury was permanent.

John T. Springman, a witness for the plaintiff, testified that about a year and a half before that time, having had occasion to do some very heavy work in his foundry, he bought a large blower, and supplied the air by means of a fan propelled by machinery; that he had placed a loose pulley at the fan, and another on the counter-shaft, both next to the fixed pulleys, shifting the belt, when necessary, on to those loose pulleys by means of a lever near the floor; that he had never seen such a contrivance anywhere else, [5 although he had been a blacksmith twenty-five years; and that such a contrivance for shifting belts was considered safe, while to put them on and take them off by hand was considered dangerous.

Robert Thompson, a witness for the plaintiff, testified that he had had a large experience in machinery and belting, having worked for twenty-five years in planing mills and sash factories, and that loose pulleys for placing and removing belts on and off fixed pulleys had been in common and general use for over twenty-five years; that they can be used wherever there is room to place them, and are generally placed on the counter-shaft

immediately adjoining the fixed pulley, the fixed pulley at the machine being as wide as both pulleys on the counter-shaft; that the belt is removed from one pulley to the other by means of a lever called a shifter, which can be operated very easily with one hand without any danger, thus stopping and starting the particular part of the machine while the rest of the machinery is in motion; and that it is dangerous to put belts on pulleys by hand while they are in motion, and he would not do it without the shifter, which renders such work perfectly safe.

Smith Pettit and John B. Randolph, witnesses for the plaintiff,—the former a machinist of 30 years' experience, and the latter the machinist at the State, War and Navy Department for a number of years,—both testified substantially to the same effect as the preceding witness, in respect to the long use of loose pulleys and a shifter for the purpose of removing belts, in all well-regulated machine-shops, and to the danger of putting them on in any other manner.

John W. Eckrit, who had worked with the plaintiff in the shop at one time, as before testified to, a witness for the plaintiff, stated that he put the belt on the pulley three or four times after the plaintiff came there, but that no one directed him to do so, and he did not know whether or not Hawk was aware of such fact; and that he had put on belts before by hand.

The plaintiff thereupon rested his case, and the defendant moved the court to instruct the jury to return a verdict in its favor upon [562] the aforesaid evidence, which the court declined to do, and the defendant thereupon excepted.

The defendant then gave evidence tending to prove that the machinery in its car-shops was of the most approved character, there being none better or more suitable to be found in the country; that loose pulleys and a shifter were not used in blacksmith shops like its own, but were used only when the machine required the power to be quickly thrown off or put on, or where the work to be done was very heavy and the belt not easily managed by hand; that the belt in question could be shifted very easily by hand, without danger, by a person of ordinary intelligence who had seen it done a few times; that there was a loose pulley on the drill-press in the blacksmith shop; that Hawk, the foreman, a carpenter by trade, had charge of all the men in the shops, and gave orders and directions to all of them, being perfectly competent to fill the position which he held, no one else having any authority to give orders to any of the men employed in the shop, as regards the belting; that the engineer's duties were only such as pertained to running the engine, which fact was known to the plaintiff; that the duties of Moore extended not only to taking off and putting on the belts when they needed repairs, but consisted in his having general charge of the belts in the shops, putting them on and taking them off whenever such work was necessary, which fact was known to all the men in the shops, including the plaintiff; and that both Morgan, who worked in the blacksmith shop, and the predecessor of the plaintiff, always called on Moore whenever the belt was off.

Hawk, the foreman, testified that on the Saturday preceding the accident, at about 4 o'clock in the afternoon, when work in the blacksmith shop was about to cease, he went there, and, standing about twenty-five feet from the plaintiff and his helper, Parsons, since deceased, addressed them both, saying that the engine would be run after working hours and the belt would be thrown off, and that Monday, when the bell rang to go to work, Moore should be called to put the belt on. He said that he gave that order because the belt had been repaired on the Friday preceding, but that he was not sure that either the plaintiff or Parsons heard him, as the machinery was in motion and was making considerable noise, and neither made any response. He said he was a carpenter, and had no special knowledge of machinery; that the belt was not taken off more than 12 or 15 times while the plaintiff was there; that when the belt was repaired on the preceding Friday it was made a little too short, which probably caused it to slip off when the plaintiff attempted to put it on; and that he never gave the plaintiff any instructions about his work at any time.

Geroge E. Noyes, a witness for the defendant, a machinist of experience, testified that he had never examined the machinery of the defendant carefully, but that it seemed to him that its general plan was good; that fast and loose pulleys are generally used where any part of the machinery is stopped periodically, and are sometimes, but not always, connected with forges; that it is always dangerous to put on a belt by hand when the machinery is in motion, and no one likes to do it, the only preventive being a loose pulley; but that in his shop he usually had boys to put on the belts by hand, and thought an ordinarily bright boy could learn to do such work in a day, by being shown how a few times.

Moore gave testimony to the effect that on two occasions he was sent for to put on the plaintiff's belt—once by the plaintiff, and the other time by Parsons; that it was his duty to attend to the belts generally; and that he always took the belt off and put it on again when he repaired it, but never at any other time unless he was sent for.

The engineer, Kline, a witness for the defendant, in describing the manner in which the plaintiff received his injury, stated that on the morning of the accident, after the machinery had been running four or five minutes, the plaintiff came into the engine-room and said, "I wish you would come and help me with my belt;" and that after they got into the blacksmith shop, the plaintiff said, "How am I to get that belt back on this side of the pulley?" He said he then ascended the ladder, and threw the belt back on the right side, but could not put it on, and then came down the ladder and said to McDade, "Hold up until I shut down." He then went into the engine-room and shut off the steam, but the engine did not stop immediately, the momentum being sufficient to

carry the fly-wheels around 8 or 12 times before the speed was checked. In the meantime, standing by his engine, he heard McDade scream. and went to see what the matter was. He stated that from the time he came down the ladder until the engine stopped was not greater than three-quarters of a minute.

The plaintiff, on his cross-examination in rebuttal, testified to the following effect: He didn't know whether putting on the belt was a part of his duty, but supposed it was, and acted accordingly. He again asserted that he had no idea of there being any serious danger in putting the belt on the pulley by hand—not any more than in picking up a hammer from the floor. Speaking of the accident, he said that when Kline had attempted to put the belt on and failed, he came down the ladder and said to him, "Go up and put it on whilst I slow up the engine," or, "Go up the ladder, put the belt on, and I will slow the engine." He further stated that he did not attempt to put the belt on until the engine was slowed—whether it was sufficiently slowed or not he did not know; but that he understood the engine was to be slowed up in order to enable him to put the belt on.

At the conclusion of the testimony the defendant renewed its motion for a verdict, which motion the court overruled, and an exception was duly taken. Counsel for the defendant asked the court to grant twenty separate prayers for instructions to the jury; three of which the court granted in the language in which they were presented, ten were slightly modified and seven were denied. The court upon its own motion gave one instruction. Under these instructions verdict and judgment were rendered for the plaintiff for $6,195. The supreme court in general term affirmed that judgment. 5 Mackey, 144. Hence this writ of error.

Messrs. **Enoch Totten** and **W. D. Davidge**, for plaintiff in error:

A servant having consented to serve in the way and manner in which the business was being conducted, has no proper ground of complaint, even if reasonable precautions have been neglected.

Sullivan v. *India Mfg. Co.* 113 Mass. 398, 399; *Leary* v. *Boston & A. R. Co.* 139 Mass. 580; *Iron-Ship Bldg. Works* v. *Nuttall*, 11 Cent. Rep. 662, 119 Pa. 149; *Moulton* v. *Gage*, 138 Mass. 390; Wood, Master and Servant, § 335, and *notes*.

When an employer has kept imperfect and unsound machinery in use for a long time, and it has been safely used by his employés, he is not liable in damages for an injury to one of them, occasioned by its unfitness.

Kelley v. *Silver Springs B. & D. Co.* 12 R. I. 112, 34 Am. Rep. 615; *Sullivan* v. *India Mfg. Co.* 113 Mass. 396; *Schroeder* v. *Michigan Car Co.* 56 Mich. 132; *Michigan C. R. Co.* v. *Smithson*, 45 Mich. 212; *Pennsylvania R. Co.* v. *Wachter*, 60 Md. 395; *O'Rorke* v. *Union P. R. Co.* 22 Fed. Rep. 189; *Sweeney* v. *Berlin & J. E. Co.* 2 Cent. Rep. 457, 101 N. Y. 520.

Where the means of information of the employé are equal or greater than those of the employer as to imperfections in machinery, the employer will not be responsible for an injury resulting from such imperfections.

Beach, Cont. Neg. 363, § 132; *Mad River & L. E. R. Co.* v. *Barber*, 5 Ohio St. 541; *Central R. & Bkg. Co.* v. *Kenney*, 58 Ga. 485; *Fones* v. *Phillips*, 39 Ark. 17, 43 Am. Rep. 264.

When the servant discovers that the machinery, tools or the like are unsafe or unfit, or that a fellow servant is careless or incompetent, and nevertheless continues in the employment without protest or complaint, he assumes the risk of the danger and waives all claims for damages.

Beach, Cont. Neg. 371, § 140; *O'Rorke* v. *Union P. R. Co.* 22 Fed. Rep. 189; *Hough* v. *Texas & P. R. Co.* 100 U. S. 224 (25: 617); *Kelley* v. *Silver Spring B. & D. Co.* 12 R. I. 112; *Richards* v. *Rough*, 53 Mich. 212; *Sjogren* v. *Hall*, 53 Mich. 274; *Dorsey* v. *Phillips & C. C. Co.* 42 Wis. 583; *Dillon* v. *Union P. R. Co.* 3 Dill. 319; Shearm. & Redf. Neg. 118–120, §§ 94, 95; *Kielley* v. *Belcher S. M. Co.* 3 Sawy. 500; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003).

To charge the defendant, it is essential to show knowledge, or that knowledge might have been obtained by the use of reasonable diligence, of the defect.

Allen v. *New Gas Co.* L. R. 1 Exch. Div. 251; *East St. L. P. & P. Co.* v. *Hightower*, 92 Ill. 139; *Chicago & A. R. Co.* v. *Platt*, 89 Ill. 141; *Dewey* v. *Chicago & N. W. R. Co.* 31 Iowa, 374; *Tierney* v. *Minneapolis & St. L. R. Co.* 33 Minn. 311; *Mad River & L. E. R. Co.* v. *Barber*, 5 Ohio St. 564; 2 Rorer, Railroads, 1200, 1201, *note*; *Painton* v. *Northern C. R. Co.* 83 N. Y. 7; *DeGraff* v. *New York C. & H. R. R. Co.* 76 N. Y. 125.

The master must furnish safe and reasonably good machinery to his servant and keep it in reasonably good order. He must have good, but not the best, machinery.

Beach, Cont. Neg. 354, § 125; *Wonder* v. *Baltimore & O. R. Co.* 32 Md. 411; *Jones* v. *Granite Mills*, 126 Mass. 84; *Keith* v. *Granite Mills*, 126 Mass. 90; *Ft. Wayne, J. & S. R. Co.* v. *Gildersleeve*, 33 Mich. 133, 256; *Burke* v. *Witherbee*, 98 N. Y. 562; *Leonard* v. *Collins*, 70 N. Y. 90; *Ladd* v. *New Bedford R. Co.* 119 Mass. 412; *Kelley* v. *Silver Spring B. & D. Co.* 12 R. I. 112, 34 Am. Rep. 615. Wood, Master and Servant, § 326.

In case an employé goes outside of the scope of his employment and voluntarily undertakes to do that which it is no part of his duty to do, and is injured, he cannot hold the employer liable.

Crew v. *St. Louis, K. & N. W. R. Co.* 20 Fed. Rep. 87; *Johnson* v. *Armour*, 18 Fed. Rep. 490; Wood, Master and Servant, § 331.

Messrs. **W. A. Cook** and **C. C. Cole**, for defendant in error:

The employer is liable to the employé for any accident happening, without fault of the latter, through the defective or dangerous condition of machinery, unknown to the employé.

Hough v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642 (29: 755).

It was the duty of the defendant to inform plaintiff of the defect in the machinery, and the danger of putting on the belt.

Cooley, Torts, 553, 554, 555; *Wheeler* v. *Wason Mfg. Co.* 135 Mass. 294; *Chicago & N. W. R. Co.* v. *Bayfield*, 37 Mich. 208, 209; *Dowling* v. *Allen*, 74 Mo. 13; *Strahlendorf* v. *Rosenthal*, 30 Wis. 674.

The master may also be negligent in commanding the servant to go into exceptionally dangerous places.

Cooley, Torts, 555; *Patterson* v. *Pittsburgh & C. R. Co.* 76 Pa. 389; *Coombs* v. *New Bedford C. Co.* 102 Mass. 583; *Union P. R. Co.* v. *Fort*, 84 U. S. 17 Wall. 555 (21: 739).

The question of whether the plaintiff was guilty of contributory negligence was one of fact for the jury.

Hough v. *Texas & P. R. Co.* 100 U. S. 225 (25: 617); *Northern P. R. Co.* v. *Herbert*, 116 U. S. 655, 656 (29: 761); *Phœnix Mut. L. Ins. Co.* v. *Doster*, 106 U. S. 32 (27: 66); *Kane* v. *Northern C. R. Co.* 128 U. S. 91 (32: 339); *Jones* v. *East Tennessee, V. & G. R. Co.* 128 U. S. 443 (32: 478); *Coombs* v. *New Bedford C. Co.* 102 Mass. 585; *Snow* v. *Housatonic R. Co.* 8 Allen, 441; *Walsh* v. *Peet Valve Co.* 110 Mass. 25; *Swoboda* v. *Ward*, 40 Mich. 420-424; *Philadelphia, W. & B. R. Co.* v. *Keenan*, 103 Pa. 124.

The rule is that where different conclusions may properly be drawn from the facts and circumstances in proof, the question of contributory negligence is for the jury.

Milwaukee & St. P. R. Co. v. *Kellogg*, 94 U. S. 469, 474 (24: 258); *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21: 745); *Hayes* v. *Michigan C. R. Co.* 111 U. S. 228, 241 (28: 410, 415); *Leather Mfrs. Nat. Bank* v. *Morgan*, 117 U. S. 96, 122 (29: 821); *Snow* v. *Housatonic R. Co.* 8 Allen, 441; *Nugent* v. *Boston, C. & M. R. Co.* 5 New Eng. Rep. 865, 80 Me. 62; *Lawless* v. *Connecticut R. R. Co.* 136 Mass. 1.

It is not error to reject a request which properly propounds the law, where the jury has already been correctly instructed upon the whole law of the case.

Laber v. *Cooper*, 74 U. S. 7 Wall. 565, 571 (19: 151); *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 295 (23: 898, 899).

567] *Mr. Justice* **Lamar** delivered the opinion of the court:

A motion was filed in this case to dismiss the writ of error on the ground that the general term of the court below never acquired jurisdiction of the case, and that, as a consequence thereof, this court is also without jurisdiction. In connection with the motion to dismiss there is also a motion to strike out the bill of exceptions.

The argument urged by the plaintiff in support of both motions is, that the rules
568] and statutes prescribing the practice and proceedings for the Supreme Court of the District of Columbia, in securing the review, in a general term of that court, of a judgment at a special term, have not been complied with in this case.

Neither of these motions can be sustained. We think the court in general term acquired jurisdiction of the case; and as it comes here regularly from that court we shall proceed to consider it upon its merits.

There are seven assignments of error which we will consider, not *seriatim*, but with reference to their relevancy to the issues presented by the record. These issues are: (1) Was the machinery with which the defendant worked defective and unsafe for the purpose for which it was used, and more particularly, was the putting the belt on the large pulley by hand dangerous; or should there have been a loose pulley upon which the belt could have been safely shifted by means of a lever? (2) Assuming that there was this defect in the machinery which made it dangerous, was the plaintiff ignorant of the defect or of the danger connected with it? (3) Did the defendant, in failing to notify the plaintiff of the danger, have reason to believe the plaintiff was ignorant either of the nature of the machinery, or of the danger incident to its use? (4) Was the plaintiff guilty of such contributory negligence as precluded a recovery?

The three instructions given by the court to the jury as requested by the counsel for the defendant were to the effect that, if the jury believed from the evidence that any one of the three following conditions or state of facts existed, the plaintiff could not recover: (1) that the accident would not have occurred but for the negligence or want of ordinary care and caution on the part of the plaintiff; (2) that the foreman of the shops, on the Saturday evening preceding the accident, ordered and directed the plaintiff to take the belt off the pulley, and to send on Monday morning for Moore to put it on, he was bound to obey the order directing him to send for Moore, and his not obeying it was such negligence as would prevent a recovery in this action; and (3) assuming that putting on the belt was attended with danger, the question to be determined by the jury was [5
not whether the plaintiff knew of such danger, but whether a man of ordinary care and observation, in his situation, would have known it, as he must be presumed to possess that degree of intelligence; and that if with such observation and care he would have known the danger, then in putting on the belt he assumed all the risks incident thereto.

The instruction given by the court on its own motion was as follows:

"If the jury find from the evidence that after he was employed by the defendant the plaintiff voluntarily, and without being required so to do, attended to the belt and habitually and with the knowledge of the defendant's officers placed the same in position without accident, and his course of conduct in relation thereto was such as to induce the defendant or its officers to believe that he had the requisite skill for that purpose, or that he had willingly assumed the duty of so placing the belt, the defendant was not in default for not having instructed him as to any danger incident to the operation."

Another instruction given by the court in lieu of the 16th one requested by the defendant was as follows: "But the jury are instructed that the defendant was not a guarantor of the safety of its machinery, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe."

The other instructions given by the court were modifications to a degree of those asked by the defendant, and were mere amplifications of those above mentioned.

We do not think there was any error in any of these instructions of which the defendant has any right to complain. The propositions contained in them are in strict accord with the principles laid down by the decisions of this court. *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 217 [25: 612, 615]; *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642, 647, 648 [29: 755, 758]; *Kane* v. *Northern C. R. Co.* 128 U. S. 91, 94 [32: 339, 341]; *Jones* v. *East Tennessee, V. & G. R. Co.* 128 U. S. 443 [32: 478].

The general principles of law by which the liability of an employer for injuries to an employé, growing out of defective machinery, is tested, are well settled by those decisions. Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employés. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employé or servant. But if the employé knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And further, if the employé himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer.

The state decisions in harmony with the principles laid down by this court on this subject are too numerous for citation.

We will now briefly notice the assignments of error, the first of which is that the court erred in refusing to direct the jury to return a verdict for the defendant, as requested by counsel.

It is argued, in support of this assignment, that there was not a *scintilla* of evidence to show negligence on the part of the defendant, as the employer of the plaintiff; that the part of the machinery which caused the accident was not defective; that the evidence showed it to be of the most approved character, purchased without regard to cost, and such as was generally in use throughout the country; that loose pulleys and a shifter or lever for shifting the belt were not used in blacksmith shops; that the plaintiff had been in the shop for nearly eighteen months, and had become familiar by constant use with the operation of putting the belt on the pulley, and it was impossible for him not to know what danger attended its use; that the Company had employed a man, competent and skillful, whose duty it was to put on all the belts in the establishment; that it was not in the line of the duty of the plaintiff to put on this belt, and whenever he did so he was acting outside the scope of his employment; and, lastly, that the manner in which the accident occurred, as described by the plaintiff himself, in failing to wait until Kline had slowed up the engine, shows that he was, by his own heedlessness and rash want of care, the author of his own misfortune. On the other hand, the evidence offered by the plaintiff certainly tended to show that the injury would not have occurred but for the defect of the fixed pulley and the projecting screw; that the machinery was unsafe, and not such as was generally used in shops of that kind, as testified to by experienced machinists introduced by the plaintiff, and the only one examined in behalf of the defendant; that he (the plaintiff) was unaware of the dangers attendant upon putting on the belt by hand; that he did not know that the belt in which he was caught had been recently, and, perhaps, imperfectly repaired; that there were in the other shops of the establishment shifters and levers which could put the belt on the pulley without danger; that he was wholly unaware of the danger attendant upon putting on the belt by hand; and that he supposed he was in the line of his duty when the injury happened.

If this evidence was worthy of belief it certainly could not be said to show such contributory negligence as would justify the court in directing a verdict for the defendant below. As a general rule, the question of contributory negligence is one for the jury, under proper instructions by the court, especially where the facts are in dispute, [572] and the evidence in relation to them is that from which fair-minded men may draw different inferences. *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 [21: 745]. Upon every question in the case—the safety or unsafety of the machinery, the ignorance on the part of the plaintiff of the danger of it, and the negligence of the plaintiff at the time of the accident—the evidence was controverted, and rendered the case just such a one as this court in *Jones* v. *East Tennessee, V. & G. R. Co.*, *supra*, said that "a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury." In the language there used, "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

There are two recent cases in Massachusetts which are so analogous, in many of their features, to the case under consideration, that we deem a special reference to them proper.

Daley v. *American Printing Co.*, 150 Mass. 77, was an action by an employé for personal injuries sustained while in the performance of his duties in the defendant's mill, using an elevator operated by a belt passing over a pulley on a shaft. At the trial the evidence introduced by the plaintiff tended to show that the belt was frequently off the pulley; that there was no one in the employ of the defendant specially charged with putting it on when it came off; and that anyone using the elevator put the belt on when he found it off. It further showed that the plaintiff, having occasion, in the course of his regular duties, to use the elevator, found the belt off and proceeded to put it on, but in so doing was caught in a set screw projecting from a collar on the shaft and whirled around the shaft, and received serious injuries. The defendant introduced testimony to show that there was another man whose duty it was to put on the belt. At the conclusion of the testimony, the trial court directed a verdict in favor of the defendant, and, the case being carried up on exceptions to the supreme judicial court, that court reversed the judgment of the court below, and ordered a new trial. In its opinion the court said: "The ground upon which the case was withdrawn from the jury is not stated. We cannot say, as matter of law, that no sufficient evidence was introduced or offered of negligence on the part of the defendant, or of freedom from negligence on the part of the plaintiff. . . . If the machinery was found to be unsuitable, and if the plaintiff was within the line of his duty in attempting to adjust the belt, we cannot say that he was not entitled to go to the jury on the question of whether he was in the exercise of due care."

573]

Myers v. *Hudson Iron Co.*, 150 Mass. 125, was an action for personal injuries sustained by the plaintiffs while in the employ of the defendant. We extract from the syllabus the following: "A mine was reached through a vertical shaft by a bucket lowered by the unwinding of a rope from the uncoupled drum of a hoisting engine, and usually controlled in its descent by a brake operated by the engineer. Laborers employed in the mine entered the bucket to descend as usual, and, upon word being given, the engineer started to let it down, but soon found that the brake was not holding. The bucket fell rapidly for many feet, when it was suddenly stopped by planks across the shaft, and the laborers were hurt. In actions against the employer to recover for such injuries, there was evidence that the brake, besides a loss of initial efficiency, was in design and original construction insufficient; that there were safer contrivances for controlling such a descent, some of which the defendant used elsewhere about the mine; and that gearing used in hoisting had, through wear and a change made in it by the defendant, become less useful as a possible means of stopping the bucket if the brake failed to hold, and, in fact, proved ineffectual to stop the bucket at the time; also, that no person had previously been hurt in going down in the bucket. *Held*, That the cases were properly submitted to the jury, who were warranted in finding verdicts for the plaintiffs."

In the course of the opinion the court said: "The risk of the safety of machinery is not assumed by an employé, unless he knows the danger, or unless it is so obvious that he will be presumed to know it." And in another part of the opinion it was said: "The [4
plaintiffs were allowed to show that other machinery or appliances than those used by the defendant would have been safer; for example, a strap-brake, a friction V, so called, or a reversible engine. In order to aid the jury in determining whether the defendant had exercised reasonable care in providing and maintaining the machinery actually in use, it was competent to show what other kinds of machinery or appliances were used elsewhere, and might have been used at shaft No. 1. *Wheeler* v. *Wason Mfg. Co.* 135 Mass. 294, 298. It does not follow from the introduction of such evidence that the defendant was bound to use the very safest or newest, or any particular, machinery or appliances; but, as 'reasonable care' is a relative term, the jury might properly consider what could be done to secure safety, and the evidence was competent."

As regards the instruction given by the court, on its own motion, above quoted, we think nothing contained therein is prejudicial to the defendant. Indeed, it may be doubted if it did not favor the defendant more than the evidence in the case and the law applicable thereto would warrant.

The same remark is true of the instruction given by the court in lieu of the 16th one asked by the defendant. That instruction as requested was as follows: "The employer is bound to use ordinary care and prudence in providing proper machinery, but he is not a guarantor of its safety. If he uses ordinary care and prudence he is absolved from responsibility. The machinery need not be the safest of the kind, provided it is such as a person of reasonable care and prudence would provide." The one given by the court in lieu thereof was as follows: "But the jury are instructed that the defendant was not a guarantor of the safety of the machinery, and was only bound to use ordinary care and prudence in the selection and arrangement and care thereof, and had a right to use and employ such as the experience of trade and manufacture sanctioned as reasonably safe." The instruction here given is in a large part identical with the language used by this court in *Hough* v. *Texas & P. R. Co.*, *supra*. The assignment of error is inexact in its statement that the court said in effect "that the defendant was bound to use and employ such [5
machinery *only* 'as the experience of trad and manufacture sanctioned as reasonable an safe.'" What the court said was, that tl defendant "was *only bound* to use ordinar care and prudence in the selection and a rangement and care" of its machinery. adding that the defendant had the right to u such machinery "as the experience of trade and manufacture sanctioned," the court imposed no additional obligation upon it, but relaxed the rigor of the rule in its favor.

If there was any error in such relaxation the defendant could not complain of it. But taken in connection with the other instructions given by the court, on that question, we think the instruction as it stands was just and reasonable—at least not prejudicial to the defendant.

We repeat, we are of the opinion that all of the instructions sufficiently guarded the interests of the defendant, and that, in the language of the court below, "if there was any error, it was in too great an indulgence and relaxation of the law in its favor."

Nor do we see any error in the refusal of the court to grant all the instructions prayed for by the defendant. Such of them as were correct, as mere abstract propositions, had already been covered by the instructions which the court had given. The others, had they been granted, would, as conclusions of law, have bound the jury to render a verdict for the defendant.

For the foregoing reasons *the judgment of the court below is affirmed.*

Mr. Justice **Brewer,** not having been a member of the court at the time this case was considered, took no part in its decision.

THE DES MOINES AND FORT DODGE RAILROAD COMPANY, *Appt.*, *v.* WABASH, ST. LOUIS AND PACIFIC RAILROAD COMPANY ET AL.

(See S. C. Reporter's ed. 576-583.)

Traffic contract between two railroads—when not a lien that runs with land—mortgage of railroad free from lien—lease, when confers no right to enforce the contract—charter obligation—damages for abandoning contract.

1. Where a contract for a traffic arrangement, made between two railroad companies, declares that the contract and any damages for the breach of the same shall be a continuing lien upon the roads of the contracting parties, this does not constitute a lien running with the land, when, by due course of law, it has passed into other hands, although it may be a valid contract personally enforceable between the parties.
2. Although money due for unpaid services under the contract might be a lien on the income or property of the delinquent company, yet conjectural damages which might result to one company during the remainder of the twenty years the contract had to run, by the failure of the other company to keep it, are not a specific lien on the property, which attached to it and followed it into the hands of a purchaser.
3. By a mortgage executed by one company on all its property, to secure its bonds, to a trust company, as trustee, the title to the property passed to the trust company, without having attached to it the lien of the contract for the traffic arrangement.
4. A lease by such railroad company to another company by which the latter assumed to pay the damages under the contract, is a personal obligation, and does not confer any right in the land to enforce the performance of the contract.
5. The obligation of one of the contracting railroads to fulfill the duties of its charter by building the unbuilt part of its road is inconsistent with a contract for a long time, such as twenty years, by which it bound itself to deliver all its freight and passengers over that part of its road to another company.
6. Where the claiming company received pay for all its services rendered while the contract was in operation, its claim of damages, which resulted from the building of the other road, and the necessary abandonment of the contract, does not constitute a lien upon the other road.

[No. 256.]

Argued April 11, 1890. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Iowa dismissing the intervention by the Des Moines and Fort Dodge Railroad Company in a suit by the Central Trust Company of New York against the Des Moines and Fort Dodge Railroad Company to foreclose a mortgage given by the latter Company to the Trust Company, the object of the intervention being to recover damages to which the intervenors might be entitled by reason of the failure of the mortgagor Company to fulfill a traffic contract during the remainder of the time which it had to run. *Affirmed.*

The facts are stated in the opinion.

Mr. **Chas. E. Whitehead,** for appellant:

Railroads have the power to carry beyond their terminals, through other corporations.

Wheeler v. *San Francisco & A. R. Co.* 31 Cal. 46; *Bank* v. *Augusta*, 49 Me. 507; *Morse* v. *Brainerd*, 41 Vt. 550; *Schroeder* v. *Hudson River R. Co.* 5 Duer, 55; *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 680 (28: 296).

A contract for a good and valid consideration for the delivery of the business of a public carrier to any connecting route for a period of years is valid and not opposed to public policy.

Richmond v. *Dubuque & S. C. R. Co.* 26 Iowa, 191, 33 Iowa, 422, 40 Iowa, 264, 86 U. S. 19 Wall. 584 (22: 173); *Oregon Steam Nav. Co.* v. *Winsor*, 87 U. S. 20 Wall. 64 (22: 315); *Wiggins Ferry Co.* v. *Chicago & A. R. Co.* 5 Am. & Eng. R. R. Cas. 1, 73 Mo. 389; *Himrod Furnace Co.* v. *Cleveland & M. V. R. Co.* 37

NOTE.—*As to lien for purchase money*, see *note* to Bayley v. Greenleaf, 5: 393.

Lien of an attorney for compensation. See *note* to Texas v. White, 19: 992.

As to factor's lien, see *note* to United States v. Villalonga, 23: 64.

As to banker's lien, see *note* to Central Nat. Bank v. Connecticut Mut. L. Ins. Co. 26: 693.

As to liens for wharfage, see *note* to *Ex parte* Easton, 24: 373.

As to lien of corporation on shares, for debt due from stockholder, see *note* to Union Bank of Georgetown v. Laird, 4: 209.

As to lien of United States for duties, see *note* to United States v. 350 Chests of Tea, 6: 702.

As to lien of a mortgage on after-acquired property, see *note* to Pennock v. Coe, 16: 436.

When a lien or right to a lien is assignable. See *note* to Davis v. Bilsland, 21: 969.

Lien, how waived; when taking other security waives lien. See *note* to Grant v. Strong, 21: 859.

Ohio St. 321, 41 Am. Rep. 509; *Terre Haute & I. R. Co.* v. *Struble*, 109 U. S. 381 (27: 970).

The provision in the contract that uniform rates shall be maintained between competitive points, is not void as against public policy.

Columbus, P. & I. R. Co. v. *Indianapolis & B. R. Co.* 5 McLean, 450; *Munhall* v. *Pennsylvania R. Co.* 92 Pa. 150, 5 Am. & Eng. R. R. Cas. 343; *Sayre* v. *Louisville Union Benevolent Asso.* 1 Duv. (Ky.) 145.

A contract which is void as to one part and valid as to another can be enforced as to the valid portion if the subjects are divisible.

United States v. *Hodson*, 77 U. S. 10 Wall. 395 (19: 937).

Where a party has availed himself of the benefits of a contract, it is not permitted to him to keep the benefits and to avoid the obligation.

Union P. R. Co. v. *McAlpine*, 129 U. S. 305 (32: 673); *Daniels* v. *Tearney*, 102 U. S. 421 (26: 189); *Burlington* v. *Gilbert*, 31 Iowa, 356; *Bissell* v. *Michigan Southern & N. I. R. Cos.* 22 N. Y. 258.

Messrs. Wager Swayne, **Wm. Rush Taggart** and **Wells H. Blodgett**, for appellees:

The contract sued on is against public policy and void.

Thomas v. *West Jersey R. Co.* 101 U. S. 83 (25: 953); *Tippecanoe County* v. *Lafayette, M. & B. R. Co.* 50 Ind. 108; *State* v. *Hartford & N. H. R. Co.* 29 Conn. 538; *Hartford & N. H. R. Co.* v. *New York & N. H. R. Co.* 3 Robt. 411; *Doolin* v. *Ward*, 6 Johns. 194; *Hooker* v. *Vandewater*, 4 Denio, 349; *Stanton* v. *Allen*, 5 Denio, 434; *Shrewsbury & B. R. Co.* v. *London & N. W. R. Co.* 21 Eng. L. & Eq. 319, 6 H. L. Cas. 113, 4 DeG. M. & G. 115; *Denver & N. O. R. Co.* v. *Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650; *Union P. R. Co.* v. *Hall*, 91 U. S. 343 (23: 428); Greenhood, Pub. Policy, 647, 653, 671; Green's Brice, Ultra Vires (2d ed.) 417, *note a*; *Arnot* v. *Pittston & E. Coal Co.* 68 N. Y. 558; *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Pa. 173; *Crawford* v. *Wick*, 18 Ohio St. 190; *Sayre* v. *Louisville Union Benevolent Asso.* 1 Duv. (Ky.) 143.

The contract did not and could not create any lien upon the property of the defendant, the Des Moines Northwestern Railway Company, or any lien that did or that could bind the Wabash, St. Louis and Pacific Railway Company, or Solon Humphreys and Thomas E. Tutt, receivers thereof.

Southern Exp. Co. v. *Western N O. R. Co.* 99 U. S. 191 (25: 319); American *notes* to *Spencer's Case* 1 Smith, Lead. Cas. *115; *Keppell* v. *Bailey*, 2 Myl. & K. 517; *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.* 22 W. Va. 600; *Maynard* v. *Polhemus*, 74 Cal. 141; *Brewer* v. *Marshall*, 18 N. J. Eq. 337, 19 N. J. Eq. 537; *Norcross* v. *James*, 140 Mass. 188; *Glenn* v. *Canby*, 24 Md. 127; *Graber* v. *Duncan*, 79 Ind. 565; *Dunlop* v. *Avery*, 89 N. Y. 592; *Reid* v. *McCrum*, 91 N. Y. 412; *De Peyster* v. *Michael*, 6 N. Y. 467; *Wiggins Ferry Co.* v. *Ohio & M. R. Co.* 94 Ill. 83; *Congleton* v. *Pattison*, 10 East, 130; *Hurd* v. *Curtis*, 19 Pick. 459.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of Iowa, dismissing the intervention by appellant in a larger and more important suit involving the sale of a railroad owned by the Des Moines and Northwestern Railway Company. As the petition of intervention is the first paper found in the record of the case before us, we are somewhat at a loss to understand the nature and character of the original suit in which the appellant sought to intervene. It is to be inferred, however, that the original suit was by the Central Trust Company of New York against the Des Moines and Northwestern Railway Company, formerly the Des Moines, Adel and Western Railroad Company, to foreclose a mortgage in which that Company was mortgagor and the Central Trust Company was trustee or mortgagee. The Wabash, St. Louis and Pacific Railway Company was also a party to that suit, on the ground that it had a lease of the road of the Des Moines and Northwestern Railway Company, under which it asserted rights paramount to everybody except the Central Trust Company.

The Des Moines and Northwestern Railway Company was originally chartered as the Des Moines, Adel and Western Railroad Company, with the purpose of building a railroad from the City of Des Moines, in the State of Iowa, in a northwesterly direction, to Panora, in the County of Guthrie. The appellant's road from Des Moines to Fort Dodge pursued the same line in a northwesterly direction from Des Moines City to Waukee, which was the point of the departure of the Adel Road in its more westerly direction. The Fort Dodge Company having completed its road from the City of Des Moines almost entirely to Fort Dodge before the Adel Company had fairly commenced its work, the former had a part of its road running between Waukee and the City of Des Moines, which was a very considerable railroad centre.

As the Adel Company was limited in its means and desired to push its road westward from Waukee through Adel to Panora, it was natural that it should enter into arrangements with the Des Moines and Fort Dodge Company for the use of its road from Waukee to Des Moines, or for a traffic arrangement. It accordingly, on the 18th of November, 1879, entered into the following agreement in writing, which is the foundation of the claim in regard to which the Des Moines and Fort Dodge Railroad Company intervenes in the suit already mentioned:

"This agreement, made the 18th day of November, 1879, between the Des Moines and Fort Dodge Railroad Company, of the one part, called for convenience the Des Moines Company, and the Des Moines, Adel and Western Railroad Company, called for convenience the Adel Company, witnesseth:

"That the Des Moines Company, being desirous of obtaining all the Des Moines business of the Adel Company for a long term of years, in consideration of the contract on the part of the Adel Company hereinafter contained, doth hereby agree and covenant with the Adel Company and grant and give unto it the following easements, rights and privileges, as follows:

"First. Out of the earnings on all through

business from the Adel Road delivered to the Des Moines Road and by it delivered to the Rock Island Road, and on all west-bound business delivered to the Adel Road at Waukee, the Adel Road shall have five sevenths (5/7), and the Des Moines Road shall have and retain two sevenths (2/7), the local freight for the Adel Road on west-bound business being included, but these divisions not to apply to business from beyond Panora.

"Second. On the freight on all local business from Des Moines to any point on the Adel Road, or from any point on the Adel Road to Des Moines, the Adel Road shall receive two thirds (2/3), while the Des Moines Road shall receive one third (1/3), including the local freight on both roads, but freight from beyond Panora not to be included.

"Third. All carloads of freight coming from or going to any point on the Adel Road beyond Panora shall be hauled by the Des Moines Road from Waukee to Des Moines, or from Des Moines to Waukee, at five dollars ($5) the carload, standard-gauge cars, and the Adel Road shall be entitled to receive all the freights and draw-backs earned thereon. In case through freights shall hereafter be reduced from what they are now, a proportionate reduction shall be made on the rate of hauling.

"Fourth. On all passenger business taken at the regular tariff rates from the Adel Road to or from Des Moines the Des Moines Road will pay over to the Adel Road one-tenth (1/10) of its receipts therefrom.

"Fifth. The Des Moines Road will allow the Adel Road the joint use of all its station-houses and station facilities at Waukee on its paying its proportion for its maintenance, to be arranged by the superintendents of the two roads.

"Sixth. The Adel Road to have equal privileges at Des Moines and equal rates on all construction material with those enjoyed by the Des Moines Road, and every facility or rate or increased rate obtained from the Rock Island Road shall be enjoyed and shared by the Adel Road, and the Des Moines Road will haul its construction material at half its local rates from Des Moines to Waukee; this to apply to all material hauled since the first of July last.

"Seventh. Uniform rates shall be maintained by both roads at all competitive points and both roads shall join in requiring the Rock Island to do the same, as far as able, and if the Rock Island shall persistently and continuously refuse to maintain such uniform rates in accordance with Mr. Riddle's letter of this date, which is made a part of this contract, at such competitive points, then the Adel Road may, by giving thirty (30) days' notice in writing of its intention so to do, terminate this contract.

"Eighth. If the Des Moines Road accounts to the Adel Road for forty per cent of the through earnings on through freight, although its share of the through earnings should hereafter be reduced to a less amount, this agreement to continue, and in the event of its failure to do so the Adel Road to have the right to terminate this contract upon thirty days' notice in writing.

"Ninth. It is agreed that if the Des Moines Road shall at any time lease or transfer its through business at Des Moines to any other than the Rock Island Railroad the Adel Road shall have the privilege then to terminate this contract by giving thirty days' notice in writing of its intention so to do.

"Tenth. The Des Moines agrees that in case any railroad shall be built or operated by it or by the Rock Island on the territory west of the Des Moines Road, south of the Northwestern Road, and east of the projected line of the Rock Island from Guthrie Centre to Guthrie, then the Adel Road may terminate this contract on giving thirty days' notice in writing.

"Eleventh. Settlements and adjustments under this contract shall be made monthly on the first day of every month, unless otherwise agreed on.

"Twelfth. In consideration of the foregoing the Adel Road hereby agrees to deliver to the [580] cars of the Des Moines Road at Waukee all its freight and passengers bound to Des Moines or to any place through Des Moines and beyond for the period of twenty years from this date.

"This contract and any damages for the breach of same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesoever hands they may come, the lien on the Adel Road being limited to so much thereof as lies between Waukee and Panora.

"The Des Moines and Fort Dodge
Railroad Company,
"By Charles E. Whitehead, Pres't.
"The Des Moines, Adel & Western
Railroad Company,
"By T. J. Coldwell, Pres't.
"J. S. Runnells, Sec'y."

After the execution of this agreement, the Des Moines, Adel and Western Railroad Company pushed its road northwestward from Waukee to Panora, and then adopted a new route almost directly north from Panora, but which it never completed. It, however, subsequently entered into arrangements with the Wabash, St. Louis and Pacific Railway Company, by which that Company, under the charter of the Adel Company, constructed the piece of road between Des Moines and Waukee, and leased that and the remainder of the Adel and Western Railroad Company, so that all the traffic provided for in the contract as coming from the Adel Company to the Des Moines and Fort Dodge Company was transferred in effect to the Wabash Company. The object of the present petition of intervention was not to recover any money actually earned by the intervening Company or the other, for all of that carrying business was settled up and paid for as it progressed; but it was to recover the damages to which the intervenors might be entitled during the remainder of the twenty years which the contract had to run by the failure on the part of the Adel Company to keep that contract. The appellant was permitted to file its [581] claim of intervention, which was amended once or twice, and was finally heard on demurrers on the part of the Des Moines and Northwestern Company, and the Central Trust Company, and the Wabash, St. Louis and Pacific Company, which demurrers were sustained, and the petition of intervention was dismissed.

The right of the Des Moines and Fort Dodge, Company to intervene in this suit is based upon

the last sentence in the contract which we have given in full. The language of this sentence is: "This contract and any damages for the breach of same shall be a continuing lien upon the roads of the two contracting companies, their equipment and income, in whosesoever hands they may come, the lien on the Adel Road being limited to so much thereof as lies between Waukee and Panora." The intervenors allege that for the supposed gain and profits which they would make out of this contract if it were faithfully kept for the period of twenty years from its date, they have a lien on the railroad itself, and on its equipment and income, which attaches to it in whosesoever hands it might come after that contract was made.

The appellees resist this principle on two grounds. First, that the contract, so far as it disables the Adel Railroad Company from the free use of all the means of railroad carriage from any part of its road to the City of Des Moines, is void as against public policy, and is especially void as a contract which in its nature disables that road from performing the public obligations assumed by it in its charter, of making and using as a common carrier the road from Waukee to Des Moines or from Des Moines to Waukee. A second objection is that, whatever the language concerning the lien upon the two contracting companies may mean, it does not constitute a lien or obligation running with the land, though it may be a valid contract between the parties, personally enforceable by an action at law. Either of these objections, if well taken, is fatal to the claim of appellant, and we are of opinion, without inquiring into the former, that the latter objection is well taken.

It will be observed that this contract does [582] not purport to be a mortgage on the railroad of the Adel Company; that it does not convey in proper terms any title to the railroad itself or to its appurtenances, or any interest in them; and that it does not secure, as a lien upon the roads, any particular sum of money. It declares that the contract and any damages from a breach of the same shall be a continuing lien upon the roads of the two contracting companies. It is difficult to conceive how the contract, abstractly considered, could be a lien upon the roads of the companies, and not much easier to see why the damages for the breach of such contract are made a lien upon the roads of the two companies. There is nothing in the language of this sentence, nor in the nature of the contract, which should make it one running with the land, or one chargeable upon the railroad, when by due course of law, or in any other mode, the property passed to other hands. And if, in point of fact, the one company had performed services under that contract for the other, for which it had received no compensation, and for which there was a sum of money due, and ascertained or readily ascertainable, which sum might be a lien on the income or property of the delinquent company, it can hardly be supposed that the conjectural damages and the speculative profits which might yet result to the company from the unperformed part of the contract through eighteen or twenty years, are to be made a specific lien on the property, attached to it and passing into the hands of whoever might become its purchaser.

When the Adel Company, under its new name of the Des Moines and Northwestern Company, executed a mortgage on all its property and issued bonds under that mortgage, under which the Central Trust Company of New York, as trustee, issued a large amount of bonds, the title to the property passed to that corporation without having attached to it the lien of the contract for a traffic arrangement between the Adel Company and the appellant, and the same thing is true in regard to the lease of February 28th, 1881, between the Des Moines Northwestern Railway Company, formerly the Adel Company, and the Wabash, St. Louis and Pacific Company, by which the latter assumed to pay the damages under the contract with appellant, or to save the former harmless in regard to it. This was a mere personal obligation, and did not confer any right in the land, to enforce the performance of that contract. As the Wabash Company by virtue of this lease undertook to complete the connection between the Adel Road, and its western extension from Panora to Waukee, and the City of Des Moines, by building the road between the two latter points, a duty which, by its charter, devolved upon the Adel Company, we think it might very well have contracted to save the company harmless in regard to the lease which in effect enabled it to complete its obligation to the public.

It seems to us that the obligation of the Adel Company to fulfil the duties of its charter by completing its connection between Waukee and Des Moines City was an obligation inconsistent with a perpetual contract to employ the Fort Dodge Railroad to do all its carrying business between those two points; that the building of this piece of road was inconsistent with a contract for a long period of time, such as twenty years, by which it bound itself to deliver all its freight and passengers to the Fort Dodge Company at Waukee. And, since the Fort Dodge Company has received compensation for all the services it rendered while this contract was in operation, we are of opinion that its claim for damages, which resulted from the determination of the Adel Company to build its own road from Waukee to Des Moines, and the actual building of that road, and the necessary abandonment of its contract with the Fort Dodge Company, do not constitute a lien upon the road of the company, and that the bill was rightfully dismissed.

Decree affirmed.

WALTON FARRAR, Adm'r., ET AL., *Appts.*,
v.
JOHN CHURCHILL, Trustee, ET AL.

JOHN CHURCHILL, Trustee, ET AL., *Appts.*,
v.
WALTON FARRAR, Adm'r.

(See S. C. Reporter's ed. 609-621.)

Appeal, when taken—cross-appeal—rules applicable—fraud in the sale of land—not presumed

NOTE.—*As to fraud and undue influence in avoidance of deed or will*, see *note* to Harding v. Handy, 6: 429.

As to fraud or illegal consideration, how far will avoid contract, see *note* to Armstrong v. Toler, 6: 468.

--personal investigation—imputed knowledge—concealment—opportunity to examine—full examination of property by purchaser—deficiency in quantity.

1. An appeal from a decree in equity must be taken in two years after the entry of the decree: and it cannot be said to be taken until it is presented to the court which made the decree, by filing the papers.
2. Although an appeal has been taken, the court below may allow a cross-appeal; but if the petition, order and bond are not filed in the court below until after two years from the entry of the decree, the cross-appeal will be dismissed.
3. The rules, regulations and restrictions are the same as to appeals as in cases of writs of error. An assignment of errors must be annexed to and returned with the transcript of the record.
4. In Mississippi, in an action for the price of land sold, the purchaser may set up in defense the fact that the vendor defrauded him by false representations as to the quantity, quality, condition or boundaries of the land.
5. Fraud is never presumed, but must be clearly made out. The false representation must be material and be acted on in the belief of its truth.
6. If the purchaser investigates for himself, and nothing is done to prevent a full investigation, he cannot say that he relied on the vendor's representations.
7. If the means of investigation be at hand and the attention of the purchaser be drawn to them, knowledge of the result which, upon due inquiry, he ought to have obtained, will be imputed to him.
8. Silence may be, but is not necessarily, equivalent to a false representation; if, with intent to deceive, the vendor conceals a material fact, which he is in good faith bound to disclose, this is equivalent to a false representation.
9. But where the facts lie equally open to both parties, with equal opportunities of examination, and the vendee undertakes to examine for himself, without relying on the statements of the vendor, it is not evidence of fraud that the vendor knows facts not known to the vendee and does not disclose them to him.
10. Where the purchaser of a tract of land personally examined the land, upon request of the seller's agent, who informed the purchaser that he knew nothing personally of the property, and in order to satisfy himself as to whether the memorandum furnished by the agent was correct, and afterwards accepted the proposition of sale and received a deed of the land, fraud must be clearly proved or relief will be denied.
11. That the deed conveys a less quantity of cleared land than stated in the agent's memorandum is not sufficient to overthrow it, in such case.

[Nos. 266, 603.]

Argued and submitted April 16, 1890. Decided May 19, 1890.

APPEALS from a decree of the Circuit Court of the United States for the Southern District of Mississippi for the recovery of purchase money of land and that the purchase money be a first lien on the land and that it be sold in satisfaction in default of payment. There was also a cross-appeal. *Cross-appeal dismissed and decree affirmed.*

The facts are stated in the opinion.

Messrs. **William L. Nugent** and **W. Hallett Phillips,** for appellants:

The memorandum was prepared by the agent of the vendor and on the faith of it the vendee incurred large obligations and expended a great deal of money, and that construction should be adopted which is favorable to the vendee.

Noonan v. *Bradley*, 76 U. S. 9 Wall. 394 (19: 757); *Mobile & M. R. Co.* v. *Jurey*, 111 U. S. 584 (28: 527); *Florida C. R. Co.* v. *Schutte*, 103 U. S. 140 (26: 335); *Orient Mut. Ins. Co.* v. *Wright*, 68 U. S. 1 Wall. 468 (17: 508); *Moran* v. *Prather*, 90 U. S. 23 Wall. 492 (23: 121).

When a bill charges a fact to be within the knowledge of the defendants, or which may fairly be presumed to be so, if the answer is silent as to the fact, it will be taken as admitted.

Moore v. *Lockett*, 2 Bibb, 67, 69; *Hardy* v. *Heard*, 15 Ark. 184; *Smilie* v. *Siler*, 35 Ala. 88; *Wilson* v. *Carver*, 4 Hayw. 92; *Neale* v. *Hagthrop*, 3 Bland, 551, 1 Dan. Ch. Pl. and Pr. 837; *United States* v. *Samperyac*, Hemp. 118, 136; *Young* v. *Grundy*, 10 U. S. 6 Cranch, 51 (3: 149).

The vendee is not estopped by accepting a conveyance showing a less number of acres of cleared land, but the vendor is estopped by his written proposition to sell.

Carpenter v. *Thompson*, 3 N. H. 204.

The court discovered the so-called estoppel arising out of the acceptance of the deed. Every opportunity to plead the estoppel was afforded the vendor and he failed to take advantage of it.

Wood v. *Ostram*, 29 Ind. 177; *Ransom* v. *Stanberry*, 22 Iowa, 334; *Dale* v. *Turner*, 34 Mich. 405; *Warder* v. *Baldwin*, 51 Wis. 450; *Lansing* v. *Montgomery*, 2 Johns. 382; *Brinsmaid* v. *Mayo*, 9 Vt. 31; *Davis* v. *Thomas*, 5 Leigh, 1; *Guild* v. *Richardson*, 6 Pick. 364.

If there was no issue on the estoppel, or supposed estoppel, made by the pleadings, the recitals in the deed to appellant could not have been availed of to work out one in favor of the vendor, and thus protect him from the consequences of his fraud.

Providence Rubber Co. v. *Goodyear*, 76 U. S. 9 Wall. 788 (19: 566); *Washington, A. & G. T. R. Co.* v. *Washington*, 77 U. S. 10 Wall. 299 (19: 894); *Boone* v. *Chiles*, 35 U. S. 10 Pet. 177 (9: 388); *Sawyer* v. *Hoyt*, 2 Tyler (Vt.) 288.

The price contracted to be given for the land has nothing to do with the question of damages, except in so far as it tends to fix the actual value in the absence of other testimony.

Estell v. *Myers*, 56 Miss. 806; Field, Damages, 42, 421; Waterman, Set-Off, 573; *Reddington* v. *Henry*, 48 N. H. 273; *Gates* v. *Reynolds*, 18 Iowa, 1; *Staley* v. *Murphy*, 47 Ill. 241; *Williams* v. *Sturdevant*, 27 Ala. 602.

Messrs. **Alexander Pope Humphrey** and *George M. Davis*, for appellees:

Silence, unless there is an obligation to speak,

As to cancellation of a deed or a contract in equity for fraud, concealment or misrepresentation, see *note* to Neblett v. Macfarland, 23: 471.

When fraud and false representations in sale of goods waived by suing for the price, or settling, or receiving pay for goods; cause of action for money or goods obtained by false representation, assignable; relief for fraud is barred by assent to transaction, or by election to affirm the contract. See *note* to Fenemore v. United States, 1: 634.

As to action for deceit; what necessary to sustain see *note* to Ming v. Woolfolk, 29: 740.

even in reference to latent defects, is not fraud.

Laidlaw v. *Organ*, 15 U. S. 2 Wheat. 193 (4: 217); *People's Bank* v. *Bogart*, 81 N. Y. 107; *Hanson* v. *Edgerly*, 29 N. H. 353; *Frenzel* v. *Miller*, 37 Ind. 1; *Smith* v. *Hughes*, L. R. 6 Q. B. 597; Bigelow, Frauds, 590; *Ward* v. *Hobbs*, L. R. 4 App. Cas. 13, L. R. 3 Q. B. Div. 150.

All preliminary agreements and negotiations are to be deemed merged in the final settled instruments executed by the parties, unless a clear mistake be established.

Potomac S. B. Co. v. *Upper Potomac S. B. Co.* 109 U. S. 681 (27: 1073); *Leggott* v. *Barrett*, L. R. 15 Ch. Div. 309.

The item of damages allowed for failure of crop was too remote.

2 Suth. Dam. 430, 431.

[10] *Mr. Chief Justice* **Fuller** delivered the opinion of the court:

John Churchill held title to certain lands in Mississippi, as trustee for Mary M. Clark, whose husband, M. L. Clark, in 1881, employed J. H. D. Bowmar, of Vicksburg, to sell the property, which he did, to A. B. Pittman, also a resident of that city, and on the 16th of March, 1882, Churchill as trustee, and Mr. and Mrs. Clark, all residing in Louisville, Kentucky, conveyed the lands and "the mules, implements and cattle on the plantation, save two horses, reserved by said two parties," to Pittman. This conveyance recites that it is "made this 9th day of January, 1882," but the attestation clause is that the signatures are appended the 16th day of March, 1882, "the date of the sale being of 9th January, 1882," and the acknowledgment by the grantors is March 16. The consideration of the conveyance was $5,000 in cash, and four notes of Pittman for $5,000 each, bearing interest at 8 per cent and payable at one, two, three and four years from date.

In the latter part of January, 1882, certain other personalty on the premises was sold by Clark to Pittman for $1,000 cash and three acceptances, one for $1,000, due April 1, one for $1,000, due May 1, and one for $1,133.10, due June 1, 1882, with grace. Two of these acceptances were transferred by Clark to the trustee, who, when they matured, brought a separate suit upon each of them. The other acceptance passed into the hands of a bona fide holder without notice. When the first of the notes given as consideration for the conveyance became due, suit was brought upon it, and, on the 7th of November, 1883, Pittman filed his bill in the Circuit Court of the United States for the Southern District of Mississippi against John Churchill, trustee, and Mr. and Mrs. Clark, alleging that fraudulent representations had been made to him in the sale of the plantation and accompanying personal property, and also in the matter of the personalty subsequently purchased from Clark, and asking that the three suits above mentioned be enjoined; for an account of damages suffered, and their application by way of recoupment, offering to pay whatever might be found due on a proper [11] accounting; and for general relief. It is admitted by counsel for appellants that the controversy over the latter purchase has been satisfactorily adjusted, and that so much of the transaction is only incidentally referred to in connection with the other fraud, circumvention and deceit alleged to have been practiced. The bill claimed failure of title as to part of the land, but this was fully met by the answer, was not pressed below, and may be regarded as out of the case. The oath to the answer was not waived, and accordingly the answer of Mary M. Clark and John Churchill, trustee, was duly verified. Clark was not served and filed no answer, but his deposition in one of the law suits was put in evidence.

A cross-bill was subsequently filed by Churchill and Mrs. Clark, praying that an account be had and stated between the parties; that whatever was found to be due from Pittman on the notes for the purchase money of the plantation should be decreed to be a lien thereon and the land sold to pay the same; that cross-complainants might have judgment for the amount found due on the two notes given for the personalty; and that a receiver be appointed, etc. It was ordered by the court that the cross-bill be treated and held as for a receiver only, and the complainant's bill as the answer thereto, as well upon the motion for a receiver as at the hearing; and that the cause be referred to an examiner and commissioner to take proof upon the issue set out in the bill, and "of the damages claimed by the complainant, and state an account between the parties, recouping against the purchase money due the defendant the damages suffered and sustained by the complainant, if any, because of the alleged frauds and misrepresentations set out in the bill, should they be established to his satisfaction." Proofs were accordingly taken and a report made by the special commissioner, and a final decree rendered November 5, 1885, in favor of Churchill, trustee, for the recovery from the complainant of the sum of $19,129.50, to bear interest at the rate of 8 per cent per annum from the second day of September, 1885, until paid; and that said sum of money with interest and costs should be a first and prior lien on the lands in question, which should be sold, in satisfaction, in default of payment as provided. From this decree an appeal was prayed by the complainant, an appeal bond duly given and approved December 1, 1885, with Thomas Rigby as surety, and the record was filed in this court November 13, 1886. The opinion of the district judge holding the circuit court was filed September 2, 1885, and appears in the record.

On October 31, 1887, the defendants Churchill and Clark presented a petition for a cross-appeal to a justice of this court, and obtained an allowance thereof, an appeal bond being approved, and a citation issued, on that day. This petition was filed in the circuit court on the 7th day of November, 1887. The citation bears this indorsement: "On this 5th day of November, in the year of our Lord one thousand eight hundred and eighty-seven, I, as administrator of the estate of Alfred B. Pittman, accept service of the within citation, and hereby enter my appearance as such administrator herein. Walton Farrar, Adm'r." This citation accompanied the transcript of the petition, order and bond on cross-appeal filed in this court November 21, 1887. It appeared from the petition that since the original appeal was taken, Alfred B. Pittman had died, and the

cause had been revived in the name of Walton Farrar, as administrator.

No decree in any action in equity can be reviewed by this court on appeal, unless the appeal is taken within two years after the entry of such decree. Rev. Stat. sec. 1008. And appeals are subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error. Rev. Stat. sec. 1012. As it is the filing of the writ of error in the court which rendered the judgment that removes the record, the writ of error is not brought in the legal meaning of the term until it is so filed (*Brooks* v. *Norris*, 52 U. S. 11 How. 204 [13: 665]); nor is an appeal "taken" until it is in some way presented to the court which made the decree appealed from. *Credit Co.* v. *Arkansas C. R. Co.* 128 U. S. 258 [32: 448].

Cross-appeals must be prosecuted like other appeals, and therefore the cross-appeal is not [613] taken until brought to the attention of the court whose decree it questions. Although the record may have been removed to this court upon appeal, yet the court below may allow a cross-appeal, sign a citation and approve a bond within the two years prescribed. And so when a cross-appeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the cross-appeal under the Statute. As in this case the petition, order and bond were not filed in the circuit court until after two years had elapsed from the date of the entry of the decree, the cross-appeal must be dismissed.

The amount due to Churchill, trustee, upon the notes and acceptances, does not appear to have been questioned, and with interest from January 9, 1882, to the 2d day of September, 1885, reached the sum of $28,541.70. The court passed upon exceptions embracing the items of damages claimed by way of recoupment set forth in the commissioner's report, and allowed the sum of $7,454, which with interest to September 2, 1885, made an aggregate of $9,412.20, and that amount being deducted from the $28,541.70, left a balance of $19,129.50 in favor of the defendant Churchill, trustee, for which the decree was rendered. The dismissal of the cross appeal dispenses with any inquiry into these allowances so far as the cross-complainants are concerned.

By section 997 of the Revised Statutes, an assignment of errors is required to be annexed to and returned with a writ of error, and the rules, regulations and restrictions are, as remarked before, the same as to appeals as in cases of writs of error. By the Twenty-first Rule of this court, it is, among other things, provided that the brief of counsel for plaintiff in error or appellant shall contain "a specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. . . . When the error alleged is to a ruling upon the report of a master, [614] the specification shall state the exception to the report and the action of the court upon it. . . . When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this Rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified. When, according to this Rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion."

There is no assignment of errors annexed to the transcript of the record in this case, nor does the brief of counsel contain any specification of errors, such as is required by our Rule. We shall not in this instance decline to consider what we suppose to be the errors relied on, but we call attention to this disregard of the Statute and the Rule, in the hope that nothing more is needed to prevent its recurrence hereafter.

Appellants insist that the circuit court erred in not allowing complainants for the difference in value of eight hundred acres of the land in question, alleged by them to have been warranted to be above overflow, but to be subject to it; for rebuilding fences and cleaning ditches, and replacing foundations to houses, in consequence of overflow; and for loss occasioned by deficiency in cleared land. The charge is of fraudulent representations, by the defendants or their agent, as to the freedom of the lands from liability to overflow from the Mississippi River, and also as to the number of acres of cleared land in the tract conveyed.

It was held in *Andrus* v. *St. Louis S. & R. Co.*, 130 U. S. 643, 648 [32: 1054, 1056], that "false and fraudulent representations upon the sale of real property may undoubtedly be ground for an action for damages, when the representations relate to some matter collateral to the title of the property and the right of possession which follows its acquisition, such as the location, quantity, quality and condition of the land, the privileges connected with it, or the rents and profits derived therefrom."

In *Myers* v. *Estell*, 47 Miss. 4, 21, the Supreme Court of Mississippi said: "In an action for the price of land sold, the purchaser may set up in defense the fact that the vendor [6 defrauded him by false representations as to the quantity, quality, condition or boundaries of the land. An offer to rescind the contract is not necessary in order to entitle the purchaser to maintain an action for damages for the fraud, . . . nor to entitle him to defend to the extent that he has suffered by the fraud, that is, to the extent that he would be entitled to recover in an action for damages founded on the fraud. The question may as well be tried in an action for the price, and the rights of the parties be settled in one suit, as to allow the plaintiff to recover the whole stipulated price, and then permit the other party to recover back the whole or a part in an action for the fraud. It is the policy of the law to avoid a multiplicity of suits." In *Estell* v. *Myers*, 54 Miss. 174, and 56 Miss. 800, the vendor having filed his bill for the foreclosure of his mortgage for the purchase money, the defense of false representations was set up, and it was held that the vendee might recoup in damages (1) the difference in the value of the land, either party being at liberty to show that the actual value was more or less than the land would have been worth if it had answered the representations, the contract price to be taken as the value of the thing

as represented, unless a higher or lower value was clearly established; (2) for the deficit or loss of crop by reason of overflow; (3) for the drowning of cattle and animals; and (4) for the expense of replacing fences, etc.

The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material. If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's repre-
[16] sentations. *Southern Development Company* v. *Silva*, 125 U. S. 247 [31: 678]. "If the party to whom the representations were made," remarked *Lord* Langdale, in *Clapham* v. *Shillito*, 7 Beav. 149, "himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded."

In *Hall* v. *Thompson*, 1 Smedes & M. 443, it was held that where T. sold a tract of land to H., and represented that it contained only fifty or sixty untillable acres, whereas about three hundred acres were unfit for cultivation, but, prior to the sale, H. examined all the land more than once, H. was not entitled to rescind the contract on the ground of misrepresentation; *sed aliter*, if fraud had been employed to conceal the defects. And the court ruled, Sharkey, *Ch. J.*, delivering the opinion, that misrepresentation entitling to relief must be in reference to some material thing unknown to the purchaser, either from not having examined, or from want of opportunity to be informed, or from entire confidence reposed in the vendor; that a concealment of material facts known to the vendor and unknown to the vendee, which are calculated to influence the action or operate to the prejudice of the vendee, is fraudulent, but that where the facts lie equally open to both vendor and vendee, with equal opportunities of examination, and the vendee undertakes to examine for himself, without relying on the statements of the vendor, it is no evidence of fraud in such case that the vendor knows facts not known to the vendee and conceals them from him. *Cleaveland* v. *Richardson*, 132 U. S. 318, 329 [33: 384].

At the same time silence may be under some circumstances equivalent to false representa-
[17] tion (*Stewart* v. *Wyoming Cattle Ranche Co.* 128 U. S. 383, 388 [32: 439, 441]), where it is stated: "In an action of deceit, it is true that silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and, if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that what is disclosed is the whole truth." Applying these rules to the case in hand, we find no adequate ground for disturbing the decree.

Mr. and Mrs. Clark and the trustee, Churchill, resided in Louisville, in the State of Kentucky. The land was situated in the State of Mississippi, of which the complainant was a citizen, residing at Vicksburg. The bill states that the defendants' agent was "one J. H. D. Bowmar, a real estate agent in Vicksburg, said district, of undoubted integrity and of the most excellent standing and reputation, who was well known to your orator and possessed his fullest confidence, as indeed he does that of the whole community;" and that Bowmar delivered to complainant a written memorandum in respect to the plantation he proposed to sell, as follows:

"First-class plantation in Bolivar County, on Miss. River; 1,550 acres in tract, 1,060 acres under cultivation; dwelling, with 6 rooms, halls and galleries, and suitable outbuildings; stables for 70 mules; 2-story barn, with cribs to hold 7,000 bushels of corn; clover and millet lots; new fencing; place well ditched and drained; 14 cabins, 4 rooms each; 11 cabins, 2 rooms each, all new; a fine garden attached to the dwelling; 26 acres of the above cleared land detached, but only half a mile away; 4 cabins, 40 mules; full supply of farming implements; price, $25,000. Have written for terms.

"J. H. D. B.

"Owner of the property says 800 acres above overflow; the levee engineer says 500, and all high lands opposite Arkansas City, on Miss. River."

Complainant testifies that he purchased the property on the faith of this statement, and informed Bowmar that he relied "on all of these representations therein contained as material inducements." He says he visited the plantation in the latter part of December, after he "had closed the purchase. I was there about the 30th or 31st of December, 1881, but was not able to judge to what extent the particulars in Dr. Bowmar's mem. were accurate, except of course as to the buildings and fences." In his bill, Mr. Pittman puts the acceptance of the proposition as after his return from visiting the plantation, and this is confirmed by the evidence of Taylor, Clark's manager, that when Pittman came there he "stated that he wanted to buy the place, and thought that he would, in case he bought the place, need all the supplies." The letter of acceptance is as follows:

"Vicksburg, Miss., Dec. 29, 1881.

"Dr. Jas. H. D. Bowmar.

"Dear Sir: I accept your offer made in behalf of the owners of the Timberlake planta-

tion, based on the representations made as to the amount, character, etc., of the lands and personal property.

"A. B. Pittman."

Mr. Bowmar testifies that he was employed by Mr. Clark to sell the place, and for that purpose delivered the memorandum to complainant, "which memorandum was based on information received from Mr. Clark and Capt. Anderson, the engineer of levees for the district in which said land is located; I knew nothing personally of the property, as I, at the time of delivering the memorandum, informed the complainant. My recollection is that we agreed that he should make a personal examination of the property before purchasing, so as to satisfy himself as to the correctness or incorrectness of the statements contained in said memorandum. I was especially solicitous on this point, as I myself knew nothing of the place and did not wish the complainant to be misled by any representations coming from me." This is not specifically denied by Pittman.

Taylor states that in the last of December, 1881, Pittman and Gayle, "both strangers to me, came to the plantation and introduced themselves to me, and said they wanted to look at the plantation with a view to buying it. I had horses saddled and took them all over the plantation, from one end to the other, all around it and through it, and brought them back to the house." We can find nothing in the evidence of Gayle to the contrary. After complainant's acceptance, he gave bond for the cash payment and received an order from Dr. Bowmar for the possession, which was dated January 23, 1882, and is set out in the bill. The deed was executed on the 16th of March, 1882, and conveys by description eight hundred and twenty-seven and fifty-five hundredths acres of cleared land, and one thousand and seven and sixty-nine hundredths acres of wood land.

Gayle, Pittman's manager, says that there was an overflow in 1882, by which they were delayed until the latter part of March before they could begin to plow, and it made them very late. Dr. Bowmar testifies that he saw the front of the plantation under water in 1844, when it was owned by Martin of Louisville; that he had been told that it overflowed in 1862, and that he heard it was overflowed in 1882; that the overflow of 1882 was more general and disastrous in its effect than any previous one within his knowledge or information, and he had lived in the valley of the Mississippi for about fifty years, his occupation prior to the war being that of a planter; that lands previously recognized as being above overflow were generally inundated by the overflow of 1882; and that the words "above overflow" are usually understood to mean above any overflow previously known to persons familiar with the valley.

There is no evidence in the record to show that Clark knew that the place had ever overflowed. The defendants Churchill and Mrs. Clark in their answer state that they have always understood that the greater part of the cleared land was above the ordinary overflows of the Mississippi River. They deny that said lands were overflowed several times or at all before said complainant purchased the same; and say that if the lands or the greater part of them were ever overflowed, they did not and do [620 not now know it; and that they have been informed and believe that even in the extraordinary overflow of 1882 a considerable part of said lands were not overflowed; they deny making any representations to the plaintiff to induce him to purchase the plantation, or that they made any representations at all in regard to it; they deny that Bowmar was authorized in any manner to make any representations to the complainant; they specifically deny that they made any representations in regard to the quantity of cleared land or the number of acres exempt from overflow, or that anyone acting for them was authorized to make, or did make, any such representations; and they deny that they represented that there was one thousand and sixty acres of cleared land on the tract, but say that they believe the tract did and does contain that number. Inasmuch as an answer under oath was not waived, the rule that these denials must be disproved by evidence of greater weight than that of one witness, or that of one witness, with corroborating circumstances, applies; and, taking this evidence together, it falls far short of establishing such a case as would entitle complainant to recover for false representations, as claimed. The memorandum refers to one thousand and sixty acres under cultivation; but Mr. Bowmar's testimony (and his undoubted integrity is conceded by complainant) is that he told the complainant that he was personally unacquainted with the land, and that he was solicitous that complainant should make a personal examination so as to satisfy himself as to the correctness or incorrectness of the statements in the memorandum; and it appears that complainant went personally upon the ground, which ought to have enabled him to determine substantially how many acres were in fact under cultivation.

Turning to the deed, it only purports to convey, and that by specific description, eight hundred and twenty-seven and fifty-five hundredths acres of cleared land. This deed was given in the middle of March, 1882, and it would be entirely unwarranted for us to hold the contents of that instrument to be overthrown by the proof before us, particularly in view of the rule that all preliminary negotiations or agreements were merged in it. The [62 contract had ceased to be executory, and while fraud, if clearly made out, might still justify relief (*Boyce* v. *Grundy*, 28 U. S. 3 Pet. 210 [7: 655]), the deed cannot be brushed away as the result of the evidence in this record.

Upon the whole case, we see no reason for doubting the correctness of the conclusions at which the district judge arrived.

The cross-appeal is dismissed and the decree is affirmed.

500]

ELIZABETH NORMAN ET AL., *Appts.*, v. JOHN A. BUCKNER.

(See S. C. Reporter's ed. 500-507.)

Louisiana law as to property of intestate—liability of administrator and his sureties—rights of creditors of estate.

1. Under the laws of Louisiana, the heirs of an intestate may take the property and pay the debts; but, when they withdraw property from the possession of the administrator and sell it, they release him and the sureties on his bond from further liability in respect to it.
2. Although the administrator, in his individual or other capacity, afterwards obtains title or possession of the property thus taken from his custody as administrator, the liability of his sureties on his bond is not thereby restored; any wrong thereafter practiced by him as to the property is a personal wrong for which his sureties are not responsible.
3. Persons, sureties on the administrator's bond, who hold claims against such estate, are not obliged to collect their claims from the estate of the purchaser of the property thus withdrawn who agreed to pay all the debts, although such administrator is the executor of the latter estate, but may compel the sale of any remaining property of the debtor estate for the payment of their claims.

[No. 275.]

Argued April 16, 17, 1890. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Louisiana dismissing a suit in equity by the heirs-at-law of an intestate to recover from the administrator and the sureties on his bond the value of property alleged to have been wrongfully alienated, and moneys paid by such heirs to redeem the property, or to procure a decree for a return of the property. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wade R. Young** for appellants.

Messrs. **Chas. J. Boatner** and *John T. Ludeling* for appellee.

501] *Mr. Justice* **Brewer** delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the Western District of Louisiana, dismissing the bill filed by appellants, complainants below. The facts are these:

Complainants are the heirs at-law of W. D. King, who died intestate in the State of Louisiana, September 5, 1877. Upon his death and on October 6, 1877, Ben. E. Hall was appointed administrator, and qualified with the defendants and Leonora E. Hall as sureties on his bond. Leonora E. Hall, the surety, was the wife of Ben. E. Hall, the administrator. At the time of his death, King owned an undivided one half of the "Mounds" plantation, with the personal property attached thereto, and also several hundred acres of wild and overflow lands. Mrs. Hall was the owner of the other undivided half of the Mounds plantation; and she and King were partners in carrying on the plantation and running a store thereon. On February 19, 1878, the complainants, as heirs of King, sold and transferred to Mrs. Hall the decedent's undivided half of the Mounds plantation, with all the personal property belonging thereto, for the consideration of five thousand dollars and the agreement of the purchaser to pay all the debts of the estate. If Mrs. Hall had carried out her agreement and paid the debts of the estate, the complainants would have received the overflow lands free from all incumbrances. For the five thousand dollars Mrs. Hall gave two notes, one of two thousand and the other of three thousand dollars, due respectively January 1, 1880, and January 1, 1881, and secured by mortgage on the Mounds plantation. This mortgage was subordinate to a prior mortgage to Aivey & Co. for $17,504.49. Complainants subsequently sold these notes to one of the defendants, John A. Buckner. On September 2, 1879, Mrs. Hall died, leaving a will, giving all her property in Louisiana to her husband and appointing him her executor. He qualified as such, and gave bond as required by the order of the court. On March 30, 1880, Aivey & Co. commenced suit to foreclose their mortgage; and on November 20, 1880, Buckner, purchaser from complainants of their notes [50
and mortgage, also commenced suit to foreclose. Under the first suit the Mounds plantation was offered for sale on June 19, 1880. At that sale, after some competition, a bid from a reliable person of thirty thousand dollars was made. Thereafter Ben. E. Hall bid thirty-one thousand dollars, and the property was struck off to him. He failed to make good his bid, and the sale was thereupon adjourned, and, subsequently, stayed by injunction proceedings. After those injunction proceedings had been gotten out of the way, and on June 21, 1884, the property was again offered for sale, and sold to Buckner for twenty-two thousand dollars, an amount not sufficient to discharge the mortgage claims. Pending these proceedings, and on December 11, 1880, Hall, the administrator of King, filed a petition for the sale of the overflow lands, in order to pay debts of the estate. An order for sale was made on this petition, and on February 5, 1881, the property was sold. At the instance of complainants this sale was set aside—they being compelled to advance $1,200 to reimburse the purchasers. Thereafter, and on November 16, 1883, another order for sale, on a similar petition, was made, and the property sold to one Isadore Newman for the sum of $1,677.74. The value of this overflow land is alleged by complainants to have been $10,000; and the prayer of the bill is for a recovery against the defendants, the sureties on the administrator's bond, of the sum of $11,200—being $10,000 as the value of the overflow land and $1,200 advanced by complainants on account of the first sale; and, failing that, a decree setting aside the sale of the undivided one half of the Mounds plantation made by them to Mrs. Hall, and requiring the purchaser, John A. Buckner, to return said property to them, with the rents, issues and profits during the time of its possession by him.

The bill has thus a double aspect. The alternative reliefs prayed for are essentially different, one being of an equitable and the other of a legal nature. We will consider that of an equitable nature first.

The prayer of the complainants is, that the contract of sale between them and Mrs. Hall [503] be set aside; and that John A. Buckner be decreed to return the undivided one half of the Mounds plantation, which they had sold to Mrs. Hall, and which he had subsequently purchased at mortgage sale. But there is nothing in the record which would justify such relief. Under the laws of Louisiana, the heirs of an intestate may take the property and pay the debts. In pursuance of this right, complainants, the heirs of the intestate King, withdrew the Mounds plantation from the possession of the administrator and sold it. By that act the responsibility of the administrator, and the sureties on his bond, as to that property, ceased. The heirs cannot take property from the custody of an administrator and then hold him or his sureties liable for loss in respect to such property resulting subsequently thereto. Dispossessing him, they relieved both him and his sureties from further responsibility; and this release is in no manner abridged by the fact that the administrator may thereafter, in his individual or in some other representative capacity, obtain the title or possession of the property thus removed from his custody as administrator. The guarantee of an administrator's bond is not against general wrong-doing on the part of the administrator, but simply against his misconduct while in charge of the property of the estate. When that property passes out of his custody his liability and that of his sureties cease. So when these complainants withdrew the Mounds plantation from the custody of the administrator, and sold it on their own account to Mrs. Hall, they released the sureties on his bond from any further liability in respect to it. Neither the administator nor his sureties owed any duty to the heirs thereafter to look after such property or protect their interests in it. *Hebert* v. *Hebert*, 22 La. Ann. 308.

Again, there is no pretense that in the sale made by complainants to Mrs. Hall there was any fraud, mistake or deception. It is not even suggested that there was any wrong in respect to it. How then can they ask to have it set aside? They allege a failure on her part to pay all the consideration. But such failure is no ground for rescission, and they, having parted with the notes received as part payment, [504] cannot return them. Further, while it is alleged that in the foreclosure sale there was collusion between Buckner, the surety, and Hall, the administrator, yet the testimony wholly fails to substantiate the claim. The specific charge is that, when the property was first offered for sale, a bid from a reliable party was made of thirty thousand dollars, a sum which would have paid off the mortgage debts, and left money enough in the estate of Mrs. Hall to have paid all the debts of her estate, including the obligation assumed by her as part of the consideration for the Mounds plantation, to pay the debts of the estate of King; that notwithstanding this advantageous bid, Hall bid thirty-one thousand dollars without having the means of making good such bid, and in collusion with Buckner, for the purpose of preventing a sale; that, failing to make good his bid, the sale was first postponed by order of Buckner's attorney, and thereafter stayed by an injunction suit brought by Montgomery and Delony, the other sureties on the bond, and all for the purpose of enabling Buckner to finally acquire title to the plantation at less than its real value. The facts are, as developed by the testimony, that there was no collusion between Buckner and Hall, and no understanding between them in reference to the property; that the foreclosure suits of Aivey & Co. and Buckner were perfectly proper proceedings for the collection of their debts, commenced only after default in payment of interest and principal, and prosecuted in the ordinary way, without undue haste. At the first sale, and that was before Buckner had commenced his foreclosure suit, it is true that the bidding was as alleged; yet Hall's bid was made on his own responsibility, without suggestion from Buckner, and upon what proved to be an unjustifiable expectation that he could arrange with Aivey & Co., or some other parties, for securing the money on the property. When the second sale took place, Buckner was the highest bidder; and this sale was made after the ordinary advertisement, and under no circumstances of oppression or wrong. So far as respects the delay in the sale, caused by the injunction proceedings, it is enough to say that Buckner had nothing to do with that, and, of course, cannot be held responsible for anything that resulted therefrom. The party who had made the bid of [5 thirty thousand dollars at the first sale, on further examination of the property, and in view of the change of circumstances, did not care to enter into competition at the second sale; and so the property was sold for only twenty-two thousand dollars, an amount which was all absorbed in the mortgage debts. It must also be borne in mind that the foreclosure proceedings were public and judicial; that no party to those proceedings owed any duty in respect thereto to the complainants; and if the mortgage property was worth more than the mortgage debts, and if they had any interest in having it realize its full value, it was their right and duty to attend the sale, and either bid themselves the full value or secure others to make such bid. So concluding this branch of the case, it is clear that the complainants, as heirs, by withdrawing this property from the custody of the administrator, released him and his sureties from further responsibility in respect to it; that the subsequent taking possession of this property by the administrator, as executor and devisee of Mrs. Hall, the purchaser from the heirs, did not restore the liability of the sureties on his bond; that any wrong practiced by him in reference to the property thereafter was a personal wrong, and one for which his sureties were not responsible; that the foreclosure proceedings were fairly conducted; and that the ill result which followed from Hall's excessive and unfulfilled bid was not the result of any collusion or agreement between him and the surety Buckner, and therefore was not an ill result for which Buckner, as purchaser at the last sale, can be held responsible. In respect to this branch of the case, therefore, the ruling was properly against the complainants.

Passing to the other, it is nothing but an action at law on an administrator's bond, to recover the value of property unnecessarily and

improperly sold by him, and damages which resulted from such sale. It is, in no proper sense, a bill for an accounting. It distinctly charges that the administrator twice wrongfully sold the overflow lands; that the complainants succeeded in having the first sale set aside, on the payment of $1,200 to the purchasers; that they had no notice of the second [506] sale, and hence were unable to contest it; and they therefore seek to recover the value of the land thus improperly and finally sold, and the $1,200 which they had to pay on account of the first sale. But waiving any question as to whether this branch of the case was improperly joined with that in which a trust is sought to be established, in respect to the Mounds plantation, we are of the opinion that the ruling of the circuit court was correct on it also, by itself considered. It is indisputable that Mrs. Hall did not pay, as she agreed, the debts of the estate of King; and that the foreclosure sale swept away her entire estate. There remained, therefore, debts due from the estate of King not paid by the heirs, or the purchaser from them of the Mounds plantation. Those creditors had a right to demand the sale of the overflow lands, the remaining property of the estate, for the payment of their claims. The fact that these claims were debts of the partnership of King and Hall, and therefore claims against both their estates; or the additional fact, if it be a fact, that Mrs. Hall's estate if properly managed could have paid these claims, and did not pay them through the mismanagement of her executor,—in no manner relieved the estate of King from its liability, or prevented the creditors from having the overflow lands sold to satisfy them. The mismanagement, if conceded, by Hall as executor of his wife's estate, in no manner affected the question of the liability of the sureties of Hall, as administrator of the estate of King, for a sale of its property. Whatever personal liability Hall may have incurred by the mismanagement of Mrs. Hall's estate, it is no burden resting upon these defendants as sureties on Hall's bond as administrator of King's estate. No liability arises against them, if there were, in fact, unpaid debts against the estate of King, and the property was sold to pay those debts.

Now the real contention of complainants is not that there were no unpaid debts of the estate of King, on account of which these lands were sold, but that Mrs. Hall's estate was also liable for these debts; that Hall, as executor, properly managing that estate, could and should have paid those debts out of that estate; and [507] that Montgomery and Delony, two of the sureties on the administrator's bond, who held these claims, were, by reason of their suretyship, under an equitable obligation to enforce their collection out of Mrs. Hall's estate. But we do not understand that any such obligation was imposed by their suretyship. They did not guarantee Hall's faithful performance of his duty as executor, or become in any manner responsible for what he did as executor. They assumed no obligations in respect to their own claims against the estate of King, either as to the time or manner of their payment. They did not thereby bind themselves to pursue every other joint debtor before asking payment from the King estate. If, by reason of Hall's mismanagement as executor, nothing was left to Mrs. Hall's estate, their claims against the King estate, as one of two joint debtors, were in no manner impaired; and the sale of the overflow lands belonging to the King estate, in satisfaction of their claims, was neither illegal nor improper; and that, in its worst aspect, is all that the testimony develops in respect to this branch of the case.

It should also be noticed that Hall's action in respect to these sales was, in fact, compelled by the complainants themselves. They proceeded against him for contempt in not closing up the estate, and it was only in response to such proceedings that he filed his petitions and made the sales with a view of paying the as yet unpaid debts of the King estate.

Further comment is unnecessary. *The decree of the Circuit Court is correct, and it is affirmed.*

WILLIAM C. WEST, *Plff. in Err.*, [507

v.

JOHNSON N. CAMDEN.

(See S. C. Reporter's ed. 507–522.)

Contract to permanently retain officer of a corporation, invalid—consideration—public office—power of corporation to change its officer.

1. A contract with the president, who holds, as trustee, a controlling interest in the stock of a joint-stock company, that plaintiff should be permanently retained as vice-president of such company at a salary of at least $5,000 per annum, is void as against public policy.
2. That the consideration of such contract was the sale to the company of the property and business of a competing firm in which the plaintiff was partner, and that plaintiff would unite with his co-partners in such sale, and that defendant was interested as a stockholder in the purchasing company, does not made the contract valid.
3. The same rule which applies to a public office applies to this case, although defendant was to receive no direct personal pecuniary compensation or gain for what he was to do.
4. When the company, of which defendant was president, decided to reduce its expenses and a new board of directors was chosen who elected as vice-president in place of plaintiff, who had held the office and discharged its duties for five years, another person who agreed to serve without salary, plaintiff has no remedy against defendant on the contract.
5. A judgment in favor of defendant should not be reversed for an erroneous instruction to the jury, which did no harm to plaintiff, because he could not recover in any event.

[No. 278.]

Argued April 17, 18, 1890. Decided May 19, 1890.

NOTE.—*As to contracts, their interpretation and validity*, see *note* to Bell v. Bruen, 11:89.

What contracts are void as against public policy or as illegal; illegal consideration, when a defense; agreement not to bid; lobby services; for contingent fees; to prevent competition. See *note* to Bartle v. Nutt, 7:825.

How far fraud or illegal consideration will avoid contract. See *note* to Armstrong v. Toler, 6:468.

IN ERROR to the Circuit Court of the United States for the District of Maryland to review a judgment in favor of defendant in an action for damages for non-fulfillment of a contract to retain plaintiff permanently in his position as vice-president of a corporation. *Affirmed.*

Messrs. **S. T. Wallis** and **E. Calvin Williams,** for plaintiff in error:

When a contract is capable of two constructions, the one lawful and the other unlawful, the former must be adopted.

Hobbs v. *McLean*, 117 U. S. 569-576 (29: 941, 943); *United States* v. *Central P. R. Co.* 118 U. S. 235, 240 (30: 173, 175); *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64, 70 (22: 315, 319); Greenhood, Pub. Pol. rule 99, p. 123; *Swaine* v. *Wilson*, 38 Week. Rep. 262; *Dubuque & S. C. R. Co.* v. *Richmond*, 86 U. S. 19 Wall. 590 (22: 176); *Printing & N. R. Co.* v. *Sampson*, L. R. 19 Eq. 462.

Messrs. **Charles Marshall** and **Thomas W. Hall,** for defendant in error:

If the office in question had been a public office, no doubt could exist as to the illegality of such an agreement as is the basis of this suit.

Meguire v. *Corwine*, 101 U. S. 108, 111 (25: 899, 900).

The principle of public policy applied to that case has been declared by this court to be one of universal law.

Oscanyan v. *Winchester R. Arms Co.* 103 U. S. 261, 272 (26: 539, 544).

It is a principle which has been declared to be equally applicable to the directors of a corporation.

Wardell v. *Union P. R. Co.* 103 U. S. 651, 658 (26: 509, 511); *Woodstock Iron Co.* v. *Richmond & D. Extension Co.* 129 U. S. 643, 662 (32: 819, 826); *Fuller* v. *Dame*, 18 Pick. 472, 483; *Woodruff* v. *Wentworth*, 133 Mass. 309, 314; *Bestor* v. *Wathen*, 60 Ill. 138; *Holladay* v. *Patterson*, 5 Or. 177; *Noel* v. *Drake*, 28 Kan. 265; *Forbes* v. *McDonald*, 54 Cal. 98.

[508] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the District of Maryland, by William C. West against Johnson N. Camden. The principal count of the declaration alleges that, in December, 1877, the defendant engaged the plaintiff to serve as vice-president of The Baltimore United Oil Company of Baltimore County, a Maryland corporation, in which the defendant was largely interested, and promised, in consideration of the plaintiff's agreement to serve as such officer, and of the conveyance and transfer to the company of the property used by the partnership firm of C. West & Sons (of which, at the time, the plaintiff was a member), in its business of refining petroleum and dealing in the same and its products, and the consolidation of the business of that firm with the business of the company, which was greatly beneficial to the company and the defendant, that the plaintiff should be retained permanently in his position as such officer, at the salary of at least $5,000 per annum, the expected fulfillment of such promise on the part of the defendant being a material part of the consideration of such transfer and consolidation, and additional to the money consideration for the same; that the transfer and consolidation were carried out shortly thereafter by the plaintiff and the other members of the firm, according to the terms of such agreement; that the plaintiff faithfully discharged the duties of such office, and was duly paid therefor, from the time when his services were so engaged until the 15th of January, 1883, when he was removed from his position, without any sufficient reason, in violation of such promise of the defendant, and notwithstanding he tendered himself to the company and to the defendant as ready and willing to continue the performance of such duties. The damages claimed are $50,000. The defendant pleaded *nil debet* and *non assumpsit.*

The plaintiff then amended his declaration, by averring that, at the time of the making of [5
such promise and of the acceptance of the same, and of the performance by the plaintiff of his part of the agreement, the defendant was able, and proposed and continued to be able, and represented and guaranteed to the plaintiff that he was and would continue to be able, lawfully and properly to procure for, and continue to, the plaintiff such office and employment in the service of the company on the said terms, which office and employment it was for the interest and benefit of the company the plaintiff should have and continue to fill at said salary; that the defendant, down to and at the time of the removal of the plaintiff from said office, was, and always continued to be, able, lawfully and properly, and to the interest and advantage of the company, and with its consent and approval and that of its stockholders, to retain the plaintiff, or cause or procure him to be retained, at said salary, and in the employment of the company; but that the defendant refused so to do, and procured the plaintiff to be removed from said office and from all employment in the service of the company, and to be deprived of all salary and emolument therefrom.

The case was tried by a jury, which found a verdict for the defendant, on which a judgment was entered for him, with costs, to review which the plaintiff has brought a writ of error.

The Baltimore United Oil Company was incorporated under the General Corporation Law of the State of Maryland, on the 13th of December, 1877. The plaintiff and the defendant were both of them incorporators of the company, and both of them named as among the first directors, in the certificate of incorporation. On the 15th of December, 1877, the members of the firm of C. West & Sons, including the plaintiff, executed an instrument in writing, by which, for the expressed consideration of $137,500, they conveyed to the company certain land in Canton, Baltimore County, Maryland, used and occupied by them as a refinery, and all the property owned and used by them in the business of refining petroleum, with the good will of such business and the good will of their business at their store in the City of Baltimore. At a meeting of the board [5
of directors of the company, the defendant, who, as trustee, subscribed for 5,059 shares out of the 6,000 shares which constituted the

capital stock, was elected president, and the plaintiff, who subscribed for 458 shares, was elected vice-president at a salary of $5,000 a year. The subscription made by the defendant for the 5,059 shares, as trustee, was made for The Standard Oil Company, which furnished the money that was paid for such shares, and they were immediately transferred to The Standard Oil Company by the defendant. The plaintiff held the said office, his compensation having been gradually increased by The Standard Oil Company to $15,000 a year, until January 15, 1883, when that company, which still held that amount of stock, having decided to reduce the expenses and to change the management, a new board of directors was chosen, not embracing the plaintiff, and another person, who agreed to serve without salary, was elected vice-president in his place. At the stockholders' meeting at which the new board of directors was chosen the stock belonging to The Standard Oil Company was voted upon by trustees who then held it for that company, the defendant not being one of them. To the consideration of $137,500 expressed in the conveyance above mentioned, Messrs. Archbold and Vilas, two of the officers of The Standard Oil Company, who took part in negotiating the arrangement with C. West & Sons, agreed, on behalf of their company, to add $12,500, bringing up the consideration paid to C. West & Sons to the sum of $150,000; which agreement was carried out.

All the obligations ever entered into by The Baltimore United Oil Company, or by The Standard Oil Company, with the plaintiff or with the firm of C. West & Sons, have been fully complied with. This suit is not brought against either of those companies, nor is it brought by C. West & Sons, but by the plaintiff individually against the defendant individually. The instrument of conveyance says nothing about any office or salary for the plaintiff in The Baltimore United Oil Company. The plaintiff knew, prior to the consummation of the sale by C. West & Sons, that [511] the defendant was acting in the negotiations as the agent of The Standard Oil Company, and knew also, prior to the organization of The Baltimore United Oil Company, that the control of it, and the disposition of its offices, rested with The Standard Oil Company, and knew that the defendant represented that company, in subscribing, as trustee, for the 5,059 shares of stock. He admits, in his testimony, that he believed that the defendant was acting for The Standard Oil Company in the transaction which resulted in the purchase from C. West & Sons, and in the agreement alleged to have been made. The case claimed by the plaintiff is that, in addition to the money consideration for the sale of the property, there was, under the circumstances above mentioned, a further consideration in the individual promise of the defendant to the effect alleged. The defendant denies the existence in fact of any such agreement on his part.

The plaintiff prayed the court to give to the jury the following instructions, each of which was refused, and the plaintiff excepted: 1. "Although the jury may find, from the evidence, that, in negotiating with Messrs. C. West & Sons for the transfer of their property and business to The Baltimore United Oil Company of Baltimore County, the defendant acted as the agent of The Standard Oil Company and was known to the plaintiff to be so acting, yet if the jury believe that the defendant was himself largely interested in The Standard Oil Company as a stockholder, and in the organization of The Baltimore United Oil Company as a means of enlarging its business and profits and promoting his own consequent interest, and believed it necessary or important to the successful organization of The Baltimore United Oil Company and the promotion of his own interests, that Messrs. C. West & Sons should sell to it their property and business and withdraw from competition with said company, and so believing, and in order to induce the plaintiff to consent to such sale and withdrawal, the defendant made with the plaintiff, on his own individual behalf, as the plaintiff has testified, the contract to which likewise the plaintiff has testified, then the defendant's agency of The Standard Oil Company and the plaintiff's knowledge of it, as hereinbefore stated, are no [512] bar to plaintiff's recovery in this action." 2. "If the jury believe, from the evidence, that the defendant was himself largely interested in The Standard Oil Company, as a stockholder, and in the organization of The Baltimore United Oil Company of Baltimore County as a means of enlarging its business and profits and promoting his own consequent interests, and believed it necessary or important to the successful organization of The Baltimore United Oil Company and the promotion of his own interests, that Messrs. C. West & Sons should sell to it their property and business and withdraw from competition with said company, and that the plaintiff was unwilling to unite with his copartners in the sale and transfer of their said property and business to the said company, and the defendant, to induce the plaintiff to unite with his copartners in selling and transferring their said business and property to the said company, contracted and agreed with the plaintiff individually, that, if he would so unite in said sale and transfer, he should have a permanent position in said company, as testified to by the plaintiff, and that, by reason of said contract and promise and relying thereon, the plaintiff did, with the knowledge and consent of his copartners as to said contract and agreement made with the plaintiff individually, unite with his copartners in the sale and transfer of the said property and business, and did withdraw said business from competition with the said company; and shall further find that the defendant, in pursuance of said contract with the plaintiff, procured the appointment of the plaintiff to the position of vice-president of the said company, and that the plaintiff accepted the same in accordance with said contract, and entered upon his duties as such officer, and continued in the discharge of the same for the term of five years, and until he was removed therefrom, and that such removal was made at the instance of or by the procurement of the defendant, without cause; and shall further find, that the plaintiff was willing, and tendered himself willing, to fulfill the duties of the said office and to continue permanently to do so,—then their verdict must be for the plaintiff, for so much as they may find he has been

[513] damaged by the failure of the defendant to comply with his said promise and agreement."

The court instructed the jury as follows: "If they find that the alleged contract between the plaintiff and the defendant, that the said plaintiff should have permanent employment as an officer of The Baltimore United Oil Company, at a salary of not less than $5,000 a year, or as much as any other officer of said company received, was made in contemplation that the defendant was to be an officer of said company and to control a majority of its stock, and that, by the use of his official position and of the control of said ownership of stock, he was to retain said plaintiff in office and fix his salary, as admitted by the said plaintiff, then their verdict must be for the defendant upon the issues joined in this case." The defendant excepted to such instruction.

That instruction was based upon the view that, on the facts stated in it, the alleged contract was void as against public policy. On this point the court said: "There is no allegation or proof that there was at any time such a contract for permanent employment directly with the company, or that the existence of such a contract with defendant was known to all the stockholders of the company; so that it resulted, if the contract be upheld, that whenever the question of retaining the plaintiff in the company's service at $5,000 a year came to be voted on, the defendant's vote was to be influenced by the fact that he was to be liable to the plaintiff in large damages unless the company retained him. Either the company must pay him $5,000 a year or the defendant must make it good to him out of his own pocket. This state of facts serves clearly to bring the case within the principle of the ruling in *Fuller* v. *Dame*, 18 Pick. 472, and *Guernsey* v. *Cook*, 120 Mass. 501; that is to say, it was a contract the purpose and effect of which was to influence the defendant as a stockholder and officer of of the company, 'in the decision of a question affecting the private rights of others, by considerations foreign to those rights,' and the defendant, by the contract, was placed under direct and very powerful 'inducement to disregard his duties to other members of the corporation, who had a right to demand his disinterested action in the selection of suitable officers.' He was to be in a relation of trust and confidence, which would require him to look only to the best interests of the whole, uninfluenced by private contracts. We think this salutary rule is applicable in this case, notwithstanding the alleged contract was not corruptly made for private gain on the part of the defendant. There were other stockholders in the company. The defendant and The Standard Oil Company, for whose benefit it is alleged the contract was made, were not all the stockholders, and it seems to us that it was certainly the right of those other stockholders to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company."

[514]

The court also instructed the jury as follows: "Even if they find that the defendant verbally promised the plaintiff, as part of the consideration for the execution by him of the contract offered in evidence, dated December 15, 1877, that plaintiff should have permanent employment as an officer of The United Oil Company of Baltimore, at a salary of not less than $5,000 a year, or as much as any other officer of said company, and that plaintiff agreed that he would accept such employment and serve said company on those terms, the plaintiff cannot recover on such verbal contract and their verdict must be for the defendant." The plaintiff excepted to that instruction.

The court also instructed the jury as follows: "The plaintiff has offered no evidence legally sufficient to sustain the allegations contained in his amended declaration, and is not entitled to recover in this action." The plaintiff excepted to that instruction, the court having remarked in regard to it: "The alleged contract being, for the reasons we have already stated, presumably void on grounds of public policy, there must be affirmative proof to sustain the allegation of the amendment that the defendant 'was and continued able, lawfully and properly, and to the interest and advantage of said company, and with and by its full consent and approval and that of its stockholders, to retain the plaintiff in the employment of said company.' We do not find any evidence to this effect which, in our judgment, could be properly submitted to the jury."

[515]

The first instruction virtually took the case from the jury, although it appears that, on a prayer by the defendant to the court to instruct the jury that the plaintiff had offered no evidence legally sufficient to entitle him to recover, and that their verdict must be for the defendant, the court refused to grant that prayer.

[516]

We think that under no circumstances could the plaintiff recover in this action, for the reason that the alleged contract was void as against public policy, and that the first instruction to the jury was correct. From the plaintiff's own testimony it appears that his only reliance was on the use of the defendant's influence as an officer of The Baltimore United Oil Company, and on his control over the stock in that company held by The Standard Oil Company. The plaintiff says of the defendant: "He was to be president of the company, and I supposed he would remain there and continue me and keep me in the position as vice-president and general manager. If he was to be president and hold five sixths of the stock and continue to hold it, it was a surety that I should remain in the position."

The agreement alleged to have been made was one on the part of the defendant whereby he might be required to act contrary to the duty which, as an officer of The Baltimore United Oil Company, he owed to that company and to the stockholders other than the plaintiff. The same rule which is applicable to the case of a public office applies to the present case, although it does not appear that the defendant was to receive direct personal pecuniary compensation or gain for what he was to do. The plaintiff, on his own showing, dealt with the defendant in reference to the fiduciary relation which the latter bore to the stockholders, both of The Standard Oil Company and of The Baltimore United Oil Company. The agreement alleged was an agreement which bound the defendant as to his future action as a di-

rector of The Baltimore United Oil Company, and an agreement to keep the plaintiff permanently in the position of vice-president of that company, irrespective of its interests. It amounted to a stipulation on the part of the defendant that no contingency should happen which should require a change of management and a reduction of expenses.

521] The principle involved is well settled in regard to public employments. *Meguire* v. *Corwine*, 101 U. S. 108, 111 [25:899, 900]; *Oscanyan* v. *Winchester R. Arms Co.* 103 U. S. 261, 272, 273 [26:539, 544]. The same doctrine has been applied to the directors of a private corporation, charged with duties of a fiduciary character to private parties, on the view that it is public policy to secure fidelity in the discharge of such duties. *Wardell* v. *Union P. R. Co.* 103 U. S. 651, 658 [26:509,511]; *Woodstock Iron Co.* v. *Richmond & D. Extension Co.* 129 U. S. 643 [32:819], and cases there cited, especially *Fuller* v. *Dame*, 18 Pick. 472, 483. See also *Guernsey* v. *Cook*, 120 Mass. 501, and *Woodruff* v. *Wentworth*, 133 Mass. 309, 314.

We think this principle is equally applicable, on the ground of public policy, although there was not to be any direct private gain to the defendant; for, as was said by the circuit court in this case, it was the right of the other stockholders in The Baltimore United Oil Company "to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company." A personal liability for damages on the part of the defendant, in case the plaintiff should be removed after an agreement of the character alleged, was calculated to be a strong incentive to the defendant to act contrary to the true interests of the company and of its other stockholders. *Bliss* v. *Matteson*, 45 N. Y. 22; 1 Morawetz, Corp. §§ 516, 519.

These views cover also the last instruction to the jury; and it becomes unnecessary to examine the question raised as to the second instruction, which was to the effect that, as the alleged contract was not in writing, the plaintiff could not recover upon it, because it was invalid under the fifth clause of the fourth section of the Statute of Frauds of Maryland, as being an agreement not to be performed within the space of one year from the making thereof; for, even though that might have been an erroneous instruction, it did no harm to the plaintiff, because he could not recover in any event. *Deery* v. *Cray*, 72 U. S. 5 Wall. 795, 807 [18:653,657]; *The Schools* v. *Risley*, 77 U. S. 10 Wall. 91, 115 [19:850, 858]; *Deery* v. *Cray*, 77 U. S. 10 Wall. 263, 272 [19:887, 890]; *Brobst* v. *Brock*, 77 U. S. 10 Wall. 519, 528 [19:1002, 1004]; *Barth* v. *Clise*, 79 U. S. 12 Wall. 400, 403 [20:393, 394]; *Tweed's Case*, 88 U. S. 16 Wall. 504, 517 [21:389, 393]; *Walbrun* v. *Babbitt*, 88 U. S. 16 Wall. 577, 580, 581 [21:489]; 522] *Decatur Bank* v. *St. Louis Bank*, 88 U. S. 21 Wall. 294, 301 [22:560, 562]; *McLemore* v. *Louisiana State Bank*, 91 U. S. 27, 28 [23:196]; *Mobile & M. R. Co.* v. *Jurey*, 111 U. S. 584, 593 [28:527, 530]; *Lancaster* v. *Collins*, 115 U. S. 222, 227 [29:373, 375], and cases there cited; *Evans* v. *Pike*, 118 U. S. 241, 250 [30:234, 237].

Judgment affirmed.

UNITED STATES, *Plff. in Err.*, [5
v.
LUKE VOORHEES.

(See S. C. Reporter's ed. 550-554.)

Mail contract—when money paid for expedited service cannot be recovered back—statement of contractor—allegations.

1. Moneys paid for carrying the mails cannot be recovered back by the United States, as illegally paid, where it is not alleged that the money was paid under a mistake of fact on the part of the Post-Office authorities, nor that any false statement or erroneous representations were made on the part of the contractor, nor that any sum was paid to him for men and horses never required or employed.
2. Where the original contract was for a sixty-two hour schedule, the fact that the contractor performed the service on a schedule of forty-three hours as a matter of private enterprise is not inconsistent with his sworn statement "that it will take fifty per cent more men and horses to perform the mail service on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty hours in winter." He could, at any time, abandon his forty-three hour schedule and adopt the sixty-two hour schedule named in his contract.
3. In such case, where it is not alleged that the defendant did not use fifty per cent more men and horses under the expedited schedule than was necessary in carrying the mails on a sixty-two hour schedule, nor that the cost of the expedited service was excessive, the increased compensation paid defendant cannot be recovered back.

[No. 282.]

Argued Apr. 18,19, 1890. Decided May 19,1890.

IN ERROR to the Circuit Court of the United States for the District of Nebraska to review a judgment sustaining a demurrer interposed by defendant to the petition in an action by the United States to recover moneys illegally paid the defendant for carrying the mails. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.*, for plaintiff in errror.

Mr. **Jno. L. Webster** for defendant in error.

Mr. Justice **Lamar** delivered the opinion of the court:

This was an action at law brought in the court below by the United States against Luke Voorhees, to recover the sum of $14,342.52, alleged to have been illegally paid him for carrying the mails.

The amended petition, filed on the 18th of July, 1886, alleged substantially as follows: In the year 1878, a contract was entered into be-

NOTE.—*As to payment voluntary, and under protest; when money wrongfully and illegally exacted can be recovered back,*—see *note* to Bank of United States v. Bank of Washington, 8: 299.

As to action to recover back duties paid under protest, see *note* to Greely v. Thompson, 13: 398.

As to payment, when voluntary; when may be recovered back,—see *note* to Little v. Bowers, 33: 1016.

tween the Postmaster-General and the defendant, by the terms of which the latter agreed to carry the mails of the United States over route No. 35,040, from Fargo to Pembina, Dakota, and back, six times a week, on a schedule of 62 hours a trip, for the sum of $17,000 a year. On the 30th of July, 1878, by reason of certain requests and a petition obtained by the defendant and his agents and employés acting for him, representing that the business interests of the country along the route demanded the expediting of the schedule time to 40 hours, which were forwarded to the Postmaster-General by or at the solicitation of the defendant, an order was made by that officer, to take effect August 1, 1878, expediting the schedule and reducing the running time upon which the mail was required to be carried over that route to 43 hours in summer and 50 hours in winter, and allowing an additional sum therefor of $8,500. So much of the aforesaid order as allowed the defendant the additional pay (which he afterwards received, from time to time) was made upon the basis of his sworn statement, as follows: "I hereby certify that it will take fifty per cent more men and horses to perform mail service on route 35,040, from Fargo to Pembina, on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty hours in winter."

The petition then alleged that from the beginning of the mail service on the aforesaid route, under the defendant's contract, the mail was in fact carried over the route on a schedule of less than 43 hours, and was so being carried at the time the order expediting the service was made; that the defendant was engaged in running a line of stage coaches over the route and carried the mail upon his stages, upon a schedule of less than 43 hours, for his own convenience and advantage; and that no additional stock and carriers were employed or rendered necessary, over and above the number actually employed and used by the defendant in performing the service under the original contract, by reason of the order expediting the service as aforesaid, nor was the actual speed increased, but the defendant continued to carry the mails upon an actual schedule of less than 43 hours, just as he had done before.

It was then alleged that the extra allowance of $8,500, made by the Postmaster General as aforesaid, was without authority of law, and was paid to defendant and received by him in violation of section 3961 of the Revised Statutes; and that the whole amount so paid to him, from time to time, between the 1st day of August, 1878, and the 9th day of July, 1881, was $14,342.52, for which sum, with interest at 6 per cent per annum from said last date, and also for costs, the plaintiff prayed judgment.

The defendant interposed a general demurrer, which was sustained by the court in a judgment rendered November 1, 1886, and the United States thereupon sued out this writ of error.

The assignment of error is a general one, and is merely to the effect that the demurrer should have been overruled and judgment entered for the United States.

The Statutes relied upon to support a reversal of the judgment are sections 3961 and 4057 of the Revised Statutes.

They are as follows:

"Sec. 3961. No extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additional stock and carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution."

"Sec. 4057. In all cases where money has been paid out of the funds of the Post-Office Department under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion or misconduct of any officer or other employé in the postal service, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon."

The case relied upon in support of the contention of the plaintiff in error is *United States v. Barlow*, 132 U. S. 271 [33: 346]. That case is not in any of its features analogous to the one at bar. It was an action brought by the United States to recover from the defendants, sub-contractors for carrying the mails, moneys paid to them under a mistake caused by their false representations as to the service.

The court held that the action was maintainable upon two grounds: (1) that the moneys [55
sued for, at least that portion which could be recovered back, consisted of an additional allowance to the defendant of $15,994.77 each year, for an expedited service ordered by the Department upon a false estimate of the additional necessary expenses, which had been adopted and acted on, upon the false representations of the defendant, as to the additional number of men and animals required for such expedited service; (2) that the moneys so allowed had been paid out of the funds of the Post-Office Department, under the pretense that service had been performed therefor, when, in fact, such service had not been performed. After referring to sections 3961 and 4057 of the Revised Statutes, *Mr. Justice* Field, delivering the opinion of the court, said: "These sections would seem to cover the present case. It cannot be pretended that the allowance for expediting the service over the new route was not made upon erroneous representations. It is admitted that such was their character." In another part of the opinion he said: "It appears that the sums thus allowed and paid to the sub contractors for stock and carriers, which were never required and never employed, aggregated $59,592.98, constituting the principal item in the amount claimed in this action." The whole line of argument in the opinion, upon the facts there stated, is readily

observed to be inapplicable to the facts alleged in the petition in this case. In that case there was a pure mistake of fact upon which the Post-Office authorities acted, and there was also fraud upon the part of the contractor, in making the false statement that additional men and horses were necessary to perform the service on the expedited schedule.

In this case there is no allegation in the petition that the money sued for was allowed and paid under a mistake of fact on the part of the Post-Office authorities, in making the change of schedule. Nor does the petition allege that any false statement or any erroneous representations were made on the part of the contractor, or that any sum was allowed and paid to the defendant, for men and horses never required and never employed. His original contract was for a 62-hour schedule. The fact that he did perform the service on a schedule
[54] of 43 hours, as a matter of private enterprise for transporting express matter and passengers, as an accommodation to the people along the line, is not inconsistent with his sworn certificate "that it will take fifty per cent more men and horses to perform mail service . . . on a reduced schedule from sixty-two hours to forty-three hours in summer and fifty hours in winter." He was at liberty at any time to abandon his 43-hour schedule and adopt the 62-hour schedule named in his contract.

By the terms of section 3961 of the Revised Statutes, increased compensation for expedited service is to be calculated upon the basis of the necessary men and stock required to perform the service under the original contract. It is not alleged that the defendant did not use 50 per cent more men and horses under the expedited schedule than was necessary in carrying the mails on a 62-hour schedule; nor is it alleged that the cost of the expedited service was excessive. We see no such false representations by the defendant, nor such mistake by the Post-Office, set forth in this petition, as would justify a recovery in this case, and *the judgment of the court below sustaining the demurrer is therefore affirmed.*

Mr. Justice **Field** did not sit in this case or take any part in its decision.

---

[492] THE CITY OF DETROIT, *Plff. in Err.*,
v.
ELIZABETH S. OSBORNE.

(See S. C. Reporter's ed. 492–500.)

Michigan law as to liability for injuries by defective sidewalks—citizen of other State—duty of city.

1. Under the rulings of the Supreme Court of Michigan, municipal corporations are not liable in damages for personal injuries for defects in sidewalks, and such being the settled law of the State, it is binding upon the federal courts.
2. A citizen of another State going into Michigan is entitled, under the Federal Constitution, to only the privileges and immunities of citizens of that State.
3. A city in Michigan, in the discharge of its public duty in respect to keeping the streets and sidewalks in repair, is under no higher or different obligation to a citizen of Ohio than to one of the State of Michigan.

[No. 295.]

Argued April 28, 29, 1890. Decided May 19, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan to review a judgment for injuries received by plaintiff, a citizen of Ohio, in consequence of a defect in a sidewalk in the City of Detroit. *Reversed.*

The facts are stated in the opinion.

Mr. **Henry M. Duffield,** for plaintiff in error:

Under the laws of the State of Michigan, as construed by the Supreme Court of the State, the City was not liable in this case.

Detroit v. *Blackeby*, 21 Mich. 84; *Detroit* v. *Putnam*, 45 Mich. 263; *Deborah Church* v. *Detroit*, 7 West. Rep. 832, 64 Mich. 571; *Brevoort* v. *Detroit*, 24 Mich. 322.

The construction of the local laws of the State by the state court is conclusive upon the federal courts.

Claiborne County v. *Brooks*, 111 U. S. 401 (28: 471); *Bucher* v. *Cheshire R. Co.* 125 U. S. 555 (31: 795); *Christy* v. *Pridgeon*, 71 U. S. 4 Wall. 196 (18:322); *Smith* v. *Kernochen*, 48 U. S. 7 How. 198 (12:666); *Luther* v. *Borden*, 48 U. S. 7 How. 1 (12: 581); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175 (17: 520); *Randall* v. *Brigham*, 74 U. S. 7 Wall. 523 (19: 285); *Elmwood Twp.* v. *Marcy*, 92 U. S. 289 (23: 710); *South Ottawa* v. *Perkins*, 94 U. S. 260 (24: 154); *Fairfield* v. *Gallatin County*, 100 U. S. 47 (25: 544); *Post* v. *Kendall County*, 105 U. S. 667 (26: 1204).

Mr. **F. H. Canfield,** for defendant in error:

Municipal corporations in a case like this are liable for injuries resulting from defective streets or sidewalks.

Weightman v. *Washington*, 66 U. S. 1 Black, 39 (17: 52); *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418 (17: 298); *Nebraska* v. *Campbell*, 67 U. S. 2 Black, 590 (17: 271); *Robbins* v. *Chicago*, 71 U. S. 4 Wall. 657 (18: 427); *Evanston* v. *Gunn*, 99 U. S. 667 (25: 307); *New York City* v. *Sheffield*, 71 U. S. 4 Wall. 194 (18: 419); *Manchester* v. *Ericsson*, 105 U. S. 347 (26: 1099); *Barnes* v. *District of Columbia*, 91 U. S. 540 (23: 440).

The decision in the *Blackeby Case*, 21 Mich. 84, does not constitute the local law of the State within the true meaning of the term "local" law, nor is it conclusive evidence of what the local law of the State is; and therefore this court is not bound to follow it.

Venice v. *Murdock*, 92 U. S. 494–501 (23: 583–585); *Boyce* v. *Tabb*, 85 U. S. 18 Wall. 546 (21: 757); *Burgess* v. *Seligman*, 107 U. S. 20–33 (27: 359–365); *Delmas* v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 668 (20: 759); *Pana* v. *Bowler*, 107 U. S. 529–540 (27: 424–428); *Oliver*

NOTE.—*As to liability to repair highways in United States; safety and convenience of, a mixed question of law and fact,*—see *note* to Fitch v. Creighton, 16: 596.

As to liability of third persons to city or town for damages recovered against it for injuries from obstructions or defects in streets, see *note* to Chicago v. Robbins, 17: 298.

v. *Rumford Chemical Works*, 109 U. S. 83 (27: 864); *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 (10: 865); *Hough* v. *Texas & P. R. Co.* 100 U. S. 213-226 (25: 612-618); *Brooklyn City & N. T. R. Co.* v. *National Bank*, 102 U. S. 14 (26: 61); *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418 (17: 298); *Barnes* v. *District of Columbia*, 91 U. S. 540 (23: 440).

The circuit court in Michigan has uniformly refused to follow the *Blackeby Case*.

Deborah Church v. *Detroit*, 7 West. Rep. 832, 64 Mich. 571; *Detroit* v. *Chaffee*, 70 Mich. 80.

When a case involving only general principles and general rules comes before the federal court, whether it be one of contract or tort, the federal court must decide it according to its own judgment and is not bound to follow a state decision, if such decision is contrary to well-settled law.

Hough v. *Texas & P. R. Co.* 100 U. S. 213, 226 (25: 612, 618); *Michigan C. R. Co.* v. *Myrick*, 107 U. S. 102, 109 (27: 325, 327); *Brooklyn City & N. T. R. Co.* v. *National Bank*, 102 U. S. 14 (26: 61).

[495] *Mr. Justice* **Brewer** delivered the opinion of the court:

On November 19, 1883, the defendant in error, while walking on Church Street, in the City of Detroit, was thrown to the ground and received severe personal injuries in consequence of a defect in the sidewalk. For these injuries she, as a citizen of Ohio, brought her action in the circuit court of the United States against the City, and recovered a verdict and judgment for ten thousand dollars. 32 Fed. Rep. 37. The City alleges error, and its principal contention is that under the rulings of the Supreme Court of Michigan municipal corporations are not liable in damages for personal injuries of this nature, and that such being the settled law of the State, it is binding upon the federal courts.

This contention suggests two inquiries: first, What is the settled law of Michigan? and, second, If it be as claimed, is it binding upon the federal courts? The answer to the first inquiry is easy and clear. The precise question was presented in 1870 to the Supreme Court of Michigan, in the case of *Detroit* v. *Blackeby*, 21 Mich. 84. In that case the injury resulted from a defect in the streets, and from failure to keep them in proper repair. Under the laws then in force, both the power and the duty of keeping streets in repair was vested in the city; but the supreme court held that this [496] duty was to the public, and not to private individuals, the mere neglect of which was a nonfeasance only, for which no private action in damages arose. The power of the Legislature to create a liability to private suit was conceded; but it was decided that, in the absence of express action of the Legislature creating such liability, the mere grant of the power and the imposition of the duty to keep streets in repair was not sufficient to sustain a private action for injuries resulting from a failure to keep such streets in repair. This doctrine has never been departed from by the Supreme Court of that State; and no action had ever been taken by the Legislature, up to the time of this accident, to change the rule of liability thus announced. In 1879 (chap. 224, Laws of 1879) an Act of the Legislature was passed for the collection of damages sustained by reason of defective public highways, streets, bridges, cross-walks and culverts. That Statute came before the supreme court for examination in the case of *Detroit* v. *Putnam*, 45 Mich. 268, and it was held, first, that "a statutory liability created in derogation to common law cannot be enlarged by construction;" and, secondly, that the Act, omitting sidewalks, left the law in respect to sidewalks not in repair as it was before; and that no private action against the city for damages springing from a defective sidewalk could be maintained. In *Deborah Church* v. *Detroit*, 64 Mich. 571, an Act purporting to extend the liability of municipal corporations to the case of damages resulting from defective sidewalks was declared unconstitutional. Thus, by the concurrent action and judgment of the Legislature and the Supreme Court of the State of Michigan there was, up to and beyond the time of the injury complained of in this action, no liability on the part of a municipality for such injuries. The case of *Detroit* v. *Chaffee*, 70 Mich. 80, in no manner conflicts with this established rule. In that case a judgment had been obtained against the city in the United States circuit court for personal injuries caused by a defective sidewalk in front of a lot owned by Chaffee. The city had no right of appeal to this court—the judgment being under five thousand dollars—and brought its action against Chaffee, the owner of the lot, under section 57, page 614, Stat. Mich. 1883, which provides [4 that "the common council shall have power to provide and ordain by ordinance that whenever any sidewalk requires to be built or repaired the said council may direct the board of public works to notify the owner, agent or occupant of any lot or parcel of land in front of or adjacent to which such walk is required to be built or repaired, to build or repair the same, and that if such agent, owner or occupant shall neglect, for a time to be specified in the ordinance, to do such building or repairing, it shall be the duty of the said board to at once do or cause the same to be done, and in such case the expense thereof shall be assessed upon such lot or parcel of land, and shall be a lien thereon until collected and paid in a manner to be prescribed in such ordinance; and the owner so neglecting to build or repair shall be liable to the city for all damages which shall be recovered against the city for any accident or injuries occurring by reason of such neglect, and also to prosecution in the recorder's court, and, on conviction, to be fined not to exceed five hundred dollars and the penalties in the city charter elsewhere provided." A judgment in favor of the city was ordered. But this section of the Statute was similar to one in force at the time of the decision in *Detroit* v. *Blackeby*, Laws of Michigan 1865, p. 679, chap. 325, sec. 1. There being no change in the Statute in this respect, it cannot be held that any change was contemplated in the rule of liability by the legislation of 1873; and the decision in *Detroit* v. *Chaffee* was simply the enforcement of a right given by both the Statutes of 1865 and 1883, springing out of a judgment not subject to the supervising control of the Supreme Court of the State. In

answer to the first inquiry it must therefore be affirmed that the law of Michigan is against any liability on the part of the City for injuries like those in this action.

The second inquiry must be answered in the affirmative. If it is a matter of local law, that law is obligatory upon the federal courts. It must be conceded that this adjudication as to the liability of a city for injuries caused by a defect in the sidewalks, the repair of which it
498] has both the power and duty to provide for, is not in harmony with the general rule in this country (2 Dillon on Mun. Corp. secs. 1017 and 1018); nor in accord with the views expressed by this court. In *Barnes* v. *District of Columbia*, 91 U. S. 540 [23:440], this court, after referring to the case from 21 Michigan, *supra*, and the doctrine stated therein, observed that "the authorities establishing the contrary doctrine, that a city is responsible for its mere negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them,"—citing in support a long list of authorities. The authorities which support a different view are collected in *Hill* v. *Boston*, 122 Mass. 344. But even if it were a fact that the universal voice of the other authorities was against the doctrine announced by the Supreme Court of Michigan, the fact remains that the decision of that court, undisturbed by legislative action, is the law of that State. Whatever our views may be as to the reasoning or conclusion of that court, is immaterial. It does not change the fact that its decision is the law of the State of Michigan, binding upon all its courts, and all its citizens, and all others who may come within the limits of the State. The question presented by it is not one of general commercial law; it is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the State. While this court has been strenuous to uphold the supremacy of federal law, and the interpretation placed upon it by the federal courts, it has been equally strenuous to uphold the decisions by state courts of questions of purely local law. There should be, in all matters of a local nature, but one law within the State; and that law is not what this court might determine, but what the Supreme Court of the State has determined. A citizen of another State going into Michigan may be entitled under the Federal Constitution to all the privileges and immunities of citizens of that State; but under that Constitution he can claim no more. He walks the streets and highways in that State, entitled to the same rights and protection as, but none other than,
499] those accorded by its laws to its own citizens.

This question is not a new one in this court. In the case of *Claiborne County* v. *Brooks*, 111 U. S. 400 [28:470], it was held that, "when the settled decisions of the highest court of a State have determined the extent and character of the powers which its political and municipal organizations may possess, the decisions are authoritative upon the courts of the United States;" and in the opinion it was observed: "It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the State."

What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation. The City of Detroit, in the discharge of its public duty in respect to keeping its streets and sidewalks in repair, is under no higher or different obligation to a citizen of Ohio than to one of the State of Michigan, and the measure of its liability under the Statutes, as stated, is to be determined by the judgment of the Supreme Court of that State, and not by what our opinions might be as to the proper construction of those Statutes. Reference may also be made to the recent case of *Bucher* v. *Cheshire R. Co.*, 125 U. S. 555 [31:795], in which this court followed, against its own judgment of the law, the rulings of the Supreme Court of Massachusetts, and held that a party traveling on Sunday, and not for necessity or charity, in the cars of a railroad company, could not recover for injuries sustained by the negligence of the company, because he was himself thus violating the law of the State. Concluding the opinion of the court in that case, it is observed: "It may be said generally that whenever the decisions of the state courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the federal courts. The whole of this subject has recently been very ably reviewed in the case of *Burgess* v. *Seligman*, 107 U. S. 20 [27:359]. Where such local law or custom has been established by repeated decisions of the highest courts of a State, it becomes also the law governing the courts of the United States sitting in that State."

Nothing more need be added to express the views of this court on the question here presented. *The judgment of the Circuit Court must be reversed and the case remanded, with instructions to sustain the demurrer to the amended declaration.*

JOHN GLENN, Trustee of the NATIONAL EXPRESS AND TRANSPORTATION COMPANY,
Plff. in Err.,
v.
JOHN E. LIGGETT.

JOHN GLENN, Trustee of the NATIONAL EXPRESS AND TRANSPORTATION COMPANY,
Plff. in Err.,
v.
JOHN J. TAUSSIG ET AL., EX'TS., ET AL.

(See S. C. Reporter's ed. 533-549.)

Clerical error—stockholder bound by decree

NOTE.—*As to individual liability of stockholders of a corporation for corporate debts*, see *note* to Hatch v. Dana, 25:885.

As to dissolution of corporation, and effect on debts owned by them, and on their property, see *note* to Mumma v. The Potomac Co. 8:945.

Lex loci *and* lex fori *as to interpretation, validity of, and defenses to, contracts.* See *note* to Slacum v. Pomery, 3:205; also *note* to Bell v. Bruen, 11:89.

*against corporation—powers of corporation—Statute of Limitations as to stockholder—corporate duty—Missouri law—parties to suit—*lex loci*—collateral suit—cause transferred.*

1. When the record states that, after judgment was rendered, the court allowed the writ of error and the citation was signed and the bond was approved, the date on those papers being prior to the rendering of the judgment must be attributed to clerical error.
2. A stockholder is bound by a decree against the corporation, such as making an assessment, in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company.
3. Although a corporation has ceased the prosecution of the objects for which it was organized, its corporate powers remain unimpaired for the collection of debts, the enforcement of liabilities and the payment of its creditors.
4. Upon the insolvency of a company, the obligation of the stockholder to pay enough of the amount unpaid on his stock to pay its debts does not become complete until a call or demand for payment, and the Statute of Limitations does not begin to run in his favor until such call or demand.
5. The stockholder cannot set up against an attempt to collect his subscription for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier.
6. In Missouri, if an action is commenced within the statutory limitation of time, and the plaintiff suffers a nonsuit, he may commence a new action within one year after the nonsuit.
7. Where the contract of the subscribers was that the stock was payable as required by the president and directors, the corporation represents them, and it is sufficient if it is a party to the suit to enforce payment.
8. The rights of the parties must be adjudicated according to the statutes and jurisprudence of the State which created the corporation, and in reference to whose laws the contracts of the subscribers to stock were made.
9. The adjudication of a court of such State in a suit properly brought, and where it had jurisdiction as to subject matter and parties, cannot be reviewed or impeached in a collateral suit, except for actual fraud.
10. Where the suit, in which a call was made on the stock, was transferred to another court of competent jurisdiction, such latter court may make a further call.

[Nos. 306, 307.]

Argued April 29, 1890. Decided May 19, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri to review judgments for the defendant in actions to recover calls on shares of stock to pay debts of the National Express and Transportation Company. *Reversed.*

A motion was also made to dismiss the first of the above-entitled causes. *Motion denied.*

The facts are stated in the opinion.

Messrs. Charles Marshall and **John Howard,** for plaintiff in error:

The causes of demurrer have been uniformly decided in favor of the plaintiff in error.

Glenn v. *Williams*, 60 Md. 93; *Glenn* v. *Semple*, 80 Ala. 159; *Vanderwerken* v. *Glenn*, 13 Va. L. J. 91; *Lewis* v. *Glenn*, 84 Va. 947; *Hambleton* v. *Glenn*, 13 Va. L. J. 242; *Hawkins* v. *Glenn*, 131 U. S. 319 (33: 184).

No Statute of Limitations began to run until a judicial call was made.

Chemung Canal Bank v. *Lowery*, 93 U. S. 73 (23: 806).

Messrs. Enoch Totten, **Mason G. Smith** and **Geo. W. Taussig,** for defendant in error:

In Missouri, the defense of the Statute of Limitations may be made by demurrer, when the petition upon its face shows that the time has elapsed.

State v. *Bird*, 22 Mo. 470; *Boyce* v. *Christy*, 47 Mo. 70; *Henoch* v. *Chaney*, 61 Mo. 129; *State* v. *Spencer*, 79 Mo. 314.

The cause of action was limited to five years. Rev. Stat. Mo. 1879, chap. 48, § 3230; 1889, chap. 103, § 6775.

The obligation was payable on demand.

Goshen & M. Turnp. Co. v. *Hurtin*, 9 Johns. 217; *Howland* v. *Edmonds*, 24 N. Y. 310; *Stillwell* v. *Craig*, 58 Mo. 24-31; *Upton* v. *Tribilcock*, 91 U. S. 45 (23: 203).

The cause of action would accrue, and the Statute begin running immediately.

Angell, Lim. (6th ed.) 93-95; 2 Daniel, Neg. Inst. § 1215; *McMullen* v. *Rafferty*, 89 N. Y. 465; *Easton* v. *McAllister*, 1 Mo. 662; *Codman* v. *Rogers*, 10 Pick. 119; *Andreas' App.* (Pa.) 11 W. N. C. 294.

The creditor can at once proceed against the stockholders.

Ogilvie v. *Knox Ins. Co.* 63 U. S. 22 How. 380 (16: 349); *Shockley* v. *Fisher*, 75 Mo. 501, 502; *Eppright* v. *Nickerson*, 78 Mo. 482; *Garesché* v. *Lewis*, 11 West. Rep. 906, 93 Mo. 197, 15 Mo. App. 565.

No making of a call by directors or by a court is necessary as between the creditors and stockholders.

Henry v. *Vermillion & A. R. Co.* 17 Ohio, 187; *Hatch* v. *Dana*, 101 U. S. 205 (25: 885); *Marsh* v. *Burroughs*, 1 Woods, 464; *Holmes* v. *Sherwood*, 16 Fed. Rep. 725; *Crawford* v. *Rohrer*, 59 Md. 600; *Re Glen Iron Works*, 20 Fed. Rep. 674; *Sagory* v. *Dubois*, 3 Sandf. Ch. 466, 492, 7 N. Y. Ch. L. ed. 922.

A creditor may not at once proceed at law.

Glenn v. *Dorsheimer*, 23 Fed. Rep. 696, 24 Fed. Rep. 536; *Glenn* v. *Priest*, 28 Fed. Rep. 908.

In Missouri, the liability of a stockholder to a creditor of a corporation becomes fixed by the insolvency and the Statute commences to run at once.

Garesché v. *Lewis*, 11 West. Rep. 906, 93 Mo. 197, affirming *S. C.* 15 Mo. App. 565; *State Sav. Asso.* v. *Kellogg*, 52 Mo. 583; *Moore* v. *Whitcomb*, 48 Mo. 543; *Sles* v. *Bloom*, 19 Johns. 456.

The operation of the Statute could not be stayed during the long period between the assignment of 1866 and the decree of 1880, by the mere neglect of the assignee to make a call or demand.

Codman v. *Rogers*, 10 Pick. 119; *Baker* v. *Atlas Bank*, 9 Met. 198; *Laforge* v. *Jayne*, 9 Pa. 410; *Pittsburgh & C. R. Co.* v. *Byers*, 32 Pa. 22; *Pittsburgh & C. R. Co.* v. *Graham*, 36 Pa. 77; *Morrison* v. *Mullin*, 34 Pa. 12, 17; *Shackamaxon Bank* v. *Disston* (Pa.) 20 W. N. C. 297; *Franklin Sav. Bank* v. *Bridges* (Pa.) 6 Cent.

Rep. 765; *Baker* v. *Johnson Co.* 33 Iowa, 154; *Prescott* v. *Gosner*, 34 Iowa, 177; *Hintrager* v. *Hennessy*, 46 Iowa, 600; *First Nat. Bank* v. *Greene*, 64 Iowa, 445; *Palmer* v. *Palmer*, 36 Mich. 488; *Wright* v. *Paine*, 62 Ala. 340; *Hatch* v. *Dana*, 101 U. S. 205 (25: 885); *Ogilvie* v. *Knox Ins. Co.* 63 U. S. 22 How. 380 (16: 349).

In Missouri, an assignment of all property of a corporation, where the stock by the provisions of statute was payable as called for by directors, gives the assignee the right to sue for them.

Shockley v. *Fisher*, 75 Mo. 501, 502; 1 Rev. Stat. Mo. 1879, § 738; *Eppright* v. *Nickerson*, 78 Mo. 488; *Braddock* v. *Philadelphia, M. & M. R. Co.* 45 N. J. L. 364; *Yeager* v. *Trust Co.* 14 W. N. C. 296.

Messrs. **Enoch Totten** and *Mason G. Smith*, for defendant in error, for motion to dismiss:

This court can obtain jurisdiction to review a final judgment at law, rendered by a circuit court of the United States, only upon a writ of error.

Sarchet v. *United States*, 37 U. S. 12 Pet. 143 (9: 1033); *Bayard* v. *Lombard*, 50 U. S. 9 How. 530 (13: 245); *Saltmarsh* v. *Tuthill*, 53 U. S. 12 How. 387 (13: 1034); *Washington County* v. *Durant*, 74 U. S. 7 Wall. 694 (19: 164).

A writ of error is brought when it is filed in the court which rendered the judgment.

Brooks v. *Norris*, 52 U. S. 11 How. 204 (13: 665); *Credit Co.* v. *Arkansas C. R. Co.* 128 U. S. 258 (32: 448).

A writ of error must be returned to this court during the term to which it is made returnable. If not so returned it becomes inoperative.

Grigsby v. *Purcell*, 99 U. S. 505 (25: 354); *Radford* v. *Folsom*, 123 U. S. 725 (31: 292); *Blair* v. *Miller*, 4 U. S. 4 Dall. 21 (1: 724); *Castro* v. *United States*, 70 U. S. 3 Wall. 46 (18: 163); *Edmonson* v. *Bloomshire*, 74 U. S. 7 Wall. 306 (19: 91); *Foyolle* v. *Texas P. R. Co.* 124 U. S. 519 (31: 533); *Richardson* v. *Green*, 130 U. S. 104 (32: 872); *Hill* v. *Chicago & E. R. Co.* 129 U. S. 170 (32: 651); *Norton* v. *Brownsville*, 129 U. S. 505 (32: 784).

A writ of error cannot be issued until there is a judgment.

Cohens v. *Virginia*, 19 U. S. 6 Wheat. 409 (5: 292).

Mr. Justice **Blatchford** delivered the opinion of the court:

These are two actions at law brought in the Circuit Court of the United States for the Eastern District of Missouri, on the 12th of July, 1886, by John Glenn, trustee of the National Express and Transportation Company, one against John E. Liggett and the other against Charles Taussig and Morris Taussig. The [534] cases were disposed of in the circuit court on a demurrer in each case to an amended petition. The demurrer was sustained in each case and judgment entered for the defendants, with costs, to review which the plaintiff has in each case brought a writ of error.

In the suit against Liggett the plaintiff claims to recover $1,890, with interest from December 14, 1880, and $3,150, with interest from March 26, 1886: and in the suit against the Taussigs, $3,000, with interest from December 14, 1880, and $5,000, with interest from March 26, 1886.

The first cause of action, as set out in the amended petition against Liggett, is as follows: Liggett subscribed for 63 shares of the capital stock of The National Express and Transportation Company, a Virginia corporation, created by an Act of the General Assembly of that State, approved December 12, 1865, and thereby promised to pay to that Company for each share $100, in such installments and at such times as he might be lawfully required to pay the same according to the legal tenor and effect of the laws under which the Company was so incorporated and his subscription to said stock, whereby, and by force of such subscription, he became a stockholder in the Company and agreed to sue and be sued, plead and be impleaded, contract and be contracted with, in said corporate name, as to all matters touching the property, rights and obligations of the corporation. On the 20th of September, 1866, the corporation, having become insolvent, by its deed of that date, duly executed, acknowledged and recorded, assigned to John Blair Hoge and C. Oliver O'Donnell, both citizens of Maryland, and John J. Kelly, a citizen of New York, in trust for the benefit of the creditors of the Company, all its property, in trust to collect all the debts, claims and moneys payable, to reduce the same to money, and to apply the proceeds to the trusts declared by the deed, including the trust therein declared for the payment of the debts of the Company in the order of priority therein provided, and shortly thereafter ceased to do business. The defendant assented to said deed, and thereby promised to pay to said trustees for each share of stock so subscribed for by him the balance of the $100 due on each share of stock, uncalled for at the time of the making of the deed, whenever he might be lawfully called upon to pay the same, according to the legal tenor and effect of the laws under which the Company was incorporated and the subscription made. At the time of the execution and delivery of the deed, the Company had called for 20 per cent of the par value of the stock. The trustees appointed by the deed neglected to perform the trusts thereby created, and the validity and effect of the deed were drawn in question in the courts of various States in which the stockholders resided, and the enforcement thereof was hindered. In November, 1871, William W. Glenn, of Baltimore, being a judgment creditor of the Company, filed a bill in the Chancery Court of the City of Richmond, it being a court of competent jurisdiction in such cases, in his own behalf and in behalf of all other creditors of the corporation, against it and certain of its officers and the trustees named in the deed of trust, as defendants; by which bill it was sought to obtain from that court a judicial determination of the validity of the deed, and a judicial construction of it, and the establishment of the legal effect and obligation of it upon all property, rights and persons affected thereby, and also to enforce the trusts thereby declared in favor of the creditors of the corporation. Pending that bill, William W. Glenn died, and in the year 1879 the suit was revived in the name of John W. Wright, sheriff of the City of Richmond, and as such duly constituted official administrator of said Glenn. After such revivor, an amended bill was filed, to which bill the corporation,

certain of its officers, and Hoge and Kelly were made defendants (O'Donnell having died). By that bill it was sought to obtain, in addition to the relief prayed for in the original bill, an account and establishment of the debts due by the Company and secured by the deed of trust, and an account of the property and estate subject to the terms of the deed, including the amount of capital stock yet remaining unpaid and uncalled by the Company and subject to be applied to the payment of its debts, the removal of the surviving trustees, the appointment of a new trustee or trustees in their room, an assessment or call to be made by the court [36] on the uncalled and unpaid capital stock and the persons liable to pay the same, for the purpose of providing means to pay the debts of the corporation, and other appropriate relief. The Company was duly served with process in the cause, in accordance with the laws and practice of the State of Virginia, certain of its officers were summoned, and the surviving trustees appeared voluntarily to the suit and answered the original and amended bills, whereby the court acquired full jurisdiction to decree as to all the matters and things involved in the suit.

Such proceedings were had in the cause that, on the 14th of December, 1880, the court decreed as follows: (1) that the deed of trust of September 20, 1866, was valid under the laws of Virginia and binding upon the corporation; (2) that, at the time of the execution of the deed, the corporation had called for 20 per cent of the amount payable by the subscribers to its capital stock, and that 80 per cent of that amount, being $80 dollars on each share, remained unpaid and uncalled for at the date of the decree, and subject to be applied to the payment of the debts of the corporation secured by the deed of trust; (3) that the right to receive such 80 per cent from the persons liable to pay it, as and when it should become payable by the terms of the contract between the Company and the subscribers to the stock, was vested by the deed in the trustees and their survivors, to be applied, when so collected, to the payment of the debts secured by the deed; (4) that the unpaid $80 per share was, by the terms of the contract between the Company and the persons liable to pay the same, payable only in such amounts and at such times as the same might be required to be paid by the Company through its president and board of directors; that no power or authority to sue for any part thereof was vested in the Company or in the trustees under the deed, unless and until such call should first be made by the corporation, and that the trustees acquired no power to make such call by force of the deed of trust or otherwise; (5) that there was no property of the Company wherewith to pay its debts, except the amount so remaining uncalled of its capital stock, and it was the duty of the proper officers of the corporation to call upon the per- [37] sons liable therefor, to pay a sufficient amount of the unpaid $80 per share to carry out the trusts of the deed and pay the creditors secured thereby, but that the corporation and its proper officers had for many years wrongfully neglected to make such call; (6) that the unpaid and uncalled $80 per share remaining in the hands of the holders of the capital stock constituted a trust fund for the payment of the creditors of the Company under the deed of trust; and that, by reason of the neglect and failure of the corporation to call for the payment of a sufficient amount thereof to satisfy its debts under the deed of trust, and thereby enable the trustees to sue for and recover the amount so called, the court possessed and would exercise such power, and would call for so much of the said uncalled amount as would be necessary to perform the trusts declared by the deed and pay the debts secured thereby; (7) the surviving trustees were removed by the decree and the plaintiff was appointed by it in their stead, to execute the trusts of the deed; (8) there were debts owing by the Company, entitled to be paid under the deed of trust, amounting to $509,392.41, each of which debts was particularly ascertained and ordered by the decree to be paid. The decree further adjudged that it was necessary and proper that 30 per cent of the par value of each share of the stock should be called for and required to be paid by the subscribers therefor and their assigns, for the purpose of paying the debts of the Company under the provisions of the deed of trust; and that a call and assessment be and the same was thereby made upon the stock and stockholders of the Company, and their assigns, of 30 per cent of the par value of the stock, being $30 on each share thereof, the same, when paid, to be paid to and received by the plaintiff as trustee under the deed, in the stead of the original trustees therein named.

The plaintiff accepted the appointment so made, and complied with its terms and conditions, and was and is duly qualified to act as such substituted trustee, and to have the rights, and perform the duties, conferred upon and required of him by the decree. By force thereof, and of the Statute of Virginia in such case made and provided, he, upon accepting such appointment, and qualifying as such trustee, as required by the decree, became and still is sub- [53 stituted to all the rights, powers, duties and responsibilities of the trustees named in the deed of trust, and became and is lawfully entitled to receive and collect the assessment or call of $30 per share on each share of stock of the Company, from the persons liable to pay the same. By virtue of the premises the defendant became indebted to him in the sum of $1,890, being $30 on each of the 63 shares of stock. In the year 1884, the plaintiff instituted suit in the Circuit Court of the United States for the Eastern District of Missouri against the defendant to enforce such liability, and on the 15th of July, 1885, suffered a nonsuit in the case.

For a second cause of action, the amended petition states that the suit so instituted in the Chancery Court of the City of Richmond was, after the 14th of December, 1880, transferred to the Circuit Court of the County of Henrico, in the State of Virginia, a court of competent jurisdiction; that such further steps were taken therein that, on the 26th of March, 1886, a further decree was entered in the cause, adjudging that, for the payment of a large balance of the indebtedness of the Company, so established, it was necessary and proper to make a call for the residue of 50 per cent remaining uncalled for and unpaid on the capital stock of the Company, and ordering and decreeing that

a call and assessment be made, and the same was thereby made, on the capital stock and the stockholders of the Company, of $50 on each share thereof, and requiring the stockholders of the Company and each of them, and their legal representatives and assigns, to pay to the plaintiff the several amounts thereby called for, and authorizing and requiring him to collect and receive said call and assessment; and, by virtue of the premises, the plaintiff claims to recover $3,150, being $50 on each of the sixty-three shares of stock.

The demurrer of the defendant Liggett sets forth as grounds of demurrer that the amended petition does not state facts sufficient to constitute any cause of action; that it appears, from its face, that no cause of action accrued to the plaintiff by reason of any of the matters set forth in either the first or the second count, at [539] any time within ten years next before commencement of this suit, or at any time within five years next before its commencement, or at any time within ten years next before the commencement of the suit in which the plaintiff alleged that he suffered a nonsuit; that both of the causes of action are barred by the Statute of Limitations of Missouri; and that the Chancery Court of the City of Richmond had no jurisdiction to make the assessment alleged, and it and the further assessment were and are void.

The suit against Liggett was commenced on the 12th of July, 1886, by the filing of a petition. A writ of summons was issued on that day and served on him on the 19th of July, 1886. A demurrer to the petition was filed on the 21st of September, 1886. The petition and the demurrer amounted in substance to the same as the amended petition and the demurrer thereto. On the 16th of October, 1886, the court sustained the demurrer. 28 Fed. Rep. 907. The decision of the court was based on views which it had previously expressed on demurrers to petitions at law and bills in equity for like causes of action, in 23 Fed. Rep. 695, and 24 Fed. Rep. 536. The ground of decision was, in all of the cases, that the suits were barred by the Statute of Limitations of Missouri.

On the 3d of November, 1886, a judgment was entered in the present suit against Liggett, for the defendant, and for his costs. On the 14th of December, 1886, by consent of parties, the judgment of November 3, 1886, was set aside. The plaintiff then, by consent, filed the amended petition, the contents of which are before set forth. The defendant filed his demurrer thereto, the court sustained the demurrer, and, the plaintiff electing to abide by his amended petition, judgment was entered for the defendant upon the demurrer, and for his costs. The judgment then proceeds, under date of December 14, 1886: "And thereupon the plaintiff, by attorney, presents to the court a writ of error to remove this cause to the Supreme Court of the United States and a citation citing and admonishing the said defendant to be and appear at a Supreme Court of the United States on the first day of the next term thereof to be begun and held at Washington, D. C., on [540] the second Monday of October next; which said writ of error is allowed and said citation signed by the judge; and said plaintiff also presents to the court his bond, in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein."

The writ of error is dated the 13th of December, 1886, and was allowed by the district judge, but the allowance bears no date. The writ bears the mark of having been filed in the office of the clerk of the circuit court on the 13th of December, 1886. The citation bears date the 13th of December, 1886, and is marked as having been filed on that day in the office of the clerk of the circuit court, and appears to have been served on the attorneys for the defendant on the 22d of December, 1886. The bond bears date the 13th of December, 1886, and was approved by the district judge, the approval bearing no date, and is marked as filed in the office of the clerk of the circuit court on the 14th of December, 1886.

It is objected by the defendant Liggett that this court has no jurisdiction of the writ of error, because the writ, the citation and the bond all of them bear date the 13th of December, 1886, and because the writ and the citation were filed in the office of the clerk of the circuit court on that day, while the judgment sought to be reviewed was not rendered until the 14th of December, 1886. But the record distinctly states that, after such judgment was rendered, the plaintiff presented to the court a writ of error, a citation and a bond, and that the court allowed the writ of error, and the citation was signed by the judge, and the bond was approved and ordered to be filed as a part of the record; and the writ of error, the citation and the bond are set forth at length. We must therefore conclude that all these things, including the filing, took place after the judgment of the 14th of December, 1886, was rendered and entered; that whatever discrepancy appears must be attributed to clerical errors; and that the matter is not open to the objection made, that the writ of error was brought, the citation signed and the bond given before the judgment was entered, even if that fact would have been available as an objection, if it existed. The case is like that of *O'Dowd* v. *Russell*, 81 U. S. 14 Wall. 402 [20: 857].

Upon the merits, we are of opinion that the judgment in favor of Liggett must be reversed. The decisions of the circuit court were made before the case of *Hawkins* v. *Glenn*, 131 U. S. 319 [33: 184], was decided by this court, on the 13th of May, 1889. All the points urged on the part of the defendant in the present case were fully argued, considered and decided by this court in *Hawkins* v. *Glenn*. The syllabus of that case correctly embodies the rulings of this court, in these words: "In the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack. Statutes of Limitation do not commence to run as against subscriptions to stock, payable as called for, until a call or its equivalent has been had, and subscribers cannot object, when an assessment to pay debts has been made, that the corporate duty in this regard had not been earlier discharged. Rules applicable to a going corporation remain applicable notwithstanding it may have become insolvent and ceased to carry on its operations, where, as in this case, it continues in the possession and exercise of all corporate powers es-

sential to the collection of debts, the enforcement of liabilities and the application of assets to the payment of creditors."

The facts set forth in the amended petition in the present case appeared in the case of *Hawkins* v. *Glenn*. That was a suit at law, brought in the Circuit Court of the United States for the Eastern District of North Carolina, to recover the amount of the assessment or call of 30 per cent, made by the decree of the Chancery Court of the City of Richmond, on December 14, 1880. The Statute of Limitations of North Carolina, of three years, was pleaded as a defense. The suit having been brought within three years from December 14, 1880, it was contended in this court, for the defendant, that the cause of action did not accrue within three years before the suit was brought; that the case was essentially unlike that of a call made by the authorities of a corporation which was still doing business; that, during the whole of the three years, the provision in the subscription, as affected by the Statute of Virginia, which submitted the subscriber to the discretion of the president and directors, as to the time at which calls might be made, had become null; and that, inasmuch as, after the corporation stopped business, the time of making a call was no longer a matter of discretion, but was subject to the direction of the law, the lapse of time before bringing the suit in the Chancery Court of the City of Richmond was to be counted in reckoning, under the Statute of Limitations, whether the suit subsequently brought against the defendant, under the call made by that court, had been brought in good time.

It was also contended in that suit by the defendant, that the decree of the Chancery Court [4] of the City of Richmond was void as against him, because he was not a party to the suit. On the latter point, this court said: "We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member,"—citing *Sanger* v. *Upton*, 91 U. S. 56, 58 [23: 220, 221]; *Morgan County* v. *Allen*, 103 U. S. 498, 509 [26: 498, 502]; *Glenn* v. *Williams*, 60 Md. 93, 116; *Hambleton* v. *Glenn*, 13 Va. L. J. 242.

This court said that it concurred in the decision of the Court of Appeals of Virginia, in *Hambleton* v. *Glenn*, made as to the Statute of Virginia, that "as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remained unimpaired;" and that it was the decision "of the highest tribunal of the State where the corporation dwelt, in reference to whose laws the stockholders contracted, and in whose courts the creditors were obliged to seek the remedy accorded,"—citing *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527 [27: 1020]; *Barclay* v. *Talman*, 4 Edw. Ch. 123, 6 N. Y. Ch. L. ed. 821; *Bank of Virginia* v. *Adams*, 1 Pars. Eq. Cas. 534; *Patterson* v. *Lynde*, 112 Ill. 196.

This court further said: "We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members, in the absence of fraud, and that this is involved in the contract created in becoming a stockholder. The decree of the Richmond Chancery Court determined the validity of the assessment; and that the lapse of time between the failure of the Company and the date of the decree did not preclude relief, [54 by creating a bar through Statutes of Limitation or the application of the doctrine of laches. And so it has been held in numerous cases referred to on the argument. The court may have erred in its conclusions, but its decree cannot be attacked collaterally; and, indeed, upon a direct attack, it has already been sustained by the Virginia Court of Appeals. *Hambleton* v. *Glenn*, *supra*. . . . Although the occurrence of the necessity of resorting to unpaid stock may be said to fix the liability of the subscriber to respond, he cannot be allowed to insist that the amount required to discharge him became instantly payable, though unascertained, and though there was no request, or its equivalent, for payment. And here there was a deed of trust made by the debtor corporation for the benefit of its creditors; and it has been often ruled in Virginia that the lien of such a trust deed is not barred by any period short of that sufficient to raise a presumption of payment. *Smith* v. *Washington City, V. M. & G. S. R. Co.* 33 Gratt. 617; *Bowie* v. *Poor School Society*, 75 Va. 300; *Hambleton* v. *Glenn*, 13 Va. L. J. 242. This deed was not only upheld and enforced by the decree of December 14, 1880, but also the power of the substituted trustee to collect the assessment by suit in his own name was declared by the Court of Appeals in Virginia, in *Lewis* v. *Glenn*, 84 Va. 947. See also *Baltimore & O. R. Co.* v. *Glenn*, 28 Md. 287. By the deed the subscriptions, so far as uncalled for, passed to the trustees, and the creditors were limited to the relief which could be afforded under it, while the stockholders could be subjected only to equality of assessment; and as the trustees could not collect except upon call, and had themselves no power to make one, rendering resort to the president and directors necessary, or, failing their action, then to the courts, it is very clear that the Statute of Limitations could not commence to run until after the call was made."

This court then cited the rule laid down in *Scovill* v. *Thayer*, 105 U. S. 143, 155 [26:968], as applying to the case before it, and said: "In that case it was said by *Mr. Justice* Woods, speaking for the court: 'There was no obligation resting on the stockholder to pay at all [54 until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portion of his stock as might be necessary to satisfy the claims of the creditors. Upon the bankruptcy of the company, his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with

the other assets of the company, to pay its debts. He was under no obligation to pay any more, and he was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete.' And it was held 'that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do. . . . But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or, at the very least, some authorized demand upon him for payment; and it is clear the Statute of Limitations does not begin to run in his favor until such order or demand.' Constituting, as unpaid subscriptions do, a fund for the payment of corporate debts, when a creditor has exhausted his legal remedies against the corporation which fails to make an assessment, he may, by bill in equity or other appropriate means, subject such subscriptions to the satisfaction of his judgment, and the stockholder cannot then object that no call has been made. As between creditor and stockholder, 'it would seem to be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents.' *Hatch* v. *Dana*, 101 U. S. 205, 214 [25:885, 887]. The condition that a call shall be made is, under such circumstances, as *Mr. Justice* Bradley remarks in *Re Glen Iron Works*, 20 Fed. Rep. 674, 681, 'but a spider's web, which the first breath of the law blows away.' And as between the stockholder and the corporation, it does not lie in the mouth of [547] the stockholder to say, in response to the attempt to collect his subscription, for the payment of creditors, that the claim is barred because the company did not discharge its corporate duty in respect to its creditors earlier. *Morgan County* v. *Allen*, 103 U. S. 498 [26:498]. These considerations dispose of the alleged error in not sustaining the defense of the statutory bar."

We regard these rulings in *Hawkins* v. *Glenn* as disposing of the points urged by the defendant as to the Statutes of Limitation of Missouri, and as to the want of jurisdiction in the Chancery Court of the City of Richmond to make the call.

Under the Statute of Missouri applicable to the present case, if an action was commenced within the statutory limitation of time, and the plaintiff suffered a nonsuit, he was allowed to commence a new action within one year after the nonsuit was suffered. The shortest period of limitation insisted on in the present case, under the Statute of Missouri, is five years. The first call was made by the decree of December 14, 1880. The first suit was brought in 1884. The plaintiff suffered a nonsuit on the 15th of July, 1885. He brought the present suit on the 12th of July, 1886. The Statute of Missouri, so far as it applies to the present case, was therefore complied with.

The point is taken by the defendant that, under the Statute of Virginia, the balance remaining unpaid on subscriptions to the stock was payable as called for or required by the president and directors of the Company; that it appears by the amended petition that the contract between the Company and the subscribers was, that the $80 per share was payable "only in such amounts and at such times as the same might be required to be paid by said Company, through its president and board of directors;" and that it is not averred in the amended petition that either the president or any of the directors was a party to the suit in the Chancery Court of the City of Richmond.

But the president and directors stand for the corporation, and it is alleged in the amended petition that the corporation was a party to the amended bill, and that it was duly served with process in the cause, in accordance with the laws and practice of the State of Virginia. The [5 corporation sufficiently represented the president and directors in their official capacity, in which alone they were to act in making a call, and it also, as held in *Hawkins* v. *Glenn*, sufficiently represented the defendant.

The rights of the parties in the present case must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contracts of the subscribers to stock were made. The legislation of Missouri, which is invoked to the effect that, for the purposes of the Statute of Limitations of that State, the liability of a stockholder in a corporation to a creditor becomes fixed by the insolvency and dissolution of the corporation, and then becomes a primary and unconditional obligation, and the Statute commences to run at once, can have no application to the present case. Nor can the adjudication of a court of Virginia, in a suit properly brought, and where it had jurisdiction as to subject matter and parties, be reviewed or impeached in a collateral suit like the present, except for actual fraud.

The further point is urged by the defendant, in regard to the decree of March 26, 1886, and the call for 50 per cent made thereby, that the Circuit Court of the County of Henrico was without jurisdiction to make a valid decree, and that such call or assessment was void. The view urged is that the decree of December 14, 1880, was a final decree, without any reservation of any right to ask for a further call or assessment; and that the transfer of the cause to the Circuit Court of Henrico County was unauthorized. But we see nothing in the terms of the decree of December 14, 1880, to exclude the authority of the same court, or of any court to which the cause should be properly transferred, to make the further assessment of $50 per share; and the allegation in the amended petition as to the transfer of the suit is that the Circuit Court of the County of Henrico was "a court of competent jurisdiction." This means that it was a court of competent jurisdiction to accept the transfer and to take jurisdiction of the suit.

In the case against the Taussigs, Charles Taus- [— sig died after the writ of error was taken, and the suit was ordered by this court to proceed against John J. Taussig and George W. Taussig, executors of Charles Taussig, deceased, and Morris Taussig, as defendants in

error. The claim against the Taussigs is on 100 shares of stock, and the amended complaint in the suit against them is like that in the suit against Liggett. The facts and the principles of law involved are the same as in the case against Liggett, the only differences being immaterial ones, namely, that the writ of error in the Taussig case was filed in the circuit court on the 14th of December, 1886, and the citation was dated and filed on the 14th of December, 1886; that the defendants state, as grounds of demurrer, only that the causes of action accrued more than five years and more than ten years prior to the commencement of the suit and to the time when the nonsuit mentioned in the amended petition was suffered by the plaintiff; and, as a further ground of demurrer, that the assessment of 30 per cent on the stock of the Company, made by the Chancery Court of the City of Richmond, and the subsequent assessment of 50 per cent, made by the Circuit Court of Henrico County, were void and of no force or effect as against the defendants, because those courts acquired no jurisdiction over the defendants, or any jurisdiction to make any assessment which should furnish any right of action to the plaintiff against the stockholders of the Company.

The judgment in each case is reversed, and each case is remanded to the Circuit Court, with a direction to overrule the demurrer to the amended petition, and to take such further proceedings as shall not be inconsistent with this opinion.

Mr. Justice **Brewer** dissents.

WILLIAM REA ET AL., *Appts.*,
v.
THE STEAMER "ECLIPSE," WILLIAM BRAITHWAITE, *Claimant.*

(See S. C. *The Eclipse*, Reporter's ed. 599-609.)

Review of admiralty judgments—when master of steamboat cannot be removed—powers of courts of admiralty.

1. This court is limited, in reviewing judgments and decrees in admiralty causes, to a determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as are presented by the bill of exceptions.
2. The owner of one half the legal title of a steamboat, who is the master in possession, and who is by written agreement entitled to such possession as master, is not liable to removal from his position as master.
3. Creditors and intervenors, in order to wind up a trust and enforce a contract of sale of a vessel, cannot resort to a court of admiralty.
4. A court of admiralty has not the characteristic powers of a court of equity in such case.

[No. 810.]

Argued April 29, 1890. Decided May 19, 1890.

APPEAL from a judgment of the Supreme Court of the Territory of Dakota affirming a judgment of the District Court of that Territory dismissing a libel in admiralty against the steamboat Eclipse, her tackle, apparel and furniture, and against all persons intervening for their interest therein, in a cause of possession, civil and maritime, and ordering possession of the steamboat, her tackle, apparel and furniture, to be delivered to the claimant, Braithwaite. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller**:

Robinson, Rea & Co., Kay, McKnight & Co., A. W. Cadman & Co. and Joseph McC. Biggert filed their libel in admiralty in the District Court of the Third Judicial District of the Territory of Dakota, April 7, 1881, against the steamboat Eclipse, her tackle, apparel and furniture, and against all persons intervening for their interest therein, in a cause of possession, civil and maritime, alleging:

"First. That they are the majority of the owners of the steamboat Eclipse, her tackle, apparel and furniture; and, being such owners, on or about the 10th day of March, 1881, appointed one William Braithwaite master of said vessel, to navigate and sail her for them, at the wages agreed upon between him and the said owners, and the said William Braithwaite continued to be such master until the 4th day of April, 1881, when the libellants removed him as master and appointed another as master in his place. [600]

"Second. That when the new master so appointed by libellants went on board said vessel by their orders, to enter upon his duties as such master, the said William Braithwaite refused to give up the possession or the papers of said vessel to the said master or to the libellants, who have demanded the same, to the great damage of the libellants."

Process was prayed against the vessel and Braithwaite, and was issued accordingly, returnable on the first Tuesday of June then next.

On the 15th of April, 1881, Braithwaite intervened as a claimant of the boat as "trustee, one of the owners, and master," averring that he was "managing owner and master of said steamer, and is entitled to the possession and command thereof, and that no other person is entitled to the possession or command thereof."

The libel was amended by stating that "the said Robinson, Rea & Co. own a twenty-five-hundred-dollar interest in said steamboat; the said Kay, McKnight & Co., four hundred and fifty dollars' interest in said steamboat; the said Joseph McC. Biggert, a twenty-five-hundred-dollar interest in said steamboat; the said A. W. Cadman & Co., a one-hundred-dollar interest in said steamboat; that the only other person having an interest in said steamboat is Wm. Braithwaite, who owns a twenty-five-hundred-dollar interest in said steamboat."

Braithwaite filed an answer and exceptions on the 6th of May.

On the 4th of June the marshal returned that he had attached the boat under the process on the day it was issued, and that on the same day one Joseph Leighton put in a claim to the boat, and with the consent of the libellants, and upon Leighton's executing a stipulation of the value of $12,000, that being the amount agreed upon between him and libellants, he had delivered the boat to Leighton. On the 25th of May, 1881, Leighton and Jordan filed their claim in intervention, as purchasers under a bill of sale, [601]

bearing date March 31, 1881, and prayed for a decree directing Braithwaite to execute a bill of sale of the Eclipse and to deliver it and the papers of the steamboat to them, and on his refusal that all his interest in the boat be transferred to them, and for costs, and such other relief as a court of admiralty is competent to give.

The cause was heard upon the pleadings and proofs, and the district court made its findings of fact and conclusion of law as follows:

"First. That the steamer Eclipse at the time of the commencement of this action was within the Third Judicial District of Dakota Territory.

"Second. That on February 4th, 1880, the claimant, William Braithwaite, and libellants, with the exception of Joseph McC. Biggert, made and entered into an agreement in writing as set forth in the fourth allegation in claimant's answer.

"Third. That subsequent to the execution of that agreement by the claimant a further clause was added substituting the name of Joseph McC. Biggert for that of John D. Biggert, which was signed by all parties to the agreement except the claimant.

"Fourth. That subsequent to the execution of the agreement the parties paid in eight thousand and fifty dollars and no more, in amounts as follows:

Capt. W. Braithwaite	$2,500
John D. Biggert	2,500
Robinson, Rea & Co.	2,500
Cadman & Co.	100
Kay, McKnight & Co.	450

"Fifth. That in pursuance of that agreement the claimant went from Pittsburgh, Pa., to Bismarck, D. T., in February, 1880, to be present when the said steamer Eclipse should be offered for sale by the U. S. marshal, and on the 18th day of February, 1880, the United States marshal sold said steamer at public auction at the Port of Bismarck, and claimant bid her in under and in pursuance of the agreement between him and libellants for the sum of eight thousand five hundred and twenty-five dollars.

602]

"Sixth. That claimant used in purchasing said steamer all of the money paid in by the parties to said agreement, viz., eight thousand and fifty dollars, and raised the balance of the purchase price, viz., four hundred and seventy-five dollars, on the credit of the said steamer, which was afterwards paid out of her earnings.

"Seventh. That the claimant, Wm. Braithwaite, and John D. Biggert, negotiated the purchase, and the marshal made the bill of sale to the claimant and John D. Biggert, as trustees.

"Eighth. That the claimant, William Braithwaite, took possession of said steamer Eclipse, as master, under and in pursuance of the said written agreement between him and libellants, and so continued in possession as master under said written agreement until he was removed by the United States marshal, by virtue of the writ issued in this case.

"Ninth. That immediately after the United States marshal took possession of the said steamer he removed the claimant and delivered the possession of the same to intervenors, without any order to do so from this court.

"Tenth. That said steamer was run by claimant during the navigation season of 1880 under said written agreement and earned eight thousand dollars, which went into the hands of the financial agent under said agreement, and the same has not been apportioned or distributed.

"Eleventh. That on February 2d, 1881, libellants and claimant signed 'Exhibit A' of the intervention and petition of Joseph Leighton and Walter B. Jordan. At that time said steamer was lying in the Missouri River, a little below Fort Benton.

"Twelfth. That the committee named in said exhibit made a conditional agreement with Charles Batchelor, agent for Joseph Leighton, to sell said steamer for eleven thousand five hundred dollars, if she should not be damaged to exceed five hundred dollars.

"Thirteenth. That on April 1st, 1881, a bill of sale was made for said steamer by libellants, transferring her to intervenors, but was not delivered, and the intervenors had not paid any money thereon, and the claimant never signed said bill of sale, but refused to sign the same, and notified intervenors and the committee that his interest in said steamer was not for sale, before any part of the purchase money had been paid by the intervenors, amounting to $2,500, before the commencement of this action,—was paid after they were notified that the claimant would not sell his interest in said steamer.

"Fourteenth. That the intervenors are not the sole owners of the said steamer, but the claimant, William Braithwaite, was at the time of the commencement of this action the owner of one-half interest therein, and part owner under and by virtue of the written agreement made with libellants.

"Fifteenth. That at the time of the commencement of this action libellants were not the owners of a majority interest in said steamer.

"Sixteenth. That there was due to the claimant, under the written agreement with the libellants, the sum of eight hundred dollars for wages at the time of the commencement of this action, and that no money whatever has been paid or tendered to him by any of the parties to this action.

"As a conclusion of law I find—

"1st. That the claimant, Wm. Braithwaite, is entitled to the possession of the steamer Eclipse."

The agreement referred to in the second finding is as follows:

"Articles of agreement made and concluded the 4th day of February, in the year of our Lord eighteen hundred and eighty, between W. Braithwaite and John D. Biggert, parties of the first part, and Robinson, Rea & Co., Kay, McKnight & Co. and Cadman & Co., of the City of Pittsburgh, County of Allegheny, State of Pennsylvania, parties of the second part, witnesseth: That whereas the steamboat Eclipse is now hopelessly involved in debt, and the said parties of the second part being creditors of said steamboat, and the said steamboat is about to be forced to marshal's sale, it being a well known and recognized fact the owners of said boat are unable to meet the indebtedness and prevent such sale, the parties hereto, fearing a sacrifice, to protect their several in-

terests, prevent such a sacrifice and form a fund for bidding up (in) said boat, and afterwards, if knocked down to them, to provide a working capital to manage and run said steamboat, covenant and agree as follows:

"First. That each of said parties shall contribute into a general fund the respective amounts set opposite their names, viz.:

Capt. W. Braithwaite	$2,500
John D. Biggert	2,500
Robinson, Rea & Co.	2,500
Cadman & Co.	100
Kay, McKnight & Co.	450

"Which several amounts are to be paid in cash by the respective parties to said parties of the first part in case said steamboat is purchased by them as herein provided, so much thereof as may be necessary to be used for paying such of the bid as may be necessary to be paid in cash and the remainder to be used as working capital.

"Second. That in addition to said cash fund the second parties are to contribute as capital the amounts of their respective claims against said steamboat, and in case said steamboat is bought by the parties hereto their claims are not to be paid at once, but to be receipted for by them and afterwards paid as hereinafter provided for.

"Third. When said steamboat is put up at marshal's sale the same is to be bid by said parties of the first part to such an amount as a majority in interest of said amount, $10,000, may determine, and be put in the name of W. Braithwaite and John D. Biggert, as trustees, and be held by them thereafter as such trustees for the following uses and purposes: first, that the same be managed and run in the interest of all the parties hereto, said William Braithwaite to act as captain and John D. Biggert as financial agent; the said Braithwaite to receive a salary of $150 per month and said John D. Biggert to receive a salary of $100 per month during the time she is so run in the interest of the parties hereto.

"Fourth. Out of the earnings of said steamboat the respective claims of the said parties of the second part are first to be paid, and, secondly, the full amount of their respective portions of said $10,000 advancement is to be paid, and when said parties of the second part are fully paid then this trust shall cease and determine, and the said steamboat shall remain wholly to the use and benefit of the said Wm. Braithwaite and J. D. Biggert, their executors, administrators and assigns."

Exhibit "A," referred to in the eleventh finding, is as follows:

"Pittsburgh, Penn., February 2, 1881.

"We, the undersigned creditors and trustees of the steamer Eclipse, hereby appoint William Rea, John D. Biggert and J. C. Kay our committee to effect sale of said steamer, granting unto them or a majority of them power to accept any offer which they may receive for the purchase of the steamer, it being expressly understood that they shall not accept any offer of less than eleven thousand five hundred dollars cash or equivalent in approved paper."

Thereupon judgment was rendered dismissing the libel, and also the intervening petition, with costs to be taxed against the libellants and intervenors, respectively, and ordering the marshal to deliver the possession of the steamboat Eclipse, her tackle, apparel and furniture, to the claimant, William Braithwaite.

This judgment was affirmed by the Supreme Court of the Territory, and the cause brought to this court by appeal.

Messrs. **Geo. W. Guthrie and W. Hallett Phillips,** for appellants:

The jurisdiction of admiralty touching property in ships in possessory suits between part owners is well established. In such suits the court entertains the question of title.

Ward v. *Peck*, 59 U. S. 18 How. 267 (15: 383); *The Tilton*, 5 Mason, 465; Henry, Adm. 38.

Persons owning more than one half the vessel have the same power to remove a master who is part owner, as one who is not, but not where there is a valid written agreement, subsisting and entitling the master to possession.

Clayton v. *The Emory*, 4 Fed. Rep. 342; Story, Partn. §§ 432, 445; *The New Draper*, 4 C. Rob. Adm.* 287: *Ward* v. *Ruckman*, 36 N. Y. 26; *The Taranto*, 1 Sprague, 170; *The Tilton*, 5 Mason, 465.

Mr. **J. G. Bigelow** for appellee.

Mr. Chief Justice **Fuller** delivered the [606
opinion of the court:

Circuit courts, in deciding causes of admiralty and maritime jurisdiction on the instance side of the court, are required to find the facts and the conclusions of law upon which their judgments and decrees are rendered, stating them separately; and we are limited, in reviewing such judgments and decrees, to a determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. 18 Stat. 315; *The Gazelle*, 128 U. S. 474, 484 [32: 496, 499]. And this judgment of the Supreme Court of Dakota Territory is subject to review in the same manner and under the same regulations. Rev. Stat. sec. 702.

By the purchase of the steamer on the 18th of February, 1880, under the agreement dated the fourth day of that month, Braithwaite and Biggert acquired the legal title to be held in trust for the payment to the "parties of the second part," Cadman & Co., Robinson, Rea & Co. and Kay, McKnight & Co., of their claims as creditors and their advances to assist Braithwaite and Biggert to make the purchase.

When this was accomplished, Braithwaite and Biggert were to remain equal owners of the boat, freed from the incumbrance. Joseph McC. Biggert seems to have been substituted for John D. Biggert, but as our conclusion is reached without regard to that circumstance, they will be treated as one. The agreement provided that the steamer was to be commanded by Braithwaite, and she was accordingly run by him during the navigation season of 1880, and earned eight thousand dollars, which went into the hands of Biggert, who was financial agent under the agreement, but this money had not been apportioned and distributed when the libel was filed.

On the 2d of February, 1881, Braithwaite and Biggert, the trustees, and Robinson, Rea

& Co., Cadman & Co. and Kay, McKnight & Co., the creditors, by a written memorandum signed at Pittsburgh, appointed Rea, Biggert and Kay a committee to effect the sale of the [607] steamer, with power to accept any offer of not less than eleven thousand five hundred dollars cash, or the equivalent in approved paper. At this time the steamer was lying in the Missouri River, a little below Fort Benton; but it appears from the intervenors' petition, that on or about April 1st she had been released from the ice in which she had wintered, and been brought down to Bismarck by her master, Braithwaite. The court found that the committee made a conditional agreement with Leighton's agent to sell the steamer for eleven thousand five hundred dollars, if she should not be damaged to exceed five hundred dollars; that a bill of sale was made by libellants April 1, 1881, transferring the boat to the intervenors, but it was not delivered or any money paid thereon; that Braithwaite refused to sign it and notified the intervenors and the committee that his interest was not for sale, after which the intervenors paid the sum of two thousand five hundred dollars; that Braithwaite was the owner of one-half interest in the steamer when the action was commenced; and that eight hundred dollars was due to him for wages under the written agreement with the libellants, no part of which had been paid or tendered to him by any of the parties.

The memorandum of February 2d was obviously entered into in view of the situation of the Eclipse as she lay locked up in the ice just below Fort Benton, and not as she was when safe in the Port of Bismarck, and the authority vested in the committee to effect a sale was limited to the acceptance of an offer of not less than a certain amount in cash or its equivalent. A contract for a sale conditioned on how much the vessel might turn out to have been damaged by her environment and extrication therefrom was not within the power conferred, which contemplated only a sale for a sum certain at the risk of the buyer, and did not embrace an executory contract dependent on a contingency. We are of opinion, upon the facts found, that nothing had been done which operated to devest the legal title, and that when the libel was filed that title was in Braithwaite and Biggert, and the interest of the intervenors and of Biggert's co-libellants was equitable merely. Braithwaite was the legal owner of [608] one half and was the master in possession. Of that possession he could not be deprived on the ground set up in the libel, that the libellants were a majority of the owners, for such was not the fact; and, moreover, he was not only part owner and master, but by the written agreement, which was still subsisting, was entitled to such possession as master, and therefore not liable to removal under section 4250 of the Revised Statutes, which provides that "any person or body corporate having more than one-half ownership of any vessel shall have the same power to remove a master, who is also part owner of such vessel, as such majority owners have to remove a master not an owner," but that the section shall not apply "where there is a valid written agreement subsisting, by virtue of which such master would be entitled to possession."

So far as the creditors and intervenors were concerned, if the former desired to wind up the trust or the latter to enforce an alleged contract of sale, which is indeed what is asked by this intervention, they should have resorted to a different tribunal. While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake (*Andrews* v. *Essex F. & M. Ins. Co.* 3 Mason, 6, 16); or declare or enforce a trust or an equitable title (*Ward* v. *Thompson*, 63 U. S. 22 How. 330 [16: 249]; *Hill* v. *The Amelia*, 6 Ben. 475; *Kellum* v. *Emerson*, 2 Curt. 79); or exercise jurisdiction in matters of account merely (*Grant* v. *Poillon*, 61 U. S. 20 How. 162 [15: 871]; *Minturn* v. *Maynard*, 58 U. S. 17 How. 477 [15: 235]; *The Ocean Belle*, 6 Ben. 253); or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart* v. *The John Jay*, 58 U. S. 17 How. 399 [15: 95]. The jurisdiction embraces all maritime contracts, torts, injuries or offenses, and it depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation. *People's Ferry Co.* v. *Beers*, 61 U. S. 20 How. 393, 401 [15: 961, 964]. There was nothing maritime about the claims of the intervenors, and the intervention was properly dismissed for want of jurisdiction over the subject matter.

The opinion of the Supreme Court of Dakota by Church, *J.*, will be found reported in 30 N. W. Rep. 159, and deals with the facts in more detail than we have been at liberty to do.

We agree with the results arrived at by that court and its *judgment is therefore affirmed.*

JOSEPH ANDERSON ET AL., *Plffs. in Err.*,
v.
LEVI CARKINS.

(See S. C. Reporter's ed. 488-491.)

Jurisdiction over state decree—Homestead Law—effect of alienation by homesteader—void contract—power of State to nullify federal statutes—parties, when in pari delicto.

1. Where, in a suit in a state court, no decree could pass against the defendants without denying the protection asserted by them under the Homstead Laws, and the Supreme Court of the State declared that this invalidity under the Homestead Laws was not sustainable, the case is one in

NOTE.—*As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution,* see *notes* to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

Jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws. See *note* to Jackson v. Lamphire, 7: 679; also *note* to Commercial Bank v. Buckingham, 12: 169.

which a right was specifically set up and claimed under the statutes of the United States, and the decision and judgment of the state court being against that right, this court has jurisdiction.

2. The theory and policy of the Homestead Law is that the homestead shall be for the exclusive benefit of the homesteader; the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by him.

3. A contract by one contemplating taking land as a homestead and who subsequently obtains title to it as such, for the sale and conveyance of half the land to another in consideration of the improvements previously made on it by the latter, is void, and specific performance of it will not be decreed.

4. A court of equity will not enforce the performance of a contract which contemplates perjury by the homesteader and is designed to thwart the policy of the government in the Homestead Laws.

5. It is not within the power of a State, directly or indirectly, to nullify or set at naught the federal statutes.

6. The man who contracts for the perjury of another and the one who contracts to commit such perjury are *in pari delicto*.

[No. 322.]

Argued May 1, 2, 1890. Decided May 19, 1890.

IN ERROR to the Supreme Court of the State of Nebraska to review a decree of that court for a specific performance of a contract for the sale of public land made before it was acquired as a homestead. *Reversed.*

The facts are stated in the opinion.

Messrs. James M. Woolworth and **John A. Casto**, for plaintiffs in error:

A contract inconsistent with public policy cannot be enforced.

Coppell v. *Hall*, 74 U. S. 7 Wall. 542 (19: 244); *Marshall* v. *Baltimore & O. R. Co.* 57 U. S. 16 How. 314 (14: 953); *Scudder* v. *Andrews*, 2 McLean, 464; *Leavitt* v. *Palmer*, 3 N. Y. 19; *Simmons* v. *Yurann*, 11 Neb. 518; *Bateman* v. *Robinson*, 12 Neb. 511; *Blanchard* v. *Jamison*, 14 Neb. 246.

Messrs. **A. H. Bowen** and *C. Hoeppner*, for defendant in error:

Where acts are merely prohibited by statute, and the parties are not *in pari delicto*, the party upon whom no penalty is imposed may, upon non-performance, enforce his contract against his co-contractor.

Jaques v. *Golightly*, 2 W. Bl. 1073; *Browning* v. *Morris*, 2 Cowp. 790; *Williams* v. *Hedley*, 8 East, 378; *Worcester* v. *Eaton*, 11 Mass. 368; *White* v. *Franklin Bank*, 22 Pick. 181; *Lowell* v. *Boston & L. R. Corp.* 23 Pick. 24; *Schermerhorn* v. *Talman*, 14 N. Y. 93; *Blanchard* v. *Jamison*, 14 Neb. 246; *Simmons* v. *Yurann*, 11 Neb. 518; *Bateman* v. *Robinson*, 12 Neb. 511.

To vest this court with jurisdiction, it must appear that the decision of the state court was in conflict with the Constitution or against a right claimed under a statute of the United States, and that such decision was necessary to the judgment or decree.

Rev. Stat. U. S. § 709; *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18: 381); *Brown* v. *Atwell*, 92 U. S. 327 (23: 512); *Steines* v. *Franklin County*, 81 U. S. 14 Wall. 20 (20: 847); *Brown* v. *Colorado*, 106 U. S. 95 (27: 132);) *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133 (29: 118).

It must appear by the record that such federal question was raised and decided by the state court.

Phœnix Ins. Co. v. *Gardiner*, 78 U. S. 11 Wall. 204 (20: 112); *Cockroft* v. *Vose*, 81 U. S. 14 Wall. 5 (20: 875); *Sevier* v. *Haskell*, 81 U. S. 14 Wall. 13 (20: 827); *Rector* v. *Ashley*, 73 U. S. 6 Wall. 147 (18: 733); *Hamilton Mfg. Co.* v. *Massachusetts*, 73 U. S. 6 Wall. 636 (18: 906); *Smith* v. *Adsit*, 83 U. S. 16 Wall. 188 (21: 310), 90 U. S. 23 Wall. 373 (23: 114); *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368 (9: 458); *Parmalee* v. *Lawrence*, 78 U. S. 11 Wall. 36 (20: 48); *Moore* v. *Mississippi*, 88 U. S. 21 Wall. 636 (22: 653); *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22: 429).

Though a federal question may have arisen, if the decision of the state court was based upon a statute of the State, and that statute is broad enough to sustain such decision and judgment, this court will not entertain jurisdiction of the case.

Kennebec & P. R. Co. v. *Portland & K. R. Co.* 81 U. S. 14 Wall. 26 (20: 851); *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257 (20: 635); *Commercial Bank* v. *Rochester*, 82 U. S. 15 Wall. 639 (21: 117); *Smith* v. *Adsit*, 83 U. S. 16 Wall. 188 (21: 310), 90 U. S. 23 Wall. 373 (23: 116); *Jenkins* v. *Lowenthal*, 110 U. S. 222 (28:129); *Adams County* v. *Burlington & M. R. Co.* 112 U. S. 123 (28: 678); *Hale* v. *Akers*, 132 U. S. 554 (33: 442).

And it is not enough that this court may see that a federal question ought to have been decided, unless it appears that such question was decided by the state court.

Coons v. *Gallaher*, 40 U. S. 15 Pet. 18 (10:645); *The Victory*, 73 U. S. 6 Wall. 384 (18: 849); *Maxwell* v. *Newbold*, 59 U. S. 18 How. 517 (15: 509); *Crowell* v. *Randell*, 35 U. S. 10 Pet. 368 (9:458); *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18: 381).

It is nowhere alleged in the answer or elsewhere that the contract sued on is in conflict with any statute of the United States.

Delmas v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 666 (20: 759); *Tarver* v. *Keach*, 82 U. S. 15 Wall. 68 (21: 82).

Although a *particeps criminis* cannot invoke the aid of the court, still if the party seeking relief, although *particeps criminis*, yet is not *in pari delicto*, the rule does not apply.

Smith v. *Bromley*, 2 Doug. 696; *Jaques* v. *Golightly*, 2 W. Bl. 1073; *Browning* v. *Morris*, 2 Cowp. 790; *Williams* v. *Hedley*, 8 East, 378; *Worcester* v. *Eaton*, 11 Mass. 368; *Lowell* v. *Boston & L. R. Co.* 23 Pick. 24; *White* v. *Franklin Bank*, 22 Pick. 181; *Schermerhorn* v. *Talman*, 14 N.Y. 93; *Blanchard* v. *Jamison*, 14 Neb. 246.

Mr. Justice **Brewer** delivered the opinion of the court: [48

On December 16, 1876, the parties hereto entered into the following contract:

"This agreement made and entered into this 16th day of December, by and between Joseph Anderson and Hannah Anderson, his wife, of the County of Adams and the State of Nebraska, parties of the first part and Levi

Carkins of Adams County, Nebraska, party of the second part, witnesseth:

"That the said parties of the first part have this day sold, for and in consideration of the sum of one hundred dollars, to them in hand paid by the said Levi Carkins, the receipt whereof is hereby acknowledged, the following real [485] estate, to wit: the south one half of southeast quarter of section ten (10), in town. eight (8), range ten (10) west in Adams County, Nebraska.

"And the parties of the first part further agree with the party of the second part that they will make and execute to him on or before the 1st day of May, 1881, a good and sufficient warranty deed of said premises, clear of all incumbrance, and for the faithful performance of this contract they hereby bind themselves, their heirs, executors, administrators and assigns.

"In witness whereof they have hereunto set their hands and seals, this 16th day of December, 1876.

"(Signed) Joseph Anderson.
"Hannah M. Anderson,
"Parties of the First Part.
"Levi Carkins.
"Party of the Second Part.
"In presence of L. P. Hawley."

In October, 1885, the defendant in error commenced his action in the District Court of Adams County, Nebraska, for a specific performance of this contract. The plaintiffs in error answered, pleading distinctly that the contract was against public policy and void, for the reason that at the time of its execution the land belonged to the general government; that it was made in contemplation of Joseph Anderson's taking the land as a homestead; that on the 7th day of March, 1877, he did enter the land as a homestead; and that he continued to reside upon and cultivate it until the 31st day of March, 1884, at which time he made final proof under the Homestead Law, and thus only obtained title. The case, after trial in the district court, passed to the Supreme Court of the State, by which a final decree was entered for a specific performance. To reverse such decree this proceeding in error has been brought. Two questions are presented—one of jurisdiction, the other of error.

First, with respect to jurisdiction: It will be observed that the contract is prima facie good. [486] The land is described, the consideration stated and its receipt acknowledged, a sale affirmed, an agreement to convey recited and the time for the conveyance specifically named. To a bill for the specific performance of this contract the defendants answered that the contract was void under the Homestead Laws of the United States. Notwithstanding this defense, so expressly stated, a decree for specific performance was entered against them. Obviously, this could not be so entered without adjudging such defense insufficient, and denying to them the protection claimed under the Homestead Laws. It is true that the Supreme Court of Nebraska, in its opinion, relied principally on two sections of the statutes of Nebraska: but it also, and as plainly, ruled that the defense that the contract was against public policy and void was not sustainable, and that the Homestead Laws carry with them no protection against such a contract. If under their provisions such a contract is void, then obviously no state statute can vitalize the contract, or deprive a party thereto of the protection afforded by the federal statutes. Inasmuch, therefore, as no decree could pass against the defendants without denying the protection asserted by them under the Homestead Laws, and as the Supreme Court of Nebraska expressly declared that this invalidity under the Homestead Laws was not sustainable, it follows that the case is one in which a right was specifically set up and claimed under the Statutes of the United States, and the decision and judgment of the state court were against that right. Hence the jurisdiction of this court cannot be doubted. *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 [22:429]. It is immaterial that the state court considered the case to be within the provisions of certain state statutes. The grasp of the federal statute must first be released. The construction and scope of that are federal questions, in respect to which the party who claims under such statute, and whose claim is denied, has a right to invoke the judgment of this court.

Passing now to the question of error: It appears that prior to the date of the contract, Carkins had been in possession of the whole quarter-section; that he had held it as a timber claim from 1873 to the time of the contract; that he had broken and cultivated forty acres, and planted twenty acres of timber; that the improvements he had thus made were of the value of one thousand dollars; that Anderson was unable to pay cash for these improvements, and so the arrangement was made by which Carkins relinquished his possession to Anderson and the latter was to enter into possession, to acquire title under the Homestead Act, and to convey one half the land in payment for these improvements. The consideration was ample, and the only question is as to the validity of the contract to convey. The theory of the Homestead Law is that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, "such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person." And section 2291, which prescribes the time and manner of final proof, requires that the applicant make "affidavit that no part of such land has been alienated, except as provided in section 2288," which section provides for alienation for "church, cemetery or school purposes, or for the right of way of railroads."

The Law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes. It is true that the sections contained no express prohibition of alienation, and no forfeiture in case of alienation; yet, under them the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by the homesteader. Section 2304 makes provision for homesteading by soldiers and officers

who served in the army of the United States during the recent war; but that section makes no substantial change, except in respect to the time of occupation. Under this section Anderson perfected his homestead right; but the question of the length of occupation required to perfect such right in no manner affects the controversy. The same affidavits in respect to alienation are required from federal soldiers as [8] in other cases of homesteads. This precise question was before the Supreme Court of Kansas, when the writer of this opinion was a member of that court; and speaking for that court he thus stated the arguments and conclusions: "Now, it is argued on the one hand that it is a matter of course for a court of equity to decree a specific performance of a contract for the conveyance of real estate except in cases where it is shown to be unjust and inequitable to do so (*Waynick* v. *Richmond*, 11 Kan. 488); that there is no express prohibition on alienation by a homesteader, or a forfeiture for such alienation; that the only thing which stands in the way of such an alienation is the perjury imposed upon the homesteader; that no man should be permitted to plead his own wrong in avoidance of his contract; that in this case there was no direct alienation, but only a contract to alienate in the future; that whatever of wrong the homesteader might be guilty of, the government alone could take advantage of, while he himself was estopped to plead it; and further, that the homestead is for the benefit of the homesteader, and that he should be permitted, by contract or otherwise, to make all the profit he can out of it. On the other hand, it is contended that the homestead is a gift from the government to the homesteader, conditioned upon his occupation for five years and upon his making no disposition or alienation during such term; that the affidavit of non-alienation is as clear an expression of the legislative intent as a direct prohibition; that the whole policy of government in this respect would be thwarted if the homesteader were permitted to alienate prior to the expiration of the five years; that a successful alienation could be accomplished only by perjury, and an attempted alienation would only offer a constant inducement to the homesteader to abandon his occupation, and thus deprive the purchaser of any possibility of acquiring title to the land; that a contract whose consummation necessarily rests on perjury is illegal; that both purchaser and vendor are parties to the wrong, and that courts refuse to enforce such a contract, not from any regard to the vendor, but from motives of public policy; and finally that courts of equity have always exercised a discretion in [9] enforcing the specific performance of contracts to convey, and that it would be strange indeed if a court of equity lent its aid to enforce the performance of a contract founded upon perjury and entered into in defiance of a clearly expressed will of the government. We think the latter reasoning correct, and that, whether the contract be absolutely void or not, it is so clearly against the will and policy of the government, and so necessarily resting upon perjury, that a court of equity will have nothing to do with it." *Mellison* v. *Allen*, 30 Kan. 382-384.

Similar views were expressed by the Supreme Court of Nebraska, in the case of *Dawson* v. *Merrille*, 2 Neb. 119, in which it was held that "the policy of the Act of Congress granting homesteads on the public lands, as disclosed by its requirement of affidavit and other provisions, is adverse to the right of a party availing himself of it to convey, or agree to convey, the land, before he receives the patent therefor;" and that "the court will not lend its aid to the enforcement of a contract which is against public policy." And the judgment of the trial court, denying specific performance of a contract for the sale of lands, made by the homesteader before he had acquired the legal title to the premises, was affirmed. See also *Oaks* v. *Heaton*, 44 Iowa, 116; *Nichols* v. *Council*, 51 Ark. 26. This very contract was before the Department of the Interior, and its invalidity adjudged by the Secretary, in the case of *Aldrich* v. *Anderson*, 2 Land Dec. 71.

There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the government in the Homestead Laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right. Such a contract is against public policy, and will not be enforced in a court of equity. Such being the scope and purpose of the federal statutes, it is not within the power of a State, directly or indirectly, to nullify or set them at naught. Suppose the State of Nebraska had passed an Act declaring that, notwithstanding the provisions of the federal statute, a homesteader might, before his homestead right was perfected [490] make a contract to convey, could it be doubted that such an Act would be void, as in conflict with paramount provisions of the federal statute? Can the policy of Congress, with respect to the disposition of public lands, be thwarted by any State? The question suggests its own answer. The law of Congress is paramount; it cannot be nullified by direct act of any State, nor the scope and effect of its provisions set at naught indirectly. But we do not think that the sections of the Nebraska Statutes, cited by the supreme court, were intended to nullify the provisions of the Acts of Congress, or have any such effect. Those sections, Nos. 1 and 2, Compiled Statutes of Nebraska, chap. 38, 376, read: "All contracts, promises, assumpsits or undertakings, either written or verbal, which shall be made hereafter in good faith and without fraud, collusion or circumvention, for sale, purchase or payment of improvements made on the lands owned by the government of the United States, shall be deemed valid in law or equity, and may be sued for and recovered, as in other contracts." "All deeds of quit-claim or other conveyance of all improvements made upon public lands shall be as binding and as effectual in law and equity between the parties for conveying of the title of the grantor in and to the same, as in cases where the grantor has the fee simple to the premises." But these refer simply to contracts for the sale and conveyances of improvements upon public lands. They are in terms limited to the matter of improvements, and do not touch in any way the land itself, whether in respect to conveyance or contract to convey. They may, if valid,

establish the sufficiency of the consideration paid by Carkins, but they do not affect at all the question of the validity of Anderson's contract to sell the land. Suppose Carkins' transfer of possession and improvements on the land is, as affirmed under these sections, a good consideration, it is no better consideration than so much money; and Carkins' right to compel a conveyance by Anderson would have been no weaker if he had paid him a thousand dollars in money, than it is now when he simply transfers to him improvements on the land of the value of one thousand dollars.

[491] We may agree with the Supreme Court of Nebraska, that the consideration passing from Carkins to Anderson was a good and valuable one; and yet that brings us no nearer the question of the validity of Anderson's contract to convey. The fact that Anderson has received full payment for the land only makes stronger the fact that perjury on his part was essential to his obtaining the title, for clearly it was not then to be obtained for him but for Carkins; and does not in the least militate against the public policy disclosed in the federal statutes, that the acquisition of title must be for the exclusive benefit of the homesteader. It may be that Carkins can recover from Anderson the value of these improvements, on the ground that Anderson has received that for which he has paid nothing; for in such an action Carkins will not be seeking to enforce an illegal contract. To that effect are the cases of *Simmons* v. *Yurann*, 11 Neb. 518; *Bateman* v. *Robinson*, 12 Neb. 511; but that is very different from the enforcement of a contract which is illegal, because against public policy. The Supreme Court of Nebraska, recognizing the general rule as to the invalidity of contracts against public policy, seemed to think that the parties were not *in pari delicto*; but we are unable to see any distinction in moral status between the man who contracts for the perjury of another and the one who contracts to commit such perjury. The fact that the former party may have parted with money or valuable property does not change the quality of his action, or give him higher claim to the consideration of a court of equity. So it results that the federal question in this case was not rightly decided by the state court; and no other question appears, which, rightly decided, upholds its decree. *The case therefore must be reversed, and remanded to the Supreme Court of the State of Nebraska for further proceedings in accordance with this opinion; and it is so ordered.*

---

[522] WILLIAM ROBINSON, *Appt.*,

v.

THE IRON RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 522-532.)

Foreclosure of railroad, when not set aside on account of agreement between bondholders—proper remedy—duty of trustee—proceedings in foreclosure suit—parties—vague agreement—action at law.

1. One of the second-mortgage or income bondholders of a railroad, in behalf of the others, cannot maintain a suit in equity to set aside a foreclosure sale of the railroad on the first mortgage to a committee of the first-mortgage bondholders or to declare the sale to be in trust for both classes of bondholders, on the ground of a breach of an agreement, made without consideration or mutuality, between committees of both classes of bondholders, that the second-mortgage bondholders should participate in the reorganization of the company after the sale and rank therein as they ranked previously, where there is no charge of fraud and no offer by the latter to redeem from the sale.
2. The proper remedy of the second-mortgage bondholders was to apply to the court in which the foreclosure took place to set aside the decree of sale.
3. Where the same person is trustee in two mortgages on a railroad, a foreclosure of the first by him is not inconsistent with his position as trustee in the second mortgage.
4. Proceedings in the foreclosure suit prior to the sale were matters proper for adjudication in that suit, and cannot, under the circumstances of the case, be questioned in this suit.
5. The alleged agreement does not create a trust for the benefit of the second-mortgage bondholders and cannot be enforced by one not a party thereto against the subsequent reorganized company not a party thereto and which does not represent the committee of the second-mortgage bondholders, who are not made parties; and is too vague and indefinite for enforcement.
6. If the plaintiff or the other second-mortgage bondholders have any right of action in respect of any such agreement, it must be one at law.

[No. 324.]

Submitted May 1, 1890. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Ohio dismissing a suit in equity brought by a holder of a second-mortgage or income bond of the Iron Railroad Company in behalf of himself and the other holders, against the Toledo, Cincinnati and St. Louis Railroad Company, the said Iron Railroad Company, the Iron Railway Company, corporations of Ohio, the Central Trust Company of New York and John C. Coombs, to set aside a sale under foreclosure proceedings to the committee of the first-mortgage bondholders or that the sale be declared to be in trust for both classes of bondholders and for an account of earnings and for other relief. *Affirmed.*

The facts are stated in the opinion.

Messrs. **George W. Morse** and *Kittredge & Wilby*, for appellant:

The bill makes proper parties.

Pacific R. Co. v. *Missouri P. R. Co.* 111 U. S. 505 (28: 498); *Sahlgard* v. *Kennedy*, 1 McCrary, 291; *Brinkerhoff* v. *Brown*, 6 Johns. Ch. 139, 2 N. Y. Ch. L. ed. 79; *Howell* v. *McCreery*, 7 Dana (Ky.) 388.

This court has jurisdiction, notwithstanding Coombs and Robinson are citizens of the same State, because the suit is ancillary to the previous suit.

Pacific R. Co. v. *Missouri P. R. Co.* 111 U. S. 505 (28: 493); *Milwaukee & M. R. Co* v. *Soutter*, 69 U. S. 2 Wall. 609, 634 (17: 886); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28: 145).

An original bill is the proper remedy to set aside a fraudulent decree.

Story, Eq. Pl. § 426; Dan. Ch. Pl. and Pr.

§ 306; Adams, Eq. § 419; Mitford, Ch. Pl. § 94; *Campbell* v. *Texas & N. O. R. Co.* 1 Woods, 368, 374, 2 Woods, 263; *Gaytes* v. *Franklin Sav. Bank*, 85 Ill. 256; *Ensminger* v. *Powers*, 108 U. S. 292 (27: 732); *Holker* v. *Parker*, 11 U. S. 7 Cranch, 436 (3: 396); *Pearce* v. *Olney*, 20 Conn. 545; *Drury* v. *Cross*, 74 U. S. 7 Wall. 299 (19: 40); *De Louis* v. *Meek*, 2 Greene (Iowa) 55; *Williams* v. *Gibbes*, 58 U. S. 17 How. 289 (15: 135); *Alexander* v. *Stavens*, 7 B. Mon. (Ky.) 351; *David* v. *Frowd*, 1 Myl. & K. 200; *Gillespie* v. *Alexander*, 3 Russ. 130; *Brooke* v. *Lord Mostyn*, 2 DeG. J. & S. 373; *Davis* v. *Tileston*, 47 U. S. 6 How. 114 (12: 366); *Ocean Ins. Co.* v. *Fields*, 2 Story, 59.

Complainant was not properly represented in the foreclosure suit.

Story, Eq. Pl. § 207; Dan. Ch. Pl. and Pr. § 592; *Simmons* v. *Taylor*, 23 Fed. Rep. 849; *Iowa County* v. *Mineral Point R. Co.* 24 Wis. 93; *Shaw* v. *Norfolk County R. Co.* 5 Gray, 162; *Webb* v. *Vermont C. R. Co.* 20 Blatchf. 218; *Mercantile Trust Co.* v. *Lamoille Valley R Co.* 16 Blatchf. 324; *Dwight* v. *Smith*, 13 Fed. Rep. 50.

Complainant's trustee was guilty of fraud.

Caffrey v. *Darby*, 6 Ves. Jr. 488; *Harrison* v. *Mock*, 10 Ala. 185; *Freeman* v. *Cook*, 6 Ired. Eq. (N. C.) 373; *Brice* v. *Stokes*, 11 Ves. Jr. 319; *Lord Shipbrook* v. *Lord Hinchinbrook*, 16 Ves. Jr. 477; *Walker* v. *Symonds*, 3 Swanst. 1.

The Iron Railroad Company was guilty of fraud.

Hibernia Ins. Co. v. *St. Louis & N. O. Transp Co.* 13 Fed. Rep. 516; *Brum* v. *Merchants Mut. Ins. Co.* 16 Fed. Rep. 140; *Blair* v. *St. Louis, H. & K. R. Co.* 22 Fed. Rep. 36.

The decree was fraudulent.

Chicago, D. & V. R. Co. v. *Fosdick*, 106 U. S. 47 (27: 47).

The sale was fraudulent.

Stinson v. *Pepper*, 10 Biss. 107; *Seaman* v. *Riggins*, 2 N. J. Eq. 214; *Cummins* v. *Little*, 16 N. J. Eq. 48; *Forman* v. *Hunt*, 3 Dana (Ky.) 614; *Howell* v. *McCreery*, 7 Dana (Ky.) 388; *Campbell* v. *Gardner*, 11 N. J. Eq. 423; *Busey* v. *Hardin*, 2 B. Mon. 407; *King* v. *Platt*, 37 N. Y. 155; *Woodward* v. *Bullock*, 27 N. J. Eq. 507; *Lefevre* v. *Laraway*, 22 Barb. 167; *Graffam* v. *Burgess*, 117 U. S. 180 (29: 839); *James* v. *Milwaukee & M. R. Co.* 73 U. S. 6 Wall. 752 (18: 885); *Boswell* v. *Coaks*, L. R. 27 Ch. Div. 424.

Complainant has no adequate remedy at law.

Dwight v. *Smith*, 13 Fed. Rep. 50; *Richardson* v. *Vermont & M. R. Co.* 44 Vt. 613.

An income bondholder has a specific lien upon the net earnings of the company, amounting to an equitable assignment of them.

Barry v. *Missouri, K. & T. R. Co.* 27 Fed. Rep. 1; *Rutten* v. *Union P. R. Co.* 17 Fed. Rep. 480; *Ketchum* v. *St. Louis*, 101 U. S. 306 (25: 999); *Morgan* v. *Union P. R. Co.* 11 Fed. Rep. 692; *Tompkins* v. *Little Rock & Ft. S. R. Co.* 15 Fed. Rep. 6; *Union P. R. Co.* v. *United States*, 99 U. S. 402 (25: 274); *Ketchum* v. *Pacific R. Co.* 4 Dill. 78, 86; Jones, R. R. Securities, § 114; *Nickals* v. *New York, L. E. & W. R. Co.* 15 Fed. Rep. 575; *Boardman* v. *Lake Shore & M. S. R. Co.* 84 N. Y. 157; *Thompson* v. *Erie R. Co.* 45 N. Y. 468; *Dent* v. *London Tramways Co.* L. R. 16 Ch. Div. 344; *Gilman* v. *Illinois & M. Teleg. Co.* 91 U. S. 603 (23: 405); *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459 (20: 199); *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798 (24: 144); *Merchants Bank* v. *Petersburg R. Co.* 12 Phila. (Pa.) 482; *Mississippi Valley & W. R. Co.* v. *United States Exp. Co.* 81 Ill. 534.

The divisional roads have taken the earnings without consideration. They stand in place of the Iron Railroad, and are chargeable as trustees.

Rutten v. *Union P. R. Co.* 17 Fed. Rep. 480; *Morgan* v. *Union P. R. Co.* 11 Fed. Rep. 692; *Hibernia Ins. Co.* v. *St. Louis & N. O. Transp. Co.* 13 Fed. Rep. 516; *Brum* v. *Merchants Mut. Ins. Co.* 16 Fed. Rep. 140; *Blair* v. *St. Louis, H. & K. R. Co.* 22 Fed. Rep. 36.

The lien of an income bondholder adheres to the net earnings after the consolidation in the same manner as it did previously, the new company being charged as trustees.

Harrison v. *Union P. R. Co.* 13 Fed. Rep. 522; *Shields* v. *Ohio*, 95 U. S. 319 (24: 357).

A failure of the mortgage trustee to take active measures for the protection of his bondholders in a foreclosure suit is fraud, and ground to reverse the foreclosure decree.

Campbell v. *Texas & N. O. R. Co.* 1 Woods, 368; *Sahlgard* v. *Kennedy*, 1 McCrary, 291; *Simmons* v. *Taylor*, 23 Fed. Rep. 849; *Harrison* v. *Mock*, 10 Ala. 185; *Caffrey* v. *Darby*, 6 Ves. Jr. 488; *Beall* v. *Darden*, 4 Ired. Eq. 84.

Messrs. **John C. Coombs** and **Chas. H. Hanson**, for appellee:

The court cannot entertain two concurrent causes between the same parties in interest for the purpose of setting aside in one all that it decrees and establishes in another.

Campbell v. *Texas & N. O. R. Co.* 1 Woods, 368, 2 Woods, 263; *Anderson* v. *Jacksonville, P. & M. R. Co.* 2 Woods, 628; *Brown* v. *Frost*, 10 Paige, 243, 4 N. Y. Ch. L. ed. 962.

The only remedy is by motion in the foreclosure suit.

Jones, Mortg. § 1668; *McCotter* v. *Jay*, 30 N. Y. 80; *Smith* v. *American L. Ins. & T. Co.* Clarke, Ch. 307, 7 N. Y. Ch. L. ed. 127; *White* v. *Coulter*, 1 Hun, 357; Story, Eq. Pl. 428; *Van Weel* v. *Winston*, 115 U. S. 228 (29: 384).

If an individual in his private capacity have two mortgages upon the same property, he not only can, but must, include both in any foreclosure proceedings.

Roosevelt v. *Ellithorp*, 10 Paige, 415, 4 N. Y. Ch. L. ed. 1033; *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459 (20:199); *Homœopathic Mut. L. Ins. Co.* v. *Sirbury*, 17 Hun, 428; *Oconto County* v. *Hall*, 42 Wis. 59; *Demarest* v. *Berry*, 16 N. J. Eq. 481; *Hawkins* v. *Hill*, 15 Cal. 499; *Hall* v. *Bamber*, 10 Paige, 296, 4 N. Y. Ch. L. ed. 984; *Mobile & C. P. R. Co.* v. *Talman*, 15 Ala. 472.

In proceedings to foreclose under bonds and mortgage to a trustee, if the trustee is a party, the bondholders need not be.

Corcoran v. *Chesapeake & O. Canal Co.* 94 U. S. 741 (24: 190); *Shaw* v. *Norfolk County R. Co.* 5 Gray, 162; *Iowa County* v. *Mineral Point R. Co.* 24 Wis. 93; *McElrath* v. *Pittsburg & S. R. Co.* 68 Pa. 37; *Shaw* v. *Little Rock & Ft. S. R. Co.* 100 U. S. 605 (25: 757); *Lambertville Nat. Bank* v. *McCready B. & P. Co.* (N. J.) 1 L. R. A. 334.

If the trustees of a mortgage on a railroad are parties to a suit, a decree rendered in a case is binding on the bondholders, unless they can show some fraud.

Huntington v. *Little Rock & Ft. S. R. Co.* 3 McCrary, 581, 16 Fed. Rep. 908: *Meyer* v. *Utah & P. B. R. Co.* 3 Utah, 280; *Farmers L. & T. Co.* v. *Green Bay & M. R. Co.* 10 Biss. 203; *Simmons* v. *Taylor*, 23 Fed. Rep. 849, 852-856; *First Nat. Ins. Co.* v. *Salisbury*, 130 Mass. 303; *Childs* v. *Childs*, 10 Ohio St. 339.

Unless the mortgagee, or other party entitled to the same, asks for the income of the division covered by his mortgage, the road must and will be run as one concern and equally for the benefit or loss of all parties interested.

Martin v. *Buffalo, N. Y. & P. R. Co.* (N. Y. Sup. Ct.) 1 Ry. & Corp. L. J. 170; *Lambertville Nat. Bank* v. *McCready B. & P. Co.* (N. J.) 1 L. R. A. 334; *Central Trust Co.* v. *Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 259, 265-267, 30 Fed. Rep. 332, 334, 29 Fed. Rep. 618, 625, 626, 628.

A party who does not seasonably intervene for the protection of his interest, cannot come in after the earnings are all gone, and found a remedy upon theoretical rights to the earnings that are gone or on theoretical possibilities of protection or restitution.

Miltenberger v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286 (27: 117); *Union Trust Co.* v. *Illinois M. R. Co.* 117 U. S. 434 (29: 963); *Burnham* v. *Bowen*, 111 U. S. 776 (28: 596); *Farmers L. & T. Co.* v. *Missouri, I. & N. R. Co.* 17 Am. & Eng. R. R. Cas. 314.

The mortgage power of sale is simply a cumulative remedy given to the mortgagee, and does not affect the jurisdiction of the court.

Jones, Mortg. § 1773, and cases cited; Jones, Chat. Mortg. §§ 777, 778; Wiltsie, Mortg. Forecl. § 264; *Cormerais* v. *Ganella*, 22 Cal. 116, 124, 125; *Walton* v. *Cody*, 1 Wis. 420; *Packard* v. *Kingman*, 11 Iowa, 219; *Green* v. *Gaston*, 56 Miss. 748; *Heyward* v. *Judd*, 4 Minn. 483, 495.

There was no offer to redeem.

May v. *May*, 11 Paige, 204, 5 N. Y. Ch. L. ed. 108; *Duncan* v. *Dodd*, 2 Paige, 99, 2 N. Y. Ch. L. ed. 829; *State Bank* v. *Green*, 11 Neb. 303; *White* v. *Coulter*, 3 Thomp. & C. 615; *Gardiner* v. *Schermerhorn*, Clarke, Ch. 103, 7 N. Y. Ch. L. ed. 63; *Buffalo Sav. Bank* v. *Newton*, 23 N. Y. 160; *Wakeman* v. *Pierce*, 3 N. Y. 334.

An association of bondholders who buy at a foreclosure sale are bona fide purchasers.

Chicago, R. I. & P. R. Co. v. *Howard*, 74 U. S. 7 Wall. 392 (19: 117); *Vose* v. *Cowdrey*, 49 N. Y. 336; *Ashhurst's App.* 60 Pa. 290.

By the allegations, wherein the plaintiff sets up his participation in an agreement to share in the benefits of the foreclosure, he is estopped from denying its validity.

Crawshay v. *Souter*, 73 U. S. 6 Wall. 739 (18: 845); *Smith* v. *Hodson*, 2 Smith, Lead. Cas. *188; *Birch* v. *Wright*, 1 T. R. 378; *Shields* v. *Barrow*, 58 U. S. 17 How. 130 (15: 158).

There is no case for specific performance.

Randall v. *Howard*, 67 U. S. 2 Black, 585, 587 (17: 269): *Spencer* v. *Lawton*, 14 R. I. 494; Fry, Spec. Perf. §§ 264, 269, 349, 361.

If the agreement be vague, uncertain and undefined, a court of equity will not enforce it.

Bispham, Eq. § 377; *Lord Walpole* v. *Lord Orford*, 3 Ves. Jr. 420; *Aday* v. *Echols*, 18 Ala. 353; *Colson* v. *Thompson*, 15 U. S. 2 Wheat. 336 (4: 253); *Schmeling* v. *Kriesel*, 45 Wis. 325.

There was no mutuality in the character of the alleged agreement.

German v. *Machin*, 6 Paige, 288, 3 N. Y. Ch. L. ed. 990; *Bronson* v. *Cahill*, 4 McLean, 21; *Benedict* v. *Lynch*, 1 Johns. Ch. 382, 1 N. Y. Ch. L. ed. 180; Fry, Spec. Perf. § 440, and cases cited.

No consideration is alleged for said contract.

Callaghan v. *Callaghan*, 8 Clark & F. 374; *Crawford* v. *Manson* (Ga.) Nov. 21, 1888; *Anson* v. *Townsend*, 73 Cal. 415; *Acker* v. *Phœnix*, 4 Paige, 305, 3 N. Y. Ch. L. ed. 447.

This is no case for awarding damages.

Hatch v. *Cobb*, 4 Johns. Ch. 560, 561, 1 N. Y. Ch. L. ed. 936, 937; *Kempshall* v. *Stone*, 5 Johns. Ch. 193, 1 N. Y. Ch. L. ed. 1054; *Sands* v. *Thompson*, 43 Ind. 24; *Milkman* v. *Ordway*, 106 Mass. 256; Fry, Spec. Perf. §§ 1266, 1271, and cases cited; *Morse* v. *Elmendorf*, 11 Paige, 278, 5 N. Y. Ch. L. ed. 136, *note*; *Smith* v. *Kelley*, 56 Me. 64.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of Ohio, by William Robinson, in behalf of himself and all the other holders of the second-mortgage or income bonds of The Iron Railroad Company, who desire to come in and aid in the prosecution of the suit, and to contribute to the expenses thereof, against The Toledo, Cincinnati and St. Louis Railroad Company, the said Iron Railroad Company, The Iron Railway Company (all three of them being corporations of Ohio), The Central Trust Company of New York, a New York corporation, and John C. Coombs.

The substance of the material allegations of the bill is as follows:

On the 5th of August, 1881, The Iron Railroad Company executed to The Central Trust Company of New York, hereinafter called "the Trust Company," a first mortgage, covering its line of railroad and other property between the Ohio River, in Lawrence County, and the south line of Jackson County, Ohio, including sundry other lines in Lawrence County, to secure $500,000 of six per cent gold bonds. On the 1st of August, 1881, the Company executed to the same Trust Company its second mortgage on the same railroad property and lines, to secure $500,000 of six per cent income bonds. This mortgage was made expressly subject to the other one. The interest to be paid on the income bonds was to be such amount, not exceeding six per cent per annum, as the Company should annually declare to be the year's installment of interest payable out of the net earnings of the lines of railroad of the Company, interest not to be accumulative, and none to be considered due and payable except out of net earnings applicable to the purpose, and when the amount should have been ascertained and declared by the board of directors. The plaintiff is the holder and owner of twenty-five of such income bonds, of $1,000 each. The interest on the first-mortgage bonds was payable absolutely, semi-annually, on the first

days of January and July, on the presentation of coupons annexed to the bonds.

Afterwards, The Iron Railroad Company was consolidated with The Toledo, Delphos and Burlington Railroad Company, an Ohio corporation, and the latter was afterwards con-
24] solidated with The Toledo, Cincinnati and St. Louis Railroad Company, another Ohio corporation. In August, 1883, the latter corporation was put into the hands of a receiver. The earnings of the road of The Iron Railroad Company were at all times sufficient to pay interest on the first-mortgage bonds, and to pay a large interest on the second-mortgage bonds. The holders of the second-mortgage bonds had no voice in either of the consolidations, and the Trust Company never assented to them. Both consolidations were illegal, collusive, fraudulent and void. No dividend was ever declared payable to the holders of the second-mortgage bonds, though it was fairly earned. So the holders of such bonds had no opportunity to enter for a breach of the conditions of the mortgage and to operate the road. The earnings of the Iron Railroad, which ought to have been applied to keep down the interest on its bonds, were largely diverted, in consequence of its consolidation with the other roads, and applied to pay their expenses; and the holders of the second-mortgage bonds have an equitable lien on the property of the companies with which The Iron Railroad Company was consolidated, to have refunded the amount of such diverted earnings, and to have them applied to pay the interest on the two classes of bonds.

By the terms of the first mortgage, the Trust Company could have entered at any time after the failure to appropriate the earnings to pay the interest, and could have had the earnings of the Iron Railroad kept separate; and there would have been a surplus to be devoted to paying the interest on the second-mortgage bonds. The Trust Company, being a trustee under both mortgages, was bound to execute its trust for the benefit of the holders of both classes of securities; but, by reason of the apparently inconsistent positions occupied by the trustee, the holders of the second-mortgage bonds had no fair notice of the proceedings to foreclose and sell the property, and the trustee gave no notice to any of the holders of the second-mortgage bonds, of such proceedings, and they were unrepresented therein and had no opportunity to present to the court the facts set forth in the bill.

5] In July, 1883, the Trust Company filed a bill in equity, in the Circuit Court of the United States for the Southern District of Ohio against The Toledo, Cincinnati and St. Louis Railroad Company, to foreclose the mortgages, and the defendant company appeared and submitted to a default and a decree of foreclosure. A receiver and a special master were appointed, and the receiver was ordered to keep a separate account of the earnings of each division, which he proceeded to do, on November 1, 1883. The special master found that the net earnings of the Iron Railroad for the five months from November 1, 1883, to April 1, 1884, were $33,716.87. On the 15th of July, 1884, five persons whose names are given, holders to a greater or less amount of the first-mortgage bonds, became a committee of the first-mortgage bondholders, under a contract whereby they were to purchase the Iron Railroad, with all its property, under the decree of sale. All, or substantially all, of the first-mortgage bondholders signed the contract with the committee; but the second-mortgage bondholders had no notice thereof, and were not invited to participate in the appointment of the committee. A copy of the agreement is annexed to the bill. It contained a provision authorizing the committee to negotiate for a participation by the second-mortgage bondholders in the benefits of the trust created by the agreement. On the 10th of June, 1884, the holders of the second-mortgage bonds were called together in Boston, and a committee of five of them, of whom the plaintiff was one, was appointed to confer with the committee of the first-mortgage bondholders, in regard to a participation in the reorganization of the Company, and to take such other steps as might be necessary to protect the interest of the second-mortgage bondholders. On the 19th of June, 1884, the two committees met, and it was agreed between them that the second-mortgage bondholders should participate in the reorganization, and should rank therein substantially as they ranked previously, subject to a fair division of expenses, it being understood that a plan of reorganization should be submitted, and that the committee of the first-mortgage bondholders should purchase the property at the sale. The railroad and property were sold on the 28th of June, 1884, in pursuance of the decree, and [5
the defendant Coombs, acting for the committee of the first-mortgage bondholders, purchased the same for $500,000, and, as the plaintiff assumed and had reason to believe, for the benefit of both classes of security holders. The sale was confirmed on the 18th of July, 1884, and on the 31st of July, 1884, the committee of the second-mortgage bondholders submitted to the committee of the first-mortgage bondholders a plan for reorganization, a copy of which is annexed to the bill with a copy of a letter from the committee of the second-mortgage bondholders, accompanying it. Meantime, immediately after the sale, the committee of the first-mortgage bondholders proceeded to organize, under the laws of Ohio, the defendant corporation The Iron Railway Company, with the intention of transferring the property to it when the sale should be confirmed. The Iron Railway Company is capitalized at $600,000, with the purpose of issuing its stock, dollar for dollar, to the first-mortgage bondholders for their bonds, and for two years' unpaid interest, and for expenses, without recognizing the rights of the second-mortgage bondholders. Coombs has transferred the railroad and property to The Iron Railway Company, which is composed of the parties who made up the first-mortgage bondholders, and no new or innocent party holds the stock thereof; and the corporation and the holders of its stock had full notice from the beginning of the rights of the second-mortgage bondholders. In August, 1884, notice of the claims of the second-mortgage bondholders was published in certain newspapers in Boston, where both classes of securities are largely or entirely held. On the 5th of August, 1884, the committee of the second-mortgage bondholders

served upon each member of the committee of the first-mortgage bondholders a notice asserting the rights of the second-mortgage bondholders, and a like notice upon The Iron Railway Company, and also published a like notice in two Boston newspapers; all of which was done before The Iron Railway Company issued the stock. In the various statements which appear as a matter of public record, the Trust Company and The Toledo, Cincinnati
27] and St. Louis Railroad Company have alleged that the earnings of The Iron Railroad Company have been sufficient, if kept separate, to pay the interest on the first-mortgage bonds, such statements being made in the papers filed in the various foreclosure proceedings to foreclose the various divisions of The Toledo, Cincinnati and St. Louis Railroad Company. The committee of the first-mortgage bondholders have stated repeatedly in a public way that their road was earning sufficient to pay the interest on the first-mortgage bonds, and such claim was made by them, and by all that class of bondholders, when The Toledo, Cincinnati and St. Louis Railroad Company first ceased to pay interest on the first-mortgage bonds.

No demand was ever duly made by the holders of the first-mortgage bonds for their interest, in accordance with the terms of their mortgage, nor by the Trust Company as trustee. A portion of the property alleged to have been purchased under the decree of foreclosure and sale is covered by the second mortgage and not by the first, although it is claimed by the purchasing committee and asserted to have been conveyed to The Iron Railway Company. The Iron Railway Company claims that, by virtue of its title from the committee of the first-mortgage bondholders, it has acquired a right to the entire income, from whatever source, of The Iron Railroad Company and all its property and franchises, although the same may exceed the sum sufficient to pay the interest on such first-mortgage bonds. There can be no valid decree of foreclosure and sale which will deprive the second-mortgage bondholders from participating in the net profits and income, after paying the interest on the first-mortgage bonds. By the terms of both mortgages, the property, if sold, was to be sold in the City of Ironton, Ohio, and the same place should have been adopted when sold under decree of the court. The net earnings of The Iron Railroad Company should have been applied, from the time of the appointment of the receiver, to pay the interest on the first-mortgage bonds, and the balance should have been left for the subject of an account between the receiver and the second-mortgage bondholders, in accordance with the terms of the mortgage.

28] The bill prays for an answer under oath, and also for a notice to the second-mortgage bondholders to come in and aid in the prosecution of the suit; that the sale to the committee of the first-mortgage bondholders be rescinded, or so far qualified as to be declared to be in trust for both classes of bondholders; that the sale to The Iron Railway Company be rescinded or be declared to be for the benefit of both classes of bondholders; that an account be taken of the amount of the earnings of The Iron Railroad Company, applicable to the payment of interest on its first and second mortgage bonds, received since the road was placed in the hands of a receiver, and also an account of the amount of earnings diverted by the consolidation, prior to the appointment of a receiver, and an account of the amount of property under the control of the court, which ought to be applied upon the bonds in lieu of such diverted earnings; for the application of the same, first, in payment of the interest overdue on the first-mortgage bonds, and the balance, if any, after that, in payment of interest up to the specified rate on the second-mortgage bonds; and for general relief.

The Iron Railway Company and Coombs put in separate demurrers to the bill. The demurrer of The Iron Railway Company alleges want of equity, and also multifariousness, in that the bill seeks both to have the foreclosure proceedings avoided and the sale set aside, and to obtain a participation in the benefits of the purchase of the property at the sale; and also alleges that it appears that the plaintiff has not been injured by the foreclosure proceedings, and that he might, with diligence, have prevented or remedied any injury by intervening in the proceedings; that for all such injury there was a plain, adequate and complete remedy at law, in a suit against the Trust Company; that it is admitted by the bill that default was made in paying the interest due to the holders of the first-mortgage bonds, which continued up to the time of the sale of the road and still continues, but it contains no offer to pay the bonds or the interest due on them, or to redeem the property from the first mortgage that it does not allege any privity with, or duty or liability to, the second-mortgage bondholders, [
on the part of the first-mortgage bondholders, nor any common interest between them; that as to so much of the bill as rests upon any alleged agreement or undertaking on the part of the committee of the first-mortgage bondholders, whose names are given in the bill, it appears that all of them are necessary parties and none of them are made parties; that all of them and the plaintiff are citizens of Massachusetts, and that this court has no jurisdiction to enforce the alleged agreement; that the agreement is not sufficient in form or certainty to permit its enforcement or to warrant any recovery of damages on account of any breach of it; that no consideration is alleged for it, nor is it alleged to be in such form as imports consideration; that the committee were not authorized to make any such agreement with the second-mortgage bondholders; that such agreement and this suit admit the competency of the organization of The Iron Railway Company, and such agreement and the alleged authority therefor do not appear to be competent to create any privity with, or duty or liability to, the plaintiff, on the part of The Iron Railway Company and its stockholders; that it does not appear that Coombs was in privity with, or incurred any obligation or liability to, the plaintiff or any of the second-mortgage bondholders, or was served with any notice, or had any knowledge, of any undertaking in behalf of any second-mortgage bondholders, or of any violation thereof, and no fraud, or knowledge of or complicity in any fraud, on the part of Coombs, is sufficiently alleged in the bill; that it is alleged in the bill that no forclosure pro-

ceedings such as are set forth can bar the second-mortgage bondholders from the net profits and income, after the payment of the interest on the first-mortgage bonds; and that for the recovery of any property formerly of The Iron Railroad Company which may not have been covered by the first mortgage but may have been covered by the second mortgage, it appears that the parties in interest have a plain, adequate and complete remedy at law.

The demurrer of Coombs is to the same effect as that of The Iron Railway Company.

[30] On a hearing on the bill and demurrers, a decree was entered dismissing the bill, with costs. An application for a rehearing was made, on an allegation of surprise and accident, by reason whereof the case was not properly presented on the part of the plaintiff. On a hearing on the application, a decree was made which states that the plaintiff was heard in support of his application, as well upon all matters which he had to advance on the insufficiency of the prior hearing, as upon any alleged error in the judgment thereupon rendered, and the defendants were not only heard in support of the sufficiency of the hearing and the correctness of the judgment, but "also offered in open court, for the purpose of preventing any amendment hereafter to said bill by incorporating therein an offer to redeem said Iron Railroad either from the lien of the first mortgage, or from the purchaser, if and whenever in the future the circumstances and parties may have become changed, and said property may have increased in value, to waive all objection to said bill, if said complainant would amend the same forthwith by making such an offer to redeem, and accept a decree of this court limiting the time therefor, and, on default in making such redemption, to be forever barred and foreclosed of all right, title and interest in said property; and said complainant declined said offer. And thereupon, upon consideration thereof, and for other sufficient reasons, as well as said offer by said defendants, said motion for a rehearing is denied, and said judgment sustaining said demurrer and dismissing said bill, with costs, stands confirmed." The plaintiff has appealed from the decree dismissing the bill.

It is impossible to sustain this bill as against the demurrers. There is no allegation of any actual fraud. There is no offer to redeem. There is no averment of any consideration or mutuality in the alleged agreement between the two committees. There is no allegation that the property was sold for less than its actual value. The bill admits that the claim of the first-mortgage bondholders is superior to that of the second-mortgage bondholders; and the failure of the plaintiff to offer to redeem is evidence that he does not think the property was worth more than it brought at the sale.

[31] If the plaintiff or the second-mortgage bondholders had exercised due diligence, they might have intervened in the foreclosure suit. No fraud being alleged, the proper remedy, if any legal injury was sustained by them, was to apply to the court in which the foreclosure took place to set aside the decree or the sale. The bill does not allege any fraud as having been committed by any party to the foreclosure suit, or that the decree was any part of a fraudulent arrangement. There is no allegation of any fraudulent practice whereby any second-mortgage bondholders lost any right to bid at the sale; nor can it be gathered from the bill that they ever had any idea of bidding or of contributing to the purchase.

As to the allegation in respect of the inconsistent positions of the Trust Company as a trustee under both of the mortgages, no collusion on the part of that Company is averred; nor is it alleged that the company, so far as it did or could represent the second-mortgage bondholders, was unfaithful to its trust. There having been an admitted default on the first mortgage, and the foreclosure proceedings having been properly instituted, there is an absence of any allegation in the bill that the second-mortgage bondholders, if they had been parties to the suit otherwise than through the trustee, could have taken any steps which would have prevented the decree of foreclosure. The Trust Company was a trustee under the first mortgage, which was prior in right to the second. It discharged no more than its duty to the first-mortgage bondholders; and it appears by the bill that the second-mortgage bondholders had a meeting and appointed a committee eighteen days prior to the sale, and thus had full knowledge of the situation of affairs, and full opportunity to apply to intervene as parties to the suit. Moreover, the bill alleges that the foreclosure suit was a suit to foreclose both of the mortgages, and, of course, according to their respective priorities. The bondholders were represented by their trustee, as is established by numerous decisions.

As to the other allegations in the bill, which question the proceedings which took place in the foreclosure suit prior to the sale, they were matters proper for adjudication in that suit, [53 and they cannot, under the circumstances of the case, be questioned in this suit. We have considered all of them, and pass them without further observation.

As to the alleged agreement that the second-mortgage bondholders should participate in the reorganization, the claim made in regard to it may be dismissed with a few words. If there was any such agreement which could be binding, it was an agreement with the members of the committee of the first-mortgage bondholders as individuals, and they are not made parties to the suit, though their names are given. Nor does the plaintiff represent the committee of the second-mortgage bondholders, with whom the agreement is alleged to have been made. Nor does The Iron Railway Company represent the committee of the first-mortgage bondholders. Independently of this, the alleged agreement is too vague and indefinite to furnish a foundation for its enforcement. On the showing of the bill, the parties never entered into any contract, and the court would have to make one for them. There was no mutuality in the agreement alleged, and no adequate consideration for it is stated or can be imported. These same considerations show that the agreement cannot be adjudged to create a trust for the benefit of the second-mortgage bondholders. If the plaintiff or the other second-mortgage bondholders have any

right of action in respect of any such agreement, it must be one at law.

We have considered the various questions raised by the bill and the demurrers, and are of opinion that they do not need any further remark.

Decree affirmed.

21] GEORGE R. RIDDLE ET AL., *Appts.*,
v.
JOSEPH M. WHITEHILL.

(See S. C. Reporter's ed. 621-640.)

Assignment by one partner, when dissolves partnership—right to sue for settlement of partnership affairs—Statute of Limitations—real estate of partners—right of surviving or solvent partner—trustee, when one partner is—effect of Statute of Limitations in equity cases.

1. An assignment by one partner dissolves the partnership, if the partnership is at will; if it is not at will, the assignment is cause for dissolution.
2. The right of action, to sue for the settlement of partnership affairs, does not, as matter of law, accrue at the time of the dissolution of the firm, but depends on circumstances.
3. When the partnership affairs are being wound up without antagonism between the parties, and assets are being realized and debts paid, the Statute of Limitations has not begun to run.
4. No length of possession of one partner of real estate paid for with partnership funds, and conveyed to him, bars the other partners. Such real estate, used for partnership uses, is, in equity, treated as personal property, in paying debts and adjusting the equities of the partners.
5. Where dissolution comes by death or assignment of one partner, the surviving or solvent partners hold the partnership property for the purpose of closing up its affairs.
6. Where there is an agreement that one partner shall close up the business of the firm and settle its affairs, which had been under his management, a trust is created, and the bar of the Statute of Limitations does not begin to run against the right to an account for partnership dealings so long as such partner acts under the trust, until he repudiates it.
7. When the cause of action is legal and the Statute has barred the remedy at law, the defense is as complete in equity as at law; but when the case falls within the exclusive jurisdiction of a court of equity the Statute is not necessarily applied.

[No. 314.]

Submitted May 1, 1890. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas dismissing a suit in equity for an account of the business, property and liabilities of a partnership and for a decree for the amount due complainant and that the undisposed assets of the firm be appropriated to the satisfaction of the decree, and for general relief. *Reversed.*

NOTE.—*Partnership; dissolution by assignment or bankruptcy of one partner, or at his will.*

A sale by one partner of his interest dissolves the firm; and the assignee or purchaser becomes a tenant in common with the other partners, and may maintain a suit for an accounting against the other partners and the persons to whom they have transferred their interest. Marx v. Goodnough, 16 Or. 26.

One member of the partnership, with the consent of his copartners, made a voluntary assignment of all his interest in the partnership to one of his copartners, and retired from the business. *Held*, That this worked a dissolution of the partnership. Sistare v. Cushing, 4 Hun, 508.

Where A and B were tenants in common of certain lands, and carried on the farming business as partners, and A sold and transferred his moiety of the lands, it was held that by such transfer the partnership was dissolved. Mumford v. McKay, 8 Wend. 442.

The grantee became a tenant in common with B in the partnership property, taking the undivided share of his grantor, subject to all the rights of A, and to the account to be taken between the original partners. *Id.*

Where no specified period is limited for the continuance of the partnership, either party may dissolve it at any time. Nerot v. Burnand, 4 Russ. 260; Crawshay v. Maule, 1 Swanst. 508; 3 Kent, Com. 53, 54; Gow, Partn. (3d ed.) 109; Story, Partn. §§ 84, 272, 273.

Whether a partnership for a certain time can be dissolved by one partner at his mere will and pleasure before the term has expired, seems to have been doubted by some authorities. Story, Partn. § 275.

In favor of the right of one partner in such cases, see 3 Kent, Com. 55; Marquand v. New York Mfg. Co. 17 Johns. 525; Skinner v. Dayton, 19 Johns. 538; Bishop v. Breckles, 1 Hoffm. Ch. 534; Cape Sable Co's Case, 3 Bland, Ch. (Md.) 674. Against it, see Story, Partn. §§ 275, 276; Howell v. Harvey, 5 Ark. 231; Pearpoint v. Graham, 4 Wash. C. C. 234; Pothier, Partn. 152. See also Monroe v. Conner, 15 Me. 180; Gow, Partn. (3d ed.) 218, 219, 225, 226; Crawshay v. Maule, 1 Swanst. 495; Peacock v. Peacock, 16 Ves. Jr. 56; Bisset, Partn. 84.

A voluntary assignment made by one partner, of his share and interest in a partnership, limited to continue for a specified period, does not of itself dissolve the partnership, nor furnish a cause for which a court of equity will, on the application of the assignor, or of the assignee, decree a dissolution against the consent of the other partners. Ferrero v. Buhlmeyer, 34 How. Pr. 33.

When no time is named for the continuance of a partnership, it is dissolvable at the will of either partner. Story, Partn. § 269; Law v. Ford, 2 Paige, 310; Marten v. Van Schaick, 4 Paige, 479; Goodman v. Whitcomb, 1 Jac. & W. 589; McElvey v. Lewis, 76 N. Y. 373.

A partnership contract for a non-specified term is dissolvable by either partner at will. Story, Partn. § 269; Briggs v. Weidmann Cooperage Co. 24 N. Y. S. R. 300.

A partnership formed by persons interested in a railway company, for the single purpose of purchasing stock in another railway company with the design of securing its control for the benefit of their corporation, is terminated by the sale of a portion of the stock purchased, and a distribution of the balance among the copartners. Kennedy v. Porter, 109 N. Y. 526.

The fact that one partner has transferred a part of his interest to a third party, and has pledged the other part thereof to such party by way of collateral security, does not justify the other partner in excluding the plaintiff from all connection with or control over the property and business. Wilcox v. Pratt, 52 Hun, 340.

Where a copartnership is formed to undertake a

Statement by *Mr. Chief Justice* **Fuller:**

On the 10th day of March, 1885, George R. Riddle and Wilson S. Packer, as trustee for Electra Packer, filed their bill of complaint in the Circuit Court of the United States for the Eastern District of Arkansas against Joseph M. Whitehill, alleging that on the 7th day of March, 1870, and for more [622] than twenty years prior thereto, the complainants and one T. J. Coleman, deceased, were partners in business under the firm style of Riddle, Coleman & Co., with their principal office at the City of Pittsburgh, in the State of Pennsylvania, engaged in dealing in coal, purchasing and transporting the same to the markets on the lower Mississippi River and elsewhere, and selling the same for a profit; that on said 7th day of March, 1870, said firm of Riddle, Coleman & Co. entered into an agreement with the defendant, Joseph M. Whitehill, as follows:

"Memorandum of articles of agreement between J. M. Whitehill, of the first part, and Riddle, Coleman and Co., of the second part, as follows:

"They agree to start a coal depot at Island Eighty-two in copartnership, and the said Whitehill agrees on his part to give his whole attention to the management at the coal yard, and the said Riddle, Coleman and Co. on their part are to furnish coal, capital or credit to start the yard and charge no interest for the extra capital, in lieu of the said Whitehill's services at the depot. The said Whitehill is entitled to one half the profits or losses and the said Riddle, Coleman and Co. the other half, to be allowed about Vicksburg and New Orleans prices for the coal delivered at the island. It is also agreed that the business shall be carried on under the name and style of J. M. Whitehill and Co., and the partnership is exclusively for the purpose of selling coal by retail and no other, and to continue for five years, providing the firm of Riddle, Coleman and Co. wish to continue in the coal business, but if they want to stop the coal business or wish to draw out of the business at Eighty-two, the firm of J. M. Whitehill and Co. is to wind up their affairs and sell the stock to the best advantage for all parties concerned.

"This the 7th day of March, A. D. 1870.

"J. M. Whitehill.

"Riddle, Coleman & Co."

That in accordance with said agreement, Riddle, Coleman & Co. furnished to said firm of J. M. Whitehill & Co. a complete plant and outfit with which to start a coal [6 yard and depot for the retailing of coal at Island Eighty-two, consisting, in part, of a wharf boat, with rooms for office, for residence of Whitehill's family, quarters for the crew and employés of the firm; box boats or flats for measuring out and selling coal from boxes; shovels, chains, lines, barrows, anchors, etc., and also coal in barges and coal boats; insured the same, and also fur-

---

particular enterprise and complete the same in a mode specifically agreed upon, it cannot be terminated at the will of one or more of the parties, but only for some one of the causes recognized by the courts as sufficient to authorize them to wind up a partnership. Hubbell v. Buhler, 43 Hun, 82.

The bankruptcy of one member of a firm works a dissolution of the partnership only to the extent of disabling it from entering into any new engagements or incurring new obligations, except those required to complete its unfinished business and wind up its affairs. Lindley, Partn. 831, 832, 931; Crawshay v. Collins, 15 Ves. Jr. 218; King v. Leighton, 100 N. Y. 386.

A partnership for no definite period is dissolvable by either party by mere notice; and such notice may be implied from withdrawal of a partner. Coll. Partn. § 109; Pine v. Ormsbee, 2 Abb. Pr. N. S. 75; Skinner v. Tinker, 34 Barb. 333.

A bona fide assignment by one partner of his partnership interest, *ipso facto* dissolves the partnership, if the assignee elect to treat it as dissolved, notwithstanding the articles expressly provide that the copartnership shall continue until two of the partners shall demand dissolution, and the other partners are desirous to have it continue. Marquand v. New York Mfg. Co. 17 Johns. 525.

Though assignment by one partner of all his right, title and interest in the copartnership property works a dissolution of the partnership, a sale and transfer of the interest which one partner has in a particular stock held by the firm does not have that effect. Comstock v. Buchanan, 57 Barb. 127, affirmed, 57 Barb. 146, *note.*

A copartnership is dissolved by one of the members becoming insolvent and making an assignment for the benefit of his creditors, and the solvent member has the right to manage and close up the business. Ogden v. Arnot, 29 Hun, 146, 16 N. Y. Week. Dig. 144.

Bankruptcy or insolvency, either of the whole partnership or of an individual member, dissolves a partnership; and the assignees become, as to the interest of the bankrupt or insolvent partner, tenants in common with the solvent partners, subject to all the rights of the other partners. 3 Kent, Com. 58; Inst. 3, 8, 26; Dig. 2, 17, 20, 47, 50; *Traité de Société* 67, No. 91; *Ex parte* Barrow, 2 Rose, 255; Murray v. Bogert, 14 Johns. 318; Kingman v. Spurr, 7 Pick. 235; Crawshay v. Maule, 1 Swanst. 509; Rodriguez v. Heffernan, 5 Johns. Ch. 417; Ketcham v. Clark, 6 Johns. 144.

A voluntary and bona fide assignment by a partner of all his interest in the partnership stock has the same effect, and dissolves the partnership. 3 Kent, Com. 59; Fox v. Hanbury, Cowp. 445; *Lord* Eldon in *Ex parte* Williams, 11 Ves. Jr. 5; Wilson v. Greenwood, 1 Swanst. 482; Gow, Partn. 304-306.

It was formerly doubted whether a partnership between more than two persons was wholly dissolved by the death or bankruptcy of one; but *Lord* Eldon has repeatedly laid down that the destruction of one operates as a dissolution with respect to the whole; and this, notwithstanding it is entered into for a term of years, unless provision is expressly made to the contrary. Bisset, Partn. 83; Gillespie v. Hamilton, 3 Madd. 251; Crawshay v. Collins, 15 Ves. Jr. 228; Kinder v. Taylor, referred to in Gow, Partn. 219; Royal Bank of Scotland v. Christie, 8 Clark & F. 214.

An assignment under the Insolvent Act, or an execution under which a partner's share is seized and sold, is likewise a dissolution. Bisset, Partn. 84; Crawshay v. Collins, 1 Jac. & W. 267, 2 Russ. 325; Brown v. De Tastet, Jac. 284; Wedderburn v. Wedderburn, 4 Myl. & C. 53; Skipp v. Harwood, 2 Swanst. 586, *note;* Waters v. Taylor, 2 Ves. & B. 299; Coll. Partn. 71.

(An examination of the authorities leads to the conclusion that the correct rule as to the effect of an assignment by one partner is laid down in the above case of Riddle v. Whitehill.—ED.)

nished additional plant and stock from time to time, as needed for said business; and Whitehill & Co. established a depot and coal fleet at Island Eighty-two, and carried on the business of a retail dealer in coal for about the space of two years at that point, and with the knowledge and consent of Riddle, Coleman & Co. started a retail store there, partly for the purpose of supplying their labor and partly for profit, carried on with the capital of Riddle, Coleman & Co., and for the profit of J. M. Whitehill & Co.; that in the latter part of the year 1871, or early in 1872, to induce the firm of J. M. Whitehill & Co. to change and remove their place of business, depot and coal fleet from Island Eighty-two to Arkansas City, the proprietors of the last-mentioned place leased to that firm, free of rent, the landing and coaling privileges at Arkansas City for a term of years; and donated to them certain town lots in said town; and, with the knowledge and approbation of Riddle, Coleman & Co., the firm of J. M. Whitehill & Co. changed, during the year 1872, the location of their business from Island Eighty-two to Arkansas City, and their fleet, barges, boats and all their outfit were moved by one of the tow-boats of Riddle, Coleman & Co. from Island Eighty-two to Arkansas City; and from that time until October, 1877, and afterwards, J. M. Whitehill & Co. carried on the business as dealers in coal at Arkansas City, and also kept a general store, and did a general merchandising business at that place; that in addition to the landing and coaling privilege and the lots donated to said firm by the proprietors of said town, as an inducement to said firm to locate their business at that point, the said J. M. Whitehill, for the use of the firm, purchased a large number of other town lots in the town and paid for the same with the money of the firm, [324] and in like manner acquired and purchased an undivided half interest in the entire river front of the town for a distance of about three thousand feet, and leased the other half interest in the river front for a period of twenty-five years, from the 1st day of May, 1872, and paid for the same out of the money and with the property of the firm, and expended large sums of the money of the firm in building residence houses, storehouses, warehouses, high-water platform, a large and expensive ice-house, a hotel and other valuable improvements on the lots and lands so donated to and purchased with the money and property of said firm, and certain lots are enumerated as having been conveyed as an inducement to locate at said town.

The bill further averred that the river front was leased to the firm on the 1st day of May, 1872, for five years, and this was subsequently extended for the additional term of twenty years from the 1st day of May, 1877; that on the 21st of July, 1875, an undivided half of the river front was sold and conveyed to the firm; that the deeds to some of the land and town lots were taken in the name of J. M. Whitehill & Co., and the deeds to other parts of the land and town lots were taken in the name of J. M. Whitehill, but complainants charge that all the land and town lots not donated to the firm were purchased with its money and for its benefit and held as partnership assets of the firm; that the business of the firm of J. M. Whitehill & Co. was very profitable, and large profits were realized therefrom, all of which, and much of the capital furnished by Riddle, Coleman & Co., were used in the purchase and improvement of the lots and river front, and J. M. Whitehill & Co. became largely indebted to said Riddle, Coleman & Co. for plant and stock furnished by them.

It was further alleged that Riddle, Coleman & Co. became embarrassed and were forced to suspend business, and on the 15th day of October, 1877, made an assignment to James Lynn, as assignee, under the laws of the State of Pennsylvania, of all their real and personal property, including the indebtedness to them from J. M. Whitehill & Co., and all their interest in the business, profits and property of said J. M. Whitehill & Co., of every description, to be collected or sold and disposed of for the benefit of their creditors; that T. J. Coleman, a member of the firm of Riddle, Coleman & Co., died in the year 1878; that the surviving members of that firm, to wit, the complainants in this cause, devoted themselves, with the aid of the assignee, to realize on the assets of the firm, and after several years' attention to that object, and the application of their individual means to the payment of the debts of the firm, they succeeded in settling up and discharging the debts, and upon a public sale, made in virtue of the powers contained in the deed of assignment, with the express assent of their creditors, all the uncollected assets of the firm, including the indebtedness of the defendant, J. M. Whitehill, and the firm of J. M. Whitehill & Co., were assigned and conveyed by said assignee to W. S. Packer, as trustee for Electra Packer, and George Riddle, by deed dated the 3d day of January, 1885, a copy of which was attached.

Complainants averred that no part of the indebtedness of J. M. Whitehill or J. M. Whitehill & Co., and no part of the assets of said J. M. Whitehill & Co., was ever paid to or collected by the said assignee, and the same and the right to sue for and collect the same is now vested in the complainants, who are also the sole surviving partners of said firm of Riddle, Coleman & Co.; that at the time of the assignment, the 15th day of October, 1877, the firm of J. M. Whitehill & Co. was indebted to the firm of Riddle, Coleman & Co. in the sum of $10,000 for plant, stock, boats, barges, flats, ferry-boats, tugs, anchors, etc., etc., and for coal furnished and supplied to J. M. Whitehill & Co. by Riddle, Coleman & Co.; that Riddle, Coleman & Co. were entitled to one half of the profits realized by said firm, and also entitled to one half of the assets of the firm of J. M. Whitehill & Co., which amounted in part to over $65,000, given in various items; that defendant Whitehill published a dissolution of the firm, and took and retained possession of all its assets, and on the 10th day of March, 1881, sold and delivered to Brown, Jones & Co. a part of the property of the

firm of J. M. Whitehill & Co. for the sum of $16,000, and also leased to Brown, Jones & Co. the coal privilege at the landing for a term of ten years, at the price and sum of $800 per annum, and has collected and received the same for three or four years, and is now in receipt of the same; that there is on said river front a large and valuable ice-house, warehouses and other large and valuable improvements erected thereon with the money and for the benefit of J. M. Whitehill & Co., from which defendant Whitehill has collected rents and received the profits since the date of the assignment of Riddle, Coleman & Co.; that Whitehill has carried on the business of a receiving and forwarding merchant and ferryman, by reason of holding the river front, and derived large profits; that he has received annually large sums of money for the rent of houses and a hotel, built with the money of the firm of J. M. Whitehill & Co., and Riddle, Coleman & Co. are entitled to one half of all these receipts; that defendant Whitehill has sold some of the lots embraced in the conveyances aforesaid and received the money therefor, and has exchanged some of the lots for other property situated in the town, and, as the title was in some instances taken in his own name, the purchasers or grantees of some of the lots may have taken the same for a valuable consideration without notice of the rights of Riddle, Coleman & Co., but defendant Whitehill should be held to account for the proceeds of such lots, to one half of which complainants are entitled; and that, as complainants charge on information and belief, Whitehill purchased with the money of Whitehill & Co. a plantation, and took the title thereto in the name of his wife and his brother, and ought to be required to account for the same. The bill then prayed that an account be taken of the partnership business of the firm of J. M. Whitehill & Co.; that that firm may be dissolved; that a master may be appointed to state an account of the business and property, and the liabilities of the firm; the indebtedness of J. M. Whitehill & Co. to Riddle, Coleman & Co.; the interest of Riddle, Coleman & Co. in the assets of the business of J. M. Whitehill & Co.; the profits realized by Whitehill from the property and privileges of J. M. Whitehill & Co., etc., etc.; and that at the final hearing complainants may have a decree for the amount due from the defendant, and that the lots and real estate purchased with the assets of the firm, remaining undisposed of to bona fide holders without notice, be appropriated to the satisfaction of the decree, and a judgment be rendered against the defendant for any balance due complainants on the business of said partnership; and that a receiver be appointed; and for general relief. The bill was verified by one of the complainants.

The defendant Whitehill demurred, and assigned for causes of demurrer:

"First. That said bill, in case the same were true, contains no matter of equity whereon this court can ground any decree or give complainants any relief as against this defendant.

"Second. That it appears by the bill that said James Lynn is a necessary party, inasmuch as it is stated that said Riddle, Coleman & Co. assigned to him all the real and personal property of said firm, and it does not appear that he has disposed of the same, and the bill seeks action in relation thereto.

"Third. That the right of action, if any existed, to sue for the settlement of the partnership matters, accrued at the time of the dissolution of said firm of J. M. Whitehill & Co., on October 15, 1877, and more than seven years next before the institution of this suit, and that the demand is stale and is barred as a cause of action against this defendant.

"Fourth. That it appears from the bill that the creditors of said Riddle, Colman & Co. were paid before the pretended sale to complainants by said James Lynn, as assignee, on January 3, 1885, and that there is no privity between complainants and this defendant to enable them to call on him for a settlement of said partnership matters."

On the 14th of April, 1886, the court sustained the demurrer, and ordered the bill to be dismissed for want of equity, and complainants prayed an appeal to this court, which was allowed. On the 7th of October, 1886, one of the days of the same term, the complainant moved to set aside the decree dismissing the bill, and for leave to amend the same by inserting therein: that the defendant continued in the possession and control of the assets belonging to the firm of J. M. Whitehill & Co. for the professed purpose of paying the debts of the firm, representing to the assignee, Lynn, that J. M. Whitehill & Co. were indebted in the sum of $20,000; that he, the defendant, had, in 1879, made arrangements to pay said indebtedness by installments of $6,000 per year, and that he was using the assets of the firm for that purpose; that defendant did not make any adverse claim to the assets belonging to J. M. Whitehill & Co., until long after the sale hereinbefore stated, in 1881; and that, after paying all the debts of J. M. Whitehill & Co., the defendant is indebted to the firm of Riddle, Coleman & Co., and subject to account, as hereinbefore stated. This motion to set aside the decree and for leave to amend was continued on the 23d day of October, 1886, to the next term, at which term the motion was overruled. The transcript of record was filed in this court on the 2d day of April, 1887.

The sections of the Statute of Limitations of Arkansas referred to are as follows:

"Sec. 4471. No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments, shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed."

"Sec. 4478. The following actions shall be

commenced within three years after the cause of action shall accrue, and not after:

"First. All actions founded upon any contract or liability, express or implied, not in writing."

"Sec. 4483. Actions on promissory notes, and other instruments in writing not under seal, shall be commenced within five years after the cause of action shall accrue, and not afterward."

"Sec. 4488. All actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued." Dig. Stat. Ark. 1884, p. 886.

Mr. **John Dalzell,** for appellants:

Upon the voluntary assignment of one of the partners, the solvent partner became a trustee to wind up the concern in the best manner for all interested and without unnecessary delay.

Parsons, Partn. § 442.

An assignee of an assignee of a copartner may maintain a bill in equity against the other copartners and the agent of the concern.

Pendleton v. *Wambersie*, 8 U. S. 4 Cranch, 73 (2:554).

When, after dissolution, the partner continued closing up the business, receiving and paying out money, the cause of action is deemed to have accrued at the date of the last item received or paid out. No demand is necessary before suit brought.

Hammond v. *Hammond*, 20 Ga. 556; *Massey* v. *Tingle*, 29 Mo. 438; *McClung* v. *Capehart*, 24 Minn. 17.

Where real estate is purchased and paid for with partnership funds, but conveyed to one of the partners alone, a trust results in favor of the other partners.

McGuire v. *Ramsey*, 9 Ark. 519.

No precise rule, applicable to all cases, as to what lapse of time will make a demand stale so as to be barred in equity, can be declared.

Wilson v. *Anthony*, 19 Ark. 22.

Mr. **D. H. Reynolds,** for appellee:

The effect of the assignment of Riddle, Coleman & Co. was to dissolve the partnership of J. M. Whitehill & Co.

Parsons, Partn. 400; *Jones* v. *Fletcher*, 42 Ark. 462; *Ogden* v. *Arnot*, 29 Hun, 146; *Fourth Nat. Bank* v. *New Orleans & C. R. Co.* 78 U. S. 11 Wall. 628 (20: 83).

The assignee acquired only the right to a share of what might remain after payment of the debts of the firm and the settlement of its accounts.

Case v. *Beauregard*, 99 U. S. 124 (25: 371); *Taylor* v. *Fields*, 4 Ves. Jr. 396.

It was the duty of the assignee to act promptly and pay the debts of the assignors and turn over to the assignors any surplus.

Mansf. Dig. §§ 305, 309; *Raleigh* v. *Griffith*, 37 Ark. 150; *Teah* v. *Roth*, 39 Ark. 66; Burrill, Assignments, 462, 480, 543.

The statute bar destroys the right that once existed, and confers title on claimant in possession.

Meeks v. *Olpherts*, 100 U. S. 569 (25: 737); *Trimble* v. *Woodhead*, 102 U. S. 649 (26: 290); *Barclay* v. *Goodloe*, 83 Ky. 493; *Parker* v. *Metzger*, 12 Or. 407.

As to actual trustees the Statute does not run, and as to constructive trustees it does run.

Adams v. *Taylor*, 14 Ark. 66, 67; Wood, Lim. § 85; *Baxter* v. *Moses*, 77 Me. 465; *Knox* v. *Gye*, L. R. 5 H. L. 656; *Noyes* v. *Crawley*, L. R. 10 Ch. Div. 31; *Speidel* v. *Henrici*, 120 U. S. 386 (30: 719).

The Statute of Limitations does not apply to direct trusts, but constructive trusts resulting from partnerships, agencies and the like are subject to the Statute.

Walker v. *Walker*, 16 Serg. & R. 379; *Kane* v. *Bloodgood*, 7 Johns. Ch. 89, 2 N. Y. Ch. L. ed. 231; *Manion* v. *Titsworth*, 18 B. Mon. 582; *Weisman* v. *Smith*, 6 Jones, Eq. 124; *Albretch* v. *Wolf*, 58 Ill. 186.

Between partners there is not such implied trust as will exclude the operations of the Statute of Limitations.

Adams v. *Taylor*, 14 Ark. 66; *McKeown* v. *Guild* (Ill.) 9 Cent. L. J. 369; *McClung* v. *Capehart*, 24 Minn. 17; *Noyes* v. *Crawley*, L. R. 10 Ch. Div. 31; *Clay* v. *Freeman*, 118 U. S. 106 (30: 107).

Courts of law and courts of equity have concurrent jurisdiction in the matter of accounts and of accounting in the matters of partnership.

Pom. Eq. Jur. 186, 189, 1416, 1420, 1421; *Cochrane* v. *Allen*, 58 N. H. 250.

The Statute of Limitations applies with equal force in courts of law and courts of equity in cases of concurrent jurisdiction, as in this case, courts of equity acting in obedience rather than in analogy to the statutes.

Story, Eq. Jur. § 1520; *Adams* v. *Taylor*, 14 Ark. 66, 67; *Wilson* v. *Anthony*, 19 Ark. 16; *Faulkner* v. *Thompson*, 14 Ark. 481; *Sullivan* v. *Hadley*, 16 Ark. 129; *Ringo* v. *Woodruff*, 43 Ark. 484; Pom. Eq. Jur. 418, 419, 917; *United States Bank* v. *Daniel*, 37 U. S. 12 Pet. 56 (9: 998); *Godden* v. *Kimmell*, 99 U. S. 201 (25: 431); *Speidel* v. *Henrici*, 120 U. S. 387 (30: 719).

The question of laches or limitations may be raised by demurrer, where, as in this case, the objection appears on the face of the bill.

Story, Eq. Pl. 484, 503, 751; Mitf. Eq. Pl. 212, and *notes C, I; Sullivan* v. *Hadley*, 16 Ark. 129; *Faulkner* v. *Thompson*, 14 Ark. 481; *Rhode Island* v. *Massachusetts*, 40 U. S. 15 Pet. 233 (10:721); *Lansdale* v. *Smith*, 106 U. S. 391 (27: 219).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Upon the face of the bill, of which the transfer to the complainants formed a part, we think the latter could maintain the suit if a cause of action existed, and we assume that the demurrer was sustained and the bill dismissed as the result of the application of the Statute of Limitations or the doctrine of laches. Should this conclusion have been reached upon the facts admitted? By the terms of the agreement in question, the partnership was to continue for five years, provided Riddle, Coleman & Co. wished to remain in the coal business; but, if not, or if

they desired to terminate this particular connection, J. M. Whitehill & Co. were "to wind up their affairs and sell the stock to the best advantage for all parties concerned." The five years ran out on the 7th day of March, 1875, but the firm went on in business. Many of the lots in question had been conveyed to Whitehill & Co. prior to 1875, and the term of the lease of the river front did not expire until May, 1877, when it was renewed for twenty years, an indication that the firm had then no intention of bringing its business to an end. The management at Arkansas City was confided to Whitehill, while Riddle, Coleman & Co. furnished the capital invested in the plant, and the coal from year to year, dealing in which was the specific object of the enterprise.

On the 15th day of October, 1877, the firm of Riddle, Coleman & Co., which had then been carrying on business at Pittsburg for more than twenty-seven years, was compelled to make an assignment. If a member of an ordinary partnership assigns, where the partnership is at will, the assignment dissolves it, and if it is not at will, the assignment may be treated by the other members of the concern as a cause for dissolution. The assignee of one partner cannot be made a member of a partnership against the will of the other partners, but the absolute right to have the affairs of the firm at once wound up, when the specified duration of the partnership has not expired, may be subject to modification according to circumstances. *Taft* v. *Buffum*, 14 Pick. 322; *Buford* v. *Neely*, 2 Dev. Eq. 481; *Monroe* v. *Hamilton*, 60 Ala. 226; Lindley on Partn. *364; *Helmore* v. *Smith*, L. R. 35 Ch. Div. 436. In the case at bar, J. M. Whitehill & Co. continued in business after October, 1877, although the bill does not state for how long a time. The failure of Riddle, Coleman & Co. presumably prevented their furnishing coal, yet the averments of the bill show that the business of Whitehill & Co. had expanded far beyond the traffic to which it had been originally confined. But assuming that by the assignment the partnership of J. M. Whitehill & Co. was dissolved, it was the duty of Whitehill to proceed at once to wind up the business and sell the stock to the best advantage, not only for himself, but for Riddle, Coleman & Co., and this was in compliance with the express provisions of the agreement. It appears that a portion of the stock, to the amount of $16,000, was not sold until the 10th day of March, 1881, at which time the coal privilege at the landing was leased for ten years; and while some of the real estate had been disposed of, a large part remained yet to be divided, when the bill was filed. The proposed amendment showed that the firm's liabilities were not liquidated until 1883.

According to the allegations of the bill, on the 15th day of October, 1877, when Riddle, Coleman & Co. assigned, the firm of J. M. Whitehill & Co. was the owner of town lots, of river front, residences, store-houses and a hotel, bought and paid for with the partnership funds. The title stood in the name either of J. M. Whitehill or of J. M. Whitehill & Co.; and part of the property was in use for partnership purposes and so employed, while a part was not, but represented the investment of partnership gains. A partnership, as such, could not hold the legal title to real estate, as it is not a person in fact or in law, and the situation in this case is well described in *Percifull* v. *Platt*, 36 Ark. 464, [634 where it was held: "If the title be made to all the partners by name, they hold the legal title as tenants in common, without survivorship. If to one partner alone, the whole legal title vests in him, which is the case, also, where the title is to a partnership name, which, as in this case, expresses the name of one party only, with the addition of 'and company.' If the deed be to a name adopted as the firm style, which includes the name of no party, it passes nothing in law. The same occurs where the deed is to one already dead."

As to this real estate, whether the deeds ran to J. M. Whitehill & Co. or to J. M. Whitehill, the latter held the title in trust, and it was so ruled in *McGuire* v. *Ramsey*, 9 Ark. 519. It is there said that "where real estate is purchased and paid for with partnership funds, but conveyed to one of the partners alone, a trust results in favor of the other partners;" and that lapse of time "cannot be allowed in favor of one partner in possession of real estate against the other, for the possession of one is the possession of both."

Lord Redesdale in *Hovenden* v. *Lord Annesley*, 2 Sch. & Lef. 633, laid down the rule, that if the trust be constituted by act of the parties, the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a party is to be constituted a trustee by the decree of a court of equity, founded on fraud or the like, his possession is adverse, and the Statute of Limitations will run from the time that the circumstances of the fraud were discovered.

"As a general rule, doubtless," said *Mr. Justice* Gray, delivering the opinion of the court in *Speidel* v. *Henrici*, 120 U. S. 377, 386 [30: 718, 719], "length of time is no bar to a trust clearly established, and express trusts are not within the Statute of Limitations, because the possession of the trustee is presumed to be the possession of his *cestui que trust*. But this rule is in accordance with the reason on which it is founded, and as has been clearly pointed out by *Chancellor* Kent and *Mr. Justice* Story, subject to this qualification, that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right [63 and interest which is clearly and unequivocally made known to the *cestui que trust;* as when, for instance, such transactions take place between the trustee and the *cestui que trust* as would in case of tenants in common amount to an ouster of one of them by the other. . . . In the case of an implied or constructive trust, unless there has been a fraudulent concealment of the cause of action, laspe of time is as complete a bar in equity as at law." Courts of equity sometimes act in obedience to the Statute, and sometimes apply it by way of analogy. Where the

cause of action is legal and the Statute has barred the remedy at law the defense is as complete in equity as at law, but where the case falls within the proper, peculiar and exclusive jurisdiction of a court of equity the Statute is not necessarily applied.

Real estate purchased with partnership funds for partnership uses, though the title be taken in the name of one partner, is in equity treated as personal property, so far as is necessary to pay the debts of the partnership and to adjust the equities of the partners; but the principle of equitable conversion has no further application. *Clagett* v. *Kilbourne*, 66 U. S. 1 Black, 346, 349 [17: 213, 216]; *Shanks* v. *Klein*, 104 U. S. 18 [26: 635]; *Allen* v. *Withrow*, 110 U. S. 119 [28: 90]; *Buchan* v. *Sumner*, 2 Barb. Ch. 165, 5 N. Y. Ch. L. ed. 599; *Collumb* v. *Read*, 24 N. Y. 505. Whitehill here was in possession for the benefit of the parties lawfully entitled, and apparently occupied no position adverse to them.

In *Knox* v. *Gye*, L. R. 5 H. L. 656, the effect of the Statute of Limitations, 21 Jac. I., chap. 16, providing that all actions of account and upon the case should be commenced and sued within six years next after the cause of such action or suit, and not after, as repeated in the 9th section of the 19 & 20 Vict., chap. 97, with this additional provision, namely, that "no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter or claim comprised in the same account having arisen within six years next before the commencement of such action or suit," upon a bill for an account brought by the executor of a deceased partner against the survivor, more than six years after the death, was considered. It was held that the matter, namely, the dissolution of the partnership, and, consequently, the possession of the partnership property by the surviving partner, arose more than six years before the commencement of the suit and was barred; that the right of action arose upon the death of the deceased partner, and the cause of action was the possession of the partnership estate by the surviving partner; that where, in the matter of the enforcement of a legal right, a court of common law would, under the provisions of the Statute of Limitations, refuse the enforcement after the lapse of six years from the accruing of the right of action, a court of equity would, where its power to grant relief was asked for under similar circumstances, adopt the principle of the Statute, and decline to grant such relief. *Lords* Westbury, Colonsay and Chelmsford concurred in the result, while the lord chancellor (*Lord* Hatherley) dissented. It was held by *Lord* Westbury that "there is no fiduciary relation between a surviving partner and the representatives of his deceased partner; there are legal obligations between them equally binding on both;" but the lord chancellor insisted with emphasis that "there is a fiduciary relation between them. The surviving partner alone having the legal interest in the partnership property, and being alone able to collect it, there arises a right in the representatives of the deceased partner to insist on the surviving partner holding the property, whenever received, subject to the rights of the deceased partner, and he cannot make use of the partnership assets without being liable to an account for them."

We are not prepared to decide that there is a definite rule of law that Statutes of Limitation commence to run immediately upon the dissolution of a partnership, irrespective of the circumstances of the particular case. *Mr. Justice* Lindley, in his excellent work on Partnership, says: "So long, indeed, as a partnership is subsisting, and each partner is exercising his rights and enjoying his own property, the Statute of Limitations has, it is conceived, no application at all; but as soon as the partnership is dissolved, or there is any exclusion of one partner by the others, the case is very different, and the Statute begins to run." Partn. (Am. ed. 1888) *510. The learned author in his last edition cites *Knox* v. *Gye*, *supra*, and *Noyes* v. *Crawley*, L. R. 10 Ch. Div. 31, in which *Vice-Chancellor* Malins quotes the above language with commendation, and dissents from *Miller* v. *Miller*, L. R. 8 Eq. 499. Where, however, partnership affairs are being wound up in due course, without antagonism between the parties, or cause for judicial interference; where assets are being realized upon and liabilities extinguished, and no settlement has been made, the cause of action has not accrued, and the Statute has not begun to run. Of course, where the partnership expires in accordance with its terms, or is dissolved by agreement, each partner as a general rule has an equal right to the possession of the partnership property, and if they cannot agree as to the disposition and division of it, a court of equity will appoint a receiver to collect and apply the effects. Each partner has a right to have the partnership assets applied in liquidation of the partnership debts, and to have the surplus assets divided, and each may insist on a sale, and that nothing shall be done except with a view to wind up the concern. But in case of dissolution by death, surviving partners are invested with the exclusive right of possession and management of the whole partnership property and business, for the purpose of paying the partnership debts and disposing of the effects of the concern for the benefit of themselves and the estate of the deceased. *Emerson* v. *Senter*, 118 U. S. 1 [30: 49]. If they go on with the business under the credit, and risking the effects, of the firm, and profits result, they will be bound to account for those profits as belonging to the firm, and they are liable to be charged with interest on the funds they use, though no profit, or even a loss, is made. And so, upon dissolution by an assignment, the solvent partners are in equity entitled to hold the effects and property in the way that surviving partners do, and if they continue the business it is at their own peril, in the absence of special provision.

When the right of action accrues, so as to set the Statute of Limitations in motion, depends, as we have said, upon circumstances,

and cannot be held as matter of law to arise at the date of the dissolution, or to be carried back by relation to that date. *Todd* v. *Rafferty*, 30 N. J. Eq. 254; *Partridge* v. *Wells*, Id. 176; *Prentice* v. *Elliott*, 72 Ga. 154; *Hammond* v. *Hammond*, 20 Ga. 556; *Massey* v. *Tingle*, 29 Mo. 437; *McClung* v. *Capehart*, 24 Minn. 17; *Hendy* v. *March*, 75 Cal. 566; *Foster* v. *Rison*, 17 Gratt. 321; *Boggs* v. *Johnson*, 26 W. Va. 821; *Atwater* v. *Fowler*, 1 Edw. Ch. 423, 6 N. Y. Ch. L. ed. 195. In *Causler* v. *Wharton*, 62 Ala. 358, the court held that where one partner, by a written agreement with the other, left the partnership assets with him to dispose of, whenever he could do so at a fair price, a continuing trust was thereby created, and the bar of the Statute of Limitations would not begin to run against the right to an account of the partnership dealings, so long as the party to whom the assets were delivered acted under the trust or admitted that it was still continuing. Under the agreement here, it is obvious that it was Whitehill who was to close up the business at Arkansas City, which had been under his management; and under the averments of this bill such a trust was created as would not be barred by the Statute of Limitations until it was repudiated by Whitehill, which attitude on his part there is nothing here to disclose unless his defense to the bill may be construed as such.

In *Adams* v. *Taylor*, 14 Ark. 62, it was held that "the relation between copartners does not create such a trust as will exempt a bill for a mere account and settlement from the operation of the Statute of Limitations, or the analogous bar by lapse of time, or staleness of the demand." That was a case where a partner came into chancery eight years after the dissolution of the partnership, for an account and settlement, and no circumstances of fraud, accident or concealment were alleged to have prevented the settlement after the partnership affairs had been wound up. The question of when the right of action accrued did not arise, nor was that anything more than, as stated by the court, a bill for a mere account and settlement; whereas we have in this case the state of affairs which existed in *McGuire* v. *Ramsey*, 9 Ark. 519, where, with respect to real estate paid for with partnership funds, it was held that the plea of the Statute could not be allowed in favor of one partner in possession of such real estate as against the other.

The case of *Chouteau* v. *Barlow*, 110 U. S. 288 [28: 132], is very much in point. Sanford, Chouteau, Sarpy and Sire were copartners in business in St. Louis. During its existence the partnership purchased and paid for, with the partnership funds, acre lands and town lots in Wisconsin and Minnesota, and held the same for the benefit of the copartnership. The firm was dissolved in 1852 by the retirement of Sanford and some twenty-four years thereafter his executor and trustee filed a bill against the representatives of the other members of the firm, who had all died, to compel an accounting touching the property of the partnership and the proceeds of such property. The dispute between the parties was as to the terms of the agreement of dissolution of the partnership in 1852. The complainants alleged that Sanford released to Chouteau all his interest in the estate of the firm, except its lands and town lots in Minnesota, and that Chouteau agreed to relieve Sanford from the debts of the firm and assure to him his proportion of the lands and town lots free from any debt or liability growing out of the copartnership affairs. The answer alleged that Chouteau agreed to relieve Sanford from the debts of the firm, and that Sanford released to Chouteau all his interest in the assets of the firm, including his interest in any of the lands and town lots in Minnesota; and further averred, by way of defense, that more than six years had elapsed since the accruing of any of the alleged causes of action set out in the bill. The opinion of the court thus concludes: "On the whole case, we are of opinion, that, after the dissolution of the St. Louis firm, the members other than Sanford were entitled to collect and dispose of all its assets, including the Minnesota 'outfit' and the Minnesota lands, to liquidate its affairs, without the interference of Sanford; that all claim on their part against Sanford individually was relinquished, leaving recourse only to those assets; and that, if there should be any surplus of those assets, after paying the debts of the firm and the advances of any of the other partners therefor, Sanford's executors would be entitled to his proper [640 proportion of such surplus. No judicial accounting has been had on the basis of the rights of the parties as we have defined them. The bill prays that the defendants may account touching the affairs and property of the copartnership and touching the proceeds of any such property. We think the plaintiffs are entitled to such an accounting, and are not barred from it by laches or by the operation of any Statute of Limitations."

In the case at bar, the business of Riddle, Coleman & Co. was finally wound up by the payment of its debts in full, to do which, as we understand the bill, coupled with the terms of the deed to the complainants, a public sale was had with the consent of the creditors, and the complainants purchased the interest in and the rights and claims against certain companies and individuals in the south, along the Mississippi River, including the interest and claims against Whitehill and the late firm of J. M. Whitehill & Co. This was within four years after Whitehill had disposed of the enumerated assets and made the lease of the coaling privilege, and within three years after the payment of the outstanding indebtedness, according to the amendment. Certainly Whitehill ought not to be allowed to complain that he was permitted to take his time in selling the stock of the concern to the best advantage; and it is clear, as the case stands at present, that the Statute did not run as against the trust in the real estate conveyed to him or to J. M. Whitehill & Co., and purchased with the money of the firm.

The decree is reversed and the cause remanded with directions to allow the complainants to amend their bill, and for further proceedings in conformity with this opinion.

584] JAMES W. HAINES, *Plf. in Err.*,
v.
E. W. McLAUGHLIN ET AL.

(See S. C. Reporter's ed. 584-598.)

Immaterial error—charge to jury—expression of opinion—claim of patent should not be enlarged—anticipation, question of fact—error in instructions to jury.

1. A remark of the court to the jury which was fully justified by the course of the trial and could not have affected plaintiff injuriously is not to be regarded in this court.
2. A part of the charge, which was withdrawn upon the defendants' counsel disclaiming it, disposes of plaintiff's exception to it.
3. Where the judge expressed an opinion to the jury as to the testimony in regard to a particular fact as applicable to the issues, but said that he left the matter wholly to them to determine, this is not error.
4. A claim admitted by the Patent Office and acquiesced in by the patentee should not be enlarged by construction beyond the fair interpretation of its terms.
5. In a suit for infringement of a patent, the question of anticipation is a question of fact, and is exclusively for the jury to determine.
6. It is not error to refuse to instruct as to an abstract question, and instructions should not be given upon hypothetical statements of fact, of which there is no evidence.

[No. 315.]

Argued and Submitted May 1, 1890. Decided May 19, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of California to review a judgment in favor of defendants in an action to recover damages for the infringement of letters-patent No. 107,611, granted to James W. Haines Sept. 20, 1870, for an "improvement in chutes for delivering timber." *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was an action at law brought to recover damages for an alleged infringement of letters-patent No. 107,611, bearing date September 20, 1870, and granted to James W. Haines for an "improvement in chutes for delivering timber." The specification, claim and drawings are as follows:

"Be it known that I, James W. Haines, of Genoa, in the County of Douglas and State of Nevada, have invented a new and improved chute for delivering timber from high mountains; and I do hereby declare that the following is a full, clear and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawing forming part of this specification.

"Figure 1 represents a side view of my improve chute.

"Figure 2 is an end view of the same.

"Similar letters of reference indicate corresponding parts.

"This invention has for its object to furnish to the public an improved chute for facilitating the transportation of timber of all kinds from the tops or sides of mountains or other elevations, and consists in constructing a chute so as to present a V-form in cross-section, the same being arranged on an incline corresponding, more or less, to the surface of the ground over which it passes, and brought in connection with a spring, or other water-supply, to receive the water therefrom, and thus form a smooth canal throughout its entire length.

"Heretofore chutes for this purpose have been constructed with flat, or nearly flat, bottoms, which while sufficiently objectionable as requiring a greater quantity of water to insure equal rapidity in the transit of the timber, are far more so for another reason, viz., the log or piece of timber, more especially at points where the inclination of the chute is slight, is liable to be checked in its descent by friction against the bottom and one side of the chute, and, when thus situated, others may pass it, thus leaving it to be again set in motion by manual assistance, or other logs striking it; the whole may become wedged together, so as to form a total obstruction to the passage of succeeding logs, destroy the chute at that point, or cause other serious injury, inconvenience and, in any event, pecuniary loss.

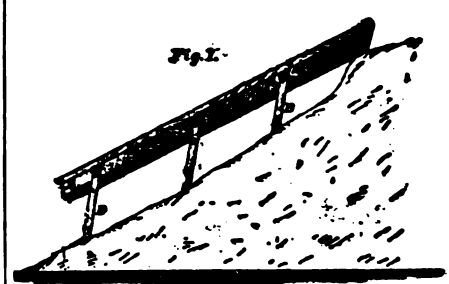
"A in the drawing represents a wooden trough made of two boards, *a* and *b*, which are joined at an angle of about ninety degrees.

"This trough is supported by trestles or frames B B, of suitable construction, and is built up on the side of a mountain, its upper end being connected with a brook, lake, stream or spring, to receive a supply of running water, which may, if desired, be regulated by means of a suitable gate.

"The timber or wood to be transported downwardly is thrown into the trough, and carried down by the water in the same. A very rapid and convenient means of conveying wood is thus provided.

"Having thus described my invention, I claim as new and desire to secure by letters-patent—

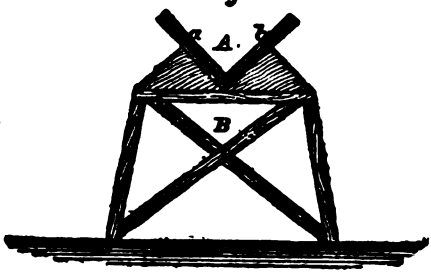
"The chute A, of V form, in cross-section, arranged on an incline in whole or in part, and adapted to receive a flow of water, for the conveyance of timber, as set forth."



NOTE.—*As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,*—see *note* to Parks v. Turner, 13: 883.

The supreme court will not review the discretionary action of the court below. See *note* to Barrow v. Hill, 14: 48.

Fig. 2.



The defendants denied each and every allegation of the complaint separately and specifically, and set up other defenses. A jury trial was had, which occupied several days, and resulted in a verdict in favor of the defendants, upon which judgment was entered. A bill of exceptions was taken, and a writ of error sued out from this court.

The plaintiff's evidence tended to show that, in the fall of 1867 and the winter and spring of 1868, he cut a large amount of wood into lengths of four feet each on the eastern slope of the Sierra Nevada, with the design of floating it out of the mountains. These logs were rolled down the sides of the cañyon upon which the trees had grown, and plaintiff built a square or rectangular flume, having bottom boards two feet wide and side boards eighteen inches wide. [587] When he turned the water into the flume and commenced putting in his wood, he found that the wood would run faster than the water, and that the lighter sticks would run faster than the heavier ones, jamming and choking up the flume. He then spread the upper edges of the side boards of the flume as far out as he could without breaking the nails at the bottom of the boards, and found that that afforded some relief. Then he took inch boards, twelve inches wide, nailed them together at an angle of 90°, so as to make a V chute, and set that in the flume. He lapped each length about three inches, by placing the lower end of one length upon the upper end of the next length below. This worked much better, but there was difficulty on account of the laps when the water was light. He then changed to the butted-jointed flume, in which the ends of the different sections abutted against each other, instead of lapping. This was in September, 1868. It is admitted that the patent was applied for August 6, 1870.

The evidence also tended to show that one A. C. Cleveland built a flume a little over a mile in length, with lapped joints, for the transportation of wood, the contract for the construction of which he made on June 22, 1868, and which was completed on the 21st of July, 1868, and used continuously until the early part of August, 1868, when Cleveland disposed of it to other parties. Cleveland described the mode and manner in which it was constructed, of two boards nailed together in V shape and put on trestles wherever necessary, and it was conducted along the mountain a distance of 6,700 feet in length. Evidence was also given on behalf of the defendants in respect to what the witnesses called a sluice at Case's tannery, at the town of Mariaville, Hancock County, in the State of Maine, in 1858, and which was still in existence at the time of the commencement of the suit. This sluice was described in substance as follows:

"At Case's tannery there was a mill-dam twelve feet high, measuring from the center of the stream to the top of the dam. It was the custom to float logs down that stream in the spring of the year from points which lay several miles above Case's tannery to other places below the tannery. In order to pass the logs over the mill-dam the said sluice was constructed. The sluice was about four feet across the top, and was built with two inclined sides, the planks of which were butted and the joints broken, which in cross-section stood at an angle of forty-five degrees, and were joined together at the bottom, and thus formed a trough in the form of a right-angled triangle, with the right angle at the bottom. This sluice or flume was some three or four hundred feet long and was four feet across the top. Its upper end was set into the mill-dam, so that the water from the dam would flow into and fill it sufficiently to convey the logs. It was built at a regular incline down the stream, and its lower end was a foot and a half or two feet above the water in the stream below the dam. The sluice or flume was built upon and sustained by suitable frame-work. The dam set the water back above it from a half to three quarters of a mile. When the logs reached the lower end of the mill-pond each one as it floated was steered by the use of poles to the upper end of the sluice, through which it was carried by floating upon the water which ran through the sluice. A million feet of logs (lumber measurement) could be run through the sluice in a day, and two or three million feet were usually so run through the sluice each year. The sluice or flume was built on a regular incline. The water ran swiftly through it at a depth of about three feet, varying from day to day according to the supply in the dam."

Eight different witnesses testified to the existence of the said Mariaville sluice, and each one of these witnesses said that he had never seen a V chute for carrying wood or lumber down a mountain side, such as described in the plaintiff's patent. One of them, however, testified that he saw one of these chutes used in transporting lumber down the mountain side over uneven grades in California in 1878. Close, who constructed this sluice in Maine, was called as a witness, and produced a diagram, which he thus described:

"My exhibit represents a cross-section of my sluice or flume, except as to stringers AA, which are not shown in cross-section. The flume itself, shown by the planking PP, is composed of plank on the inside of a frame and set at a convenient angle of about forty-five degrees, and is supported on horses, one of which is shown in the part marked DD. The feet of the horses rest on cross-sills, one of which is shown in the parts marked B. From each end of the cross-sill B a brace C extends to the upper ends of the horse D and the whole structure rests upon stringers AA. The planking is pinned or nailed to the inside of the frame. The stringers extend underneath the

whole length of the flume, which can be extended to any desired length. The horse frames DD can be set at any desired distance apart, say from four to five feet, their only purpose being to support the planking P. This device gives a flume of V form in cross-section. The diamond piece V was placed in the throat of the horses DD for the purpose of saving water and rested on the top of the planking. Piers were built over falls and gulches and over land, as the conformation of the ground required, and by the use of trestle work or posts. In one case that I know of such a sluice has been built on tops of trees, cut twenty feet from the ground. My flume was built on an incline to give a current or draft of water, and was used for the conveyance of logs or other lumber by means of the flow of the water. The way I happened to build this sluice was a case of necessity, as I will describe. The Messrs. Case, who owned the tannery at the place where I built the sluice at Mariaville, had a long raceway or penstock some three hundred feet in length on one side and in the bed of the stream below the dam for the purpose of carrying water from the dam to the flume in the tannery, and they called on me to come and help them out of their trouble. They said the log-driver wanted to cut a hole in their dam twelve feet by twelve feet and build a gate, and if that was done they said it would ruin them, as they had thirty thousand hides in their vats, which would spoil for the reason that the log-drivers would draw all the water from their pond and they could not run their hide nor the bark mills, as they had a limited supply of water to supply a gate of twelve feet by twelve. I made a contract with them to build a sluice to sluice by their tannery all the logs that were above their tannery or that ever would be, and in my contract I was not to lower their pond
590] one inch. I built the sluice, as I have already described, and it was a perfect success, and people came from distances to see this new and improved sluice. A part of this sluice is now in existence, which can be seen by anyone who desires to see it.

"The length of this sluice or flume was some three hundred feet. The first logs that were put through the sluice were by me, and four men of us put through six hundred and forty logs in thirty-five minutes, and this was in April, 1858, and, as I have said before, millions of feet of logs have been put through it since that time.

"The side boards were of plank two and a half inches thick, fourteen inches wide and three plank on a side. There was room on the horses to have planked up two or three plank higher if desirable, but it never was called for, it being about impossible for a log to get out over the sluice or flume."

The defendants read in evidence from a work called "Babbage on Economy of Machinery and Manufactures," which was published in London in 1841, a description of the slide at Alpnach in Switzerland, of which the following is a copy:

"The slide of Alpnach is formed entirely of about 25,000 large pine trees, deprived of their bark, and united together in a very ingenious manner without the aid of iron. It occupied about 160 workmen during eighteen months, and cost nearly 100,000 francs, or £4,250. It is about three leagues, or 44,000 English feet, long, and terminates in the Lake of Lucerne. It has the form of a trough, about six feet broad and from three to six feet deep. Its bottom is formed of three trees, the middle one of which has a groove cut out in the direction of its length for receiving small rills of water, which are conducted into it from various places for the purpose of diminishing the friction. The whole of the slide is sustained by 2,000 supports, and in many places it is attached in a very ingenious manner to the rugged precipices of granite.

"The direction of the slide is sometimes straight and sometimes zigzag, with an inclination of from 10° to 18°. It is often carried along the sides of hills and the flanks of precipitous rocks, and sometimes passes over their summits. Occasionally it goes under ground, and at other times it is conducted over the deep gorges by scaffolding 120 feet in height."

The bill of exceptions states:

"The plaintiff's counsel, during the trial, constantly claimed that the plaintiff's invention was not a mere flume in V form nor a mere chute in V form, but he claimed that it was a combination of both; and he also claimed that the patentee was entitled to his patent because he had discovered that a chute made in V form in cross section and built down a mountain's side of varying grades, so that its operation partook of the nature of both a flume and a chute, would do work which no other form of flume or chute would do. He also claimed that, because the plaintiff kept on improving such combined flume and chute until he found out by actual experiment and use that such combined flume and chute, when made without laps so as to form a smooth canal throughout its entire length, would do several times as much work as it would when it was made in any of the methods which had been used in constructing it prior to the month of September, 1868, that the invention was not to be considered, in law or fact, as a completed invention until it was so constructed; that it formed a smooth canal throughout its entire length, as mentioned in the specifications of the patent. All the way through the trial the plaintiff's counsel claimed that a 'flume' and a 'chute' were two different things. Plaintiff's counsel frequently, during the trial, spoke of plaintiff's said alleged invention as a 'flume'."

Messrs. **William M. Stuart** and **M. A. Wheaton**, for plaintiff in error:

The refusal of the court to allow the jury to decide as to whether a sluice or flume included the patented invention or not, was error.

Tucker v. *Spalding*, 80 U. S. 13 Wall. 455 (20: 516); *Bischoff* v. *Wethered*, 76 U. S. 9 Wall. 812 (19: 829); Curtis, Patents, § 446; *Winans* v. *Denmead*, 56 U. S. 15 How. 338, 339 (14: 720).

So long as Haines was still making changes and important functional improvements in his chute, it was not a completed invention. Until it was a completed invention the time had not arrived at which it was his duty to apply for a patent.

Elizabeth v. *American N. P. Co.* 97 U. S. 133-137 (24: 1004, 1005); Curtis, Patents, § 87; *Webster Loom Co.* v. *Higgins*, 105 U. S. 589 (26: 1180).

Mr. **Z. Montgomery**, for defendants in error:

The claim admitted by the Patent Office and acquiesced in by the patentee should not be enlarged by construction by the court beyond the fair interpretation of its terms.

Burns v. *Meyer*, 100 U. S. 671 (25: 738).

A mere expression of opinion by a judge on a question of fact is not necessarily a ground of error.

Eastern Transp. Line v. *Hope*, 95 U. S. 297 (24: 477).

It is not error in instructing the jury to comment on the evidence, if the right to weigh the evidence and determine disputed facts be not taken from them.

Knickerbocker L. Ins. Co. v. *Trefz*, 104 U. S. 197 (26: 708): *Games* v. *Stiles*, 39 U. S. 14 Pet. 322 (10: 476); *Tracy* v. *Swartout*, 35 U. S. 10 Pet. 80 (9: 354).

It is not error to refuse to instruct as to an abstract question.

Hamilton v. *Russell*, 5 U. S. 1 Cranch, 309 (2: 118); *Chirac* v. *Reinecker*, 27 U. S. 2 Pet. 613 (7: 538); *Tucker* v. *Moreland*, 35 U. S. 10 Pet. 58 (9: 345).

It is erroneous to give instructions based on a hypothetical state of facts of which there is no evidence.

United States v. *Breitling*, 61 U. S. 20 How. 252 (15: 900); *Goodman* v. *Simonds*, 61 U. S. 20 How. 343 (15: 934); *Irvine* v. *Irvine*, 76 U. S. 9 Wall. 617 (19: 800).

The jury may be instructed to find for the defendant where, should the verdict be against him, the court would set it aside.

Baltimore & P. R. Co. v. *Jones*, 95 U. S. 439 (24: 506); *Griggs* v. *Houston*, 104 U. S. 553 (26: 840); *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 116 (22: 780): *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 (27: 1003); *Herbert* v. *Butler*, 97 U. S. 319 (24: 958); *Schuylkill & D. I. & R. Co.* v. *Munson*, 81 U. S. 14 Wall. 442 (20: 867).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Nine exceptions were taken in the progress of the trial, and error is assigned in the giving of each one of the instructions which are shown in the first, second, third, fourth, fifth, sixth, seventh and eighth exceptions, and also in the [592] refusal of the court to give an instruction asked for by the plaintiff, as shown in the ninth exception. The first exception related to an observation by the court to the jury that counsel upon both sides had used the terms "flume" and "chute" synonymously, that the words of the patent were "an improved chute," but that, in discussing it, the terms had been used as of the same signification. The bill of exceptions states that it was the fact that the plaintiff's counsel had frequently during the trial spoken of the alleged invention as a "flume." This is not only so stated as a conclusion from the evidence, but we find quite a number of questions put by plaintiff's counsel, which make use of the word "flume" in that way, as for instance: "What part of the flume does timber go fastest?" "As the chute is steepest the timber goes faster?" "How was the body of water in the lapped flume or chute, which you commenced using in 1868, as to quantity?" "To what extent has the V chute or flume gone into use, made as you made it, since 1868; since you made this in 1868?" "Do you recollect what time Mr. White finished that chute?" "What difficulties, if any, did you encounter in using that flume after Mr. White left it?" The remark of the court was fully justified and could not have affected plaintiff injuriously, as his claim was that his invention was a combination of a "flume" and a "chute," and the distinction contended for as existing between them was insisted on in that connection and made entirely clear throughout the case. And in the fifth instruction asked for by the plaintiff and given by the court, reference is made to Haines' patent as "a combination of flume and chute," although the patent does not cover any such combination.

The second exception was to the charge of the court in relation to the Alpnach flume or slide, to the effect, at first, that if the jury believed, from the evidence, that that slide substantially accomplished the object and purpose of the patented article, and that a party skilled in the business, reading that description, could easily and readily build a flume such as was patented here, then the description and publication would constitute a defense. But this part of the charge was withdawn upon the defendants' counsel disclaiming the slide as a [593] complete anticipation, and the court then said. "It is not claimed by the defendant that this Alpnach slide, an account of which has been read to you, over in Switzerland, is a complete anticipation. It is only submitted to you as a possible suggestion of the idea of bringing timber down from the mountain sides." This disposes of this exception.

In the course of the charge, the court went over the facts in relation to the Cleveland flume, stating, among other things, that it was successfully operated until the 15th of August, 1868, and performed its functions and ends satisfactorily. Plaintiff's counsel specifically objected to the statement that the flume worked successfully, and a colloquy ensued as to what constituted successful operation, and the judge told the jury that that was the way he understood the testimony, as applicable to the issues, but said that he left the matter wholly to them to determine. In this, as the question arose, there was no error. *Eastern Transp. Line* v. *Hope*, 95 U. S. 297 [24: 477]. Counsel for plaintiff objected to this part of the charge, also, upon grounds treated of under subsequent exceptions. The extract is quite long, and it is unnecessary to give it in full. It concluded as follows: "If, under all the evidence in the case, then, you believe that this flume built by Cleveland was in all its substantial elements the same as that afterwards patented by the plaintiff in this case, then your verdict must be for the defendants, because it is a conceded fact that that was a public use, or, whether conceded or not, it was a public use, and it was in use more than two years before the plaintiff applied for his patent." This is the third exception, and may be considered with the fourth, fifth, sixth, seventh and eighth exceptions to the following portions of the charge:

4. "You have heard a good deal in this case, gentlemen, in regard to this matter of abutted joints or lapped joints. Now, I say to you, you may dismiss that particular quality of this flume from your consideration. There is nothing in the patent covering this matter of joining sections of the flume, and a party would be liable for infringement, I apprehend, if liable at all, who should use this flume with a lapped joint as well as if he used it with an abutted [594] joint. As a matter of fact, the evidence in this case, I believe, without contradiction, shows this in the Mariaville flume, made at Maine, a model of which is before you. The joints there were what mechanics call 'broken;' the boards ran over from one section half way over on the other and were abutted.

"That would undoubtedly give strength to the flume, and where heavy materials were run through would probably be an advantage.

"On other hand, where no very great strength is required, the ordinary abutted flume, as made by the plaintiff in this case, might have an advantage, and that perhaps for cheapness, and, where other conditions obtained where it could be used, perhaps a lapped flume would cover all the requirements needed and be cheaper than either one of the others; but as a matter of law you may dismiss the whole matter of joints from your consideration one way or the other, because specifically it is not covered by the patent."

5. "If a wooden trough of 'V' form in cross-section, arranged on an incline, in whole or in part, and adapted to receive a flow of water for the conveyance of logs or timber or wood when thrown into said trough, and to transport the same downwardly along said trough by means of water flowing therein, was an old device at the time of plaintiff's alleged invention, the mere fact, if such be the fact, that plaintiff first applied this old device to the transportation of logs or timber or wood down the side of a mountain or of such a cañon or of an elevation was no invention, and under such a state of facts, if you find them to exist, your verdict should be for defendants."

6. "The invention which is covered by the claim of plaintiff's patent is a chute of V form in cross-section, arranged on an incline, in whole or in part, and adapted to receive a flow of water for the conveyance of timber thrown into said trough and carried down by the water in the same. According to this description the character of the incline is not stated, and therefore is not material, except that it should be steep enough to give the water strength of flow sufficient to transport the timber thrown into the trough."

[595] 7. "If the Cleveland chute was a chute of V form in cross section, with its series of planks lapped at their ends, arranged on an incline in whole or in part and adapted to receive a flow of water for the conveyance of timber thrown into said chute and carried down by means of water in the same, and was finished on the 22d day of July, 1868, and was publicly and successfully used by Cleveland for the transportation of wood or timber in the manner aforesaid between the 22d day of July, 1868, and the 5th of August, 1868, then this was a public use of plaintiff's invention in the United States, for more than two years before plaintiff's application for a patent, and constituted a constructive abandonment of plaintiff's invention, and under these facts, if you find them to exist, your verdict should be for defendants."

8. "If you believe that the wooden flume testified to by several of defendants' witnesses as having been constructed at Mariaville, Maine, was constructed and operated at that place in the year 1858 and thereafter, and was of 'V' form in cross-section, and was arranged from the top of a dam to a point 300 feet beyond said dam, and was adapted to receive a flow of water for the transportation of logs from the upper to the lower end of said flume and along the whole length thereof, and was set upon an incline steep enough to give the water in said flume strength of flow sufficient to swiftly transport the logs placed in the head of said flume to the lower end thereof and along the whole length thereof, and that this flume was successfully operated and many thousands of logs transported through it in the year 1858 and thereafter, previous to 1868, by means of a flow of water through said flume, then I instruct you that this was an anticipation of the invention claimed in plaintiff's patent, and that your verdict should be for the defendants."

The argument of plaintiff's counsel is that the lapped flume did not include Haines' completed invention; that it was one of Haines' experiments, which Cleveland saw and copied, but this could not affect Haines' right to go on and complete his invention by making further experiments and discoveries producing further new and useful results; that until it was a completed invention the time had not arrived at which it was his duty to apply for a patent; and therefore that he forfeited nothing by delay.

Various instructions guarding this point were given by the court, and among them these:

"7. If an inventor applies for his patent within two years from the time that he first exhibits his completed invention in public no amount of public use within that two years either by the inventor or others will work any forfeiture of his right to a patent or constitute any evidence of abandonment."

"16. The jury will not consider any former flume or chute to be an anticipation unless they believe such former flume or chute developed the same mode of operation as the flume described in the plaintiff's patent."

Of course, if the patent for the completed chute described nothing which could be recognized as a patentable improvement differing from the prior lapped chute, then the objection has no basis to rest on.

The evidence leaves no doubt that the lapped chute was in public use with Haines' consent or allowance more than two years prior to the application for the patent.

Counsel further insists that the flumes referred to in the fifth and sixth exceptions did not include the plaintiff's invention and were not covered by his patent, and that whether this was so, and whether the "smooth canal" of the patent could be anticipated by the lapped chute, were questions of fact which the court should have left to the jury to decide.

A claim admitted by the Patent Office and acquiesced in by the patentee should not be enlarged by construction beyond the fair interpretation of its terms, and this patent says nothing about how the joints are constructed; nor whether the chute contained any joints at all or not; and this is admitted in the brief of the plaintiff's counsel.

The specification says: "This invention has for its object to furnish to the public an improved chute for facilitating the transportation of timber of all kinds from the tops or sides of mountains or other elevations, and consists in constructing a chute so as to present a V form [97] in cross-section, the same being arranged on an incline corresponding, more or less, to the surface of the ground over which it passes, and brought in connection with a spring or other water supply, to receive the water therefrom, and thus form a smooth canal throughout its entire length." This smooth canal is the result obtained by constructing the chute according to the description, and it covers lapped joints just as much as it does abutted joints. The Mariaville sluice was constructed on the same plan as the Haines' chute and both were rectangular flumes. Haines himself testifies that his V chute was "a rectangular flume at an angle of 90°." It was intended to facilitate the transportation of timber of all kinds from other elevations as well as mountains, and was necessarily arranged on an incline adapted to the surface over which it passed; and the character of the incline was not stated.

The parts of the charge presented by exceptions five and six were correct, and, as to the other instructions, they described the working of the Haines flume as represented in the patent and in Haines' testimony, and by them the court charged the jury that if they believed from the evidence that the Cleveland and Mariaville chutes, or flumes, or sluices were constructed and successfully operated on the plan and in the manner described by the court, which was the plan and manner in which the Haines chute was operated, then this was an anticipation of the invention claimed by Haines. There was no error in this, for such was the conclusion of law, if the jury found the facts from the evidence to be as stated; and it is to be noted in this connection that the court in conclusion instructed the jury as follows:

"All questions of fact are exclusively for the jury to decide. The court does not decide nor instruct you as to whether the Mariaville sluice or any other sluice or flume or chute was or was not an anticipation of the plaintiff's patent. The question of anticipation is purely a question of fact, and is exclusively for the jury to determine."

The ninth exception was taken to the refusal of the court to give the following instruction:

"The patent in this case is not merely for a V-shaped trough or sluice. Neither does it [98] cover a flume with a flat bottom and flaring sides. Neither does it cover a V-shaped flume or sluice so constructed on an even or nearly even grade that it will carry throughout its length a full volume of water sufficient to float freely the wood or other material that is transported through it. None of these things would constitute any anticipation of the patented invention." This instruction was open to serious objection. It was not contended that either the Cleveland flume or the Mariaville sluice had a flat bottom, nor did the description of the patent require the chute to be so constructed as to have a given amount of fall. It is not error to refuse to instruct as to an abstract question, and instructions should never be given upon hypothetical statements of fact, of which there is no evidence. The charge of the court was as favorable to the plaintiff as he had any right to demand, and to have given the foregoing would have tended to confuse and mislead. It was properly refused. In fact, it appears to us that the evidence of anticipation was so conclusive that, as contended by counsel for defendants in error, the circuit court would have been warranted in directing the jury to find for the defendants, inasmuch as, if there had been a verdict against them, the court would have been compelled to set it aside.

The judgment is affirmed.

THE CHEROKEE NATION, *Appt.*, [64

v.

THE SOUTHERN KANSAS RAILWAY COMPANY.

(See S. C. Reporter's ed. 641-661.)

Union of equitable and legal cause of action—when suit not dismissed—Cherokee Nation, not sovereign—eminent domain in Indian territory—power of Congress to authorize construction of railroad in such territory—constitutional guaranty—compensation for lands taken—title—nonpayment—insolvency—offer to pay.

1. An equitable cause of action to enjoin a railway company from locating and maintaining a railroad cannot be united with a legal cause of action for compensation for the lands proposed to be taken by the railway company.
2. An action by the Cherokee Nation to obtain such double relief, against the Southern Kansas Railway Company, can be considered a petition of appeal, under the Act of June 4, 1884, for a trial of the case as to damages, and should not be dismissed for the misjoinder.
3. The Cherokee Nation is not a sovereign nation and the right of eminent domain within its territory can be exercised without its consent by the United States on just compensation being made to the owner.
4. Congress has power to authorize a corporation to construct a railroad through the territory of the Indian tribes.
5. The constitutional guaranty that private property cannot be taken "for public use without just compensation" is fulfilled if provision is made for compensation which is sure and adequate.
6. An Act which forbids the construction of the railway until full compensation be made to the owner of the lands, and in case of an appeal for the payment into court of double the amount of the award before entering on the land, is a certain and adequate provision for compensation.
7. Though the land be entered on pending the appeal, the title does not pass, and the land is not

taken, until compensation is actually made to the owner.

8. If the company fails to pay the compensation, fixed by the new trial provided for in the Statute, it becomes a trespasser and the plaintiff will be entitled to compensation for the use of its property.

9. The possibility of insolvency by the railroad company and its inability to pay any damages in excess of the moneys paid into court is not sufficient ground for holding the provision made in the Act for securing compensation inadequate.

10. An offer to pay into court double the amount awarded by the referees is not a compliance with the Statute; the moneys must be actually paid into court before the company can enter upon the lands to construct its road.

[No. 664.]

Argued March 12, 1890. Decided May 19, 1890.

APPEAL from a decree of the District Court of the United States for the Western District of Arkansas dismissing a suit in equity to enjoin a railway company from maintaining a railway, telegraph or telephone line through the territory of the Cherokee Nation or for compensation for lands taken and other relief. *Reversed.*

The facts are stated in the opinion.

Messrs. **J. E. McDonald,** *R. J. Bright* and **John C. Fay,** for appellant:

The Cherokee Nation is a sovereign state.

Cherokee Nation v. *Georgia*, 30 U. S. 5 Pet. 16 (8: 30); *Worcester* v. *Georgia*, 31 U. S. 6 Pet. 539 (8: 493); *Eastern Band of Cherokees* v. *United States*, 117 U. S. 308 (29: 886); *United States* v. *Cox*, 59 U. S. 18 How. 100 (15: 299); *Whitsett* v. *Forehand*, 79 N. C. 232.

The right of eminent domain resides in the Cherokee Nation in its territory.

Kohl v. *United States*, 91 U. S. 371 (23: 451); *Pollard* v. *Hagan*, 44 U. S. 3 How. 212 (11: 565); *Doe* v. *Beebe*, 54 U. S. 13 How. 25 (14: 35); *Goodtitle* v. *Kibbee*, 50 U. S. 9 How. 471 (13: 220); *Weber* v. *State Harbor Comrs.* 85 U. S. 18 Wall. 57 (21: 798); Cooley, Const. Lim. 526.

The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes.

Union P. R. Co. v. *United States*, 99 U. S. 719 (25: 501).

The Cherokee Nation has a right to stand upon the contracts of its treaties.

Eastern Band of Cherokees v. *United States*, 20 Ct. Cl. 481, 117 U. S. 288 (29: 880).

Congress has no constitutional power to settle the rights under treaties except in cases purely political.

Wilson v. *Wall*, 73 U. S. 6 Wall. 89 (18: 729); *American & O. Ins. Cos.* v. *356 Bales of Cotton*, 26 U. S. 1 Pet. 542 (7: 255); *Doe* v. *Wilson*, 64 U. S. 23 How. 460 (16: 585); *The Kansas Indians*, 72 U. S. 5 Wall. 737 (18: 667); *Foster* v. *Neilson*, 27 U. S. 2 Pet. 254 (7: 415); *Crews* v. *Burcham*, 66 U. S. 1 Black, 356 (17: 91); *Blair* v. *The Pathkiller*, 2 Yerg. 407; *Harris* v. *Doe*, 4 Blackf. 369; *United States* v. *43 Gallons of Whiskey*, 108 U. S. 491 (27: 803); *Head Money Cases*, 112 U. S. 597 (28: 803).

Where the property is taken by a corporation, which may be solvent or insolvent, compensation must first be made.

Loveree v. *Newark*, 38 N. J. L. 151; *White* v. *Nashville & N. W. R. Co.* 7 Heisk. (Tenn.) 518; *United States* v. *Reed*, 56 Mo. 565; *Paris* v. *Mason*, 37 Tex. 447; Mills, Em. Dom. title *Compensation.*

In proceedings of this character, a property owner may contest the question as to whether the taking was within the power of eminent domain, and in the alternative seek compensation.

Re Deansville Cemetery Asso. 66 N. Y. 569; *Hanson* v. *Vernon*, 27 Iowa, 28; *Talbot* v. *Hudson*, 16 Gray, 417; *Memphis Freight Co.* v. *Memphis*, 4 Coldw. 419; *Hardin* v. *Boyd*, 113 U. S. 757 (28: 1141).

Messrs. A. T. Britton, **A. B. Browne** and **George R. Peck,** for appellee:

The United States has the right of eminent domain throughout its entire geographical extent; and this right may be exercised, for all such purposes as properly belong to it, in any political division of the United States, and in any region or territory not politically organized.

Mississippi & R. R. B. Co. v. *Patterson*, 98 U. S. 403 (25: 206); *United States* v. *Jones*, 109 U. S. 513 (27: 1015); *Kohl* v. *United States*, 91 U. S. 367 (23: 449).

The right of eminent domain may be exercised for railroads.

United States v. *Fisher*, 6 U. S. 2 Cranch, 358 (2: 304); *Stockton* v. *Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9; Cooley, Const. Lim. § 537; *California* v. *Central Pacific R. Co.* 127 U. S. 1 (32: 150).

The Cherokee Nation is not a sovereign state. Nor has the right of eminent domain of the United States over the Cherokee country been abridged or surrendered by treaty or otherwise.

Revision of Indian Treaties, 25, 28, 31, 32, 39, 45, 51, 56, 61, 65, 79, 85.

The status of the Cherokees as a people, subject to and dependent upon the United States, is shown by numerous decisions of this court.

Cherokee Nation v. *Georgia*, 30 U. S. 5 Pet. 1 (8: 25); *United States* v. *Rogers*, 45 U. S. 4 How. 567 (11: 1105); *United States* v. *Kagama*, 118 U. S. 375 (30: 228); *The Cherokee Tobacco*, 78 U. S. 11 Wall. 616 (20: 227).

The government cannot abdicate nor barter away its inherent powers.

Cooley, Const. Lim. 343, 649.

Whatever may be the political status of the Cherokees they are as to these lands mere proprietors; and if their political dignity and authority were much higher than they are, the lands would still be subject to be taken.

United States v. *Chicago*, 48 U. S. 7 How. 185 (12: 660).

The Indian country is now governed by Act of Congress and not by treaty.

Choctaw Nation v. *United States*, 119 U. S. 27 (30: 314).

Suits in equity and actions at law cannot be joined.

Hurt v. *Hollingsworth*, 100 U. S. 100 (25: 569); *Thompson* v. *Central Ohio R. Co.* 73 U.

S. 6 Wall. 134 (18: 765); *Bennett* v. *Butterworth*, 52 U. S. 11 How. 674 (13: 861).

[643] *Mr. Justice* **Harlan** delivered the opinion of the court:

This is an appeal from a decree of the District Court of the United States for the Western District of Arkansas. The litigation between the parties arises out of an Act of Congress, approved July 4, 1884, entitled "An Act to Grant the Right of Way through the Indian Territory to the Southern Kansas Railway Company, and for Other Purposes." 23 Stat. 73. By the first section of that Act the above Company was authorized to locate, construct, operate and maintain a railway, telegraph and telephone line, through the Indian Territory, beginning at a point on the northern line of the Territory, where an extension of the Southern Kansas Railway from Winfield in a southerly direction would strike that line, running thence south in the direction of Dennison, Texas, on the most practicable route, to a point at or near where the Washita River empties into the Red River, with a branch constructed from a point at or near where the main line crosses the northern line of the Territory, westwardly along or near that line to a point at or near where Medicine Lodge Creek crosses the northern line of the Territory, and from that point in a southwesterly direction, crossing Beaver Creek at or near Camp Supply, and reaching the west line of the Indian Territory at or near where Wolf Creek crosses the same, with the right to construct, use and maintain such tracks, turnouts and sidings as the Company might deem it to their interest to construct along and upon the right of way and depot grounds by that Act granted. The second section grants to the Company a right of way of a prescribed width through the Territory for its main line and branch road, stations and telegraph and telephone lines, subject to the condition that no part of the lands granted shall be used otherwise than for the Company's railroad, telegraph and telephone lines, and that if any portion ceases to be so used, it shall revert to the nation or tribe of Indians from which it was taken.

The third section, upon which some of the principal questions in the case depend, is in these words:

"Sec. 3. That before said railway shall be constructed through any lands held by individual occupants, according to the laws, customs and usages of any of the Indian nations or tribes through which it may be constructed, full compensation shall be made to such occupants for all property to be taken or damage done by reason of the construction of such railway. In case of failure to make amicable settlement with any occupant, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the President, who, before entering upon the duties of their appointment, shall take and subscribe, before competent authority, an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award. In case the referees cannot agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right, within ninety days after the making of the award and notice of the same, to appeal by original petition to the courts, [644] where the case shall be tried *de novo*. When proceedings have been commenced in court, the Railway Company shall pay double the amount of the award into court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned, and proceed with the construction of the railroad. Each of said referees shall receive for their services the sum of four dollars per day for each day they are engaged in the trial of any case submitted to them under this Act, with milage at five cents per mile. Witnesses shall receive the usual fees allowed by the courts of said nations; costs, including compensation of the referees, shall be made a part of the award, and be paid by such Railroad Company."

The 5th, 6th and 8th sections are as follows:

"Sec. 5. That said Railway Company shall pay to the Secretary of the Interior, for the benefit of the particular nations or tribes through whose lands said main line and branch may be located, the sum of fifty dollars, in addition to compensation provided for in this Act for property taken and damages done by the construction of the railway for each mile of railway that it may construct in said Territory, said payments to be made in installments of five hundred dollars as each ten miles of road is graded. Said Company shall also pay, so long as said Territory is owned and occupied by the Indians, to the Secretary of the Interior the sum of fifteen dollars per annum for each mile of railway it shall construct in the said Territory. The money paid to the Secretary of the Interior under the provisions of this Act shall be apportioned by him, in accordance with the laws and treaties now in force among the different nations and tribes, according to the number of miles of railway that may be constructed by said Railway Company through their lands: *Provided*, That Congress shall have the right, so long as said lands are occupied and possessed by said nations and tribes, to impose such additional taxes upon said railroad as it may deem just and proper for their benefit: *Provided further*, That if the general council of either of the nations or tribes through whose lands said railway may be located shall within four months after the filing of maps of definite [645] location, as set forth in section six of this act, dissent from the allowances provided for in this section, and shall certify the same to the Secretary of the Interior, then all compensation to be paid to such dissenting nation or tribe under the provisions of this Act shall be determined as provided in section three for the determination of the compensation to be paid to the individual occupant of lands with the right of appeal to the courts upon the same terms, conditions and requirements as therein provided: *Provided further*, That the amount awarded or adjudged to be paid by said Railway Company for

said dissenting nation or tribe shall be in lieu of the compensation that said nation or tribe would be entitled to receive under the provisions of this section. Nothing in this Act shall be construed to prohibit Congress from imposing taxes upon said railway, nor any Territory or State hereafter formed through which said railway shall have been established from exercising the like power as to such part of said railway as may lie within its limits. Said Railway Company shall have the right to survey and locate its railway immediately after the passage of this Act.

"Sec. 6. That said Company shall cause maps showing the route of its located lines through said Territory to be filed in the office of the Secretary of the Interior, and also to be filed in the office of the principal chief of each of the nations or tribes through whose lands said railway may be located; and after the filing of said maps no claim for a subsequent settlement and improvement upon the right of way shown by said maps shall be valid as against said Company: *Provided*, That when a map showing any portion of said Railway Company's located line is filed as herein provided for, said Company shall commence grading said located line within six months thereafter, or such location shall be void, and said location shall be approved by the Secretary of the Interior in sections of twenty-five miles before construction of any such section shall be begun."

"Sec. 8. That the United States Circuit and District Courts for the Northern District of Texas, the Western District of Arkansas 646] and the District of Kansas, and such other courts as may be authorized by Congress, shall have, without reference to the amount in controversy, concurrent jurisdiction over all controversies arising between said Southern Kansas Railway Company and the nations and tribes through whose territory said railway shall be constructed. Said courts shall have like jurisdiction, without reference to the amount in controversy, over all controversies arising between the inhabitants of said nations or tribes and said Railway Company; and the civil jurisdiction of said courts is hereby extended within the limits of said Indian Territory, without distinction as to citizenship of the parties, so far as may be necessary to carry out the provisions of this Act."

The Cherokee Nation having dissented from the allowance provided for in the fifth section of the above Act, commissioners were appointed by the President, as provided in the third section. They met at Topeka, Kansas, on the 26th of August, 1886, and, having duly qualified according to law, proceeded to the Indian Territory in the discharge of their duties. Their report to the President, made September 25, 1886, states that they inspected the located line of road as it traversed the territory of the Cherokee Nation, with its branch, and that upon an actual view of the lands proposed to be taken and appropriated for right of way, station grounds, etc., under the Act of Congress, they found that said Nation was entitled to receive as adequate compensation for such lands and for damages done by the construction of the railway, for thirty-five and one-half miles of the main line, the sum of $93 for each mile, aggregating for the whole distance $3,301.50. They also found and awarded as adequate compensation and damages in respect to the lands to be taken and appropriated for the branch line, one hundred and twelve and $\frac{54}{100}$ miles in length, the sum of $36 for each mile, aggregating for the whole distance the sum of $4,051.44. The commissioners ordered that the Railway Company, within ten days after receiving notice from the Secretary of the Interior that their report was filed, should deposit with that officer the total amount of the awards made by them, for such disposition under the law and the order of the Secretary as might be just and proper. This report having been filed in the office of the Secretary of the Interior, its contents were made known by that officer to the principal chief of the Cherokee Nation in a communication dated October 29, 1886.

The Cherokee Nation, by the Act of its National Council, approved December 17, 1886, concurred in by its House, December 16, 1886, dissented from and rejected as unjust, inequitable and without authority of law, the award made by the commissioners.

The third, fourth, fifth and eighth sections of that Act are as follows:

"Sec. 3. That the Cherokee Nation does not concede to the United States the rightful power, through its constituted authorities, to authorize any private individual or corporation to enter upon, appropriate and use any lands belonging to said Nation without first obtaining the consent of the constituted authorities of said Nation, and hereby protests against the action of said Southern Kansas Railway Company in entering upon and appropriating the lands of the Cherokee Nation as an arbitrary and unjust violation of the guaranteed rights of said Nation.

"Sec. 4. That the principal chief be, and he is hereby, authorized and empowered to proceed in pursuance of the provisions of the third and the eighth sections of said Act of Congress, and bring suit in the Circuit Court of the United States in and for the Western District of Arkansas against said Southern Kansas Railway Company, the object of said suit being to vindicate the absolute title of the Cherokee Nation to all lands within her borders, and to obtain redress from said Company for such damages as may have been sustained by said Nation by means of the location and construction of said railroad: *Provided*, That nothing herein shall be construed as an acknowledgment by the Cherokee Nation of the right of the United States to appropriate the lands of the Cherokee Nation for the benefit of private corporations without its consent.

"Sec. 5. That the principal chief be, and he is hereby, further authorized and empowered to employ suitable counsel for the bringing and management of said suit on the part of the Cherokee Nation."

"Sec. 8. That the principal chief be, and

he is hereby, authorized and required to certify the provisions of this Act to the Secretary of the Interior in pursuance of the provisions of the fifth section of Act of Congress."

Subsequently the Cherokee Nation, by its attorneys, sent a communication to the President of the United States, in which that Nation, with its principal chief—reserving to that Nation all rights and claims in and to the common property thereof as absolute owner of the same, and expressly denying the right and authority of the United States to grant to persons or corporations any easement, right of way or property right whatever in, to and upon their common property, as specially set forth in their protest of December 12, 1884—appealed to the Circuit Court of the United States of the Western District of Arkansas from the award and judgment of the referees, and prayed that a transcript of all the proceedings relating to the award, together with their appeal, be certified to that court.

In consequence of this communication and appeal, the Secretary of the Interior, January 22, 1887, transmitted to that court all of said proceedings on file in his Department, as far as they related to the Cherokee lands proposed to be taken by the Railroad Company.

The bill in the present case was filed in that court on the 26th day of January, 1887.

It alleges that the Cherokee Nation is a sovereign state, recognized as such by the various treaties made between it and the United States, beginning with that of Hopewell, November 22, 1785, and ending with that of Washington, July 10, 1866; and is entitled to exercise, and is exercising, the powers, jurisdiction and functions of a sovereign state within the territory ceded to it and defined under the treaty of Fort Gibson, February 14, 1833.

It also alleges that by virtue of its inherent sovereignty, as recognized by those treaties, the right of eminent domain, with other rights of sovereignty in its country, remains exclusively vested in it; that in addition to the cessions of territory by the above treaties, for which it gave a full and valuable consideration, the United States, by letters-patent, conveyed said territory to it in fee simple; that all of such territory remains under the jurisdiction and sovereignty of the plaintiff, except certain tracts lying west of the 96th degree of west longitude and north of the 37th degree of north latitude, which have been conveyed back to the United States by the Cherokee Nation under the terms of the Treaty of 1866; that the Southern Kansas Railway Company, without right and without consent or license from the plaintiff, entered its domain and territory and commenced the construction over it of a railway; that in the construction of such railway that Company had commenced cutting down the natural surface of the land, building embankments thereon, and appropriating the stone, earth and lumber found on the line of the proposed road; had graded about ten miles of its road, and threatened and intended to carry on the same damage and destruction of the plaintiff's property throughout the whole of the proposed line of road, destroying the property and depriving the plaintiff, by reason of the construction of such road, of a large revenue arising from the rental of its property for grazing purposes under existing leases of the lands proposed to be occupied by the Railway Company, and causing thereby irreparable loss and damage to the plaintiff. Referring to the Act of Congress, the plaintiff avers that no jurisdiction or authority remained in the United States to grant any right of way through its territory, and that the right of eminent domain over that territory remained, under the above treaties and patents, in the plaintiff. The bill then sets forth the facts already stated in relation to the proceedings taken by the commissioners appointed under the Act of Congress, and proceeds:

"That, even though the said referees had been authorized to make the award referred to, the sum by them awarded is entirely insufficient and inadequate compensation for the said right of way; that the same is reasonably worth the sum of $500 per mile, and your complainant, protesting against the said award and insisting that the United States have no power to grant a right of way through the territory of your complainant without its consent, and protesting and insisting that the said referees had no lawful authority to make an award for the lands so intended to be taken from your complainant or its domain, and that even on payment of the compensation so awarded the said corporation could acquire no right to build its road through the territory of your complainant without its consent, still insists that the compensation so proposed to be awarded and paid is inadequate, insufficient for the land proposed to be taken, and prays that this complaint may be taken and treated as an original complaint and petition in appeal from the action of the said referees, as provided by section 8 of the Act of July 4, 1884, aforesaid. [650

"Your complainant avers that, by reason of the premises aforesaid, the referees aforesaid had no authority to condemn any of the land or territory of your complainant or to make any award therefor, and that no right accrued to the said Southern Kansas Railway Company to enter upon or build said proposed railway through the territory of your complainant."

The prayer of the bill is that the said awards be vacated and set aside; that the defendant be restrained and perpetually enjoined from locating or attempting to locate, construct, equip, operate, use or maintain a railway, telegraph or telephone line through the land, domain or territory of the complainant; that pending this suit it be restrained as aforesaid; and that, in the event the court should decline to grant the injunction prayed, the complainant be awarded full, just and adequate compensation for the lands so proposed to be taken and the rights, easements and franchises so proposed to be

ed to the defendant. The bill prays
ach other and further relief as the nature
e case requires.
he defendant appeared, and by its attor-
offered to pay into the registry of the
rt the sum of $14,705.98, being double
amount of the award of the referees ap-
inted to assess the damages for the right
way for the railroad through the plain-
ff's territory.

A demurrer to the bill was sustained. The
prayer for an injunction was refused, a hear-
ing on the question of damages was denied be-
cause of the misjoinder of equitable and legal
causes of action, and the bill was dismissed
for want of equity, without prejudice, and
with judgment against the plaintiff for costs.
33 Fed. Rep. 900.

The plaintiff, as we have seen, seeks a de-
cree setting aside and vacating the award of
damages made by the referees, and perpetu-
ally enjoining the Railway Company from
locating, operating and maintaining a rail-
road, telegraph and telephone line through
its territory, as provided for in the Act of
July 4, 1884. Relief of that character is un-
questionably of an equitable nature. But
the plaintiff unites with this cause of action
a prayer that if an injunction be refused, it
may be awarded full, just and adequate com-
pensation for the lands proposed to be taken
by the Railway Company and for the rights,
easements and franchises assumed to be grant-
ed to it by Congress. The latter is a legal,
as distinguished from an equitable, cause of
action. "Whenever," this court said in *Van
Norden* v. *Morton*, 99 U. S. 378, 380 [25: 453,
454], "a new right is granted by statute, or a
new remedy for violation of an old right, or
whenever such rights and remedies are de-
pendent on state statutes or Acts of Congress,
the jurisdiction of such cases, as between the
law side and the equity side of the federal
courts, must be determined by the essential
character of the case, and unless it comes with-
in some of the recognized heads of equitable
jurisdiction it must be held to belong to the
other." We do not doubt that a proceeding
for an assessment of damages for the taking
of private property for public use is one at
law. It possesses none of the essential ele-
ments of a suit in equity within the meaning
of the Statutes defining the jurisdiction of the
courts of the United States. It was there-
fore properly held below that these two
causes of action could not be united in the
same suit in a court of the United States.
Hurt v. *Hollingsworth*, 100 U. S. 100 [25:
569]; *Buzard* v. *Houston*, 119 U. S. 347,
351 [30: 451, 452].

But the court below ought not, for that
reason, to have dismissed the plaintiff out
of court, without making some provision,
by appropriate orders, for the protection of
its rights as against the Railway Company.
Congress gave the Cherokee Nation, if dis-
satisfied with the allowances provided for in
the above Act, the right, within ninety
days after the making of an award and no-
tice of the same, "to appeal by original pe-
tition to the courts," and have a trial of the
[illegible] It did not prescribe the form
[illegible] indicate what it should
contain. Yet, a petition of some kind was
necessary in order to invest the court below
with authority to take hold of the question
of compensation to be made to the Cherokee
Nation, and finally determine it without ref-
erence to the award of the commissioners.
While, for the reasons above stated, the pro-
ceeding instituted by the plaintiff could not
be regarded as technically a suit in equity,
of which the court might take cognizance
under the general statutes defining its juris-
diction, we perceive no reason why, in view
of the broad terms of the Act of Congress
and of the peculiar relations which the plain-
tiff sustains to the government and people of
the United States—relations which forbid,
if to be avoided, the application of strict
rules of interpretation—the bill might not
have been treated simply as an original pe-
tition of appeal by the plaintiff for a trial
of the case between it and the Railway Com-
pany upon the issue as to damages. It was
none the less a petition for appeal because
relief of an equitable character was asked that
could not be granted. The petition need
not have been regarded as one to which the
Railway Company must file a formal an-
swer, but rather as the basis for such orders
as would bring both parties into court for
the determination of the question of dam-
ages. As the case is to be tried *de novo*, the
court can properly make an order requiring
the Railway Company to take the initiative
by filing its written application or petition
for an ascertainment of the compensation to
be made for the property proposed to be taken
or the damage that would be done by reason
of the construction of the railway. To that
petition, when filed, the Cherokee Nation can
demur, answer or plead, as they may be ad-
vised. Under issues thus made, or under
some other mode of procedure devised by the
court, and appropriate for a regular trial of
the issues, the case can be tried *de novo*, and
all the questions of law and fact that either
party chooses to raise be finally determined.
This mode of proceeding will result in a
speedy determination of the matters really
in dispute, and is conducive to the ends of
justice. And we are the better satisfied wit
such a disposition of the controversy, b
cause the equitable relief sought by t
plaintiff cannot be granted. We have h
some doubt as to whether, in the present c
titude of the case, the reasons for this c
clusion ought to be now given. But as
questions raised by the demurrer were e
orately examined by the court below (33
Rep. 900), and were fully discussed at the
and as the plaintiff ought not to be l
suppose that a new bill in equity,
upon the alleged invalidity of the
July 4, 1884, would avail any good p
we have concluded to state the ground
which we hold that Congress, in the
of that Act, has not violated any ri
longing to the plaintiff.

No allegations are made in the
would justify a decree perpetually
the Railway Company from proceed
the Act of Congress. The propos
the Cherokee Nation is sovereign i
that the United States is sovereig

[652]

sense that the several States are sovereign, and that that Nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the Acts of Congress defining the relations of that people with the United States. From the beginning of the government to the present time, they have been treated as 'wards of the nation,' 'in a state of pupilage,' 'dependent political communities,' holding such relations to the general government that they and their country, as declared by *Chief Justice* Marshall in *Cherokee Nation* v. *Georgia*, 30 U. S. 5 Pet. 1, 17 [8: 25, 31], "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to aquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility." It is true, as declared in *Worcester* v. *Georgia*, 31 U. S. 6 Pet. 515, 557, 569 [8: 483, 499, 504], that the treaties and laws of the United States contemplate the Indian territory as completely separated from the States and the Cherokee Nations as a distinct community, and (in the language of *Mr. Justice* McLean in the same case, p. 583) that "in the executive, legislative and judicial branches of our government we have admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state or separate community." But that falls far short of saying that they are a sovereign state, with no superior within the limits of its territory. By the Treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nations should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory, and that the government would secure to that Nation "the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people, or such persons as have connected themselves with them;" and, by the Treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits. This is made clear by the decisions of this court, rendered since the cases already cited. In *United States* v. *Rogers*, 45 U. S. 4 How. 567, 572 [11: 1105, 1107], the court, referring to the locality in which a particular crime had been committed, said: "It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. . . . We think it too firmly and clearly established to admit of dispute that the Indian tribes, residing within the territorial limits of the United States, are subject to their authority." [655] In *United States* v. *Kagama*, 118 U. S. 375, 379 [30: 228, 229], the court, after observing that the Indians were within the geographical limits of the United States, said: "The soil and the people within these limits are under the political control of the government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social affairs, and thus far not brought under the laws of the Union or of the State within whose limits they resided. . . . The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." The latest utterance upon this general subject is in *Choctaw Nation* v. *United States*, 119 U. S. 1, 27 [30: 306, 314], where the court, after stating that the United States is a sovereign nation limited only by its own Constitution, said: "On the other hand, the Choctaw Nation falls within the description in the terms of our Constitution, not of an independent state or sovereign nation, but of an Indian tribe. As such, it stands in a peculiar relation to the United States. It was capable under the terms of the Constitution of entering into treaty relations with the government of the United States, although, from the nature of the case, subject to the power and authority of the laws of the United States when Congress should choose, as it did determine in the Act of March 3, 1871, embodied in section 2079 of the Revised Statutes, to exert its legislative power."

In view of these authorities, the contention that the lands through which the defendant was authorized by Congress to construct its railway are held by the Cherokees as a sovereign nation, without dependence on any other, and that the right of eminent domain within its territory can only be exercised by it, and not by the United States except with the consent of the Cherokee Nation, cannot be sustained. The fact that the Cherokee Nation holds these lands in fee simple under patents from the United States is of no consequence in the present discussion; for the United States may exercise the right of eminent domain, even within the limits of the several States, for purposes [656]

necessary to the execution of the powers granted to the general government by the Constitution. Such an authority, as was said in *Kohl* v. *United States*, 91 U. S. 367 [23: 449], is essential to the independent existence and perpetuity of the United States, and is not dependent upon the consent of the States. *United States* v. *Fox*, 94 U. S. 315, 320 [24: 192, 193]; *United States* v. *Jones*, 109 U. S. 513 [27: 1015]; *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645 [28: 846]; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 154 [29: 845, 846]. As was said by *Mr. Justice* Bradley in *Stockton* v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9, 19: "The argument based upon the doctrine that the States have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the Constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the State, in order that it may fully carry out the objects and purposes of the Constitution, then it has it. Whatever may be the necessities or conclusions of theoretical law as to eminent domain or anything else, it must be received as a postulate of the Constitution that the government of the United States is invested with full and complete power to execute and carry out its purposes." It would be very strange if the national government, in the execution of its rightful authority, could exercise the power of eminent domain in the several States, and could [657] not exercise the same power in a territory occupied by an Indian nation or tribe, the members of which were wards of the United States, and directly subject to its political control. The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; provided only, that they are not taken without just compensation being made to the owner.

But it is said that the objects for which the Act of 1884 was passed are not such as admit of the exercise of the right of eminent domain. This contention is without merit. Congress has power to regulate commerce, not only with foreign nations and among the several States, but with the Indian tribes. It is not necessary that an Act of Congress should express, in words, the purpose for which it was passed. The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution. The railroad which the defendant was authorized to construct and maintain will have, if constructed and put into operation, direct relation to commerce with the Indian tribes, as well as with commerce among the States, especially with the States immediately north and south of the Indian Territory. It is true that the Company authorized to construct and maintain it is a corporation created by the laws of a State, but it is none the less a fit instrumentality to accomplish the public objects contemplated by the Act of 1884. Other means might have been employed, but those designated in that Act, although not indispensably necessary to accomplish the end in view, are appropriate and conducive to that end, and therefore within the power of Congress to adopt. The question is no longer an open one, as to whether a railroad is a public highway, established primarily for the convenience of the people, and to subserve public ends, and therefore subject to governmental control and regulation. It is because it is a public highway, and subject to such control, that the corporation by which it is constructed, and by which it is to be maintained, may be permitted, under legislative sanction, to appropriate private property for the purposes of a right of way, upon making just compensation to the owner, in the mode prescribed by law. It is well said by Mr. Cooley, in his Treatise on Constitutional Limitations, section 537, that "while there are unquestionably some objections to compelling a citizen to surrender his property to a corporation, whose corporators, in receiving it, are influenced by motives of private gain and emolument, so that *to them* the purpose of the appropriation is altogether private, yet conceding it to be settled that these facilities for travel and commerce are a public necessity, if the Legislature, reflecting the public sentiment, decide that this general benefit is better promoted by their construction through individuals or corporations than by the State itself, it would clearly be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with the public interest." But this precise question was determined upon full consideration in *California* v. *Central Pacific R. Co.*, 127 U. S. 1, 39 [32: 150, 157], where this court said: "The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. . . . Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the east with the Pacific, traversing States as well as Territories, and employing the agency of state as well as federal corporations." Upon this point nothing more need be said.

It is further suggested that the Act of Congress violates the Constitution in that it does not provide for compensation to be made to the plaintiff before the defendant entered upon these lands for the purpose of con-

[659] structing its road over them. This objection to the Act cannot be sustained. The Constitution declares that private property shall not be taken "for public use without just compensation." It does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. Whether a particular provision be sufficient to secure the compensation to which, under the Constitution, he is entitled, is sometimes a question of difficulty. In the present case, the requirements of the Constitution have, in our judgment, been fully met. The third section provides that before the railway shall be constructed through any lands proposed to be taken, full compensation shall be made to the owner for all property to be taken or damage done by reason of the construction of the road. In the event of an appeal from the finding of the referees, the Company is required to pay into court double the amount of the award, to abide its judgment; and, that being done, the Company may enter upon the property sought to be condemned, and proceed with the construction of its road. We are of the opinion that this provision is sufficiently reasonable, certain and adequate to secure the just compensation to which the owner is entitled.

The plaintiff asks, What will be its condition, as to compensation, if, upon the trial *de novo* of the question of damages, the amount assessed in its favor should exceed the sum which may be paid into court by the defendant? This question would be more embarrassing than it is, if, by the terms of the Act of Congress, the title to the property appropriated passed from the owner to the defendant, when the latter—having made the required deposit in court—is authorized to enter upon the land, pending the appeal, and to proceed in the construction of its road. But, clearly, the title does not pass until compensation is actually made to the owner. Within the meaning of the Constitution, the property, although entered upon, pending the appeal, is not taken until the compensation is ascertained in some legal mode, and, being paid, the title passes from the owner. Such was the decision in *Kennedy* v. *Indianapolis*, 103 U. S. 599, 604 [26: 550, 553], where the court construed a clause of the Constitution of Indiana, declaring that no man's property "shall be taken or applied to public use, . . . without a just compensation being made therefor"—substantially the provision found in the National Constitution. This court there said that "on principle and authority the rule is, under such a Constitution as that of Indiana, that the right to enter on and use the property is complete as soon as the property is actually appropriated under the authority of law for a public use, but that the title does not pass from the owner without his consent until just compensation has been made to him." In the case now before us the property in respect to which the referees made the award will be conditionally appropriated for the public use when the defendant makes a deposit in court of double the amount of such award, and it only remains to fix the just compensation to be made to the owner. But the title has not passed, and will not pass, until the plaintiff receives the compensation ultimately fixed by the trial *de novo* provided for in the Statute. So that, if the result of that trial should be a judgment in its favor in excess of the amount paid into court, the defendant must pay off the judgment before it can acquire the title to the property entered upon, and, failing to pay it within a reasonable time after the compensation is finally determined, it will become a trespasser, and liable to be proceeded against as such. And, in such case, if the plaintiff shall sustain damages by reason of the use of its property by the defendant pending the appeal, the latter will be liable therefor. The apprehension, therefore, that the plaintiff may lose its property without receiving just compensation therefor, is without foundation.

Some stress is laid upon the possibility that the defendant may become insolvent before the proceedings below reach a conclusion, and become unable to pay any damages in excess of the amount it may pay into court. The possibility of such insolvency is not, in our opinion, a sufficient ground for holding that the provision made in the Act of Congress for securing just compensation is inadequate. Absolute certainty in such matters is impracticable, and therefore cannot reasonably be required. In determining the [660] validity of the Act of Congress, the presumption must be indulged that a deposit in court of double the amount awarded by three disinterested referees, appointed by the President, will amply secure the payment of any compensation that may be fixed at the trial in the court below. The record states that the defendant offered to pay into court double the amount of the award made by the referees. The offer to pay is not a compliance with the Statute. The amount required to be deposited must be actually paid into court before the Company can rightfully enter upon the lands sought to be condemned, or proceed with the construction of its road.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

HN McGAHEY, *Plff. in Err.*,
v.
THE STATE OF VIRGINIA.

OSEPH BRYAN, *Plff. in Err.*,
v.
THE STATE OF VIRGINIA.

AMES P. COOPER, *Plff. in Err.*,
v.
THE STATE OF VIRGINIA.

H. W. ELLETT, *Plff. in Err.*,
v.
THE STATE OF VIRGINIA.

C. H. CUTHBERT, *Plff. in Err.*,
v.
THE STATE OF VIRGINIA.

Ex parte:
In the Matter of LEWIS BROWN, *Appt.*

THOMAS S. HUCLESS, *Plff. in Err.*,
v.
JOHN K. CHILDREY.

GEORGE S. VASHON, *Plff. in Err.*,
v.
SAMUEL C. GREENHOW, Treasurer of the CITY OF RICHMOND, VIRGINIA.

(See S. C. Reporter's ed. 662-721.)

Review of state decisions—Virginia law—tax receivable coupons—suit against State—use of coupons to pay dues to State—unconstitutional laws—impairing obligation of contract—costs due State payable in coupons—license tax for sale of coupons, void—Statute of Limitations—Section of Virginia Code unconstitutional—license for sale of liquor—coupons, when not receivable for taxes.

1. In ordinary cases, the decision of the highest court of a State as to the validity of its statute is binding on this court; but where the question arises as to whether a contract has been made which a state statute impairs, this court has power to decide for itself such question, whatever may be the decision of the state court.

2. The Virginia Law of 1871 as to the funding and payment of the public debt constitutes a contract between the State and the holders of the bonds and coupons issued under it, and the holders of such coupons may use them to pay state taxes and public dues.

3. The various Virginia laws restraining the use of such coupons for payment of taxes and dues to the State and imposing obstructions to such use and to proceedings instituted to establish their genuineness, impair the obligation of such contract and are invalid.

4. No suit or proceedings can be instituted by any holder of such bonds or coupons against such State, or her executive officers, to control them in the exercise of their official functions as agents of the State.

5. A holder of the tax-receivable coupons of such State, issued under the Law of 1871 or the Law of 1879, who tenders them in payment of taxes or costs, has the right to be free from [illegible] on account of such taxes or dues, and may vindicate such right in all lawful modes of redress.

6. The Virginia laws which require the production of the bond in order to establish the genuineness of the coupons and which exclude expert testimony to prove their genuineness, are unconstitutional.

7. The obligation of a contract is impaired, in the constitutional sense, by any law which prevents its enforcement, or which materially abridges the remedy for enforcing it which existed when it was contracted, and does not supply an alternative remedy equally adequate and efficacious.

8. Costs recovered in an action, by the State of Virginia, for fees paid to officers for their services, are a debt due to such State and may be paid in such coupons.

9. The Virginia Law of May 23, 1887, requiring a license tax for the sale of such coupons, violates the constitutional provision as to impairing the obligation of contracts. Any undue restraint upon their negotiability violates the contract.

10. A new and shorter Statute of Limitations is not necessarily unconstitutional as to actions which had accrued, if a reasonable time is given by it to bring such actions.

11. Section 415 of Virginia Code, prohibiting proceedings to try the genuineness of the coupons due before July 1, 1888, after one year from that date, and prohibiting such proceedings as to other coupons after one year from the time they are due, is an unreasonable law, and impairs the obligation of the contract.

12. The requirement of the Virginia Statute that the fee for a license for the sale of intoxicating liquors shall be paid in lawful money of the United States does not impair the obligation of the contract made by the State with the holders of the said coupons.

13. Such tax-receivable coupons are not receivable for taxes levied for the state literary fund to maintain public schools, the State Tax Act having required taxes for that purpose to be paid only in lawful money of the United States. Such Tax Act is, in that respect, a valid law.

[Nos. 1057, 1055, 1056, 1058, 1142, 1217, 1216, 23.]

Argued Jan. 21, 1890. Decided May 19, 1890.

OF the above entitled causes, Nos. 1057, 1055, 1056, 1058, 1142 and 23 were in error to the Supreme Court of Appeals of the State of Virginia.

No. 1217 was an appeal from the Circuit Court of the United States for the Eastern District of Virginia.

No. 1216 was in error to the Circuit Court of the United States for the Eastern District of Virginia.

The cases of *Bryan* v. *The State of Virginia*, *Cooper* v. *State of Virginia* and *McGahey* v. *State of Virginia*, Nos. 1055, 1056, 1057, are to review judgments of the Supreme Court of Appeals of that State affirming judgments of the Circuit Court of that State in favor of the State, against the persons severally named, for the recovery of taxes due from them respectively. *Reversed.*

The case of *Ellett* v. *State of Virginia*, No. 1058, was a suit brought to recover the amount of a judgment previously rendered against him in the Circuit Court of Richmond for taxes and costs. Judgment was rendered against him for the taxes and costs which was affirmed by the Supreme Court

Appeals of that State. *Judgment of the latter court reversed.*

The case of *Cuthbert* v. *State of Virginia*, No. 1142, is brought here to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming a judgment of the Hustings Court of the City of Petersburg finding said Cuthbert guilty and imposing a fine upon him for unlawfully selling and offering to sell tax-receivable coupons of the bonds of said State, as agent or broker, without having obtained a special license so to do. *Reversed.*

The case of *Ex parte Brown*, No. 1217, is an appeal from a judgment of the Circuit Court of the United States for the Eastern District of Virginia, refusing to discharge upon habeas corpus said Brown from imprisonment for nonpayment of a fine for the payment of which he had tendered coupons of bonds of the State. *Reversed.*

The case of *Hucless* v. *Childrey*, No. 1216, was an action of trespass on the case, brought by Hucless against Childrey, treasurer of Richmond and collector of taxes due the State, to recover damages for the refusal of the latter to receive tax-receivable coupons in payment of a license tax for the sale of intoxicating liquors. The circuit court rendered judgment for defendant, which is brought here for review. *Affirmed.*

The case of *Vashon* v. *Greenhow*, No. 23, is to review a judgment of the Supreme Court of Appeals of Virginia, reversing a judgment of the Hustings Court of Richmond granting a peremptory mandamus commanding said Greenhow, treasurer, to receive certain coupons tendered for state taxes for public schools. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Wm. L. Royall** and **D. H. Chamberlain** for plaintiffs in error and appellant.

Messrs. **R. A. Ayers** and **J. Randolph Tucker** for defendants in error and appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

These cases, like the *Virginia Coupon Cases*, decided in April, 1885, and reported in 114 U. S. 269 [29: 185], and like *Barry* v. *Edmunds* and other cases argued at the same time, decided in February, 1886, and reported in 116 U. S. 550 [29: 729], etc., arise upon certain tax-receivable coupons attached to bonds of the State of Virginia issued in reduction and liquidation of the state debt under the Acts of March 30, 1871, and March 28, 1879. The present appeals are a continuation of the controversy arising upon said coupons as receivable and tendered in payment of taxes and other state dues.

The origin of these bonds and coupons has been fully explained in former cases; but the proper disposition of the cases now to be considered will be greatly facilitated by presenting a connected résumé of the legislative Acts relating to and affecting the said securities, and of the decisions heretofore made in reference to said Acts.

The state debt of Virginia amounted, prior to the late civil war, to more than thirty millions of dollars. After the war it became a matter of great importance to arrange this debt in such manner as to bring it within the control and means of the State. West Virginia had recently been separated from the parent State and had participated in the advantages of the money raised by the issue of the state securities. It was supposed by those who were best qualified to know the facts that at least one third of the state resources was lost by this excision of territory, and the Legislature of Virginia deemed it nothing more than equitable that the new State should bear one third of the state debt. A proposition was therefore made to the bondholders of the State to receive two thirds of the amount due them in new bonds payable thirty-four years after date, with coupons attached thereto receivable, after becoming due, in payment of taxes and other claims and demands due to the State. This scheme was formulated by the Act of March 30, 1871, entitled "An Act to Provide for the Funding and Payment of the Public Debt," and was acquiesced in by the public creditors, or the great majority of them, who accepted and received the bonds provided for in the Act, which were loked upon as a favorite security in consequence of the value attached to the coupons as legal tender instruments in the payment of taxes and public dues. The Act, amongst other things, provided as follows:

"Section 2. The owners of any of the bonds, stocks or interest certificates heretofore issued by this State which are recognized by its Constitution and laws as legal" [except certain specific securities named] "may fund two thirds of the amount of the same, together with two thirds of the interest due or to become due thereon to the first day of July, 1871, in six per centum coupon or registered bonds of this State . . . to become due and payable in thirty-four years after date, but redeemable . . . after ten years, the interest to be payable semi-annually on the first days of January and July in each year. The bonds shall be made payable to order or bearer and the coupons to bearer, and registered bonds payable to order may be exchanged for bonds payable to bearer, and registered bonds may be exchanged for coupon bonds, or *vice versa*, at the option of the holder. The coupons shall be payable semi-annually, and be receivable at and after maturity for all taxes, debts, dues and demands due the State, which shall be expressed on their face . . . ." [666

Provision was made in the third section of the Act for the issue of certificates for one-third part of the debt which was not funded in said bonds, the payment of which certificates it was declared would be provided for in accordance with such settlement as should thereafter be had between the States of Virginia and West Virginia in regard to the public debt of the State existing at the time of its dismemberment.

By the fourth section the treasurer was authorized and directed to cause to be prepared, engraved or lithographed registered bonds and bonds with coupons, and certificates of the character mentioned in the second and third sections, and, when prepared, to com-

mence the issuance of the same. It was further enacted that the bonds and certificates should be signed by the treasurer and countersigned by the auditor; that the coupons should be signed by the treasurer, or that a *fac simile* of his signature should be stamped or engraved thereon. The bonds were to be issued in series, and those of each series to be numbered from one upwards, as issued, and the coupons, in addition to the number of the bond to which they were attached, were to be numbered from one to sixty-seven. The surrendered bonds were to be canceled and deposited in the office of the state treasurer.

[67] By section 5 certain assets belonging to the State, when realized or converted into money, were to be paid into the treasury to the credit of a sinking fund created for the purchase and redemption of the bonds issued under the Act, and, after 1880, inclusive, a tax of two cents on a hundred dollars of the assessed valuation of all property in the State was to be applied in like manner. The treasurer, the auditor of public accounts and second auditor were appointed commissioners of the sinking fund.

It has always been contended on the part of the bondholders that this Statute created a contract between them and the State, firm and inviolable, which the Legislature had no constitutional right to violate or impair; and such was, for several years, the uniform holding of the Supreme Court of Appeals of Virginia. See *Antoni* v. *Wright*, 22 Gratt. 833, November Term, 1872; *Wise* v. *Rogers*, 24 Gratt. 169; *Clarke* v. *Tyler*, 30 Gratt. 134. A different view, however, has since been taken by the court of appeals, which now holds that the Act of 1871 was unconstitutional from its inception, being repugnant to certain provisions of the Constitution of the State adopted in 1869. An elaborate argument to this effect is contained in the opinion of the court rendered in one of the cases now before us, *Vashon* v. *Greenhow*, decided January 14, 1886. In ordinary cases the decision of the highest court of a State with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court, under the Constitution of the United States and the Acts of Congress relating to writs of error to the judgments of state courts, to inquire, and judge for itself, with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto.

The decisions of this court, therefore, in reference to the question whether a valid contract was made by the Statute in question between the State of Virginia and the holders of the bonds authorized by said Act, are to [68] be considered as binding upon us, although a contrary view may have been taken by the courts of Virginia; and in view of this principle of constitutional law, and of the decisions made by this court, we have no hesitation in saying that the Act of 1871 was a valid Act, and that it did and does constitute a contract between the State and the holders of the bonds issued under it, and that the holders of the coupons of said bonds, whether still attached thereto or separated therefrom, are entitled, by a solemn engagement of the State, to use them in payment of state taxes and public dues. This was determined in *Hartman* v. *Greenhow*, 102 U. S. 672 [26: 271], decided in January, 1881; in *Antoni* v. *Greenhow*, 107 U. S. 769 [27: 468], decided in March, 1883; in the *Virginia Coupon Cases*, 114 U. S. 269 [29: 185], decided in April, 1885, and in all the cases on the subject that have come before this court for adjudication. This question, therefore, may be considered as foreclosed and no longer open for consideration. It may be laid down as undoubted law that the lawful owner of any such coupons has the right to tender the same after maturity in absolute payment of all taxes, debts, dues and demands due from him to the State. The only question of difficulty which can arise in any case is as to the mode of relief which the owner of such coupon is entitled to in case they are refused when properly tendered in making his payment, or as to the cases which may be excepted from the operation of his right.

For, almost from the start, the Legislature of Virginia has from time to time enacted various laws calculated to embarrass the holders of said coupons in the free use of them for the payment of taxes and other dues. As early as March, 1872, an Act was passed prohibiting the officers charged by law with the collection of taxes from receiving in payment anything else than gold or silver coin, United States treasury notes and notes of the national banks, and repealing all other Acts inconsistent therewith. This Law was under consideration in the case of *Antoni* v. *Wright*, 22 Gratt. 833, before referred to, and the Supreme Court of Appeals of Virginia decided that in issuing these bonds the State entered into a valid contract with all persons taking the coupons to receive them in payment of taxes and state dues, and that the Act of 1872, so far as it conflicted with this contract, was void.

In *Clarke* v. *Tyler*, 30 Gratt. 134, decided in 1878, it was said that this decision in *Antoni* v. *Wright* "must be held to be the settled law of this State."

By an Act passed March 25, 1878, it was declared that every officer charged with the collection of taxes should deduct from the matured coupons which might be tendered to him in payment of taxes or other dues to the State, the tax upon the bonds from which the coupons were cut, which tax was declared to be fifty cents on the hundred dollars market value of said bonds. This Law was repeated in the Act of 1876, and bore oppressively upon the holders of the coupons, inasmuch as it compelled them to pay the tax due on bonds of which they were not the owners, and of the owners of which they had no knowledge. It was a clear impairment of the obligation of the contract with the holders of the coupons. The validity of this Act came before this court for consideration in the case of *Hartman* v. *Green-*

how, 102 U. S. 672 [26: 271], and it was held to be unconstitutional. *Mr. Justice* Field, speaking for the court in that case, said: "We are clear that this Act of Virginia of 1876, requiring the tax on her bonds issued under the Funding Act of March 30, 1871, to be deducted from the coupons originally attached to them, when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds and held by different owners, without impairing the contract with such bondholders contained in the Funding Act, and the contract with the bearer of the coupons."

By an Act of the Legislature of Virginia, approved on the 28th of March, 1879, another plan for the settlement of the public debt was promulgated. By the first section it was enacted, "That to provide for funding the debt of the State, the governor is hereby authorized to create bonds of the State, registered and coupon, dated the 1st day of January, 1879, the principal payable forty years thereafter, bearing interest at the rate of three per cent per annum for ten years, and at the rate of four per centum per annum for twenty years, and at the rate of five per centum per annum for ten years, payable in the Cities of Richmond, New York or London, as hereinafter provided, on the 1st days of July and January of each year, until the principal is redeemed." "The coupons on said bonds shall be receivable at and after maturity for all taxes, debts, dues and demands due the State, and this shall be expressed on their face. The holder of any registered bond shall be entitled to receive from the treasurer of the State a certificate for any interest thereon, due and unpaid, and such certificate shall be receivable, etc. All obligations created under his Act shall be forever exempt from all taxation, direct or indirect, by the State or by any county or corporation therein, and this shall be expressed on the face of the bonds." "The bonds hereby authorized shall be issued only in exchange for the outstanding debt of the State, as hereinafter provided." Bonds were issued under this Act in conformity with its requirements, and some of the coupons thereon are the subject of controversy in one or more of the suits now before us for consideration. The questions relating to their receivability for taxes and other public dues, and to the validity of subsequent laws passed in derogation or obstruction thereof, are the same as those which arise under like circumstances upon the coupons of the bonds issued under the Act of 1871.

At the session of the General Assembly held in 1882 still another scheme for funding and reducing the state debt was formulated by an Act approved February 14 of that year, which specified the amount of each class of indebtedness supposed to be obligatory upon the State of Virginia in relation to the corresponding obligation of the State of West Virginia, and the rate of percentage at which new bonds were proposed to be issued to the public creditors according to the different classes of the debts. These new bonds were to be dated July 1, 1882, and payable July 1, 1932, with interest at three per cent per annum. The commissioners of the sinking fund were authorized to issue them either as registered or coupon bonds, but no security was proposed for the payment of the bonds or coupons except the pledged faith of the State. This Act was [67
called "the Riddleberger Act," and was declared to be the final proposition which the State would make to its creditors. Of course it was not to be expected that those who held bonds issued under the Acts of 1871 or 1879, with coupons invested with the quality of legal tender for the payment of taxes and other public dues, would willingly surrender their bonds in exchange for the bonds to be issued under the Riddleberger Act; and for the purpose apparently of creating motives to induce such bondholders to make the exchange, several ancillary bills were passed at the same session, calculated to discourage and hamper the use of the tax-paying coupons of 1871 and 1879. One of these bills, approved the 14th of January, 1882 (recited in full in 107 U. S. 771-774 [27: 470, 471]), required that whenever any taxpayer should tender to any person whose duty it was to collect or receive taxes, debts or demands due the Commonwealth, any papers purporting to be coupons detached from bonds of the Commonwealth issued under the Act of 1871, in payment of any such taxes, debts and demands, the person to whom such papers were tendered should receive the same, giving the party tendering a receipt stating that he had received the same for the purpose of identification and verification, but that he should at the same time require such taxpayer to pay his taxes in coin, legal-tender notes or national bank bills, and give him a receipt therefor. In case of his refusal to pay, the taxes should be collected as all other delinquent taxes were collected. The Act then provided for a proceeding in the county court or hustings court of the city to ascertain whether the coupons tendered were genuine legal coupons receivable for dues or not. This proceeding was to be instituted by the petition of the taxpayer, and defended by the Commonwealth's attorney, and the matter was to be tried by jury. If the decision should be in favor of the taxpayer, the judgment was to be certified to the treasurer, who thereupon was required to receive the coupons for taxes and refund the money paid by the taxpayer out of the first money in the treasury. The law further provided that, if any taxpayer should apply for a mandamus to compel the collector to receive his coupons for taxes, a similar proceeding should take place, for the purpose [67
of ascertaining the identity and validity of the coupons, and when found to be genuine a mandamus might issue. The suggestion upon which this law was based, as recited in the preamble thereof, was, that many spurious, stolen and forged bonds were in circulation, which made it imprudent to receive coupons in payment of taxes without an investigation first had with regard to their genuineness and validity. It is apparent that such a cumbrous mode of proceeding was a very awkward substitute, so far as the

taxpayer was concerned, for the reception of his coupons as so much money when presented.

Another Act, approved on the 26th of January, 1882, provided that in case of proceedings instituted against a taxpayer for the collection of his tax, notwithstanding his tender of coupons in payment thereof, he should be authorized o pay the tax under protest, in lawful money, and might within thirty days thereafter sue the officer for the amount, and if it should be determined that it was wrongfully collected the amount should be returned, and it was declared that no writ of injunction, supersedeas, mandamus, prohibition or other writ whatever should be issued to hinder or delay the collection of tax.

Another Act, approved on the 7th of April, in the same year, changed the General Law of Mandamus to coincide with the provisions of the Act of January 26th.

The validity of these Acts came before this court for consideration in the case of *Antoni v. Greenhow*, and the question in that case was whether they so far affected the remedy of the holder of coupons as to impair the obligation of the contract made by the State to receive them for taxes and other dues. This was the general question presented, although it is true that the particular question in that case was whether the proceeding by mandamus to compel the acceptance of the coupons in payment of taxes and other dues was unconstitutionally obstructed. The case was instituted by Antoni, a taxpayer, by a petition to the Supreme Court of Appeals of Virginia for a mandamus against Greenhow, the treasurer of the City of Richmond, to compel him to accept a coupon tendered by the petitioner in part payment of his taxes. The treasurer answered that he was ready to receive the coupon as soon as it had been legally ascertained to be genuine and by law receivable, referring, of course, to the law as it then stood, prescribing the special proceedings before mentioned for ascertaining the genuineness and validity of coupons. To this answer a demurrer was filed. Upon the hearing the court was equally divided on the questions involved, and denied the writ. The judgment was brought by writ of error to this court, and the precise question was whether the Acts of 1882 unconstitutionally impeded the remedy by mandamus. The court, in discussing the question, discussed the general effect of the said Statutes, and came to the conclusion that they did not interpose any material obstructions to the proceeding, so as to be obnoxious to the charge of impairing the obligation of the contract.

[573]

Under all the obstacles with which the holders of coupons now had to contend in utilizing those instruments in the payment of taxes and public dues (the only way in which any satisfaction thereof could be obtained), they still succeeded in disposing of many of them, and more stringent legislation was finally resorted to for the evident purpose of suppressing their use altogether. In the session of 1884 several Acts of the General Assembly were passed to this end. By an Act approved March 12, 1884, it was made the duty of the attorneys for the Commonwealth to defend the suits brought by taxpayers, and, if decided against the Commonwealth, to carry the case to the higher courts by appeal, to defend all suits brought in the federal courts; and to carry judgments against the Commonwealth or the collector of taxes by appeal to the Supreme Court of the United States. An Act approved March 13, 1884, declared that no action of trespass or on the case should be brought or maintained against any collecting officer, for levying upon the property of any taxpayer who had tendered in payment, in whole or in part, any coupons cut from bonds of the State for such taxes, and who should refuse to pay his taxes in gold, silver, United States treasury notes or national bank notes. Another Act, approved on the 15th of March, 1884, required all licenses to be paid in lawful money of the United States. Still another Act, approved March 19, 1884, required that all coupons received for taxes, beyond what they would have been exchanged for under the Riddleberger Act, should be charged to the bond from which they were clipped, as a payment on the principal of the bond. Finally, by the Tax Act, approved March 15, 1884, section 65, it was declared that no person should sell tax-receivable coupons from bonds of the State of Virginia without a special license, for which privilege he should pay one thousand dollars for each office or place of business kept for that purpose, and in addition thereto a tax of twenty per centum upon the face value of all tax-receivable coupons sold by him, and should give to the purchaser a certificate stating that he had sold such coupons to the purchaser, naming him and specifying the number and amount of the coupons and date of sale; and whenever such coupons should be tendered for taxes the broker's certificate should be delivered to the collector. This section was subsequently amended by an Act passed May 23, 1887, so as to include in the prohibition not only the selling or offering to sell tax-receivable coupons, but the tendering, passing or offering to tender or pass for another any such coupons, without a special license therefor, and the license fee was made $1,000 for the privilege of selling or offering to sell coupons in each county, city or town of over 10,000 inhabitants, and $500 for each county, city or town of under 10,000 inhabitants; and the privilege was confined to selling, tendering and passing such coupons to taxpayers residing, or owning property subject to tax, within the county, city or town in which the license was obtained, and it was declared that any person violating this provision should be deemed guilty of a misdemeanor, and upon conviction should be fined, at the discretion of a jury, not less than $500 nor more than $2,000. Section 91 declared that every attorney-at-law should pay an annual license fee of fifteen dollars if under five years' practice, and twenty-five dollars if over five years' practice; but that no attorney thus licensed should be allowed to bring suit against the Commonwealth, or any treasurer or collector of taxes, for the re-

[6

[

covery of money for coupons tendered for taxes, unless he took out a special license therefor, for which privilege he should pay a specific license tax, in addition to the tax before required, of two hundred and fifty dollars.

In April, 1885, after the passage of these various Acts, the *Virginia Coupon Cases* (so called), reported in 114 U. S. 269 [29: 185], etc., came before this court for consideration. There were eight of these cases. One of them, *Poindexter* v. *Greenhow*, the leading case in the report, was an action of detinue brought by Poindexter, a taxpayer, against Greenhow, treasurer of Richmond, for a desk of the plaintiff, of the value of thirty dollars, seized and taken by Greenhow on the 25th of April, 1883, for the purpose of raising the taxes due from the plaintiff after he had tendered coupons in payment thereof. Upon an agreed statement of facts, no dispute being raised as to the genuineness of the coupons, judgment was given in the Hustings Court of Richmond for the defendant, on the ground that the plaintiff should have paid his tax, in lawful money, and pursued the remedy pointed out in the Act of 1882. As this was the highest court in the State in which a decision in the case could be had, the judgment was brought by writ of error to the Supreme Court of the United States, and the question was now directly raised, whether the Restraining Acts passed by the Legislature of Virginia were of such force and validity as to prevent the taxpayer from suing the collecting officer for taking his goods in satisfaction of taxes after a tender of coupons for the payment thereof, without adopting the proceedings required by the said Acts. This court held that the Acts were unconstitutional so far as they prohibited the collector or receiver of the taxes from accepting coupons issued under the Act of 1871 in payment of taxes according to the contract contained in said Act, and imposed upon the taxpayer the circuitous and onerous proceeding of establishing the genuineness of his coupons in court; that the tender of the coupons was equivalent to the tender of legal money in payment of the tax, and exonerated the taxpayer from further molestation in respect thereof; and that, if he continued to hold himself in readiness to pay said tax in the coupons tendered, his property could not lawfully be taken in satisfaction of the same.

The court distinguished this remedy of the taxpayer from that which was in question in the case of *Antoni* v. *Greenhow*, in that in the latter case the proceeding by mandamus alone was under consideration, and that form of proceeding for relief was held not to be materially obstructed by the Acts of 1882; and it was held that nothing in the decision of that case concluded the rights of taxpayers and coupon holders in reference to other remedies which the law gave them for the unlawful seizure of their property in satisfaction of the tax, after having duly tendered coupons in payment thereof. Therefore, without expressly overruling the case of *Antoni* v. *Greenhow*, the court decided that the Acts referred to were unconstitutional, so far as they had the effect of depriving the taxpayer of his remedy by detinue, or trespass, or case, or other proper action, for unlawful seizure of his goods after tendering tax-receivable coupons in payment of his taxes. The judgment of the hustings court was therefore reversed. The question was very fully and elaborately discussed by *Mr. Justice* Matthews in delivering the opinion of the court, although there was a dissenting opinion on the part of the chief justice and three of the associate justices.

Two other of the coupon cases, *White* v. *Greenhow* and *Chaffin* v. *Taylor*, were cases of trespass for taking the property of the taxpayers in payment of taxes after they had tendered coupons in payment thereof, and were in all substantial respects similar to the case of *Poindexter* v. *Greenhow*, and were decided in the same way. In one of them, *Chaffin* v. *Taylor*, the Act of March 13, 1884, which expressly forbids an action of trespass or case against a collecting officer, was referred to and relied on by the defendant in the action.

A fourth case, that of *Baltimore & O. R. Co.* v. *Allen, Auditor of Accounts of the State of Virginia*, was a bill for injunction, filed in the circuit court of the United States, to prevent the defendant from seizing the cars and other personal property of the complainant in satisfaction of taxes alleged to be due, for the payment of which the railroad company had tendered tax-paying coupons. [67
An injunction was granted by the circuit court to prevent the seizure of the complainant's property, and the decree was affirmed by this court upon the same grounds which were taken in the case of *Poindexter* v. *Greenhow*.

The fifth case, *Carter* v. *Greenhow*, was an action brought in the circuit court of the United States, and founded upon section 1979 of the Revised Statutes of the United States, by which every person who, under color of any statute, etc., of any State or Territory, subjects a citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. The plaintiff in said action set forth that in May, 1883, he tendered certain taxpaying coupons of the State, in payment of taxes due from him, to the defendant Greenhow, treasurer of the City of Richmond, who refused to receive the same in payment, and unlawfully entered upon plaintiff's premises and seized and took certain property of the plaintiff to sell the same in payment of said taxes; that the plaintiff had a right under the Constitution of the United States to pay his said taxes in the coupons referred to, and the defendant refused to receive the same under the color of, and by the command of, the Act of Assembly of the State of Virginia, approved January 26, 1882, which forbids collectors of taxes due the State to receive in payment thereof anything except gold, silver, etc.; and that he levied on said property under the command of the 18th section of another Act of Assembly, approved

21

1 1, 1879, and of other statutes enacted the General Assembly of the State of ginia, which statutes he alleged to be ignant to the Constitution of the United tes and void. The amount of damages imed in the action was less than five hun- ed dollars, and therefore was not within e jurisdiction of the circuit court of the nited States, unless it should be sustained y the section of the Revised Statutes referred o. Judgment was given for the defendant, and was affirmed by this court on the ground that the case did not come within section 1979, because the right claimed was not one of the rights referred to in that section.

The sixth case, *Pleasants* v. *Greenhow*, was a bill for injunction, filed in the circuit court of the United States, to restrain the defendant Greenhow from levying on plaintiff's property for taxes after coupons were tendered therefor. The amount of taxes being less than five hundred dollars, relief was prayed for on the same ground of deprivation of rights, which was preferred as the cause of action in the case of *Carter* v. *Greenhow*. The bill was dismissed by the circuit court, and its decree was affirmed by this court for the same reason which prevailed in that case.

The seventh case was *Marye, Auditor of the State of Virginia*, v. *Parsons*. Parsons, a citizen of New York, filed a bill in equity in the circuit court of the United States against Marye, auditor of the Commonwealth of Virginia; Greenhow, treasurer of the City of Richmond; Hill, treasurer of the City of Norfolk; Dunnington, treasurer of the City of Lynchburg; Munford, commissioner of revenue of Richmond; Price, commissioner of Lynchburg, and Langley, commissioner of Norfolk. He alleged that he was the owner of a large amount of coupons cut from bonds of Virginia, issued under the Act of 1871, and receivable by that Act in payment for taxes, debts and demands due the State, a list of which coupons was appended to the bill. He claimed that they constituted a contract with the State, and, after setting forth the laws which had been passed by the State of Virginia for preventing or interfering with the use of such coupons in the payment of taxes and other state dues (which laws he alleged to be unconstitutional and void), he prayed that the defendants, as officers of the State, might be compelled specifically to perform the contract of the State with regard to said coupons, and to receive them in payment of taxes and other dues, and that a mandatory injunction for that purpose might be issued. The defendants filed a demurrer, plea and answer to the bill, and a perpetual injunction, as prayed for, was awarded by the circuit court. The complainant did not allege that he owed any taxes or other demands to the State of Virginia for which he had offered coupons in payment, but his ground of action was that the coupons held by him were valueless so long as the officers of the State, in obedience to its laws, refused to receive such coupons in payment of taxes, and hence he sought the relief prayed for in his bill. This court reversed the decree of the circuit court, holding that the injury complained of was of an abstract nature, *damnum absque injuria*, and that the bill should have been dismissed on that ground; and that none but taxpayers, or those who are indebted to the State upon some other claim or demand, are in a position to complain of the refusal of the officers of the State to receive coupons in payment of such taxes and demands.

The remaining case was that of *Moore* v. *Greenhow*, being a petition for a mandamus to compel the defendant to receive coupons in payment of a license tax as a sample merchant, the petitioner not having pursued the course pointed out by the Act of January 14, 1882, for establishing the genuineness of the coupons tendered by him. The petition was denied by the Circuit Court of Richmond, and its decision was affirmed in conformity with the conclusion arrived at in the case of *Antoni* v. *Greenhow*, that the Act of January 14, 1882, as applicable to the remedy of mandamus, did not violate the Constitution of the United States.

Several other coupon cases came before this court in October Term, 1885, and were decided in February, 1886. They were *Barry* v. *Edmunds*, 116 U. S. 550 [29 : 729]; *Chaffin* v. *Taylor*, 116 U. S. 567 [29 : 727]; *Royall* v. *Virginia*, 116 U. S. 572 [29 : 735], and *Sands* v. *Edmunds*, 116 U. S. 585 [29 : 739]. These cases do little more than repeat the views of the court contained in the coupon cases decided in the previous year, except perhaps in deciding, in the case of *Royall* v. *Virginia*, that the license tax of a practising lawyer was a tax within the meaning of the Act of 1871, and payable in coupons attached to bonds issued under that Act.

In another case, *Royall* v. *Virginia*, 121 U. S. 102 [30 : 883], it appeared that an information was filed against Royall for practising as a lawyer without first having obtained a revenue license. He pleaded payment of the license fee, partly in a coupon cut from a bond issued under the Act of 1871 and partly in cash. The Commonwealth demurred to this plea, and it was held that the demurrer admitted that the coupon was genuine, and bore on its face the contract of the State to receive it in payment of taxes, etc., and that this showed a good tender, and brought the case within the ruling in *Royall* v. *Virginia*, 116 U. S. 572 [29 : 735].

In the session of the General Assembly of Virginia of 1886, several additional Acts were passed, all having for object the imposition of further obstructions and impediments in the way of using the tax-payment coupons. An enumeration of these Acts with a general indication of their purport is all that is necessary to state. By the Act of January 21, 1886, it was declared that no pert evidence shall not be received of the genuineness of any paper or instrument by machinery, or in any other manner by the actual or personal handwriting of the party to be charged or his agent. By the Act of January 26, 1886, it was declared that in the trial of any issue involving the genuineness of a coupon purporting to have been from any bond authorized by law issued by the State, or by any city

[679]

or corporation, the defendant may demand the production of the bond, and thereupon it shall be the duty of the plaintiff to produce such bond, with proof that the coupon was actually cut therefrom. On the same day another Act was passed declaring that any person who shall solicit or induce any suit or action to be brought against the State of Virginia, or any citizen thereof, by verbal representations, or by writing or printing, shall be deemed guilty of the offense of champerty, and subject to fine and imprisonment. By the Act of March 1, 1886, it was declared that any person licensed to practice law in Virginia who shall solicit or induce any suit or action to be brought against the State, or any citizen thereof, by verbal representations, or by writing or printing, shall be deemed guilty of barratry, and if found guilty it is made the duty of the court to revoke his license and disbar him forever from practising law in the Commonwealth. By an Act of March 4, 1886, it was declared that all license fees required for the transaction of any business in the State shall be paid in coin, legal-tender notes or national bank bills; and if coupons shall be tendered in payment thereof, they shall be received by the officer for identification by the proceedings prescribed in the Act of 1882; but no license shall issue to the applicant, nor shall he have the right to conduct business or pursue his profession until said coupons have been verified in the manner prescribed by said Act; and by another Act, passed February 27, 1886, it was declared that after the 1st day of July, 1888, no petition shall be filed or other proceeding instituted to try the question whether any paper purporting to be a coupon detached from any bond of the State is genuine and legally receivable for taxes and other state dues, except within one year from said 1st day of July, 1888, if such coupon first became receivable prior to that time; and within one year from the time the coupon becomes receivable if it becomes receivable after that date. This law became incorporated in the Code of 1887 as section 415. Finally, as according to the decisions of this court in 1885 and 1886, the collecting officers were liable to action for proceeding against the property of the taxpayers who had tendered coupons in payment of their taxes, on the 12th of May, 1887, an Act was passed authorizing suits to be brought against such taxpayers for taxes due from them, which suits were to be in the name of the Commonwealth, and to be commenced by a notice served on the party liable for the tax, or on the agent of such party who may have tendered the coupons. If the defendant relies upon the tender of coupons as payment he shall plead the same specifically in writing, and file the coupons tendered with the clerk, and the burden of proving the tender and genuineness of the coupons shall be on the defendant. If established, the judgment shall be for the defendant on the plea of tender. If the defendant fail in his defense, there shall be judgment for the Commonwealth for the taxes due and interest and costs, and execution shall issue thereon as in other cases; and if judgment be against the defendant, a fee of ten dollars is allowed to the attorney for the Commonwealth as part of the costs in the case; but the Commonwealth is not to be liable for any fees or costs. The Act is set forth in full in the case *Re Ayers*, 123 U. S. 451 [31: 216].

Since the passage of this Act the cases *Re Ayers*, *Re Scott* and *Re McCabe* have come [68
before this court for consideration. They were decided in December, 1887. These cases came before us on applications for habeas corpus, directed to the marshal of the United States for the Eastern District of Virginia, who held the applicants, one of them the attorney-general of Virginia, another the auditor of the State and the third the Commonwealth's attorney for Loudoun County, who had been committed for contempt by the circuit court of the United States for disobedience to a restraining order. The case in which said order was made was this: James P. Cooper and others, subjects of Great Britain, filed their bill of complaint in the Circuit Court of the United States for the District aforesaid against Marye, auditor of the State of Virginia, Ayers, attorney-general thereof, and the treasurers of counties, cities and towns in the State, and the Commonwealth's attorneys of counties, cities and towns therein; in which bill it was alleged, amongst other things, that the complainants, on the faith of the decisions of this court, that the State of Virginia could not impair the value of the coupons issued under the Acts of 1871 and 1879 as a tender for taxes, had bought a large quantity of said coupons in open market in London and elsewhere, amounting to more than one hundred thousand dollars, for the purpose of selling said coupons to the taxpayers of Virginia, believing that they would be able to sell them at considerable advance. The bill then set forth the Act of Assembly of May 12, 1887, authorizing and requiring suits to be brought in the name of the Commonwealth against taxpayers who should have tendered coupons in payment of their taxes. It further alleged that this Act is repugnant to the Constitution of the United States, for the reason that, taken in connection with the Act of January 26, 1882, it first commands the State's officers to refuse to receive those coupons, and then commands them to bring suits against those who have tendered them, as well as against those who have tendered spurious coupons; that it imposes upon the defendants heavy costs and fees, etc. It further set out the provisions of various other Acts before referred to, tending to embarrass [68
the holders of coupons in the use of the same, and in the proceedings for establishing their genuineness. The bill prayed that the defendants might be restrained and enjoined from bringing or commencing any suit provided for by the said Act of May 12, 1887, or from doing any other act to put said Statute into force and effect, and that until the hearing of a motion for said injunction a restraining order might be made to that effect. A restraining order was accordingly made by the court in pursuance of the prayer

ill, and it was for disobedience to der that the parties in the cases of Scott and McCabe were committed for pt. This court, after a very full and examination of the questions arising cases, decided that the suit of Cooper thers against Marye, Ayers and others, hich the said restraining order and order ommitment for contempt were made, virtually and in effect a suit against the e of Virginia, and therefore in violation he Eleventh Amendment of the Constitu- n of the United States, which declares t the judicial power of the United States all not be construed to extend to any suit law or equity commenced or prosecuted gainst one of the United States by citizens f another State, or by citizens or subjects f any foreign state; and the judgment of he court was that the circuit court had no jurisdiction to entertain said suit, and that its facts and proceedings were void; and the petitioners, Ayers, Scott and McCabe, were discharged. The cases in which the question has been considered in this court as to when a proceeding against the officers of a State may be considered as a proceeding against the State itself, or only as a proceeding against the officers for a violation of a clear duty imposed upon them by law, were carefully reviewed and distinguished in the elaborate opinion of the court delivered by *Mr. Justice* Matthews, and may be referred to as throwing much additional light upon that vexed and interesting question; but it is particularly referred to here, in connection with the other cases cited, for the purpose of showing the conditions, circumstances and aspects in which the questions arising on these tax-paying coupons have presented themselves to the court.

Without committing ourselves to all that has been said, or even all that may have been adjudged, in the preceding cases that have come before the court on the subject, we think it clear that the following propositions have been established:

First, That the provisions of the Act of 1871 constitute a contract between the State of Virginia and the lawful holders of the bonds and coupons issued under and in pursuance of said Statute:

Second, That the various Acts of the Assembly of Virginia passed for the purpose of restraining the use of said coupons for the payment of taxes and other dues to the State, and imposing impediments and obstructions to that use, and to the proceedings instituted for establishing their genuineness, do in many respects materially impair the obligation of that contract, and cannot be held to be valid or binding in so far as they have that effect:

Third, That no proceedings can be instituted by any holder of said bonds or coupons against the Commonwealth of Virginia, either directly by suit against the Commonwealth by name, or indirectly against her executive officers to control them in the exercise of their official functions as agents of the State:

Fourth, That any lawful holder of the tax-receivable coupons of the State issued under the Act of 1871 or the subsequent Act of 1879, who tenders such coupons in payment of taxes, debts, dues and demands due from him to the State, and continues to hold himself ready to tender the same in payment thereof, is entitled to be free from molestation in person or goods on account of such taxes, debts, dues or demands, and may vindicate such right in all lawful modes of redress—by suit to recover his property, by suit against the officer to recover damages for taking it, by injunction to prevent such taking where it would be attended with irremediable injury, or by a defense to a suit brought against him for his taxes or the other claims standing against him. No conclusion short of this can be legitimately drawn from the series of decisions which we have above reviewed, without wholly overruling that rendered in the *Coupon Cases* and disregarding many of the rulings in other cases, which [88 we should be very reluctant to do. To the extent here announced we feel bound to yield to the authority of the prior decisions of this court, whatever may have been the former views of any member of the court.

There may be exceptional cases of taxes, debts, dues and demands due to the State which cannot be brought within the operation of the rights secured to the holders of the bonds and coupons issued under the Acts of 1871 and 1879. When such cases occur they will have to be disposed of according to their own circumstances and conditions.

It was earnestly contended in the dissenting opinion in the *Coupon Cases*, that the defense of a tender of coupons set up by a taxpayer when prosecuted for the payment of his taxes was in the nature of a set-off and could not be enforced against a State any more than a suit could be prosecuted against it; in other words, that a set-off is in reality a cross-suit, and as such subject to the prohibition of the Eleventh Amendment. But the majority of the court held, and perhaps with better reason, that where a set-off or counterclaim is made by virtue of an agreement or contract between the parties, it no longer has the character of a mere set-off, but becomes attached to the primary claim as *pro tanto* a defeasance thereof. At all events such was the decision of the court, and it is not our purpose to question the authority of that decision so far as it may apply to the cases now before us.

It remains to apply the law as we conceive it to be to the several cases now under consideration.

1, 2, 3. With regard to three of these cases, *Bryan* v. *The State of Virginia*, *Cooper* v. *The State of Virginia* and *McGahey* v. *The State of Virginia*, we have very little hesi- [886] tation or difficulty in coming to a conclusion. They are suits brought by the Commonwealth of Virginia against the persons severally named, under the Act of May 12, 1887, for the recovery of taxes due from them respectively. The proceedings in the last-named case may be described as a sample of them all. The case was instituted in the Circuit

Court of Alexandria, Virginia, in the name of the Commonwealth, by the following notice:

"To John McGahey:

"Take notice that on the 23d day of March, 1888, in accordance with the statutes in such cases made and provided, I shall move the Circuit Court of Alexandria City for a judgment against you in favor of the Commonwealth of Virginia for the sum of $12.60, with interest on $6.40, part thereof, from the 15th day of December, 1886, till paid, and on $6.20, the residue, from December 15, 1887, till paid, that being the sum due by you to the said Commonwealth of Virginia for taxes, together with the penalty thereon, in payment of which papers or instruments purporting to be coupons detached from bonds of the State of Virginia have been tendered and not accepted as payment, and which taxes have not been otherwise paid, due on certain real and personal property in the City of Alexandria, the said taxes being the same assessed according to law by the Commonwealth of Virginia for the years 1886 and 1887, upon the property aforesaid.

"Leonard Marbury,

"For the Commonwealth of Virginia."

To this notice the defendant filed the following plea:

"For a plea in this behalf the defendant says that the plaintiff ought not to maintain its action, because he says that heretofore, viz., on the 1st day of December, 1886, and on the 1st day of December, 1887, when the taxes sued for became respectively due and payable, and prior to the commencement of this action in said city, he was willing and ready to pay and then and there tendered and offered to pay to the plaintiff tax-receivable coupons, then due and payable, cut from bonds issued by the plaintiff under the Act of the General Assembly of Virginia, approved March 30th, 1871, entitled 'An Act to Provide for the Funding and Payment of the Public Debt,' together with lawful money of the United States, as follows, viz.: For the said tax of $6.40, one (1) coupon, No. 23, cut from bond No. 5,684, due January 1, 1883, for $3; one (1) coupon, No. 23, cut from bond No. 4,213, due January 1, 1883, for $3; and forty cents (40c.) lawful money of the United States.

"And for the said tax of $6.20, one (1) coupon, No. 29, cut from bond No. 1,048, due January 1, 1886, for $3; one (1) coupon, No. 28, cut from bond No. 2,899, for $3, due July 1, 1885; and twenty cents (20c.) lawful money of the United States; to receive which the plaintiff then and there refused.

"And the defendant further says that always, from the times when the said taxes became respectively due and payable, hitherto he has been ready and willing to pay and is still here ready and willing to pay to the plaintiff the said tax-receivable coupons and lawful money, and he now brings into court here said coupons and lawful money, ready to be paid to the plaintiff if it will accept the same; and this he is ready to verify; whereupon he prays judgment," etc.

Upon the issue thus joined a trial by jury was had and a verdict given for the Commonwealth for $13.96, and judgment entered thereon with costs. A bill of exceptions was taken at the trial, which shows that the defendant first moved to quash the notice of motion and dismiss the cause on the ground that the Act of May 12, 1887, entitled "An Act to Provide for the Recovery by Motions of Taxes and Certain Debts Due the Commonwealth," etc., is repugnant to section 10, article I., of the Constitution of the United States; which motion was overruled. The defendant, then, to maintain the issue on his part, proved that when said taxes became respectively due and payable he tendered in payment thereof to the proper collecting officer the coupons and lawful money described in and filed with his plea, which coupons on their face purported to have been originally [68
attached to bonds issued by the State of Virginia under the Act of March 30, 1871, being then respectively due and payable, and having each upon its face the following language: "Receivable at and after maturity in payment for all taxes, debts and demands due the State,"—which said coupons and money the said officer refused to receive. The said coupons were then offered in evidence, and are in the form following, printed wholly from an engraved plate: "Receivable at and after maturity for all taxes, debts and demands due the State. The Commonwealth of Virginia will pay the bearer three dollars' interest, due 1st January, 1883, on bond No. 4,213. George Rye, treasurer of the Commonwealth of Virginia." The other coupons offered were of similar form in all respects. The defendant further proved that he never owned the bonds from which the coupons were cut, and knew nothing whatever in respect to their ownership; that the coupons when purchased by him were already detached from the bonds; and that he bought them in open market as genuine coupons, and without any reason to doubt their genuineness. He further proved that prior to September 1, 1879, the State had issued bonds of the kind and in the form authorized by said Act to the amount of many millions of dollars, the coupons thereon being wholly printed from engraved plates and not signed manually. He further offered to prove the denominations and numbers of the bonds issued under the Act of March 30, 1871, and the Act of March 28, 1879. He offered and read in evidence to the jury Senate Document XV., Senate Journal 1881-82, which contained a report of H. H. Dixon, second auditor of the Commonwealth of Virginia, directed to the president of the Senate, in answer to certain questions which had been proposed to him by the Senate for its information, in which report, amongst other things, the said second auditor stated: "I have the honor to report that I have no knowledge of any spurious or forged bonds or coupons issued or purporting to have been issued under either of the said Acts. As to any bonds or coupons that may have been stolen I have heard of none issued under the Act of March 28, 1879; nor have I any knowledge of any issued under the Act of March [6

1, except such information as may be
ned in the report made to the Legis-
March 30, 1874, by the joint commit-
investigate the sinking fund, in which
ficiency of $15,939.89 of bonds and of
25.45 of interest is stated." Another re-
of said auditor was offered in evidence
the defendant, in which he stated as fol-
vs: "I have the honor to report that no
nterfeit or forged obligations, bonds, cou-
ons or certificates of the State of Virginia
ve in any way come to my knowledge."
he defendant then offered to prove by the
estimony of an expert witness that the cou-
pons issued were genuine coupons, but the
court refused to receive such testimony or to
allow it to go to the jury because of the
Act of the General Assembly approved Jan-
uary 21, 1886; to which ruling the defend-
ant excepted on the ground that said Act
was repugnant to the Constitution of the
United States. The defendant then rested,
and thereupon the Commonwealth demanded
of the defendant the production of the bonds
from which the coupons tendered purported
to have been cut, with proof that said cou-
pons were actually cut therefrom. The de-
fendant moved the court to overrule and dis-
allow such demand, on the ground that the
Act of Assembly approved January 26, 1886,
under which the demand was made, was
repugnant to the Constitution of the United
States and void. But the court overruled
said motion and sustained the demand, to
which the defendant excepted. The evidence
being closed, the defendant prayed the court
to instruct the jury that the production of
the bonds from which the coupons in issue
were cut, together with proof that the cou-
pons were cut therefrom, was not necessary
to establish the genuineness of the coupons,
and that the Act requiring this to be done is
contrary to the Constitution of the United
States. But the court refused this instruction
and instructed the jury that such production
of bonds and proof, when demanded, was
necessary to establish the genuineness of the
coupons, to which ruling the defendant ex-
cepted. The defendant further prayed the
court to instruct the jury that if the jury
believe from the evidence that the State of
Virginia issued her bonds with tax-receiv-
able interest coupons thereto attached, which
coupons were made payable to bearer, and
were printed from engraved plates and not
signed manually by any officer of the State,
and if they further believe that the defend-
ant purchased the coupons filed with his plea
of tender in open market, in good faith, as
genuine coupons of said State, then the bur-
den is upon the State to prove said coupons
spurious, and that the Act of March 12, 1887,
placing upon the defendant the burden of
proving them genuine, is repugnant to the
Constitution of the United States. This in-
struction was also refused by the court and
the defendant excepted. The judgment in
the case was removed by writ of error to the
Supreme Court of Appeals of the State of
Virginia, and was affirmed. The present
writ of error brings this judgment before us
for consideration.

[690]

whether the Acts of Assembly of the State of Virginia which required the production of the bonds in order to establish the genuineness of the coupons, and prohibiting expert testimony to prove the said coupons, are or are not repugnant to the Constitution of the United States. On this subject we think there can be little doubt. It is well settled by the adjudications of this court, that the obligation of a contract is impaired, in the sense of the Constitution, by any Act which prevents its enforcement, or which materially abridges the remedy for enforcing it, which existed at the time it was contracted, and does not supply an alternative remedy equally adequate and efficacious. *Bronson* v. *Kinzie*, 42 U. S. 1 How. 311 [11: 143]; *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 190 [13: 383]; *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44 [19: 370]; *Walker* v. *Whitehead*, 83 U. S. 16 Wall. 314 [21: 357]; *Von Hoffman* v. *Quincy*, 71 U. S. 4 Wall. 535 [18: 403]; *Tennessee* v. *Sneed*, 96 U. S. 69 [24: 610]; *Memphis* v. *United States*, 97 U. S. 293 [24: 920]; *Memphis* v. *Brown*, 97 U. S. 300 [24: 924]; *Howard* v. *Bugbee*, 65 U. S. 24 How. 461 [16: 753].

[694]

We have no hesitation in saying that the duty imposed upon the tax payer of producing the bonds from which the coupons tendered by him were cut, at the time of offering the same in evidence in court, was an unreasonable condition, in many cases impossible to be performed. If enforced it would have the effect of rendering valueless all coupons which have been separated from the bonds to which they were attached, and have been sold in the open market. It would deprive them of their negotiable character. It would make them fixed appendages to the bond itself. It would be directly contrary to the meaning and intent of the Act of 1871 and the corresponding Act of 1879. It would be so onerous and impracticable as not only to affect, but virtually destroy, the value of the instruments in the hands of the holder who had purchased them. We think that the requirement was unconstitutional.

We also think that the prohibition of expert testimony establishing the genuineness of coupons was in like manner unconstitutional. In the case of coupons made by impressions from metalic plates (as these were), no other mode of proving their genuineness is practicable; and that mode of proof is as satisfactory as the proof of handwriting by witness acquainted with the writing of the party whose signature it purports to be. One who is expert in the inspection and examination of bank notes, engraved bonds or other instruments of that character is able to detect almost at a glance whether an instrument is genuine or spurious, provided he has an acquaintance with the class of instruments to which his attention is directed. It is the kind of evidence resorted to in proving the genuineness of bank notes, and the kind of evidence naturally resorted to to prove the genuineness of coupons and other instruments of that character. To prove such instruments of such inst... is to take from the holder of such inst... the only feasible means he has in h... to establish their validity.

[695] In addition to these objections to the proceedings, we question very much whether the Act of May 12, 1887, which authorizes and requires a suit to be brought against the taxpayer who tenders payment in coupons, as well as the other Acts which require their rejection, are not themselves laws impairing the obligation of the contract. They make no discrimination between genuine and spurious coupons. A bank which should refuse to receive its bills in payment of a note due from one of its customers, but should sue him on his note, and leave him to establish the genuineness of the bills by suit against the bank, would not be regarded with much favor in a business community. It is the duty of its cashier or receiving teller to judge of the genuineness of the bills offered, and to refuse them as spurious on his peril, or rather, on the peril of the bank itself. So, in regard to these coupons, instead of relegating the taxpayer to a course of litigation, the officers of the State charged with the duty of collecting the taxes should themselves decide on the genuineness of the coupons offered. Penalties for knowingly offering spurious coupons, or using them in any way, for sale or otherwise, would probably be as effective in preventing their circulation as like penalties are in suppressing counterfeit bank bills, and other negotiable instruments.

In the case of *Bryan* v. *The State of Virginia* the coupons that were tendered for the payment of the tax sued for purported to have been cut from bonds issued under the Act of March 30, 1871, and the same obstacles to the proof of their genuineness were interposed as in the case of McGahey, by requiring the production of the bonds from which the coupons were cut, and by excluding expert testimony. The same also is true of the proceedings in the case of *Cooper* v. *The State of Virginia*.

We are of opinon, therefore, that *the judgments in these three cases sought to be reversed, and the records severally remanded, for the purpose of such proceedings as may be required in due course of law, according to this opinion.*

[696] 4. The case of *Ellett* v. *The State of Virginia* was a suit brought to recover the amount of a judgment previously rendered against Ellett in the Circuit Court of Richmond for taxes and costs, the amount of taxes being $39.52, and the costs being $24.49. Execution having been issued upon this judgment, the defendant Ellett tendered to the sheriff, in payment thereof, coupons for the whole amount, lacking $1.49, which he tendered in lawful money. The coupons purported to be cut from a bond issued under the Act of March 30, 1871, and were overdue, and each bore upon its face a contract of the State of Virginia that it should be received in payment of all taxes, debts and demands due to her. The defendant pleaded this tender and averred that the sheriff refused to receive the said coupons and money, alleging that he was forbidden to do so by the Act of May 12, 1887, and that he, the defendant, has always been ready and willing since said tender to deliver said coupons and money to the sheriff in payment of said execution, and was still ready and willing to do so, and brought the same into court for that purpose. This plea was rejected by the court. A verdict was given for the plaintiff and judgment rendered thereon, which was affirmed by the Supreme Court of Appeals of the State of Virginia. The point made in this case is, that the costs included in the judgment on which the present suit was brought were not a debt due to the State of Virginia in her own right, but were due to the officers in whose favor they were taxed and whose services they were to compensate. We think that this point is untenable. The costs were recovered by the State of Virginia in the original action, to compensate her for the fees which she had to pay to the officers for their services. The demand of the officers for their costs was a demand against the State of Virginia, and not against the defendant; and, by reason of this demand against her, she was entitled to recover the amount against the defendant; so that in no legal sense can it be said that the costs included in the judgment belonged to the officers and not to the State. They were recovered by her in [6
form, and they belonged to her, when recovered, in substance. We are of opinion, therefore, that *this judgment must also be reversed, and the record remanded for the purpose of such proceedings as may be required in due course of law, in accordance with this opinion.*

5. The next case to be considered is that of *Cuthbert* v. *The State of Virginia*. This was a presentment found against Cuthbert in the Hustings Court of the City of Petersburg, Virginia, charging that he did, on the first day of November, 1888, and had continuously from day to day since that time, in said city, unlawfully sold and offered to sell, and unlawfully tendered and passed to divers persons, naming them, tax-receivable coupons from the bonds of the State of Virginia, without having previously obtained a special license, as required by law, authorizing him, said Cuthbert, to sell and offer to sell and to tender and pass such coupons, he, in doing the same, acting as the agent and broker for another person or persons to said jurors unknown, contrary to the Act of Assembly in that behalf. The presentment contained two other counts, which were abandoned. The defendant tendered a special plea in writing, to which the Commonwealth demurred, and the court sustained the demurrer. The defendant then pleaded not guilty. The jury, under the rulings of the court, found him guilty and assessed a fine of $500. On the trial the case was submitted to the jury upon an agreed statement of facts. The principal facts shown by this statement were that, on the 1st day of November, 1888, the defendant sold and offered to sell, and tendered and passed, and offered to tender and pass, for another, as charged in the presentment, tax-receivable coupons from bonds of the State of Virginia, which were overdue and bore upon their face the contract of said State that they should be received in payment of [6

all taxes, debts and demands due said State from taxpayers owing taxes to the said State, and that he did not have the special license therefor required by the Act of May 23, 1887, and had not paid the license tax of $1,000 provided by said Act for the privilege of selling the same, nor the state tax of twenty per centum upon the face value of the same; also, that the defendant Cuthbert was a member of a firm doing business in Petersburg as insurance agents, representing various foreign insurance companies, all of which had paid to the State all license taxes assessed upon them; also, that the defendant was not engaged in any business upon which a license tax is charged by the State, except the business of selling tax-receivable coupons from bonds of the State, and had not been so engaged. Upon this agreed statement of facts, the defendant moved the court to instruct the jury that the Act under which the presentment was found is repugnant to section 10 of article I. of the Constitution of the United States, and therefore void, and that they must acquit the defendant. The court refused to give this instruction, but instructed the jury that the said Act is not repugnant to the Constitution, and the defendant excepted. After the verdict was rendered, the defendant moved the court to set it aside upon the same grounds, which motion was overruled. The cause was carried to the supreme court of appeals, and by that court the judgment was affirmed and its decision is now here for review. The question in this case is, whether the Act requiring a license tax for the sale of coupons was or was not in violation of that clause of the Constitution of the United States which relates to impairing the obligation of contracts.

It is manifest from the terms of the Act of 1871, as well as that of 1879, under which tax-receivable coupons were authorized to be and were issued, that said coupons were intended to circulate from hand to hand, being expressly made payable to bearer, and being made receivable for taxes, debts, dues and demands due to the State. Any undue restraint upon the free negotiability of these instruments, therefore, would be a violation of the clear understanding and agreement of the parties. That the license required by the 56th section of the Tax Act of March 15, 1884, as amended by the Act of May 23, 1887, was a very material interference with such negotiability, is most manifest. If sustained as a valid Act of legislation, and [701] carried into effect, it would prevent the negotiation of such coupons by any holder thereof. The enormous license fee of one thousand dollars in towns of more than ten thousand inhabitants and of five hundred dollars in other counties and towns, with the exaction of twenty per cent of the face value on every coupon sold, was absolutely prohibitory in its effect. A material quality of the coupons—their negotiability—was thereby destroyed. The point cannot be made any clearer by argument than it appears by the mere statement of it. This follows whether the law is construed as applicable to the sale by a coupon-holder of his own coupons, or to the sale or passing by any person of coupons for another. An owner of coupons residing in New York or London, under the operation of the law, if the coupons were not paid by the State when they became due, would be obliged to go in person to Virginia in order to dispose of them to those who might be able and willing to use them in the payment of taxes.

The judgment in this case must also be reversed, and the record remanded for the purpose of such proceedings to be had as law and justice may require, in accordance with this opinion.

6. The next case to be considered is that of *Ex parte Brown*, which was an application of the petitioner, Brown, to the Circuit Court of the United States for the Eastern District of Virginia, to be discharged from imprisonment in the custody of R. A. Carter, the sergeant of said city and *ex officio* jailer thereof. The petition sets forth that the petitioner was sentenced by the Hustings Court of the City of Richmond to pay a fine of $25 and costs, amounting to $26.70, and to remain in the jail of the said city until the same should be paid, in the custody of the said sergeant; that on the 3d of July, 1889, he tendered W. P. Lawton, clerk of the hustings court, in payment of said fine, [702] eighteen dollars in coupons and $8.70 in lawful money of the United States; that each of said coupons was cut from a bond issued by the State of Virginia under the Act of March 30, 1871, and was overdue, and bore upon its face the contract of the State that it should be receivable in payment of all taxes, etc.; that the clerk refused to receive said coupons and money in payment of said fine and costs, because certain Acts of the General Assembly of Virginia forbade him so to receive them; that thereafter, on the same day, he tendered the same coupons and current money to Carter, sergeant as aforesaid, and demanded his release from custody; that said sergeant also refused to receive said coupons and money in payment of said fine and costs, and he refused the same because the coupons so tendered by the petitioner became due prior to the 1st day of July, 1888, and because section 415 of the Code of Virginia of 1887 prohibits the receipt of any coupons of said State which became due prior to July 1, 1888, as those tendered did; that said section 415 is repugnant to the Constitution of the United States; and that the petitioner is therefore detained in said jail and in custody of said sergeant in violation of the said Constitution. The petitioner therefore prayed a habeas corpus to be directed to the said Carter, sergeant as aforesaid, and that he be discharged from custody. The writ being issued, Carter made return thereto in substance as follows: He annexed to said return a copy of the judgment and order of the Hustings Court of Richmond committing the petitioner to the jail of the city until he should pay a certain fine imposed upon him, as stated in the petition. He admitted that on the 3d of July, 1889, the petitioner tendered the coupons and money set out and described in his petition, to the clerk, Lawton, who refused to receive the same; and that on the 3d of

July, 1889, the petitioner tendered to him, Carter, $8.70 in current money of the United States, and eighteen dollars in coupons purporting to be detached from bonds of the State of Virginia; but he denied that they were genuine coupons legally receivable. He further stated in his return that, by section 415 of the Code of Virginia of 1887, it [703] is provided that no petition shall be filed or other proceeding had to try whether any paper printed, written, engraved or lithographed, purporting to be a coupon detached from any bond of said State, is a genuine coupon legally receivable for taxes, debts or demands of the said State, where said coupon became due prior to July 1, 1888, unless said petition was filed or proceeding had within one year from July 1, 1888; and he charged the fact to be that the coupon held by the petitioner became due prior to July 1, 1888. The court below refused to discharge the prisoner, holding that section 415 of the Code of 1887 is not repugnant to the Constitution of the United States. The petitioner thereupon appealed to this court, and the question is as to the constitutionality of the section referred to.

We have already set forth the provisions of this law in a former part of this opinion, it being the Act passed February 27, 1886, and afterwards incorporated in the Code of 1887, as section 415. Under the operation of this Act, after the 1st day of July, 1889, of course, all coupons that were then more than a year past due were absolutely precluded from being used in payment of dues to the State, as provided for in the Act of 1871. Considering the obstacles which had been interposed in the way of their use for that purpose, it is not difficult to imagine that a very large proportion of the coupons attached to the bonds of 1871 had not been presented, or, if presented, had not been received for taxes prior to the date referred to.

[705] The passage of a new Statute of Limitations giving a shorter time for the bringing of actions than existed before, even as applied to actions which had accrued, does not necessarily affect the remedy to such an extent as to impair the obligation of the contract within the meaning of the Constitution, provided a reasonable time is given for the bringing of such actions. This subject has been considered in a number of cases by this court, particularly in *Terry* v. *Anderson*, 95 U. S. 628, 632 [24: 365, 366], and *Koshkonong* v. *Burton*, 104 U. S. 668, 675 [26: 886, 889], where the prior cases are referred to. In *Terry* v. *Anderson*, *Chief Justice* Waite, speaking for the court, said: "This court has often decided that Statutes of Limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect. *Hawkins* v. *Barney*, 30 U. S. 5 Pet. 457 [8: 190]; *Jackson* v. *Lamphire*, 28 U. S. 3 Pet. 280 [7: 679]; *Sohn* v. *Waterson*, 84 U. S. 17 Wall. 596 [21: 737]; *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290 [18: 475]; *Sturges* v. *Crowninshield*, 17 U. S. 4 Wheat. 122 [4: 529]. It is difficult to see why, if the Legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. . . . In all such cases the question is one of reasonableness, and we have therefore only to consider whether the time allowed in this Statute is, under all the circumstances, reasonable. Of that the Legislature is primarily the judge; and we cannot overrule the decision of that department of the government unless a palpable error has been committed."

The court in that case held that the period of nine months and seventeen days given to sue upon a cause of action which had already been running nearly four years, was not unconstitutional. The liability in question was that of a stockholder under an Act of incorporation for the ultimate redemption of the bills of a bank which had become insolvent by the disaster of the civil war. The Legislature of Georgia, on the 16th of March, 1869, passed a statute requiring all actions against stockholders in such cases to be brought by or before the 1st of January, 1870.

In the case of *Koshkonong* v. *Burton* the [70 suit was brought upon bonds of the Town of Koshkonong issued January 1, 1857, with interest coupons attached. The coupons matured at different dates from 1858 to 1877. The action was brought on the 12th of May, 1880, and the question was whether the action as to the coupons maturing more than six years before the commencement of the suit was barred by the Statute of Limitations of Wisconsin. In March, 1872, an Act was passed to limit the time for the commencement of actions against towns, counties, cities and villages, on demands payable to bearer. It provided that no action brought to recover money on any bond, coupon, interest warrant, agreement or promise in writing made by any town, county, city or village, or upon any installment of the principal or interest thereof, shall be maintained unless the action be commenced within six years from the time when such money has or shall become due, when the same has been made payable to bearer or to some person or bearer, or to the order of some person, or to some person or his order; provided, that any such action may be brought within one year after this Act shall take effect. This court, speaking by *Mr. Justice* Harlan, said: "It was undoubtedly within the constitutional power of the Legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. Whether the first proviso in the Act of 1872, as to some causes of action, especially in its application to citizens of other States holding negotiable municipal securities, is, or not, in violation of that condition, is a question of too much

practical importance and delicacy to justify us in considering it unless its determination be essential to the disposition of the case in hand; and we think it is not." The case was decided without determining the question referred to.

[107] A question of the same nature frequently arises upon statutes which require the registry of conveyances and other instruments within a limited period prescribed and making them void, either absolutely or in their operation as against third persons, if not recorded within such time. Such laws, as applied to conveyances and other instruments in existence at the time of their passage, are, of course, retrospective in their character, and may operate very oppressively if a reasonable time be not given for the registry required. This subject was discussed in the case of *Vance* v. *Vance*, 108 U. S. 514 [27: 808], *Mr. Justice* Miller delivering the opinion of the court, where the prior cases were adverted to and commented upon. The same rule applies in those cases as in reference to Statutes of Limitation, namely, that the time given for the act to be done must be a reasonable time, otherwise it would be unconstitutional and void.

It is evident from this statement of the question that no one rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another.

It is necessary, therefore, to look at the nature and circumstances of the case before us and of the class of cases to which it belongs. The primary obligation of the State with regard to the coupons attached to the bonds issued under the Act of 1871 was to pay them when they became due; but if they were not paid at maturity the alternative right was given to the holder of them to use them in the payment of taxes, debts, dues and demands due to the State. The very nature of the case shows that such an application of the coupons could not be made immediately or in any very short period of time. If all the bonds were of the denomination of one thousand dollars each, it would require twenty thousand of them to make up the funded debt of twenty millions of dollars. These twenty thousand bonds would be likely to be scattered and dispersed through many States and countries, and it would be impracticable for the holders of [108] them to use the coupons which the State should fail to pay in cash, in the alternative manner stipulated for in the contract, unless they had a reasonable time to dispose of them to taxpayers. No limitation of time was fixed by the Act within which the coupons should be presented or tendered in payment of taxes or other demands. The presumption would naturally be that they could be used within an indefinite period, like bank bills. Under this condition of things, a Statute of Limitations giving to the holders thereof but a single year for the presentation in payment of taxes of the coupons then in their possession, perhaps never severed from the bonds to which they were attached, and comprising all the coupons which had been originally attached thereto, seems, even at first blush, to be unreasonable and oppressive. Probably not one tenth, if even so large a proportion, of the bondholders were taxpayers of the State of Virginia. The only way in which they could, within the year prescribed, utilize their coupons, the accumulation perhaps of years, would be to sell and dispose of them to the taxpayers. How this could be done, especially in view of the onerous laws which were passed with regard to the sale of coupons in the State, it is difficult to see. Under all the circumstances of the case, and the peculiar condition of the securities in question, we are compelled to say that in our opinion the Law is an unreasonable law, and that it does materially impair the obligation of the contract.

We have spoken of the Act as limiting, indifferently, the time of tendering the coupons, and the time of commencing proceedings to ascertain their genuineness. Its terms relate only to the latter; and as this proceeding cannot be instituted until the coupons have been tendered, the effect is to make a tender necessary before the expiration of one year, which can often be done only within a few days, or even hours; since the taxes may become due in that short period, and not become due again until a year afterwards. This puts the unconstitutionality of the Act beyond question.

Without further discussion of the subject, we conclude that *the judgment of the Circuit Court must be reversed, and the same is reversed accordingly, and the cause remanded for the purpose of such proceedings as may be required by law and justice, in conformity with this opinion.*

7. The next case which we shall consider is that of *Hucless* v. *Childrey*, which was an action of trespass on the case, brought in the Circuit Court of the United States for the Eastern District of Virginia, by Hucless, a citizen of the State of Virginia, residing in Richmond, against Childrey, the treasurer of Richmond, and, as such, collector of taxes and license taxes due to the State, to recover damages for the refusal of the said Childrey to receive tax-receivable coupons in payment or part payment of a license tax payable for a license to sell by retail wine, spirits and other intoxicating liquors, whereby the plaintiff was prevented from pursuing the said business (which was a lawful business), and sustained damage by reason thereof to the extent of six thousand dollars. The declaration stated in substance that the plaintiff desired and intended to open and conduct the business aforesaid at 405 West Leigh Street, in said City of Richmond, for one year from the first of May, 1889: that he was a fit person, and intended to keep an orderly house, and that the place was suitable, convenient and appropriate for that purpose; that by the statute law of Virginia a person desiring and intending to conduct such business must apply to the commissioner of revenue for the city or county for a license therefor, who shall ascertain the

amount to be paid and give the applicant a certificate specifying the same, and such person shall make a deposit therefor with the treasurer or collecting officer of the city or county, of the amount so ascertained, and shall take from him a receipt for such deposit indorsed on the certificate, or otherwise he shall deposit with the treasurer the amount of tax assessed by law for the license tax on said business. Thereupon he shall make application in writing for a license for such business to the commissioner of the revenue for such city or county, accompanied by said certificate, and the person so desiring to conduct said business is forbidden by said statutes to conduct the same until he has appeared before the judge of the corporation or county court, and has proved that he has made such deposit and is a fit person to conduct such business, etc.; that the license tax imposed by the laws of Virginia to be paid for the business of selling, by retail, for one year, wine, ardent spirits, malt liquors or any of them, in cities of more than one thousand inhabitants, is $125; that on the 3d of May, 1889, plaintiff applied to the commissioner of revenue of Richmond to ascertain the amount to be paid by him as his license tax for selling by retail as aforesaid, and the commissioner gave to him a certificate specifying the same as $125; that on the same day the plaintiff presented said certificate to Childrey, the defendant, treasurer as aforesaid, and tendered to him, in payment of said license tax, $123 in coupons and two dollars in lawful money, and demanded a receipt stating that he had deposited with him $125 in said coupons and money; that Childrey refused to receive said coupons and money, and refused to give plaintiff said receipt; that each of said coupons was cut from a bond issued by the State of Virginia under the Act of March 30, 1871, and each bore upon its face the contract of the State that it would be received in payment of all taxes, debts, dues and demands due to the State; that thereafter, on the 3d day of May, 1889, the plaintiff stated to said Childrey that he desired and intended to conduct the business aforesaid at 405 West Leigh Street, and then tendered to him in payment of the license tax due to the State on said business for one year $123 in coupons and $2.75 in lawful money, and demanded of him a certificate of such deposit, but Childrey refused to receive said coupons and money, and refused to give such certificate, and refused to receive said coupons and money in both cases, because sections 399, 536 and 538 of the Code of Virginia of 1887 forbade him to receive them; and the plaintiff averred that said sections are repugnant to section 10, article I., of the Constitution of the United States, which the said Childrey well knew; that he, Childrey, obeyed the command of said sections and declined to follow the mandate of the Constitution; that by force of the statute law of Virginia the plaintiff would have been liable to indictment and severe penalties if he had proceeded to open and conduct his said business before he had satisfied the judge of the corporation or the Hustings Court of the City of Richmond that he was a fit person to conduct said business, that he would keep an orderly house and that the place was a suitable one, and that the plaintiff could not apply to said court to enter on said inquiries until he presented to said court a receipt from said Childrey for said deposit indorsed on the certificate furnished by the commissioner of the revenue, or the certificate of the commissioner indorsed on the receipt of said Childrey.

To this declaration the defendant filed a demurrer, which was sustained by the circuit court and judgment rendered for the defendant, which judgment is brought here for review.

The law under which the treasurer justified his action in refusing to receive the coupons tendered by the plaintiff is set forth in the declaration with sufficient accuracy and fullness for the disposal of the case, except that it should be added that the license fee to be deposited with the treasurer was required to be in lawful money of the United States as a condition precedent to the granting of the license. [71

We are of opinion that the requirement that the license fee shall be paid in lawful money of the United States does not, as contended, impair the obligation of the contract made by the State with the holders of the coupons referred to. Licenses for the sale of intoxicating liquors are not only imposed for the purpose of raising revenue, but also for the purpose of regulating the traffic and consumption of these articles, and hence the State may impose such conditions for conducting said traffic as it may deem most for the public good. Instead of a license fee of $125 it might have imposed a license fee of $250, or any other amount, or it might have prohibited the sale of intoxicating liquors altogether, as is admitted by the counsel for the plaintiff in their brief. They concede that the State might, in her discretion, absolutely abolish the sale of spirituous liquors, or prescribe on what terms they shall be sold. In this view, there does not seem to be any violation of the obligation of the State in requiring the tax which is imposed to be paid in any manner whatever—in gold, in silver, in bank notes, or in diamonds. The manner of payment is part of the condition of the license intended as a regulation of the traffic. It would be very different if the business sought to be followed was one of the ordinary pursuits of life, in which all persons are entitled to engage. License taxes imposed upon such pursuits and professions are imposed purely for the purpose of revenue, and not for the purpose of regulating the traffic or the pursuit. For these considerations we are clearly of opinion that *the judgment of the Circuit Court was right, and it is therefore affirmed.*

8. The remaining case which we have to consider is that of *Vashon* v. *Greenhow*. This case arose upon the refusal of Greenhow, treasurer of the City of Richmond, to receive from Vashon tax-receivable coupons in payment, or part payment, of taxes due from him, including a certain amount due for school taxes for the maintenance of the public [71

free schools of the State. Upon this refusal Vashon filed a petition for a mandamus in the Hustings Court of the City of Richmond, stating that he was a taxpayer of the said city, and was indebted to the State for state taxes of 1884 to the amount of $35.63, and tendered to Greenhow, the said treasurer, in payment therefor, certain coupons cut from the bonds of the State issued under the Act of March 30, 1871—one of the denomination of thirty dollars and one of the denomination of three dollars, said coupons being past due, and being presented to the court with the petition; that he, at the same time, offered to pay the treasurer the whole of said tax in legal-tender notes and coin, and demanded that the treasurer receive said coupons along with said legal-tender notes and coin for the purpose of identification and verification in manner and form as required by the Act of January 14, 1882. The petition further alleged that by virtue of the State's contract to receive said coupons in payment of said taxes, and by virtue of the Act of Assembly aforesaid, he was entitled, upon the payment of his said tax in money, to have his said coupons received for identification and verification, and pay his tax therewith; wherefore he prayed a writ of mandamus commanding said Greenhow, treasurer of said city, to receive the said money and also the said coupons, and commanding him to forward said coupons to the court for identification and verification according to law. A rule to show cause having been granted, the treasurer filed his answer to the petition, in which he stated the truth to be that Vashon was indebted to the [714] State for taxes for the year 1884, as follows, to wit: for tax on property the sum of $35.63, being $9.66 for the maintenance of public free schools, as per exhibit attached to the answer. He further stated and admitted that the petitioner offered to pay the said tax in money at the same time that he demanded the respondent to receive the coupons mentioned in the petition for the purpose of identification and verification. The answer then proceeds as follows:

"Your respondent avers that he was willing to receive the payment of said tax in money, but refused to receive and receipt for so much of the coupons as were offered in payment of that portion of the tax set aside by law and dedicated to the maintenance of the public free schools of the State.

"Your respondent assigns the following reasons for such refusal:

"(1.) The Constitution of Virginia provides, in section 7 of article VIII., what specific sum shall be set apart as a permanent and perpetual literary fund, and includes in it such other sums as the General Assembly may appropriate.

"(2.) Section 8 of the same article provides that the General Assembly shall apply the annual interest of the literary fund and an annual tax upon the property of the State of not less than one mill nor more than five mills on the dollar, for the benefit of the public free schools.

"(3.) In pursuance of this constitutional authority the General Assembly has provided, in Acts of 1883-84, p. 561, that on tracts of lands and lots a tax of ten cents on every hundred dollars of the assessed value thereof shall be levied, which shall be applied to the support of the public free schools of the State.

"(4.) Again, the last General Assembly, in Acts of 1883-84, p. 603, have provided that all taxes assessed on property, real or personal, and dedicated to the maintenance of the public free schools of the State, shall be paid and collected only in lawful money of the United States, and shall be paid into the treasury to the credit of the free school fund, and shall be used for no other purpose whatsoever.

"Your respondent avers that to have forwarded such of the coupons as were offered in payment of the tax dedicated to the public free schools would have been a violation of the Constitution and the laws above referred to.

"For these reasons your respondent insists that he ought not to have forwarded, for the purpose of identification and verification, so much of the coupons as were tendered in payment of that portion of the tax dedicated to the public free schools.

"He therefore prays that the writ of mandamus may be denied and the petition dismissed with costs."

To this answer the petitioner entered a demurrer, which was sustained by the court and a peremptory mandamus was awarded pursuant to the prayer of the petition. The case being carried to the Supreme Court of Appeals of Virginia the judgment was reversed, and this judgment of reversal is now before us for review. The court of appeals placed their judgment upon two distinct grounds. In the first place, they reviewed the former judgments of that court which had sustained the Act of March 30, 1871, as a valid and constitutional enactment and binding upon the State as a contract with the bond and coupon holders under the same. The court were of opinion that these decisions were based upon a mistaken assumption that the State had received a consideration for the issuing of the bonds created by the Act aforesaid. They argued and attempted to show that the State had not received any consideration whatever, but that the issuing of the bonds under the Act of 1871 was a mere gratuity on the part of the State, and was not binding upon it so as to prevent the Legislature from abrogating the conditions of that Act. We have already indicated our views with regard to this position taken by the supreme court of appeals, and have referred to the decisions made by this court sustaining the validity of the Act of 1871, which decisions of this court we regard as binding upon us.

The other ground on which the court of appeals placed its decision was, that the Act of 1871, as applied to the moneys due and payable to the "literary fund," or fund for the maintenance of public free schools, was contrary to the Constitution of the State, adopted in 1869. The 7th and 8th sections of the eighth article of that Constitution declared as follows:

"Sec. 7. The General Assembly shall set apart, as a permanent and perpetual literary fund, the present literary funds of the State, the proceeds of all public lands donated by Congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the State by forfeitures, and all fines collected for offenses committed against the State, and such other sums as the General Assembly may appropriate.

"Sec. 8. The General Assembly shall apply the annual interest on the literary fund, the capitation tax provided for by this Constitution for public free school purposes and an annual tax upon the property of the State of not less than one mill nor more than five mills on the dollar, for the equal benefit of all the people of the State."

The court, in its opinion, held that in view of these constitutional provisions the Legislature had no power to declare, or contract, that the moneys due to the literary fund might be paid in coupons attached to the bonds authorized by the Act of 1871; and that such a payment would be repugnant to the very nature of the fund. It might well be added, that coupons thus paid into the fund would be of no value whatever to it, for as soon as paid into the treasury they would become valueless as if canceled and destroyed, unless some provision were made for their reissue, and the putting of them into renewed circulation. This would be opposed to the whole tenor of the Act, would be unjust to the coupon holders themselves, and would probably be contrary to the Acts of Congress in reference to the creation of paper currency. We think that the position of the court of appeals in this case is well taken, that coupons could not be made receivable as a portion of the literary fund; and that, if they could not be received as a part of the fund, they could not properly be made receivable for the taxes laid for the purpose of maintaining said fund. For several years after the Constitution was adopted, and after the Law of 1871 had been passed, the taxes for the benefit of free schools were mingled in the assessment and collection of taxes, and in the treasury when received, with the other taxes and funds raised for the support of the state government. As long as this state of things continued the collecting officers could not object to receiving coupons in payment of taxes, because the share due to the school fund could easily be paid from the treasury, to the credit of that fund, out of the lawful moneys received. But by the Tax Act of March 15, 1884, it was provided that all taxes assessed on property, real or personal, by that Act, and dedicated by it to the maintenance of the public free schools of the State, should be paid and collected only in the lawful money of the United States, and should be paid into the treasury to the credit of the free school fund, and should be used for no other purpose whatsoever, and to this end the auditor of public accounts should have the books of the commissioner of the revenue prepared with reference to the separate assessment and collection of said school tax, and the several treasurers of the Commonwealth should have the tax bills in their counties and corporations so made out as to specify the amount of the tax due from each taxpayer to the public free school fund, including the capitation taxes of whatever kind or nature, and should keep said capitation tax and school tax separate and distinct from all other taxes or revenues so collected by him, and forward the same, thus separate and distinct, to the auditor of public accounts, which should be kept separate and distinct by him from all other taxes or revenues until paid to the public free schools. Since the passage of this Act, and in pursuance thereof, the taxes and other revenues raised for the purpose of maintaining public schools, and belonging under the Constitution to the literary fund, have been kept separate and distinct from the other taxes raised for the general support of the state government. This was the practice when the case of *Vashon* v. *Greenhow* arose, and in our judgment the law requiring the school tax to be paid in lawful money of the United States was a valid law, notwithstanding the provisions of the Act of 1871; and that it was sustained by the sections of the Constitution referred to, which antedate the Law of 1871, and override any provisions therein which are repugnant thereto. [71

In *Paup* v. *Drew*, 51 U. S. 10 How. 218 [13: 394], a decision was made by this court in a case not very different in principle from the one now under consideration. It had been decided in *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 190 [13: 383], at about the same time, that the law of Arkansas which chartered the Bank of the State of Arkansas (the whole capital of which belonged to the State), and provided that the bills and notes of said institution should be received in all payments of debts due to the State, was valid and irrepealable, and that, although this provision was subsequently in terms repealed, the notes of the bank which were in circulation at the time of the repeal were not affected by it; and that the undertaking of the State to receive the notes of the bank constituted a contract beween the State and the holders of these notes which the State was not at liberty to break or impair, although notes issued by the bank after the repeal were not within the contract and might be refused. After this decision the case of *Paup* v. *Drew* came up, in which it was held that although the notes of the bank were receivable in payment of all debts due to the State in its own right, and could not be refused, yet where the State sold lands which were held by it in trust for the benefit of a seminary, and the terms of the sale were that the debtor should pay in specie or its equivalent, such debtor was not at liberty to tender the notes of the bank in payment. The question arose in this way: Congress in 1827 had passed an Act "Concerning a Seminary of Learning in the Territory of Arkansas," by which two entire townships of land were directed to be set aside and reserved from sale, out of the public lands within the said Territory, for

the use and support of a university within the said Territory. In 1836 Congress passed another Act entitled, "An Act Suplementary to the Act Entitled 'An Act for the Admission of the State of Arkansas into the Union, and to Provide for the Due Execution of the [720] Laws of the United States within the Same, and for Other Purposes,'" by which last Act the lands so reserved for the use and support of a university were vested in the State of Arkansas. On the 28th of December, 1840, the Legislature of Arkansas passed an Act entitled "An Act to Authorize the Governor to Dispose of the Seminary Lands;" and in 1842 the then governor of the State sold to John W. Paup the right to enter and locate 640 acres of said land and received from him therefor bonds payable at different dates in specie or its equivalent. In 1847 the governor of the State brought a suit upon these bonds, and the defendants brought into court the sum of $6,050 in notes of the Bank of the State of Arkansas, and pleaded a tender of the same in discharge of the debt. The plaintiff demurred on the ground that the proceeds of the bonds were part of a trust fund committed to the State by Congress for special purposes, over which the State had no power except to collect and disburse the same in pursuance of the objects of the grant, and the State had no power to apply said funds to the payment of ordinary liabilities, and was not bound to accept in payment of such bonds any depreciated bills, bank paper or issues, even though she might be ultimately liable to redeem them. This demurrer was sustained and judgment given that the fund was a trust fund held by the State of Arkansas for the purposes to which it was devoted, and therefore the State could not properly contract to receive other than lawful money for property disposed of belonging to said fund.

We think that the principle of this case sustains the decision of the Court of Appeals of Virginia in the case now under consideration, and *the judgment of that court is affirmed.*

It may be argued that the principle involved in the last case is equally applicable to all taxes raised for the support of the state government, inasmuch as the funds necessary for that purpose, as well as those raised for the purpose of maintaining public free schools, are required to be paid in cash. But there is this difference, that the tax for [721 school purposes is set apart for that specific use, under the express requirement of the Constitution, whilst the general tax for carrying on the government is, or should be, adequate to meet not only the actual expenses of the government itself, but also the outstanding debts and obligations that may be due and payable during the fiscal year, of which the coupons are themselves a part. If the tender of tax-receiving coupons to any considerable amount is apprehended, the rate of taxation should be raised so as to produce a sufficient surplus over and above such coupons to meet the expenses of the government. If the influx of coupons should be so uncertain that no safe calculation could be made on the subject, an arrangement could probably be made with the coupon holders, for limiting the proportion of tax which would be received in coupons. It is certainly to be wished that some arrangement may be adopted which will be satisfactory to all the parties concerned, and relieve the courts as well as the Commonwealth of Virginia, whose name and history recall so many interesting associations, from all further exhibitions of a controversy that has become a vexation and a regret.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COUR

OF THE

UNITED STATES

IN

OCTOBER TERM, 1889.

Vol. 136.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1889,

AND REPORTED HEREIN,

VOL. 136,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 136 U. S.	Title.	Here in.
3–4	Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States Romney v. United States	478
4–5	" " "	482
5	" " "	485
5–6	" " "	486
7	" " "	480
7–9	" " "	481
9–11	" " "	482
11–14	" " "	483
14–17	" " "	484
17–19	" " "	485
19–21	" " "	486
21–24	" " "	487
24–27	" " "	488
27–29	" " "	489
29–42	" " "	490
42–45	" " "	491
45–48	" " "	492
48–51	" " "	493
51–54	" " "	494
54–57	" " "	495
57–59	" " "	496
59–62	" " "	497
62–65	" " "	498
65–68	" " "	499
68–70	Ryan v. United States	447
70–73	" " "	448
73–76	" " "	449
76–79	" " "	450
79–80	" " "	451
81–82	" " "	452
82–84	" " "	453
84–87	" " "	454
87–88	" " "	455
89	Kneeland v. American Loan & T. Co. Kneeland v. Ballou	379
90	" " "	380
90–93	" " "	381
93–96	" " "	382
96–99	" " "	383
99–101	" " "	384
101–104	" " "	385
104	McCall v. California	391
104–109	McCall v. California	392
109–112	" " "	393
112–114	" " "	394
114	Norfolk & W. R. Co. v. Pennsylvania	394
115	" " "	395
115–118	" " "	396
118–120	" " "	397
120–121	" " "	398
121	Hot Springs R. Co. v. Williamson	355
121–124	" " "	357
124–127	" " "	358
127–130	" " "	359
130	" " "	360
130–132	Lovell v. Cragin	372
132–135	" " "	373
135–138	" " "	374
138–141	" " "	375
141–144	" " "	376
144–146	" " "	377
146–149	" " "	378
149–151	" " "	379
152	Cornell University v. Fiske	427
152–155	" " "	431
155–158	" " "	432
158–161	" " "	433
161–176	" " "	434
176–179	" " "	435
179–182	" " "	436
182–185	" " "	437
185–188	" " "	438
188–191	" " "	439
191–194	" " "	440
194–197	" " "	441
197–200	" " "	442
200–203	" " "	443
203–205	" " "	444
205–208	" " "	445
208–211	" " "	446
211–212	United States v. North Carolina	336
213–215	" " " "	337
216	" " " "	338
217–219	" " " "	339
219–222	" " " "	340
222	" " " "	341

Off. Rep. 126 U. S.	Title.	Here in.
223–224	Union Bank of Chicago v. Kansas City Bank	341
224–226	" " " "	342
229–230	" " " "	343
230–233	" " " "	344
233–235	" " " "	345
235–237	" " " "	346
237–238	Smith Middlings Purifier Co. v. McGroarty	346
238–239	" " " "	347
239–241	" " " "	348
241	" " " "	349
242–244	Hamilton v. Liverpool, L. & G. Ins. Co.	419
244–246	" " " "	420
246–249	" " " "	421
249–252	" " " "	422
252–255	" " " "	423
255–256	" " " "	424
257	Palliser, *Re*	514
257–260	" "	515
260	" "	516
262–265	" "	517
265–267	" "	518
267–268	" "	519
268	Chicago Railway Equipment Co. v. Merchants' Bank	349
269–275	" " " "	350
275–277	" " " "	351
277–281	" " " "	352
281–283	" " " "	353
283–286	" " " "	354
286	" " " "	355
287	Thompson v. Phenix Ins. Co.	408
288	" " "	409
288–291	" " "	410
291–293	" " "	411
293–296	" " "	412
296–299	" " "	413
299–300	" " "	414
300	Allen v. Hanks	414
301–303	" "	415
303–306	" "	416
306–309	" "	417
309–312	" "	418
312	" "	419
313	Minnesota v. Barber	455
317–319	" "	457
319–322	" "	458
322–325	" "	459
325–328	" "	460
328–330	" "	461
330	Luis Oteiza y Cortes, *Re*	464
331	" " "	465
331–334	" " "	466
334–337	" " "	467
337–338	" " "	468
338	Saloy v. Bloch	468
339–341	" "	469
341–344	" "	470
344–347	" "	471
347	" "	472
348–349	Reynolds v. Adden	360
349–352	" "	361
352–355	" "	362
355–356	" "	363
356	Nashua & L. R. Corp. v. Boston & L. R. Corp.	363
365	" " "	364
365–368	" " "	365
369–371	" " "	366

Off. Rep. 126 U. S.	Title.	Here in.
371–374	Nashua & L. R. Corp. v. Boston & L. R. Corp.	367
374–377	" " "	368
377–379	" " "	369
379–382	" " "	370
382–385	" " "	372
385	" " "	371
386	Norris v. Haggin	424
386–388	" "	425
388–391	" "	426
391–393	" "	427
393	Texas & P. R. Co. v. Marshall } Marshall v. Texas & P. R. Co. }	385
394–395	" " "	387
396–401	" " "	388
401–404	" " "	389
404–407	" " "	390
407	" " "	391
408–409	Richelieu & O. Nav. Co. v. Boston Marine Ins. Co.	398
409–412	" " "	399
412–414	" " "	400
414–415	" " "	401
421–423	" " "	403
423–425	" " "	404
425–428	" " "	405
428–431	" " "	406
431–434	" " "	407
434–436	" " "	408
436	Kemmler, *Re*	519
438–441	" "	521
441–443	" "	522
443–446	" "	523
446–449	" "	524
449	" "	525
450–451	District of Columbia v. Woodbury	472
451–454	" " "	473
454–457	" " "	474
457–459	" " "	475
459–462	" " "	476
462–465	" " "	477
465–467	" " "	478
468	Stevens v. Fuller	461
468–475	" "	462
475–478	" "	463
478	" "	464
479	Indiana v. Kentucky	329
503–504	" "	330
504–507	" "	331
507–510	" "	332
510–513	" "	333
513–515	" "	334
515–518	" "	335
518–519	" "	336
519–521	Thaw v. Ritchie	531
521–523	" "	532
523–526	" "	533
526–533	" "	534
533–540	" "	535
540–543	" "	536
543–546	" "	537
546–548	" "	538
549–551	Gibbons v. Mahon	525
551–557	" "	526
557–560	" "	527
560–563	" "	528
563–565	" "	529
565–568	" "	530
568–569	" "	531
570–571	Sherman v. Robertson	540

Off. Rep. 126 U. S.	Title.	Here in.
572–578	Inland & S. Coasting Co. v. Tolson	539
578	Irwin v. San Francisco Sav. Union	540
580	" " "	545
580	Davenport v. Paris	548
581–584	Mason v. United States	545
584–585	" "	546
586	" "	548
586	Burrus, *Re*	500
586–589	" "	501
589–592	" "	502
592–594	" "	503
595	" "	504
595	" "	505
595	" "	506
595	" "	507
595	" "	508
595	" "	509
595	Burrus, *Re*	510
595	" "	511
595–596	" "	512
596	" "	513
596–597	" "	514
597	" "	503
597–600	" "	504
600–603	" "	505
603–606	" "	506
606–609	" "	507
609–612	" "	508
612–615	" "	509
615–618	" "	510
618–621	" "	511
621–624	" "	512
624–627	" "	513

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1889.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

479] THE STATE OF INDIANA, *Complainant*,
v.
THE STATE OF KENTUCKY.

(See S. C. Reporter's ed. 479-519.)

Jurisdiction and boundary of Kentucky—boundary between Kentucky and Indiana—rights of Kentucky—cession by Virginia—acquiescence in possession of territory.

1. When Kentucky became a State, the waters of the Ohio River ran north of Green River Island, and the jurisdiction and boundary of Kentucky then extended and still extend to what was then low-water mark on the north side of that channel.
2. The boundary between Kentucky and Indiana is at low-water mark on the north side of the channel of the Ohio River as it ran north of Green River Island when Kentucky became a State.
3. Kentucky succeeded to the rights and possession of Virginia and her dominion and jurisdiction continue as they existed when she was admitted to the Union unaffected by the fact that the channel of the river is now filled up.
4. When one State is the original proprietor and grants the territory on one side only of a river, it retains the river within its own domain, and the newly-created State extends to the river only.
5. Long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.

[No. 2, Original.]

Argued Apr. 9, 10, 1890. Decided May 19, 1890.

BILL in equity by the State of Indiana against the State of Kentucky to establish the boundary line between those States along the middle line of the Ohio River and to settle claims to the possession of, and jurisdiction over, a tract of land, lying on what is now the north side of the Ohio River. *Judgment settling the boundary line between the two States and in favor of the claim of Kentucky to the tract of land.*

The facts are stated in the opinion.

Messrs. **Joseph E. McDonald,** *John M. Butler* and **Alpheus H. Snow,** for complainant:

This court has jurisdiction of questions of boundary between two States of this Union.

Missouri v. *Kentucky*, 78 U. S. 11 Wall. 395 (20: 116); *Wisconsin* v. *Pelican Ins. Co.* 127 U. S. 265, 287, 288 (32: 239, 242, 243).

It is not the bank of the river, but the river itself, at which the cession of Virginia commences.

Handly v. *Anthony*, 18 U. S. 5 Wheat. 374 (5: 113).

The Kentucky courts have always claimed to the low-water mark on the northwest side of the Ohio River.

Fleming v. *Kenney*, 4 J. J. Marsh. 158; *Church* v. *Chambers*, 3 Dana, 279; *McFall* v. *Commonwealth*, 2 Met. (Ky.) 394; *McFarland* v. *McKnight*, 6 B. Mon. 510.

In Indiana the authority of *Handly* v. *Anthony* is recognized as applicable to the boundaries of riparian owners, but the right of wharfing out into the Ohio River is insisted upon.

Stinson v. *Butler*, 4 Blackf. 285; *Cowden* v. *Kerr*, 6 Blackf. 280; *Doe* v. *Hildreth*, 2 Ind. 274; *St. Joseph County* v. *Pidge*, 5 Ind. 13; *Bainbridge* v. *Sherlock*, 29 Ind. 364; *Gentile* v. *State*, 29 Ind. 409; *Carlisle* v. *State*, 32 Ind. 55; *Martin* v. *Evansville*, 32 Ind. 85; *Sherlock* v. *Alling*, 44 Ind. 184; *Sherlock* v. *Bainbridge*, 41 Ind. 35.

The same may be said of the courts of Illinois, though there is a strong tendency to claim to the middle of all rivers.

Middleton v. *Pritchard*, 4 Ill. 510; *Ensminger* v. *People*, 47 Ill. 384; *Buttenuth* v. *St. Louis Bridge Co.* 123 Ill. 535; *Fuller* v. *Dauphin*, 124 Ill. 542.

In Ohio and Virginia the question has been hotly discussed, and the authority of *Handly* v. *Anthony* denied.

Benner v. *Platter*, 6 Ohio, 505; *Covington & C. Bridge Co.* v. *Mayer*, 31 Ohio St. 317.

The statement of this court in *Handly* v. *Anthony* relating to the state boundary line is a dictum.

St. Joseph & G. I. R. Co. v. *Devereux*, 41 Fed. Rep. 14.

The United States survey of 1806, a mean-

der line of which ran along the north side of Green River Island, did not affect the location of the state boundary line.

St. Paul & P. R. Co. v. *Schurmeier*, 74 U. S. 7 Wall. 272 (19: 74); *Doe* v. *Hildreth*, 2 Ind. 274; *Reid* v. *Langford*, 3 J. J. Marsh. 420.

The gradual recession of the water from a low-water mark of the Ohio River, would on the facts as they appear in this case leave the intermediate territory in Indiana.

Missouri v. *Kentucky*, 78 U. S. 11 Wall. 395, 407 (20: 116, 120).

Executive officers of a State act in a discretionary manner whenever they attempt to act within a territory which is in dispute, and their action is not the action of the State.

State v. *Young*, 46 Vt. 565.

Messrs. **J. Proctor Knott** and **P. W. Hardin**, *Atty-Gen.* of Kentucky, for defendant:

An equitable bar arises from lapse of time and acquiescence against the claims of Indiana.

Smith v. *Clay*, 3 Bro. Ch. 640, *note; Hovenden* v. *Annesley*, 2 Sch. & Lef. 636; *Prevost* v. *Gratz*, 19 U. S. 6 Wheat. 481 (5: 311); *Hughes* v. *Edwards*, 22 U. S. 9 Wheat. 489 (6: 142); *Miller* v. *M'Intyre*, 31 U. S. 6 Pet. 61 (8: 320); *Piatt* v. *Vattier*, 34 U. S. 9 Pet. 405 (9: 173); *Boone* v. *Chiles*, 35 U. S. 10 Pet. 177 (9: 388); Sugd. Vend. 753; *Buchannon* v. *Upshaw*, 42 U. S. 1 How. 56 (11: 46); *Rhode Island* v. *Massachusetts*, 45 U. S. 4 How. 591 (11: 1116); *Bowman* v. *Wathen*, 42 U. S. 1 How. 189 (11: 97).

Maps of early explorers and the reports of travelers are mere hearsay.

Missouri v. *Kentucky*, 78 U. S. 11 Wall. 410 (20: 121).

The theory of complainant's case here is based upon a misconception or a strained application of *Handly* v. *Anthony*, 18 U. S. 5 Wheat. 374 (5: 113).

When the bed of a stream between two riparian proprietors is abandoned by the water —whether by a filling up of the channel or the formation of a new one—leaving the land on the shores unchanged in site and character, the property remains as it was before.

Hopkins Academy v. *Dickinson*, 9 Cush. 545.

[503] *Mr. Justice* **Field** delivered the opinion of the court:

This is a controversy between the State of Indiana and the State of Kentucky growing out of their respective claims to the possession of and jurisdiction over a tract of land nearly five miles in length and over half a mile in width, embracing about two thousand acres, lying on what is now the north side of the Ohio River.

Kentucky alleges that when she became a State on the 1st of June, 1792, this tract was an island in the Ohio River, and was thus within her boundaries, which had been prescribed by the Act of Virginia creating the District of Kentucky. The territory assigned to her was bounded on the north by the territory ceded by Virginia to the United States. The tract in controversy was then and has ever since been called Green River Island. Kentucky founds her claim to its possession and to jurisdiction over it upon the alleged ground that at that time the River Ohio ran north of it, and her boundaries extended to low-water mark on the north side of the river; also upon her long undisturbed possession of the premises, and the recognition of her rights by the legislation of Indiana. Indiana rests her claim also upon the boundaries assigned to her when she was admitted into the Union on the 11th of December, 1816, of which the southern line was designated "as the River Ohio from the mouth of the Great Miami River to the mouth of the Wabash." This boundary, as she alleges, embraces the island in question, she contending that the river then ran south of it, and that a mere bayou separated it from the main land on the north.

The territory lying north and west of the Ohio, embracing the State of Indiana, as well as the territory lying south of that river, embracing the State of Kentucky, was, previous to 1776, and down to the cession of the same to the United States, held by the State of Virginia. Indeed, that Commonwealth claimed that all the territory lying north of the Ohio River and west of the Alleghanies and extending to the Mississippi was within her chartered limits. As stated by *Chief Justice* Marshall, in *Handly* v. *Anthony*, 18 U. S. 5 Wheat. 374, 376 [5: 113], at an early period of the Revolutionary War, "the question whether the immense tracts of unsettled country which lay within the charters of particular States ought to be considered as the property of those States or as an acquisition made by the arms of all for the benefit of all, convulsed our confederacy and threatened its existence." To remove this cause of disturbance, Congress in September, 1780, passed a resolution recommending "to the several States having claims to waste and unappropriated lands in the western country, a liberal cession to the United States of a portion of their respective claims, for the common benefit of the Union." The Commonwealth of Virginia yielded to this recommendation, and on the 20th of December, 1783, an Act was passed by her Legislature authorizing her delegates in Congress to convey to the United States all her right, title and claim, as well of soil as of jurisdiction, "to the territory or tract of country within the limits of the Virginia character, situate, lying and being to the northwest of the River Ohio," subject to certain conditions, among which was that the territory should be laid out and formed into States containing a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as the circumstances would admit, and that the States so formed should be distinct republican States, and admitted members of the Federal Union, having the same rights, sovereignty, freedom and independence as the other States. In pursuance of this Act the delegates in Congress, on the 1st of March, 1784, executed a formal deed ceding to the United States all the right, title and claim as well of soil as of jurisdiction which the Commonwealth had to the territory or tract of country within the limits of the Virginia charter, "*situate, lying*

and being to the northwest of the River Ohio," for the uses and purposes and subject to the conditions mentioned in the Act of the Commonwealth.

By the Act of Congress of July 13, 1787, entitled "An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio," a modification was made of the terms of the cession of Virginia, to the effect that there should be formed in [5] the ceded territory not less than three nor more than five States, the fixed and established boundaries of which were designated, and of which the Ohio River was declared to be one.

As thus seen, the territory ceded by the State of Virginia to the United States, out of which the State of Indiana was formed, lay northwest of the Ohio River. The first inquiry, therefore, is as to what line on the river must be deemed the southern boundary of the territory ceded, or, in other words, How far did the jurisdiction of Kentucky extend on the other side of the river? Early in the history of the State, doubts were raised on this point, and to quiet them, its Legislature, on the 27th of January, 1810, passed the following Act declaring the boundaries of certain counties in the Commonwealth:

"Whereas doubts are suggested whether the counties calling for the River Ohio as the boundary line extend to the state line on the northwest side of said river, or whether the margin of the southeast side is the limit of the counties; to explain which

"*Be it enacted by the General Assembly*, That each county of this Commonwealth, calling for the River Ohio as the boundary line, shall be considered as bounded in that particular by the state line on the northwest side of said river, and the bed of the river and the islands therefore shall be within the respective counties holding the main land opposite thereto, within this State, and the several county tribunals shall hold jurisdiction accordingly." (Statute Law of Kentucky, vol. 1, 268.)

Upon this question of boundary we also have, happily, a decision of this court rendered so early as 1820. In *Handly* v. *Anthony*, 18 U. S. 5 Wheat. 374 [5:113], ejectment was brought to recover land which the plaintiff claimed under a grant from the State of Kentucky, while the defendants held under a grant from the United States, and the title depended upon the question whether the land lay in the State of Kentucky or in the State of Indiana. It was separated from the main land of Indiana by a bayou, a small channel, which made out of the Ohio, and entered that river again a few miles below. This bayou was from four to five poles wide and [3] its bed was dry during a portion of the year. The court said that the question whether the land lay within the State of Kentucky or of Indiana depended chiefly upon the Land Law of Virginia and on the cession of that State to the United States. And in determining this question it went into the consideration of the proper construction to be given to the deed of cession, and reached the conclusion that the boundary between the States was at low-water mark on the northwest side of the river.

"In pursuing this inquiry," said the court, "we must recollect, that it is not the bank of the river, but the river itself, at which the cession of Virginia commences. She conveys to Congress all her right to the territory 'situate, lying and being to the northwest of the River Ohio.' And this territory, according to express stipulation, is to be laid off into independent States. These States, then, are to have the river itself, wherever that may be, for their boundary. This is a natural boundary, and in establishing it Virginia must have had in view the convenience of the future population of the country. When a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary. . . If, instead of an annual and somewhat irregular rising and falling of the river, it was a daily and almost regular ebbing and flowing of the tide, it would not be doubted that a country bounded by the river would extend to low-water mark. This rule has been established by the common consent of mankind. It is founded on common convenience. Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual than where it is diurnal. Wherever the river is a boundary between States, it is the main, the permanent [507] river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark. When the State of Virginia made the Ohio the boundary of States, she must have intended the great River Ohio, and not a narrow bayou into which its waters occasionally run. All the inconvenience which would result from attaching a narrow strip of country lying on the northwest side of that noble river to the States on its southeastern side, would result from attaching to Kentucky, the State on its southeastern border, a body of land lying northwest of the real river, and divided from the main land only by a narrow channel, through the whole of which the waters of the river do not pass until they rise ten feet above the low-water mark."

This decision has been followed by the courts of Kentucky. See *Church* v. *Chambers*, 3 Dana, 279; *McFarland* v. *McKnight*, 6 B. Mon. 510; *Fleming* v. *Kenney*, 4 J. J. Marsh. 158; *McFall* v. *Commonwealth*, 2 Met. (Ky.) 394. In this last case, the defendant, a justice of the peace for a Cincinnati township, in the State of Ohio, solemnized a marriage on a ferryboat upon the Ohio River,

midway between Newport in Kentucky and Cincinnati in Ohio, and was indicted in the courts of Kentucky for unlawfully solemnizing a marriage, and was convicted of the offense, he not having been authorized to perform that ceremony by the county court of that State. The Court of Appeals of Kentucky in affirming the conviction referred to the authority of *Handly* v. *Anthony*, and said: "That the boundary and jurisdiction of the State of Kentucky rightfully extend to low-water mark on the western or northwestern side of the River Ohio must now be considered as settled." The same doctrine was maintained in *Commonwealth* v. *Garner*, 3 Gratt. 655, by the General Court of Virginia, at its June Term, 1846, after elaborate consideration, against the earnest contention of some of its judges that the jurisdiction of the State after the cession extended to the line of high-water mark on the northwest side of the river.

We agree with the observations of the court in *Handly* v. *Anthony*, that great in-
[508] convenience would have followed if land on either side of the river, that was separated from the main land only by a mere bayou, which did not appear to have ever been navigable, and was dry a portion of the year, had been attached to the jurisdiction of the State on the opposite side of the river; and, in the absence of proof that the waters of the river once flowed between the tract in controversy in this case, and the main land of Indiana, we should feel compelled to hold that it was properly within the jurisdiction of the latter State. But the question here is not, as if the point were raised to-day for the first time, to what State the tract, from its situation, would now be assigned, but whether it was at the time of the cession of the territory to the United States, or more properly when Kentucky became a State, separated from the main land of Indiana by the waters of the Ohio River. Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two States. That, however, is a matter for arrangement and settlement between the States themselves, with the consent of Congress. If when Kentucky became a State on the 1st of June, 1792, the waters of the Ohio River ran between that tract, known as Green River Island, and the main body of the State of Indiana, her right to it follows from the fact that her jurisdiction extended at that time to low-water mark on the northwest side of the river. She succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its waters might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri* v. *Kentucky*, 78 U. S. 11 Wall. 395, 401 [20: 116, 118]. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.

The question then becomes one of fact: Did the waters of the Ohio pass between Green River Island and the main land of Indiana when Kentucky became a State and her boundaries were established? There is much evidence introduced on the part of Indiana to show that since her admission into the Union the Ohio River has not passed between the island and the main land except at intervals of high water; and that at low water the main land has been accessible for portions at least of the year from the island, free from any water obstructions. Aside from the speculations of geologists, which are not of a very convincing character, the evidence consisted principally of the recollections of witnesses, which were more or less vague and imperfect. Apart from those speculative theories, she produced no evidence that at the time the cession was made by Virginia to the United States in 1784, or when Kentucky became a State, the tract was attached to and formed a part of the territory then ceded, out of which the State of Indiana was created, or that the waters of the Ohio did not run between it and the main land of Indiana so as to justify its designation as an island in the river. Much evidence has also been given on that subject by Kentucky, and a great number of transactions shown, which proceeded upon the assumption that the tract was within the jurisdiction of that State. It is clear, we think, from the whole testimony, that at an early day after Kentucky became a State, the channel between the island and the main land of Indiana was often filled with water the whole year and sometimes to the width of two hundred yards; and that water passed through it, of more or less depth, the greater part of the year, until down to a period subsequent to the admission of Indiana into the Union.

But above all the evidence of former transactions, and of ancient witnesses, and of geological speculations, there are some uncontroverted facts in the case which lead our judgment irresistibly to a conclusion in favor of the claim of Kentucky. It was over seventy years after Indiana became a State before this suit was commenced, and during all this period she never asserted any claim by legal proceedings to the tract in question. She states in her bill that all the time since her admission Kentucky has claimed the Green River Island to be within her limits and has asserted and exercised jurisdiction over it, and thus excluded Indiana therefrom, in defiance of her authority and contrary to her rights. Why then did she delay to assert by proper proceedings her claim to the premises? On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of complaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty, both

as to soil and jurisdiction, over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge, and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenues.

This long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority. In the case of *Rhode Island* v. *Massachusetts*, 45 U. S. 4 How. 591, 639 [11: 1116, 1137], this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the Colonies, said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his Law of Nations, speaking on the same subject, says: "The tranquillity of the people, the safety of states, the happiness of the human race do not allow that the possessions, empire and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title." Book II., chap. 11, sec. 149. And Wheaton, in his International Law, says: "The writers on national law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." Part II., chap. IV., § 164. Potential as are the considerations drawn from the long silence and acquiescence of Indiana in the claim and pretensions of Kentucky, her affirmative action is not the less persuasive in favor of Kentucky's claim. It appears that on March 26, 1804, Congress authorized a survey into townships, six miles square, of the public lands north of the Ohio River and east of the Mississippi River. Chap. 35, 2 Stat. 277. Under this Act a survey was made of the land in the vicinity of Green River Island in the month of December, 1805, and in April, 1806, and it did not include the island within the territory north of the Ohio, but treated the bank of the bayou or channel north of the island as the bank of that river. The notes of this survey were given in evidence and show conclusively that the officers of the government at that time did not consider the tract in controversy as forming any part of the territory of Indiana, but did consider that the waters of the Ohio River running north of it made the tract now in controversy an island of the river. This survey from the time it was made has been regarded as establishing the fact that the southern boundary of Indiana lies north of the island. It is now insisted that the lines of this survey were intended merely as meander lines run for the purpose of defining the sinuosity of the bank and the means of ascertaining the quantity of land then subject to sale, and were not intended as a boundary line of the island. Conceding, for the purposes of this case, that this is true, so far as related to the fixing of the precise line of low-water mark, to which the territory of Indiana extended, it does not affect the force of the survey, as evidence that the island was not included within that territory, according to the judgment at that time of the surveying officers of the United States. With knowledge of this survey, the Legislature of that State, on the 27th of February, 1875, passed an Act entitled "An Act to Ascertain the Location of the Boundary Line between the States of Indiana and Kentucky above and near Evansville, and Making the Same Evidence in any Dispute." This Act recited that difficulty and dispute had arisen between the owners of land in Indiana and Kentucky in regard to the boundary line between the two States, and that such difficulty involved the title to large tracts of land above and near the line between Green River Island and the State of Indiana, and empowered and directed the governor to select a commissioner, who should be a resident of the State and a practical surveyor, to act with a similar commissioner to be appointed by the governor of Kentucky;

and provided that the two commissioners so selected should make a survey of the line dividing the States, beginning at the head of Green River Island near and opposite to the mouth of Green River, and running thence down the Ohio River to the lower end of the island.

The second and third sections of this Act are as follows:

"Sec. 2. In running said line the said commissioners shall consult and be governed by the surveys originally made by the government of the United States when such surveys are not inconsistent with each other, and they shall establish and mark proper monuments along said line, whereby the same may be plainly indicated and perpetuated.

"Sec. 3. Within ten days after making such survey and establishing said line, said commissioners shall reduce the same to writing, giving a full and plain description of all the courses and distances, and of the marks and monuments made and established, and sign and acknowledge the same before some officer authorized to take acknowledgments of deeds, which writing, so acknowledged, shall be recorded in the recorder's office in the Counties of Vanderburgh and Warrick, and the original file in the office of the secretary of state, and such writing, or the record thereof, shall be conclusive evidence in any of the courts of this State of the boundary line between the States of Indiana and Kentucky, between the points on said Green River Island heretofore indicated."

An appropriation was also made for the survey.

An Act of similar purport had been passed by the State of Kentucky on the 23d of April, 1873, authorizing the governor of that State to appoint a surveyor to act with the person elected by the governor of Indiana and make a survey of the line. In pursuance of these [14] Acts the States each appointed a commissioner to survey the line. The commissioners accordingly, in 1877, made a survey, and ran a line on the north side of Green River Island, and also of the small tract known as Buck Island. In doing this, they followed the lines of the United States survey of 1806. By this survey both these islands were left within the State of Kentucky. Complaint being made of the action of the commissioners in running the line on the high bank, the governor of Indiana directed the commissioner of that State to suspend any further action under the Act, and subsequently visited Evansville, a city in Indiana, northwest of the island, and near the survey made, and examined the line of the survey, and in a subsequent letter to the commissioners stated that the line thus run did not in any part conform to the low-water mark of the river, but that the greater part was upon the bank, and the residue at a distance from it, leaving a tract of land between it and the river.

Subsequently the Legislature of Indiana, upon the recommendation of the governor, repealed the law authorizing the survey, and on the 14th of March, 1877, passed an Act authorizing the governor to enter into negotiations with the governor of Kentucky for the acquisition from the latter State of all her rights of jurisdiction and soil over the Green River Island and her claim for any ground on the Indiana side of the river at said island, or to establish the line between the States by surveys, to be made in such manner as they might deem just; provided that the governor of Kentucky should be authorized to enter into the agreement by the Legislature of that State, and the consent of Congress should be obtained thereto. These efforts to adjust the boundary line failing, the governor was authorized to direct the prosecution in this court of a suit for the purpose of determining and settling the boundary.

Now, whilst no agreement between the States would be of any validity under the Constitution without the consent of Congress, and the survey made pursuant to the joint action of the two States would not have been legally binding even had it not been withdrawn before the report of the commissioners was filed in the offices designated in the Acts, still the Law of Indiana authorizing the line to be fixed in accordance with the survey of the United States (and no other was made except the one in 1806, although the Act speaks of surveys), was a plain recognition on her part that the boundary of the State was north of the island, though it was uncertain where the line should be drawn on the land, inasmuch as the channel of the bayou had been filled up. It is an admission entitled to great weight in explaining the cause of the State's general acquiescence, from the time it was admitted into the Union up to the passage of that Act, in the claim and jurisdiction of Kentucky. Independently of the necessity of obtaining the consent of Congress to the execution of any agreement between the two States, it was competent for the State of Indiana to provide for a survey of a line already established, and to make such survey evidence in subsequent controversies upon the subject.

Whilst on the part of Indiana there was a want of affirmative action in the assertion of her present claim, and a general acquiescence in the claim of Kentucky, there was affirmative action on the part of Kentucky in the assertion of her rights, as we have seen by the Law declaring the boundaries of her counties on the Ohio River, passed in January, 1810; and there was action taken in the courts of the United States and of the State by parties claiming under her or her grantor, and there was also action by her officers in the assertion of her authority over the land; all of which tends to support the claim of rightful jurisdiction. It at least shows that her claim was never abandoned by her or her people. On the 10th of February, 1784, Virginia issued a military land warrant to one John Slaughter. In March, 1785, Slaughter had a tract of six hundred acres surveyed, upon which he located a part of that warrant, and the tract was conveyed to him by the Commonwealth of Virginia on the 10th of February, 1790, by patent, in which the land was described by metes and bounds as lying in the district set apart for the officers and soldiers of the Virginia Continental Line.

on the first arge island in the Ohio below the mouth of Green River. That island was Green River Island. In September, 1821, Slaughter's heirs, who were residents of Virginia, brought a suit in ejectment in the Circuit Court of the United States for the District of Kentucky, to recover the land conveyed to their ancestor by this patent, against Garrett and others, who were in possession. The cause was not tried until 1834, when the plaintiffs, who relied entirely upon the validity of the patent to Slaughter, recovered judgment and were awarded restitution of the premises. When the marshal went upon the land to execute the writ for its possession, he was accompanied by one Levi Jones, who claimed to have an equitable title under Slaughter's heirs, and was there to receive possession. Garrett, one of the defendants, concluded to purchase one hundred acres of the land upon which he was living from Jones, and for part of the purchase money executed to Jones his note. Jones assigned this note to James Rouse, who in turn assigned it to Jackson McLean. McLean brought an action at law upon the note in the Circuit Court of Henderson County, in Kentucky, in which he recovered judgment by default, and sued out a writ of execution, whereupon Garrett filed a bill in equity in the same court, making Jones and Rouse co-defendants with McLean, to enjoin the enforcement of the judgment of law upon the following, among other, grounds: first, that the process in the common-law action had been served upon him at his residence on Green River Island, which was not within the territorial limits of the State of Kentucky, but beyond the jurisdiction of the court, and that therefore the service of process, judgment and execution were null and void; second, that neither Jones, nor Slaughter, under whom he claimed, had ever had a valid title to the land which Jones had sold him, because the military land warrant upon which Slaughter's patent had been issued could not be located upon land which lay northwest of the Ohio and north of the mouth of the Green River. As evidence that the tract of land in controversy lay in Indiana and not in Kentucky, he filed a copy of the deed of cession from Virginia to the United States as part of his bill. The question of Kentucky's title and right of jurisdiction over Green River Island was thus put in issue and its decision was necessary to the determination of the case. Several depositions were taken by each party upon the point, but, upon a full hearing of the case, Garrett's bill was dismissed, with costs and charges. Here were two adjudications, one by the United States circuit court and the other by a circuit court of the State, that Green River Island was within the jurisdiction of Kentucky. And the record shows that between 1818 and 1877 numerous grants of parcels of land on the island were made by Kentucky, and that between these dates taxes were assessed by her officers upon the lands as being within her territory and jurisdiction.

We have spoken of the character of the testimony introduced *on the part of Indiana*, and of the fact that it does not touch upon the condition of the channel above the island previous to her admission as a State into the Union. The testimony of the witnesses introduced by the State of Kentucky consisted to a great extent of recollections, which must of necessity have been more or less imperfect. They showed, as already stated, that in former times at some periods of the year there was a large volume of water which passed north of Green River Island, and that sometimes this volume continued throughout the whole year; but they also showed that at a very early period great changes had taken place in the channel north of the island, so that in some portions of the year it was easy to pass on foot from the island to the main land.

The facts as they existed at the time of the cession of Virginia to the United States, in 1784, and even at the time of the admission of Kentucky into the Union, have long since passed beyond the memory of man, and therefore cannot be established by oral testimony. As counsel says, the very grandchildren of men then living are now hoary with age. The facts can only be established as a matter of inference from general facts in regard to the condition of the country, and documentary evidence which in many cases rises little above that of hearsay, such as notices by travelers and maps given by them indicating the position of the tract in question. Of the latter it may be said that they all represent the tract as an island in the river.

Great changes in the bed of the river were [518
to be expected from the immense volume and flow from its vast water-sheds. These water-sheds, according to the official report of the Tenth Census of the United States, cited by counsel, comprise over two hundred thousand square miles, and more than half of the water from them comes from east of Green River Island, and nearly all the great watercourses find their way to the Ohio River. That vast changes should be made in the channel of that river from the volume of water thus received, and its impetuous flow at certain seasons wearing away its banks, deepening some portions of the stream and filling up others, was not surprising; and that where large vessels at one time could easily float should have become dry ground many years afterwards was but the natural effect of the tremendous forces thus brought into operation.

We have not deemed it important to take up the testimony of each of the numerous witnesses produced in the case by the States of Indiana and Kentucky. It would serve no useful purpose to attempt an analysis of the testimony of each, and to show how little and how much weight should be attributed to it. All the testimony is to be taken with many allowances from imperfect recollection, from the confusion by many witnesses of what they saw with what they heard, or of what they knew of their own knowledge with what they learned from the narrative of others. The clear and admitted facts we have mentioned, corroborated as they are by nearly everything of record pre-

sented, leave on our minds a much more satisfactory conclusion than anything derived from the oral testimony before us. The long acquiescence of Indiana in the claim of Kentucky, the rights of property of private parties which have grown up under grants from that State, the general understanding of the people of both States in the neighborhood, forbid at this day, after a lapse of nearly a hundred years since the admission of Kentucky into the Union, any disturbance of that State in her possession of the island and jurisdiction over it.

Our conclusion is, that the waters of the Ohio River, when Kentucky became a State, [519] flowed in a channel north of the tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled.

Judgment in favor of the claim of Kentucky will be entered in conformity with this opinion; and commissioners will be appointed to ascertain and run the boundary line as herein designated, and to report to this court, upon which appointment counsel of the parties will be heard on notice.

And it is so ordered.

---

[211] THE UNITED STATES OF AMERICA,
Plff.,
v.
THE STATE OF NORTH CAROLINA.

(See S. C. Reporter's ed. 211-222.)

Interest, when allowed—not allowed against a State—North Carolina not liable for interest on its bonds, after due—lex loci.

1. Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property.
2. Interest is not to be awarded against a sovereign government unless its consent has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers.
3. By the decisions of North Carolina, that State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid.
4. The bonds of that State issued under its Statutes of Jan. 27, 1849, Dec. 22 and 25, 1852, and Feb. 14, 1855, do not bear interest after maturity; that the bonds are payable in New York does not subject them to the law of the latter State as to interest.
5. Contracts are to be governed, as to their nature, their validity and their interpretation, by the law of the place where they are made, unless the contracting parties appear to have had some other place in view.

[No. 3, Original.]
Argued Apr. 2, 1890. *Decided May 19, 1890.*

SUIT at law, brought by the United States against the State of North Carolina, to recover interest on bonds of the State after their maturity, and before their payment. *Judgment for the defendant.*

Statement by *Mr. Justice* **Gray:**

This was an action of debt, brought in this court, on November 5, 1889, by the United States against the State of North Carolina, upon one hundred and forty-seven bonds under the seal of the State, signed by the governor, and countersigned by the public treasurer, for one thousand dollars each, payable in thirty years from date, with interest at the yearly rate of six per cent, alleged in the declaration to be payable half-yearly until payment of the principal; nineteen of the bonds, dated January 1, 1854, and payable January 1, 1884, and seven bonds dated January 1, 1855, and payable January 1, 1885, issued under the Statutes of North Carolina of January 27, 1849, and December 22 and 25, 1852; and the remaining one hundred and twenty-one bonds, dated April 1, 1855, and payable April 1, 1885, issued under the Statute of North Carolina of February 14, 1855; and all these bonds, differing only in date of execution and in day of payment, being in the following form:

"It is hereby certified that the State of North Carolina justly owes to the North Carolina Railroad Company, or bearer, one thousand dollars, redeemable in good and lawful money of the United States at the Bank of the Republic, in the City of New York, on the first day of January, 1884, with interest thereon at the rate of six per cent per annum, payable half-yearly at the said bank on the first days of January and July of each year, from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed.

"In witness whereof the governor of the said State, in virtue of the power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and her public treasurer hath countersigned the same, this first day of January, 1854."

The material provisions of the Statutes under which the bonds were issued are copied in the margin.*

NOTE.—*As to interest, when recoverable as damages or on money*, see *note* to Sneed v. Wister, 5: 717.

As to rate of interest after maturity, see *note* to Town of Ohio v. Frank, 26: 531.

As to the rule of calculation of interest, see *note* to Story v. Livingston, 10: 200.

*The Act of January 27, 1849, chap. 82, entitled "An Act to Incorporate the North Carolina Railroad Company," contains the following provisions:

"Sec. 36. That whenever it shall appear to the Board of Internal Improvements of this State, by a certificate, under the seal of said company, signed by their treasurer and countersigned by their president, that one third have been subscribed for and taken, and that at least five hundred thousand dollars of said stock has been actually paid into the hands of said treasurer of said company, the said Board of Internal Improvements shall be and they are hereby authorized and required to subscribe, on behalf of the State, for stock in said company to the amount of two millions of dollars to the capital stock of said company; and the subscription shall be paid in the following manner, to wit: the one fourth part as soon as the said company shall commence work, and one fourth thereof every six

3] The declaration alleged that, at the dates when the bonds became payable, payment of 4] the principal was demanded by the United States and refused by the State of North Carolina.

The State of North Carolina pleaded pay- 5] ment of the principal sums of the bonds after they became payable, together with all interest accrued thereon to the days when they became payable.

The United States moved for judgment, as by *nil dicit*, because the plea did not answer so much of their demand as was for interest after the bonds became payable.

The case was submitted to the decision of the court upon a case stated, signed by the Attorney-General of the United States, and by the Attorney-General of North Carolina, as follows:

"The parties to the above-entitled case stipulate that upon the issue joined the facts are that payment of the bonds was demanded and refused at the several times in the years 1884 and 1885 in the declaration alleged; but subsequently, upon or about the 2d day of October, 1889, all coupons upon the bonds were paid, and that, besides, $147,000 was paid upon account of whatever might then remain due upon the bonds; the United States then contending that because of interest at six per cent per annum, which at that time had accrued upon the principal of the bonds since their maturity, such payment left still unpaid upon the debt the sum of $41,280; whilst the State then contended that no interest had accrued upon the principal of the bonds after their maturity, and therefore that such payment was in full of such debt.

"The parties submit to the court that, in case as matter of law the principal of said bonds did so bear interest after maturity, judgment is to be entered for the plaintiff for $41,280; but that if it did not so bear interest, judgment is to be entered for the defendant."

Messrs. **W. H. H. Miller,** *Atty-Gen.*, **S. F. Phillips,** *J. G. Zachry* and *F. D. McKenney*, for plaintiff:

---

months thereafter, until the whole subscription in behalf of the State shall be paid: *Provided*, The treasurer and president of said company shall, before they receive the aforesaid installments, satisfactorily assure the Board of Internal Improvements, by their certificates, under the seal of said company, that an amount of the private subscription has been paid in equal proportion to the stock subscribed by the State.

"Sec. 37. That if in case the present Legislature shall not provide the necessary and ample means to pay the aforesaid installments on the stock subscribed for on behalf of the State, as provided for in the thirty-sixth section of this Act, and in that event, the Board of Internal Improvements aforesaid shall, and they are hereby authorized and empowered to, borrow, on the credit of the State, not exceeding two millions of dollars, as the same may be needed by the requirements of this Act.

"Sec. 38. That if, in case it shall become necessary to borrow the money by this Act authorized, the public treasurer shall issue the necessary certificates, signed by himself and countersigned by the comptroller, in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually at such times and places as the treasurer may appoint, the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued; but no greater amount of such certificates shall be issued at any one time than may be sufficient to meet the installment required to be paid by the State at that time.

"Sec. 39. That the comptroller shall register the said certificates at large in a book to be by him kept for that purpose, at the time he countersigns the same."

"Sec. 41. That, as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof; and, in addition thereto, all the stock held by the State in the North Carolina Railroad Company hereby created shall be, and the same is hereby, pledged for that purpose; and any dividends of profits which may, from time to time, be declared on the stock held by the State as aforesaid, shall be applied to the payment of the interest accruing on said certificates; but until such dividends of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed, to pay all such interest as the same may accrue out of any moneys in the treasury not otherwise appropriated.

"Sec. 42. That the certificates of debt, hereby authorized to be issued, shall be transferable by the holders thereof, their agents or attorneys, properly constituted, in a book to be kept by the public treasurer for that purpose; and in every instance, where a transfer is made, the outstanding certificate shall be surrendered and given up to the public treasurer, and by him canceled, and a new one, for the same amount, issued in its place to the person to whom the same is transferred." Laws of North Carolina of 1848-49, pp. 153, 154, 155.

The Act of December 22, 1852, chap. 10, entitled "An Act to Regulate the Form of Bonds Issued by the State," contains the following provisions:

"Sec. 1. That all certificates hereafter to be issued for any money to be borrowed for the State by virtue of any Act now in force authorizing the same, or of any Act which may be hereafter passed for that purpose, shall be signed by the governor and countersigned by the public treasurer, and sealed with the great seal of the State, and shall be made payable to —— or bearer; and the principal shall be made payable by the State at a day named in the certificate or bond; and coupons of interest in such form as may be prescribed by the public treasurer, and to be attached to the certificate, and the certificates and coupons attached thereto shall be made payable at such bank or place in the City of New York as he, the public treasurer, may think proper, or at the office of the public treasury at Raleigh, if preferred by the purchaser: *Provided, however*, That no such certificate shall be issued for a less sum than one thousand dollars, and no certificate shall be sold for a less sum than par value.

"Sec. 2. That it shall be the duty of the public treasurer to enter in a book, to be kept for that purpose, a memorandum of each bond or certificate issued by virtue of this Act, the numbers, date of issue, when and where payable, to whom issued, or to whom sold, and at what premium, if any, the same was sold by him." Laws of North Carolina of 1852, pp. 45, 46.

By the Act of December 27, 1852, chap. 9, entitled "An Act to Increase the Revenue of the State by the Sale of its Bonds," "it shall be the duty of the public treasurer to have coupons attached to all the bonds of the State hereafter sold by him." Laws of North Carolina of 1852, p. 45.

The Act of February 14, 1855, chap. 32, entitled "An Act for the Completion of the North Carolina Railroad," contains the following:

"Sec. 1. That the public treasurer is authorized and instructed to subscribe, in behalf of the State, for ten thousand additional shares of capital stock in the North Carolina Railroad Company, and that he make payment for said stock, by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions prescribed for the sale of the bonds heretofore issued and sold to pay the State's original subscription in the stock of said company; and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized that were given for those issued under the direction of said Act: *Provided, nevertheless*, That the whole amount of principal money of such bonds or certificates of debt shall not exceed the sum of one million of dollars." Laws of North Carolina of 1854-55, p. 64.

The language of the Act of 1848-49 imports a proposed obligation upon the part of the State to pay interest upon the money to be borrowed up to the time of its repayment.

M'Kinlay v. *Blackledge*, 2 Hayw. 28; *Beckwith* v. *Hartford, P. & F. R. Co.* 29 Conn. 268, 76 Am. Dec. 599.

The State of North Carolina is liable for interest on the bonds.

United States v. *McKee*, 91 U. S. 442, 450 (23: 326, 327); *State* v. *Blount*, 1 Hayw. 4; *Dereveux* v. *Burgwin*, 11 Ired. L. 490; *Lewis* v. *Rountree*, 79 N. C. 122; *Patapsco Guano Co.* v. *Magee*, 86 N. C. 350; *Attorney-General* v. *Cape Fear Nav. Co.* 2 Ired. Eq. 444; *Bledsoe* v. *State*, 64 N. C. 392.

The law which defines the right to the interest here in the present case is that of New York. The contract was to be executed, and in view of law was broken, in the latter State.

Story, Confl. Laws, § 280 *et seq.*; *Andrews* v. *Pond*, 38 U. S. 13 Pet. 65 (10: 61); *Cockle* v. *Flack*, 93 U. S. 344 (23: 949); *Ottowa* v. *First Nat. Bank*, 105 U. S. 342 (26: 1127); *Roberts* v. *McNeely*, 7 Jones, L. (N. C.) 506, 78 Am. Dec. 261; *Selleck* v. *French*, 1 Conn. 32, 6 Am. Dec. 185; *People* v. *New York County*, 5 Cow. 331; *Lush* v. *Druse*, 4 Wend. 313; *Miller* v. *Burroughs*, 4 Johns. Ch. 436; *United States* v. *Bank of Metropolis*, 40 U. S. 15 Pet. 377 (10: 774); *Van Rensselaer* v. *Jewett*, 2 N. Y. 135; *People* v. *Canal Comrs.* 5 Denio, 401.

Messrs. **T. F. Davidson**, *Atty-Gen.* of North Carolina, and **S. G. Ryan**, for defendant:

Unless the contract was express to pay post-maturity interest, the defendant is not liable.

Attorney-General v. *Cape Fear Nav. Co.* 2 Ired. Eq. (N. C.) 444; *Bledsoe* v. *State*, 64 N. C. 392.

In construing the statutes of a State the federal courts will adopt the settled construction of the state courts.

Elmendorf v. *Taylor*, 23 U. S. 10 Wheat. 152 (6: 289); *Shelby* v. *Guy*, 24 U. S. 11 Wheat. 361 (6: 495); *Bell* v. *Morrison*, 26 U. S. 1 Pet. 351-376 (7: 174-185); *M'Cluny* v. *Silliman*, 28 U. S. 3 Pet. 270 (7: 676); *M'Cutchen* v. *Marshall*, 33 U. S. 8 Pet. 220 (8: 923).

Where state courts have varied, last decision adopted.

Leffingwell v. *Warren*, 67 U. S. 2 Black, 599 (17: 261).

And such adoption will follow, even though the United States Supreme Court has decided adversely before.

Carroll County v. *United States*, 85 U. S. 18 Wall. 71 (21: 771); *Christy* v. *Pridgeon*, 71 U. S. 4 Wall. 196 (18: 322); *Post* v. *Kendall County*, 105 U. S. 667 (26: 1204); *Henderson* v. *Griffin*, 30 U. S. 5 Pet. 151 (8: 79); Potter's Dwar. Stat. (1874) 145, rule 1; *Burgess* v. *Seligman*, 107 U. S. 20, 33-35 (27: 359, 365); *Jaffray* v. *McGehee*, 107 U. S. 361 (27: 495); *Roth* v. *Ehman*, 107 U. S. 319 (27: 499).

If the terms of the contract be doubtful, where the State is a party specially, then the contract shall be construed in consonance with the common law.

2 Wait, Act. and Def. 286; *Hooper* v. *Baltimore*, 12 Md. 464; *Keech* v. *Baltimore & W. R. Co.* 17 Md. 32.

Interest is a creature of statute and is not recoverable under the common law.

Pekin v. *Reynolds*, 31 Ill. 529, 83 Am. Dec. 244.

Upon a contract for the payment of money and for interest thereon by installments, but which is silent as to interest after the time specified for the payment of the principal, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract.

Re Bartenbach, 11 Nat. Bankr. Reg. 61; *Lash* v. *Lambert*, 15 Minn. 416, 2 Am. Rep. 142; *Cook* v. *Fowler*, L. R. 7 H. L. 27, 9 Eng. Rep. (Moak's *notes*) 17.

The public can act only through its authorized agents, and it is not bound until all who are to participate in what is to be done have performed their respective duties. Negotiable paper is no more protected against this inquiry than any other.

Anthony v. *Jasper County*, 101 U. S. 693 (25: 1005); *Coler* v. *Cleburne*, 131 U. S. 162 (33: 146); Randolph, Com. Paper, §§ 348, 350.

Mr. Justice **Gray** delivered the opinion of the court:

This is an action brought in this court by the United States against the State of North Carolina upon bonds issued by the State and held by the United States. By the case stated, it appears that the State, some time after the maturity of the bonds, paid the principal, together with interest thereon to the time when the bonds became payable; and the only question presented for our decision is whether, as matter of law, the principal of the bonds bore interest after maturity, and according to our opinion upon this question judgment is to be entered for the one party or the other.

Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U. S. 565 [25: 235]; *United States* v. *Bayard*, 127 U. S. 251, 260 [32: 159, 163], and authorities there collected; *Re Gosman*, L. R. 17 Ch. Div. 771.

In *Gosman's Case*, just cited, where the personal property of a deceased person had been taken possession of by the Crown for want of known next of kin and was afterwards recovered by petition of right by persons proved to be the next of kin, who claimed interest for the time the Crown held the property, *Sir* George Jessel, Master of the Rolls, speaking for the Court of Appeal, summed up the law of England in this short judgment: "There is no ground for charging the Crown with interest. Interest is only payable by statute or by contract."

In *United States* v. *Sherman*, the Circuit Court of the United States for the District of South Carolina had certified that there was probable cause for an act done by an officer of the United States, for which judgment had been recovered against him in that court; and consequently, by express Acts of Congress, "the amount so recovered" was to "be provided for and paid out of the proper appropriation from the treasury." Acts of March 3, 1863, chap. 76, § 12 (12 Stat. 741); July 28, 1866, chap. 298, § 8 (14 Stat. 329). This court held that the judgment creditor was entitled to receive from the United States the amount of the judgment only, without interest; and *Mr. Justice* Strong, in delivering the opinion, said: "When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government; but not until then. Before that time, the government is under no obligation, and the Secretary of the Treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The Act of Congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by federal legislation, declared to bear interest. Such legislation, however, has no application to the government; and the interest is no part of the amount recovered. It accrues only after the recovery has been had. Moreover, whenever interest is allowed, either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes." 98 U. S. 567, 568 [25: 236].

In *United States* v. *Bayard*, this court held that on money received by the Secretary of State from a foreign government under an international award, invested by him in interest-bearing securities of the United States, and ultimately paid to the petitioner, interest was not payable, because the money was in effect withheld by the United States; and *Mr. Justice* Blatchford, delivering judgment, said: "The case therefore falls within the well-settled principle that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect. It has been established as a general rule, in the practice of the government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private Acts of relief, passed by Congress on special application. The only recognized exceptions are where the government stipulates to pay interest, and where interest is given expressly by an Act of Congress, either by the name of interest or by that of damages." 127 U. S. 260 [32: 163].

In *United States* v. *McKee*, where a claim against the United States for moneys and supplies furnished during the Revolutionary War had been referred by Congress to the court of claims with directions to be governed in its adjustment and settlement "by the rules and regulations heretofore adopted by the United States in the settlement of like cases," interest was allowed by that court, and by this court on appeal, because Congress was shown to have allowed interest in many private Acts for the settlement of similar claims. 10 Ct. Cl. 231, 235; 91 U. S. 442, 451 [23: 326, 327].

In *United States* v. *Bank of Metropolis*, 40 U. S. 15 Pet. 377 [10: 774], cited at the bar, no question of interest was suggested by counsel, or considered by the court.

In North Carolina, as elsewhere, in an action against a private person, to recover a sum certain and overdue, interest may doubtless be recovered, either according to the dictum in *Devereux* v. *Burgwin*, 11 Ired. L. 490, 495, on the ground of a "promise to pay being implied from the nature of the transaction;" or, as more accurately stated in other cases, as damages for nonperformance of the defendant's contract. *State* v. *Blount*, 1 Hayw. 4; *Hunt* v. *Jucks*, 1 Hayw. 173; *M'Kinlay* v. *Blackledge*, 2 Hayw. 28. See *Young* v. *Godbe*, 82 U. S. 15 Wall. 562, 565 [21: 250, 251]; *Holden* v. *Freedman's S. & T. Co.* 100 U. S. 72, 74 [25: 567, 568]; *Price* v. *Great Western R. Co.* 16 Mees. & W. 244, 248; *Cook* v. *Fowler*, L. R. 7 H. L. 27, 32, 36, 37; *Union Inst. for Sav.* v. *Boston*, 129 Mass. 82.

But it is equally well settled, by judgments of the Supreme Court of North Carolina, that the State, unless by or pursuant to an explicit statute, is not liable for interest, even on a sum certain which is overdue and unpaid. [219

In *Attorney-General* v. *Cape Fear Nav Co.*, 2 Ired. Eq. 444, 454, decided in 1843, in a suit on behalf of the State to recover dividends due to it as a stockholder, the corporation, by way of set-off, claimed interest for the State's failure to pay its subscription at the time when it was payable; and *Chief Justice* Ruffin, in delivering judgment, laid down, as undoubted law, that "the general rule is that the State never pays interest unless she expressly engages to do so."

In *Bledsoe* v. *State*, 64 N. C. 392, 397, decided in 1869, under a clause in the Constitution of the State providing that "the supreme court shall have original jurisdiction to hear claims against the State; but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next General Assembly for its action,"—a claim was made for fuel and provisions furnished to the State Insane Asylum, under written contract of the superintendent, from October, 1863, to April, 1865, with interest from the times of delivery. Upon the question of interest, the court said: "It was decided by this court in *Attorney-General* v. *Cape Fear Nav Co.*, 2 Ired. Eq. 444, that the State is not bound to pay interest, unless there is a special contract to that effect. The contract, in this case, must be understood to have been made with reference to the law as it then stood. But because of the changes in and the disturbed condition of the

government, and because payment has been delayed for a long time, we recommend a departure from the rule, so far as to allow interest from the end of the war, say May 1, 1865, until January 1, 1869, when the plaintiff presented his claim to the General Assembly."

Whether interest not stipulated for in a contract is to be awarded as damages for nonperformance of the contract, or on the ground of an implied promise to pay it, a private person is no less chargeable with interest on debts certain and overdue for money or goods, than on promissory notes or bonds obligatory; and the State is no more chargeable with interest in the one case than in the other.

[220]

The scope and effect of the bonds now sued on cannot be determined without a careful consideration of the provisions of the statutes from which the officers who executed the bonds derived their authority.

Under the original Act of January 27, 1849, the obligations of the State for money borrowed were required to be signed by the treasurer and countersigned by the comptroller, "in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent per annum, payable semi-annually at such times and places as the treasurer may appoint, the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued."

There is nothing in that Statute to show that certificates issued under it are to be negotiable from hand to hand, or assignable by the mere act of the holder, so as to create a contract between the State and any assignee. On the contrary, the Statute requires that they shall be registered at large by the comptroller at the time of his countersigning them, and the only transfer provided for is on the books of the treasurer, and by surrender of the old certificate and issue of a new one instead thereof to the assignee.

In that Act, as no other date is mentioned for the payment of the principal than the date at which it "shall be redeemable," it would be difficult (as is admitted by the learned counsel for the United States, citing *Vermilye* v. *Adams Express Co.*, 88 U. S. 21 Wall. 138, 145 [22: 609, 611]), to attribute to the word "redeemable" any other meaning than "payable;" and the provision that the interest shall be "payable semi-annually, at such times and places as the treasurer may appoint," naturally relates to interest before the date fixed for payment of the principal, and could hardly be extended to imply an authority to the treasurer and the comptroller to bind the State to pay interest after that date.

But any doubt upon this point is removed by the Act of December 22, 1852, pursuant to the provisions of which the bonds in suit were issued.

[221]

This Act makes new requirements, differing in many respects from, and in so far superseding, the requirements of the former Act. It requires all certificates, thereafter *issued for money* borrowed by the State, to be under seal of the State, signed by the governor and countersigned by the treasurer. It clearly shows that they are to be negotiable, as well by requiring them to "be made payable to —— or bearer," as by requiring a registry of a memorandum of their original issue only. It omits the provision that the principal "shall be redeemable" at the end of thirty years, and instead thereof prescribes that "the principal shall be made payable by the State at a day named in the certificate or bond." It requires "coupons of interest to be attached to the certificates;" and both the certificates and the coupons are required to be made payable, either at such bank or place in the City of New York as the treasurer may designate, or at the public treasury in Raleigh, if preferred by the purchaser.

From the general principle that an obligation of the State to pay interest, whether as interest or as damages, on any debt overdue, cannot arise except by the consent and contract of the State, manifested by statute, or in a form authorized by statute, it appears to us to follow as a necessary consequence that no authority to the officers of the State to bind it by such an obligation can be implied from the Act of 1852, requiring the certificates or bonds issued under it to be made payable at a day named in them, and to have coupons of interest attached to them, and making no mention whatever of interest after the date at which the principal is payable.

In the light of the provisions of this Statute, the agreement in the bonds sued on, that the principal sum shall be "redeemable in good and lawful money" at the place and day therein designated, must be deemed equivalent to an agreement that they shall be payable on that day; and if the further provision by which interest is payable half-yearly "from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed," could, upon the face of the bonds, and without regard to the laws under which they were issued, be construed to include interest after the date at which the principal is payable, and for which interest there were no coupons to be surrendered, it cannot be allowed such an effect, because the State of North Carolina has never authorized its officers to incur any such obligation in its behalf.

[2

This disposes of all the suggestions made in behalf of the United States, except the argument that, the bonds being payable in New York, the payment of interest is to be governed by the law of New York, according to which it is said that the State would be liable to pay interest, like a private person. *People* v. *Canal Comrs.* 5 Denio, 401.

But these bonds are obligations of the State of North Carolina; they were executed, delivered and registered in North Carolina by high officers of the State; the rate of annual interest is fixed at six per cent, the legal rate in North Carolina, and not seven per cent, the then legal rate in New York; and the fact that the bonds were made payable at a particular bank in New York, pursuant to the authority conferred by the Statute of North Carolina upon its public treasurer,

instead of being made payable, as by that Statute they might have been, at Raleigh, the capital of the State, cannot affect the extent of the obligation of the State of North Carolina. The manifest object of the alternative, allowed by the Statute, of making the bonds payable either at New York or at Raleigh, was to promote the convenience of bondholders, and not to submit the obligation, the construction or the effect of the bonds to the operation of different laws, according to the place at which they should actually be made payable. The case therefore falls within the general rule, well established in this court, that contracts are to be governed, as to their nature, their validity and their intrepretation, by the law of the place where they are made, unless the contracting parties appear to have had some other place in view. *Liverpool & G. W. Steam Co.* v. *Phœnix Ins. Co.* 129 U. S. 397, 453 [32: 788, 796].

Judgment for the defendant.

Mr. Justice **Miller**, *Mr. Justice* **Field** and *Mr. Justice* **Harlan** dissented.

---

[223] THE UNION NATIONAL BANK OF CHICAGO ET AL., *Appts.*,

v.

THE BANK OF KANSAS CITY ET AL.

(See S. C. Reporter's ed. 223-237.)

Deed of trust, when valid in Missouri—general assignment—appointment of receiver—power of one partner—receiver's power—jurisdiction on division of opinion.

1. A deed of trust, executed in Missouri, by one with the consent of another of three partners, of all the property of the partnership, to secure certain of its debts, containing the provision that if the partnership pay such debts the deed shall be void, and authorizing the trustee, on default of payment, to sell the property and from the proceeds pay the debts and return the surplus to the grantors, is not void for want of the assent of one of the partners, which was never given to the transfer.
2. The fact that the non-assenting partner did give his previous assent and directions to the making of an assignment for the benefit of creditors does not cause the deed of trust to operate as a general assignment for the benefit of all the creditors of the partnership under sec. 354, Rev. Stat. of Missouri of 1879.
3. The making of the deed of trust and the appointment of a receiver, who is the same person as the trustee, on the same day, and as part of the proceeding to administer the assets of the insolvent partnership, to which the creditors secured by the trust deed and the trustee and the partners agreed, do not constitute a general assignment for the benefit of all the creditors nor require the receiver to administer the funds in his hands in that manner.
4. The deed of trust, by the decisions of Missouri, is only a mortgage and not an assignment under said Statute, and is an instrument by which one partner can bind the partnership, although his copartners did not join in it.
5. The appointment of a receiver does not change the title or right of possession of the property, but puts it into his custody for the benefit of the party ultimately entitled.
6. Where the amount in dispute is insufficient to give this court jurisdiction of the whole case, the jurisdiction of this court is confined to answering the questions of law presented by the certificate of division of opinion between the judges before whom the case was heard in the circuit court.

[No. 18.]

Argued Oct. 16, 17, 1889. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Missouri dismissing a suit in equity to declare a deed of trust to be a general assignment for the benefit of all the creditors of a partnership and for a distribution accordingly. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was a petition, in the nature of a bill in equity, filed in a court of the State of Missouri by citizens and corporations of other States, judgment creditors (each of them in the sum of less than $2,500), in behalf of all the creditors of James B. Melone, [22 of Macon, in the State of Missouri, Richard A. Melone and Charles H. Benedict, of Kansas City, in that State, and all three citizens of Missouri, and doing business at Kansas City as partners, under the name of Benedict, Melone & Co., against those three partners, three banking corporations of Missouri, and Charles Stewart, likewise a citizen of Missouri.

The bill alleged that on February 16, 1882, Richard A. Melone, in behalf of the partnership, executed a deed of trust, a copy of which was annexed to the bill, purporting to be by and between the partnership of the first part, Stewart of the second part and the three Banks of the third part, and to convey to Stewart the personal property and choses in action of the partnership; provided that if the partnership should pay certain specified debts which it owed to each of the Banks, "then these presents and everything herein shall cease and be void; but if they, the said Benedict, Melone & Co., shall fail or make default in the payment of such indebtedness to said three above-mentioned Banks, or any part thereof, when the same shall have become past due and payable for five days, then it shall be lawful for said party of the second part to sell said property in any manner he shall think fit, and out of the proceeds arising from said sale pay off said indebtedness or so much thereof as shall be unpaid, together with the costs and expenses of said sale, and the overplus, if any there be, shall be paid to said parties of the first part. Said party of the second part

---

NOTE.—*As to liability of partners on bills and notes; power of partner, as agent, to bind the firm as party to negotiable instruments, and otherwise,*—see *note* to Le Roy v. Johnson, 7: 391.

How far partners are liable for each other's acts. See *note* to Nelson v. Hill, 12:81.

When partner liable on contracts in firm name after dissolution; what notice of dissolution is necessary to avoid liability. See *note* to Lovejoy v. Spafford, 23:851.

As to effect of admissions of partner, after dissolution, on his copartners, see *note* to Thompson v. Bowman, 18:736.

As to rights and powers of surviving partners, see *note* to Moore v. Huntington, 21:642.

shall take immediate possession of said property."

The bill further alleged that this deed included all the partnership property; that the partnership and each partner were then, as all the defendants well knew, hopelessly insolvent; that on the same day and simultaneously with the execution of that deed, Benedict, upon a suit commenced by him in a court of Missouri to wind up the partnership, procured the appointment of Stewart as receiver of its property, and he immediately qualified and entered upon his duties as such; that James B. Melone had previously authorized his copartners to make a general [225] assignment for the benefit of all the partnership creditors without any preferences, and never authorized or approved the deed of trust; that the action of the two other partners in executing that deed to Stewart and having him appointed receiver was a fraudulent attempt on their part to evade the Statute of Missouri concerning voluntary assignments; that by reason of the premises, and of that Statute, the deed of trust operated as a voluntary assignment of all the property of the partnership for the benefit of all its creditors; that all the partnership property was delivered to Stewart and taken possession of by him under the deed of trust; that out of the property Stewart had realized the sum of $58,000, enough to pay all the creditors of the partnership about sixty per cent of their debts if the preferences in the deed of trust should be set aside; but that Stewart, instead of performing the duties required of him by the aforesaid Statute of Missouri, had treated the deed of trust as a valid mortgage, and had paid the debts of the Banks in full, amounting to about $19,000, and was proceeding to distribute as receiver the rest of the trust fund in his hands.

The bill prayed that the deed of trust might be declared to be a general assignment for the benefit of all the creditors of the partnership in proportion to their respective claims; that Stewart be ordered to make distribution accordingly; and that the Banks be ordered to pay the sums received by them into the registry of the court.

Stewart and the three Banks demurred to the petition; and before further proceedings in the cause, it was removed, on application of the plaintiffs, into the circuit court of the United States; and that court, upon a hearing on bill, answers, replication and proofs, before *Mr. Justice* Miller and *Judge* Krekel, ordered the bill to be dismissed, and they certified a division of opinion on the following questions:

"1. Is the instrument of writing in this case, called a deed of trust, which we find, as a matter of fact, conveys all the partnership property of Benedict, Melone & Co. to Charles Stewart as trustee, as security for the Banks therein named, void for want of the assent of James B. Melone, one of the partners, which was never given to that transfer?

[226] "2. As James B. Melone did give his previous assent and directions to the making of an assignment for the benefit of creditors, does the deed of trust above mentioned operate as a general assignment for the benefit of all the creditors of the partnership under section 354 of the Revised Statutes of Missouri of 1879?

"3. Does the making of that deed of trust and appointment of a receiver, who is the same person as the trustee, on the same day, and as part of the proceeding to administer the assets of the insolvent partnership, to which the Banks and Stewart and the partners in the firm of Benedict, Melone & Co. agreed, constitute a general assignment for the benefit of all the creditors, and require the receiver to administer the funds in his hands in that manner?"

A final decree was entered for the defendants, in accordance with the opinion of the presiding justice; and the plaintiffs appealed to this court.

Messrs. C. L. Dobson and **A. C. Douglass**, for appellants:

A partner is not authorized, by virtue of the partnership relation, to appoint a trustee and interpose him between the partnership, its property and creditors, thereby, *ipso facto*, dissolving the partnership, and placing its property in the hands of third persons for sale and disposition.

Hitchcock v. *St. John*, Hoff. Ch. 511, 6 N. Y. Ch. L. ed. 1226; *Wetter* v. *Schlieper*, 15 How. Pr. 274; *Dana* v. *Lull*, 17 Vt. 390; *Rogers* v. *Batchelor*, 37 U. S. 12 Pet. 230 (9:1066); *Wells* v. *March*, 30 N. Y. 350; *Palmer* v. *Myers*, 43 Barb. 511; *Deming* v. *Colt*, 3 Sandf. 284; *Hayes* v. *Heyer*, 3 Sandf. 293; *Coope* v. *Bowles*, 18 Abb. Pr. 442; *Bowen* v. *Clark*, 1 Biss. 128; *Pearpoint* v. *Graham*, 4 Wash. C. C. 234; *Holland* v. *Drake*, 29 Ohio St. 445; *Bull* v. *Harris*, 18 B. Mon. 195; *Kirby* v. *Ingersoll*, Harr. Ch. (Mich.) 172; *Wilcox* v. *Jackson*, 7 Colo. 521; *Maughlin* v. *Tyler*, 47 Md. 545; *Steinhart* v. *Fyhrie*, 5 Mont. 463; *Stein* v. *LaDow*, 13 Minn. 412; *Dunklin* v. *Kimball*, 50 Ala. 251; *Pettee* v. *Orser*, 6 Bosw. 123; *Loeb* v. *Pearpoint*, 43 Am. Rep. 123, 58 Iowa, 469; *Havens* v. *Hussey*, 5 Paige, 31, 3 N. Y. Ch. L. ed. 614; *Ormsbee* v. *Davis*, 5 R. I. 442; *Woolridge* v. *Irving*, 23 Fed. Rep. 676; *Baltimore Nat. Bank* v. *Sackett*, 2 Daly, 400; *Loeschigk* v. *Hatfield*, 5 Robt. (N. Y.) 31; *Kemp* v. *Carnley*, 3 Duer, 1; *Haggerty* v. *Granger*, 15 How. Pr. 247; *Everson* v. *Gehrman*, 10 How. Pr. 301; Parsons, Partn. 164-166; Story, Partn. § 101; 3 Kent, Com. § 44, and *note;* 1 Bates, Partn. § 338, *note;* *Hughes* v. *Ellison*, 5 Mo. 463; *Drake* v. *Rogers*, 6 Mo. 318; *Clark* v. *Rives*, 33 Mo. 579; *Hook* v. *Stone*, 34 Mo. 330; *Keck* v. *Fisher*, 58 Mo. 532.

When a debtor has made a general disposition of all his property and effects, and suspended his whole business in consequence thereof, thereby declaring insolvency, his act in so doing constitutes a voluntary assignment under the Missouri Statute.

The courts look beyond the mere form of instruments, and, with the aid of parol proof, construe them according to their real meaning and effect.

Martin v. *Hausman*, 14 Fed. Rep. 160; *Kellogg* v. *Richardson*, 19 Fed. Rep. 72; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Perry* v. *Corby*, 21 Fed. Rep. 737; *Kerbs* v. *Ewing*, 22 Fed. Rep. 693; *Clapp* v. *Nordmeyer*, 25 Fed. Rep. 71; *Freund* v. *Yaegerman*, 26 Fed. Rep. 812; *State*

v. *Morse*, 27 Fed. Rep. 262; *Weil* v. *Polack*, 30 Fed. Rep. 813; *Crow* v. *Beardsley*, 68 Mo. 435; *State* v. *Benoist*, 37 Mo. 501; *Sexton* v. *Anderson*, 95 Mo. 332; *Berry* v. *Cutts*, 42 Me. 445; *Downing* v. *Kintzing*, 2 Serg. & R. 326; *Van Vleet* v. *Slauson*, 45 Barb. 317; *Holt* v. *Bancroft*, 30 Ala. 200; *Livermore* v. *McNair*, 34 N. J. Eq. 478; *Watson* v. *Bagaley*, 12 Pa. 164; *Miners Bank's Appeal*, 57 Pa. 193; *Burrows* v. *Lehndorff*, 8 Iowa, 96; *Van Patten* v. *Burr*, 52 Iowa, 518; *Heineman* v. *Hart*, 55 Mich. 64; *Harkrader* v. *Leiby*, 4 Ohio St. 602; *Dickson* v. *Rawson*, 5 Ohio St. 224; *Englebert* v. *Blanjot*, 2 Whart. 240; *Mussey* v. *Noyes*, 26 Vt. 471; *Thompson* v. *Heffner*, 11 Bush, 359; *Perry* v. *Holden*, 22 Pick. 269.

Messrs. **Henry N. Ess**, *William Warner*, **O. H. Dean** and *James Hagerman*, for appellees:

A partner has the right to pledge, mortgage and sell the entire property of a commercial firm without the consent of his copartner.

Tapley v. *Butterfield*, 1 Met. 515; *Anderson* v. *Tompkins*, 1 Brock. 456, 459; *Deckard* v. *Case*, 5 Watts, 22; *Patch* v. *Wheatland*, 8 Allen, 102; *Lamb* v. *Durant*, 12 Mass. 54; *Milton* v. *Mosher*, 7 Met. 244; *Woodruff* v. *King*, 47 Wis. 262; *Holt* v. *Simmons*, 16 Mo. App. 97; *Graser* v. *Stellwagen*, 25 N. Y. 315; *Nelson* v. *Wheelock*, 46 Ill. 25; *Whitton* v. *Smith*, 1 Freeman, Ch. (Miss.) 237, 238; *Harrison* v. *Sterry*, 9 U. S. 5 Cranch, 289 (3: 104); Herman, Chattel Mortg. § 118; Lindley, Partn. (Ewell's ed.) 285; Collyer, Partn. (Perkins' ed.) § 395; Story, Partn. § 94.

The chattel mortgage should be held valid because the non-executing partner, after knowledge of its execution received immediately thereafter, not only failed to repudiate it, but acquiesced in its execution and delivery for a period of twelve months and more.

Parsons, Partn. (3d ed.) 124; *Emerson* v. *Senter*, 118 U. S. 3 (30: 49); *Williams* v. *Whedon*, 109 N. Y. 333.

If the acts of the two managing partners are not valid, such mortgage, being for valid firm debts, is good in equity to the extent of the shares or interests of the parties executing it, in the firm property.

Bowker v. *Burdekin*, 11 Mees. & W. 128; *Ross* v. *Howell*, 84 Pa. 129; *Grier* v. *Hood*, 25 Pa. 430; *Inbusch* v. *Farwell*, 66 U. S. 1 Black, 566-573 (17: 188-191).

The deed of trust does not operate as an assignment for the benefit of creditors.

Kuykendall v. *McDonald*, 15 Mo. 416; *State* v. *Benoist*, 37 Mo. 500; Bump, Fraud. Conv. 350, 351; *Potter* v. *McDowell*, 31 Mo. 74; *Cason* v. *Murray*, 15 Mo. 378; *Tompkins* v. *Wheeler*, 41 U. S. 16 Pet. 118 (10: 908); *Clarke* v. *White*, 37 U. S. 12 Pet. 200 (9: 1055); *Marbury* v. *Brooks*, 20 U. S. 7 Wheat. 577 (5: 527); *Brooks* v. *Marbury*, 24 U. S. 11 Wheat. 99 (6: 428); *Crow* v. *Beardsley*, 68 Mo. 438; *Carson* v. *Blakey*, 6 Mo. 273; *Perry* v. *Corby*, 21 Fed. Rep. 737; *Smith & K. I. Co.* v. *Thurman*, 29 Mo. App. 186; *Hargadine* v. *Henderson*, 97 Mo. 375-386.

The making of the deed of trust and the proceedings to wind up the partnership, and the appointment of a receiver under such proceedings, do not constitute a general assignment for the benefit of the creditors.

Sampson v. *Shaw*, 19 Mo. App. 274; *Meredith Mfg. Co.* v. *Smith*, 8 N. H. 348; *Low* v. *Wyman*, 8 N. H. 536; *Barker* v. *Hall*, 18 N. H. 298; *Brown* v. *Foster*, 2 Met. 152; *Henshaw* v. *Sumner*, 23 Pick. 446; *Fairbanks* v. *Haynes*, 23 Pick. 323; *Bates* v. *Coe*, 10 Conn. 280; *Worman* v. *Wolfersberger*, 19 Pa. 59; *Lampson* v. *Arnold*, 19 Iowa, 481; *Shapleigh* v. *Baird*, 26 Mo. 326; *Bailey* v. *Kansas Mfg. Co.* 32 Kan. 79.

Mr. Justice **Gray** delivered the opinion of the court: [229

The claim of each plaintiff being for less than $5,000, and the amount in dispute therefore insufficient to give this court jurisdiction of the whole case, our jurisdiction is confined to answering the questions of law presented by the certificate of division of opinion between the judges before whom the case was heard in the circuit court. Rev. Stat. §§ 650, 652, 693; Act of February 16, 1875, chap. 77, § 3 (18 Stat. 316); *Dow* v. *Johnson*, 100 U. S. 158 [25: 632]; *United States* v. *Ambrose*, 108 U. S. 336 [27: 746]; *Jewell* v. *Knight*, 123 U. S. 426 [31: 190].

The determination of these questions is governed by the law of Missouri, where the deed of trust was made, and the parties to it resided. In ascertaining the construction and effect of section 354 of the Revised Statutes of the State of 1879, which is supposed to affect the case, it is important to bear in mind the law of Missouri as it existed before those Statutes were enacted.

The Supreme Court of Missouri in 1852, speaking by *Mr. Justice* Gamble, said: "It is not necessary to quote books for the purpose of showing that a debtor in failing circumstances may give a preference to one or more of his creditors to the exclusion of others; and that such disposition of his effects is not impeachable on the ground of fraud, because it embraces all his property," —and accordingly upheld assignments by insolvent debtors of all their property to pay particular creditors. *Cason* v. *Murray*, 15 Mo. 378, 381; *Richards* v. *Levin*, 16 Mo. 596, 599.

It was also well settled by the decisions of that court, that each partner, by virtue of the relation of partnership, and of the community of right and interest of the partners, had full power and authority to sell, pledge or otherwise dispose of all personal property belonging to the partnership, for any purpose within the scope of the partnership business, and might therefore, without the concurrence of his copartners, mortgage the partnership property by deed of trust, to secure the payment of a partnership debt (*Clark* v. *Rives*, 33 Mo. 579; *Keck* v. *Fisher*, 58 Mo. 532); although one partner, without the concurrence of his copartners, could not delegate to a stranger the right of the partnership to administer the partnership effects, and therefore could not make a general assignment of all the property of the partnership for distribution by the assignee among the partnership creditors, retaining no equity of redemption in the partnership. *Hughes* v. *Ellison*, 5 Mo. 463; *Hook* v. *Stone*, 34 Mo. 329. [230

The Statutes of Missouri restricting voluntary assignments have always been construed

rather strictly by the Supreme Court of the State.

By the earliest Statute upon the subject, "in all cases in which any person shall make a voluntary assignment of his lands, tenements, goods, chattels, effects and credits, or any part thereof, to any person, in trust for his creditors or any of them, it shall be the duty of the assignee" to file an inventory of the assigned property in the office of the clerk of the circuit court of the county in which the assignee resides. Missouri Rev. Stat. of 1845, chap. 10, § 1, reënacting Act of February 15, 1841, § 1, Missouri Laws of 1840-41, p. 13.

In the Revised Statutes of 1855, chap. 8, § 1, that section was reënacted, and at the end of the chapter this section was added: "§ 39. Every provision in any assignment, hereafter made in this State, providing for the payment of one debt or liability in preference to another, shall be void; and all debts and liabilities, within the provisions of the assignment, shall be paid *pro rata* from the assets thereof."

The Supreme Court of Missouri repeatedly and uniformly held that, taking those two
231] sections together, § 39 only prohibited preferences among the creditors designated in an assignment, either of the whole or of part of the debtor's property, but did not invalidate partial assignments for the benefit of some of the creditors of the assignor, and was so far inefficient to prevent preferences among creditors; and the court observed: "If the Legislature wish to strike at the root of the evil, they must go back to an old principle of the common law, which permits a debtor to prefer one creditor to another, and which privilege can be effected in a variety of modes other than those referred to in our Statutes concerning assignments." *Shapleigh* v. *Baird*, 26 Mo. 322, 326; *Johnson* v. *McAllister*, 30 Mo. 327; *Many* v. *Logan*, 31 Mo. 91; *State* v. *Benoist*, 37 Mo. 500, 516.

An Act of February 13, 1864, repealed § 39 of the Act of 1855, and enacted that "every assignment hereafter made in this State," under the provisions of the Act of 1855, "shall be for the benefit of all creditors who shall present and prove up their claims under the provisions of said Act, and all debts and liabilities so proved and allowed shall be paid *pro rata* from the assets thereof." Act of February 13, 1864, §§ 8, 9, Missouri Laws of 1863-64, p. 6.

In 1865 this provision was reënacted in this form: "Every voluntary assignment of lands, tenements, goods, chattels, effects and credits made by a debtor to any person in trust for his creditors shall be for the benefit of all the creditors of the assignor, in proportion to their respective claims." Gen. Stat. of 1865, chap. 112, § 1; 1 Wagner's Stat. (3d ed.) 150.

In 1878 the construction and effect of this provision were drawn in judgment before the Supreme Court of Missouri in *Crow* v. *Beardsley*, 68 Mo. 435, where a debtor had conveyed his stock of merchandise by a deed of trust, in no respect differing from the one now before us, to secure the payment of certain of his creditors. It was contended that the provision of the Statute, just quoted, avoided all conveyances of property which gave a preference among creditors. But it was held that while that provision had a wider scope than § 39 of the Act of 1855, and was designed to prevent any preference of creditors "by assignment," yet it did not
[2 avoid deeds of trust, in the nature of mortgages, which were only securities for the payment of debts. The court clearly pointed out the distinction between assignments and deeds of trust in the nature of mortgages, saying: "An assignment is more than a security for the payment of debts; it is an absolute appropriation of property to their payment." "The distinction is that an assignment is a conveyance to a trustee for the purpose of raising funds to pay a debt, while a deed of trust in the nature of a mortgage is a conveyance in trust for the purpose of securing a debt, subject to a condition of defeasance. The deed in question here is therefore a deed of trust in the nature of a mortgage." 68 Mo. 437, 438. Upon these reasons it was adjudged that the deed was not within the Statute concerning assignments, and could not be avoided by a creditor not named in it, except for fraud.

The section there construed was afterwards reënacted, in the same words, in § 354 of the Revised Statutes of 1879, which were the Statutes in force when the deed of trust in this case was made.

The only embarrassment in the present case has been occasioned by the course of decision in the Circuit Court of the United States within the State of Missouri, originating in a case decided in 1882 by an opinion of *Judge* Krekel with the concurrence of *Judge* McCrary. *Martin* v. *Hausman*, 14 Fed. Rep. 160.

In that case, the debtors assigned and transferred their whole stock in trade by a deed which declared that it was made to secure certain debts therein mentioned, but directed the assignee to proceed at once to sell the property, and out of the proceeds to pay the debts as they matured, and provided that after they had been fully paid "this deed shall be released," and reserved no right of redemption to the assignors. Upon a review of the decisions of the Supreme Court of Missouri, and especially *Shapleigh* v. *Baird*, *State* v. *Benoist* and *Crow* v. *Beardsley*, above cited, it was held that, as the deed did not purport to be a security for a debt, leaving an equity of redemption in the grantors, and empowering the trustee to sell only if the debts specified should not be paid at maturity, but conveyed the property ab-
[2 solutely to the trustee, to be sold for the payment of the debts named and preferred in it, it was not a mortgage security, but an assignment for the benefit of creditors; and *Judge* Krekel laid down this general rule: "A debtor in Missouri, under its legislation and adjudications thereon, may, though he be insolvent at the time, prefer one or more of his creditors by securing them; but he cannot do it by an instrument conveying the whole of his property to pay one or more creditors. Instruments of the latter class will be construed as falling within the

Assignment Laws, and as for the benefit of all creditors, whether named in the assignment or not." 14 Fed. Rep. 166.

The rule thus laid down has since been followed by the same and other judges in the federal courts within the State of Missouri, and has been extended (in disregard of the adjudication of the Supreme Court of the State in *Crow* v. *Beardsley*), so as to hold a deed of trust, in the nature of a mortgage, of all the personal property of the debtor, to be a voluntary assignment, within the meaning and effect of the Missouri Statute. *Dahlman* v. *Jacobs*, 16 Fed. Rep. 614; *Kellog* v. *Richardson*, 19 Fed. Rep. 70; *Clapp* v. *Dittman*, 21 Fed. Rep. 15; *Perry* v. *Corby*, 21 Fed. Rep. 737; *Kerbs* v. *Ewing*, 22 Fed. Rep. 693; *Freund* v. *Yaegerman*, 26 Fed. Rep. 812, and 27 Fed. Rep. 248; *State* v. *Morse*, 27 Fed. Rep. 261.

That rule, as thus construed and applied, has not, however, always been approved in the circuit court. In *Clapp* v. *Dittman*, above cited, *Mr. Justice* Brewer, then circuit judge, confessed that, if it were a new question, his own conclusion would be different, and in harmony with the decisions in *Metropolis Nat. Bank* v. *Sprague*, 20 N. J. Eq. 13, 28; *Farwell* v. *Howard*, 26 Iowa, 381; *Doremus* v. *O'Harra*, 1 Ohio St. 45; *Atkinson* v. *Tomlinson*, 1 Ohio St. 237, and other cases; and declared that he should follow the rule, as having been established by the course of the decisions in the courts of the United States with in the State of Missouri, until there should be some authoritative construction of the Statute by the Supreme Court of the United States, or by the Supreme Court of the State. 21 Fed. Rep. 17. See also *Perry* v. *Corby*, 21 Fed. Rep. 737; *Freund* v. *Yaegerman*, 27 Fed. Rep. 248; *Elgin Nat. Watch Co.* v. *Meyer*, 30 Fed. Rep. 659; *Weil* v. *Polack*, 30 Fed. Rep. 813.

The decision in *Crow* v. *Beardsley* has always been treated in all the courts of the State as settling the law of Missouri upon the subject. It has been followed by the St. Louis Court of Appeals in *Holt* v. *Simmons*, 16 Mo. App. 97, and by the Kansas City Court of Appeals in *Sampson* v. *Shaw*, 19 Mo. App. 274, and in *Smith & K. I. Co.* v. *Thurman*, 29 Mo. App. 186; and it has been approved and acted on by the Supreme Court of Missouri in a very recent case, in which the court, after repeating and enforcing the reasoning upon which *Crow* v. *Beardsley*, proceeded, said: "The Assignment Law of Missouri is not, in letter or spirit, a Bankrupt or Insolvent Debtor's Act. A debtor, whether solvent or insolvent, may, in good faith, sell, deliver in payment, mortgage or pledge the whole or any part of his property for the benefit of one or more of his creditors, to the exclusion of others, even though such transfer may have the effect of delaying them in the collection of their debts. Its terms in no way qualify the rule by which the character of this instrument is to be determined. Reading the instrument then as a whole, in the light of the circumstances under which it was executed, was it intended as a security, or as an absolute unconditional conveyance, *in praesenti*, to the grantee of all the grantor's interest in the property, both legal and equitable, to the exclusion of any equitable right of redemption?" And it was accordingly adjudged that the Assignment Law was inapplicable to a deed of trust, conveying all the debtor's property, real and personal (except his homestead and household furniture, and a horse and buggy), to a trustee in trust to secure the payment of part of his debts for which he was liable either as principal or as surety, which appeared to the court, upon a view of all its provisions as applied to the facts of the case, to be "not an absolute indefeasible assignment of all the grantor's title, both legal and equitable, in the property 'in trust for his creditors,' but a deed of trust to secure the payment of debts and other liabilities, in which the grantor has an interest in the property conveyed," for the protection of which "equity gives him a right of redemption, though no clause of defeasance was inserted in the deed." *Hargadine* v. *Henderson*, 97 Mo. 375, 386, 387, 389.

The question of the construction and effect of a statute of a State, regulating assignments for the benefit of creditors, is a question upon which the decisions of the highest court of the State, establishing a rule of property, are of controlling authority in the courts of the United States. *Brashear* v. *West*, 32 U. S. 7 Pet. 608, 615 [8: 801]; *Allen* v. *Massey*, 84 U. S. 17 Wall. 351 [21: 542]; *Lloyd* v. *Fulton*, 91 U. S. 479, 485 [23: 363, 365]; *Sumner* v. *Hicks*, 67 U. S. 2 Black, 532, 534 [17: 355, 356]; *Jaffray* v. *McGehee*, 107 U. S. 361, 365 [27: 495, 496]; *Peters* v. *Bain*, 133 U. S. 670, 686 [33: 696, 702]; *Jencks* v. *Quidnick Co.* 135 U. S. 457 [34: 200]. The decision in *White* v. *Cotshausen*, 129 U. S. 329 [32: 677], construing a similar statute of Illinois in accordance with the decisions of the Supreme Court of that State as understood by this court, has therefore no bearing upon the case at bar. The fact that similar statutes are allowed different effects in different States is immaterial. As observed by *Mr. Justice* Field, speaking for this court: "The interpretation within the jurisdiction of one State becomes a part of the law of that State, as much so as if incorporated into the body of it by the Legislature. If, therefore, different interpretations are given in different States to a similar local law, that law in effect becomes by the interpretations, so far as it is a rule for our action, a different law in one State from what it is in the other." *Christy* v. *Pridgeon*, 71 U. S. 4 Wall. 196, 203 [18: 322, 324]. See also *Detroit* v. *Osborne*, 135 U. S. 492 [34: 260].

In the present case, there can be no doubt that the deed of trust, conveying the personal property of the partnership to secure the payment of its debts therein named, and reserving in the clearest terms a right of redemption to the grantors, by providing that if they shall pay those debts the deed shall be void, as well as by authorizing the trustee to sell the property only in case of their failing to pay those debts or any part thereof for five days after they become payable, was, according to the settled course of decision in

236] the courts of the State of Missouri, a mortgage only, and not an assignment under the Statute relied on; and therefore, according to the decisions in Missouri, cited at the beginning of this opinion (no fraud being proved or suggested), an instrument which one partner had the inherent authority to bind the partnership by, although his copartners did not join in it.

The deed of trust, executed by and with the consent of two of the three partners, being a valid mortgage, and not an assignment, within the meaning of the Statute, the fact that the third partner had authorized his copartners to execute an assignment, which was never executed, cannot affect the validity of the operation of the deed of trust.

Nor did the simultaneous appointment of a receiver of the partnership property at the suit of one of the partners alter the nature of the deed of trust, or transform it into a voluntary assignment, within the meaning of the Statute of Missouri, as construed by the Supreme Court of the State. A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession, in the property. *Skip* v. *Harwood*, 3 Atk. 564; *Anon.* 2 Atk. 15; *Wiswall* v. *Sampson*, 55 U. S. 14 How. 52, 65 [14: 322, 328]; *Ellis* v. *Boston, H. & E. R. Co.* 107 Mass. 1, 28; *Maynard* v. *Bond*, 67 Mo. 315; *Heiman* v. *Fisher*, 11 Mo. App. 275, 281. And in the present case, the three Banks have claimed and received payment of the full amount of their debts from Stewart as trustee under the mortgage, and not as receiver under the appointment of the court.

The necessary conclusion is, that each of the questions certified must be answered in the negative, and that *the decree of the Circuit Court dismissing the bill must be affirmed.*

237] The *Chief Justice*, having been of counsel, and *Mr. Justice* **Brewer**, not having been a member of the court when the case was argued, took no part in its consideration or decision.

237] THE GEORGE T. SMITH MIDDLINGS PURIFIER COMPANY ET AL., *Appts.*, *v.* MARY S. J. McGROARTY ET AL.

(See S. C. Reporter's ed. 237-241.)

Jurisdiction, as to amount—of United States circuit court—mortgages by insolvent corporations—Ohio law—state decisions, when followed.

1. Where the claim of one appellant is for less than $5,000 the appeal will be dismissed as to him; where the claim of another appellant is more than $10,000, this court has jurisdiction of the appeal as to such claim.
2. The United States Circuit Court in Ohio had jurisdiction of a suit by citizens of other States (who were not parties to previous proceedings in the state probate court), to set aside mortgages as fraudulent as to them and other creditors, where all that had been done in the state court was to file the assignment and the assignee's bond.
3. In Ohio, mortgages made by a trading corporation, after it has become insolvent and ceased to do business, to prefer some of its creditors, are invalid against its creditors generally, whether the mortgages were or were not parts of the same transaction as an assignment under the Statute.
4. Courts of the United States will not hold a conveyance valid against citizens of other States, which the courts of the State hold to be void as against its own citizens.

[No. 28.]

Argued April 15, 16, 1889. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Ohio dismissing a suit in equity to declare certain mortgages to inure to the benefit of general creditors and that the assignee distribute the fund in his hands accordingly and be restrained from paying it upon the debts secured by the mortgages. *Reversed.*

Statement by *Mr. Justice* **Gray:**

This was a bill in equity, filed November 4, 1885, by a corporation of Michigan against the Simpson and Gault Manufacturing Company, a corporation of Ohio, Sayler, a citizen of Ohio and assignee of that Company, under the laws of Ohio, McGroarty, Simpson, Gault and Fitch, also citizens of Ohio, and Charles, a citizen of New York.

The bill alleged that the defendant Company, on May 25, 1885, by a deed of assignment filed in the Probate Court of Hamilton County in the State of Ohio, granted and assigned all its property, real and personal, to Sayler, in trust to sell and dispose of it, and to apply the proceeds, after paying the expenses of executing the trust, to the payment of all its creditors; that Sayler accepted the trust, and gave bond as required by the laws of Ohio, and entered on his duties as assignee under that deed, and sold all the property, and was about to distribute the proceeds; that the Company then and still was indebted to the plaintiff in the sum of $1,461.72, and interest from February 3, 1885; that on May 23, 1885, the Company, being deeply insolvent, and contemplating and intending to make a general assignment of all its property to Sayler as aforesaid, and as part of one and the same transaction with that assignment, and by the procurement of Simpson, who was president of the defendant Company, and of one O'Hara, its treasurer, executed and delivered mortgages of all its property to the five individual defendants, Simpson, McGroarty, Gault, Fitch and Charles, severally, in fraud of the plaintiff and other creditors of the Company, and with a fraudulent intent to prefer the mortgagees as creditors of the Company, contrary to the provisions of the Statutes of Ohio regulating

NOTE.—*As to jurisdiction of U. S. circuit court depending on parties and residence, see note to* Emory v. Greenough, 1: 640.

As to concurrent jurisdiction of tribunals, see note to Smith v. M'Iver, 6: 153.

assignments for the benefit of creditors; and that the Company, and Sayler as its assignee, had been requested by the plaintiff, and had refused, to take procedings to have the mortgages set aside.

The bill prayed that the mortgages might be declared to inure to the benefit of the plaintiff and all other general creditors of the Company; and that Sayler might be ordered to distribute the fund in his hands accordingly, and be restrained from applying it to the payment of the debts secured by the mortgages, and for further relief.

No service was made upon Charles; and, upon the plaintiff's motion, the bill was dismissed as to him, and was amended by joining as plaintiffs three citizens of the State of New York, partners under the name of W. & F. Livingston, and by alleging that they had recovered judgment against the defendant Company in November, 1885, for the sum of $10,822.89, which remained unreversed, upon which execution had been issued and returned unsatisfied.

Sayler, Simpson, McGroarty, Fitch and Gault demurred to the bill, for want of [239] equity and because the matters stated in the bill, and all questions touching the validity of the mortgages and the distribution of the proceeds of the sale of the property, were within the exclusive jurisdiction of the Probate Court of Hamilton County. The court sustained the demurrers and dismissed the bill, and the plaintiffs appealed to this court.

Messrs. **Joseph Wilby** and **J. C. Harper**, for appellants:

The demurrers to the jurisdiction of the circuit court were not well taken.

No summons or notice, or citation of any kind was served upon appellants in the probate court prior to the filing of this bill; nor does the record in the probate court show any controversy or parties at the date of the filing of the bill.

Gaines v. *Fuentes*, 92 U. S. 10 (23: 524); *Fiske* v. *Hills*, 11 Biss. 294; *Craigie* v. *McArthur*, 4 Dill. 474; *Shelby* v. *Bacon*, 51 U. S. 10 How. 56 (13: 326).

The circuit court below first acquired and now has jurisdiction of the matters set forth in the bill.

Orton v. *Smith*, 59 U. S. 18 How. 263 (15: 393); *Green* v. *Creighton*, 64 U. S. 23 How. 90 (16: 419).

This attempted limitation and restriction upon the equitable jurisdiction of the federal courts as between litigants of the proper diverse citizenship has been repeatedly ignored and repudiated.

Payne v. *Hook*, 74 U. S. 7 Wall. 425 (19: 260); *Hess* v. *Reynolds*, 113 U. S. 73 (28: 927); *Ellis* v. *Davis*, 109 U. S. 485 (27: 1006); *Fleisher* v. *Greenwald*, 20 Fed. Rep. 547; *Simon* v. *Oppenheimer*, 20 Fed. Rep. 553; *McConihay* v. *Wright*, 121 U. S. 201, 206 (30: 932, 933); *Hart* v. *Sansom*, 110 U. S. 151 (28: 101).

The preferential chattel mortgagees were not diligent creditors, and are not entitled to protection in the security they received.

Blennerhassett v. *Sherman*, 105 U. S. 100, 117 (26: 1080, 1085); *Fassett* v. *Traber*, 20 Ohio, 540, 545; *Doremus* v. *O'Harra*, 1 Ohio St. 45, 49; *Harkrader* v. *Leiby*, 4 Ohio St. 602.

The chattel mortgages are preferences within the inhibition of sec. 6343, Rev. Stat. of Ohio.

Stevenson v. *Agry*, 7 Ohio (pt. 2) 247; *Atkinson* v. *Tomlinson*, 1 Ohio St. 237; *Bagaley* v. *Waters*, 7 Ohio St. 359; *Hoffman* v. *Mackall*, 5 Ohio St. 124, 136; *Bloomingdale* v. *Stein*, 42 Ohio St. 168; *Justice* v. *Uhl*, 10 Ohio St. 170, 177.

The bill shows a fraud upon the law and an attempted evasion of it.

Lee v. *Lee*, 33 U. S. 8 Pet. 44 (8: 861); *Downing* v. *Kinteing*, 2 Serg. & R. 326; *Sharpe* v. *Thomas*, 6 Bing. 416; *Doe* v. *Carter*, 8 T. R. 300; Maxwell, Stat. 133, chap. 4, *Construction to Prevent Evasion*.

Two instruments, if in fact executed and intended as parts of one transaction, may be so regarded in law, and as such within the operation of statutes to which, as separate instruments, in form, they would not be obnoxious.

White v. *Cotzhausen*, 129 U. S. 329 (32: 677); *Preston* v. *Spaulding*, 120 Ill. 208; *Field* v. *Geoghegan*, 125 Ill. 70; *Van Patten* v. *Burr*, 52 Iowa, 518; *Moore* v. *Church*, 70 Iowa, 208; *Holt* v. *Bancroft*, 30 Ala. 193; *Berry* v. *Cutts*, 42 Me. 445; *Clapp* v. *Nordmeyer*, 25 Fed. Rep. 71; *Doggett* v. *Herman*, 16 Fed. Rep. 812; *Livermore* v. *McNair*, 34 N. J. Eq. 478; *Hahn* v. *Salmon*, 20 Fed. Rep. 801; *Kellogg* v. *Root*, 23 Fed. Rep. 525; *Root* v. *Potter*, 59 Mich. 498; *Winner* v. *Hoyt*, 66 Wis. 227.

The preferential chattel mortgages are invalid.

Curran v. *Arkansas*, 56 U. S. 15 How. 304 (14: 705); *Mumma* v. *Potomac Co.* 33 U. S. 8 Pet. 281 (8: 945); *Baring* v. *Dabney*, 86 U. S. 19 Wall. 1 (22: 90); *Broughton* v. *Pensacola*, 93 U. S. 266 (23: 896); 2 Morawetz, Priv. Corp. §§ 803, 861-863; Wait, Insolv. Corp. §§ 162, 654; Taylor, Priv. Corp. (2d ed.) § 668.

The great weight of authority is against the power of directors to use their position to their own advantage.

2 Morawetz, Priv. Corp. § 787; Taylor, Priv. Corp. § 759; *Koehler* v. *Black River Falls Iron Co.* 67 U. S. 2 Black, 715 (17: 339); *Bradley* v. *Farwell*, 1 Holmes, 433; *Adams* v. *Kehlor Milling Co.* 35 Fed. Rep. 433, 36 Fed. Rep. 212; *Lippincott* v. *Shaw Carriage Co.* 25 Fed. Rep. 577; *Corbett* v. *Woodward*, 5 Sawy. 403; *Stout* v. *Yeager Milling Co.* 18 Fed. Rep. 802; *Coons* v. *Tome*, 9 Fed. Rep. 532; *Richards* v. *New Hampshire Ins. Co.* 43 N. H. 263; *Haywood* v. *Lincoln Lumber Co.* 64 Wis. 639.

Messrs. **Thos. McDougall** and *Avery & Holmes*, for appellees:

An insolvent corporation has power to prefer one creditor to another, the same as a private individual, in Ohio.

Arrowsmith v. *Harmoning*, 42 Ohio St. 254; *Mauarr* v. *Parrish*, 26 Ohio St. 636; *Coats* v. *Donnell*, 94 N. Y. 168; *Dana* v. *United States Bank*, 5 Watts & S. 223; *Reichwald* v. *Commercial Hotel Co.* 106 Ill. 439; *Planters Bank* v. *Whittle*, 78 Va. 737; *Buell* v. *Buckingham*, 16 Iowa, 284; *Catlin* v. *Eagle Bank*, 6 Conn. 233; *Ringo* v. *Biscoe*, 13 Ark. 563; *Wilkinson* v. *Bauerle*, 41 N. J. Eq. 635; *Bergen* v. *Porpoise Fishing Co.* 42 N. J. Eq. 397.

The simple question is one of priority between two contending mortgagees.

In Ohio, mortgages take effect from the time of their delivery to the recorder.

Magee v. *Beatty*, 8 Ohio, 396; *Stansell* v. *Roberts*, 13 Ohio, 148; *Mayham* v. *Coombs*, 14 Ohio, 428; *White* v. *Denman*, 1 Ohio St. 110.

It is the motive, design and situation of the assignor, and not the motives of the assignee, that give character to the assignment, and bring it within the operation of the Statute.

Mitchell v. *Gazzam*, 12 Ohio, 315; *Doremus* v. *O'Harra*, 1 Ohio St. 50.

The Statute does not extend to, or in any way affect, conveyances or mortgages made by the failing debtor to his creditor for the purpose of paying or securing his debt.

Atkinson v. *Tomlinson*, 1 Ohio St. 240; *Harkrader* v. *Lieby*, 4 Ohio St. 602, 609; *Dickson* v. *Rawson*, 5 Ohio St. 218, 221; *Justice* v. *Uhl*, 10 Ohio St. 170.

The fact that the mortgages may have been executed at one and the same time with the deed of assignment, does not constitute them an assignment in trust.

Merchants Nat. Bank v. *Nottingham M. & S. Co.* (Ohio) 15 Cin. L. Bul. 8; *Wilson* v. *Berg*, 88 Pa. 167; *Holt* v. *Bancroft*, 30 Ala. 193; *Bailey* v. *Kansas Mfg. Co.* 32 Kan. 73; *Tootle* v. *Coldwell*, 30 Kan. 125.

The fact that two directors happened to be indorsers on some of the notes secured by the mortgage, does not invalidate the mortgage.

Planters Bank v. *Whittle*, 78 Va. 739, 740; *Buell* v. *Buckingham*, 16 Iowa, 284; *Gordon* v. *Preston*, 1 Watts, 385; *Whitewell* v. *Warner*, 20 Vt. 425; *Ashhurst's Appeal*, 60 Pa. 290; *Bradley* v. *Farwell*, 1 Holmes, 433; *Corbett* v. *Woodward*, 5 Sawy. 403.

Mr. Justice **Gray** delivered the opinion of the court:

The claim of the plaintiff Company being for less than $5,000, is insufficient to give this court jurisdiction, and the appeal must therefore be dismissed as to that Company. *Stewart* v. *Dunham*, 115 U. S. 61 [19: 329]; *Gibson* v. *Shufeldt*, 122 U. S. 27 [30: 1083].

But the claim of W. & F. Livingston, citizens of New York, who by leave of the circuit court and amendment of the bill were joined as plaintiffs, is more than $10,000, which is sufficient to give this court jurisdiction of the appeal, so far as concerns their claim; and Charles, also a citizen of New York, who was originally joined as defendant, not having been served with process, and the bill having been dismissed as to him, the case in regard to the citizenship of the parties was within the jurisdiction of the circuit court.

The plaintiffs, in the brief filed in their behalf, expressly "disclaim any intention to impeach the transaction in controversy, as one made with intent to hinder, delay or defraud creditors;" and seek to maintain their bill on the sole ground "that the transaction shown by the bill is within the operation of section 6343 of the Revised Statutes, and that therefore the attempted preferences should be decreed to inure to the benefit of the general creditors."

By § 6335 of the Revised Statutes of Ohio of 1880, "when any person, partnership, association or corporation shall make an assignment to a trustee of any property, money, rights or credits, in trust for the benefit of creditors, it shall be the duty of said assignee" to file the assignment in the probate court of the county in which he resides, and to give bond, with sureties approved by that court, for the performance of his duties as assignee.

By § 6343, "all assignments in trust to a trustee or trustees, made in contemplation of insolvency, with the intent to prefer one or more creditors, shall inure to the equal benefit of all creditors, in proportion to the amount of their respective claims, and the trusts arising under the same shall be administered in conformity with the provisions of this chapter."

Subsequent sections provide for publishing notice of the appointment of the assignee, and for an appraisement and inventory of the property, the examination of the assignor and assignee on oath, the conversion of the property into money, the discharge of incumbrances, the proof of debts and the distribution of the property among the creditors.

The objection taken to the jurisdiction of the circuit court of the United States, upon the ground that the Probate Court of Hamilton County had exclusive jurisdiction of the matters in controversy, cannot be sustained. Upon the allegations of the bill, admitted by the demurrer, nothing appears to have been done in that court, before the commencement of this suit, except to file the voluntary assignment of the debtor and the bond of the assignee; and the circuit court clearly had jurisdiction of a bill by citizens of other States (who did not, so far as appears by this record, become parties to the proceedings in the state court), to set aside the mortgages as fraudulent or invalid as against them. *Shelby* v. *Bacon*, 51 U. S. 10 How. 56 [13: 326]; *Green* v. *Creighton*, 64 U. S. 23 How. 90 [16: 419]; *Payne* v. *Hook*, 74 U. S. 7 Wall. 425 [19: 260]; *Arrowsmith* v. *Gleason*, 129 U. S. 86 [32: 630].

The defendants rely on the decision in *Sayler* v. *Simpson*, 45 Ohio St. 141, in which it appears that in a controversy to which these assignees, these mortgagees and W. & F. Livingston were parties, the Supreme Court of Ohio held that the probate court had jurisdiction to determine the rights of the mortgagees; but neither that decision, nor the facts stated in that report, have been pleaded or appear of record in this case.

The present case is to be decided by the application of the law of Ohio to the facts stated in this bill and admitted by the demurrer; and the best evidence of that law, as affecting the validity of the mortgages and assignment, is to be found in the decisions of the Supreme Court of Ohio. *Union Bank* v. *Kansas City Bank*, 136 U. S. 223 [34: 341].

In the recent case of *Rouse* v. *Merchants Bank*, 46 Ohio St. 493, that court, upon a similar state of facts, adjudged that mortgages made by a trading corporation after it had become insolvent, and had ceased to do business, to prefer some of its creditors, were invalid and ineffectual against its creditors

generally, without regard to the question whether the mortgages were or were not parts of the same transaction as an assignment under the Statute.

That decision, it is true, proceeded in part upon a theory that the property of an insolvent incorporation is a trust fund for its creditors in a wider and more general sense than could be maintained upon general principles of equity jurisprudence. *Graham* v. *La Crosse & M. R. Co.* 102 U. S. 148, 161 [26: 106, 111]; *Wabash, St. L. & P. R. Co.* v. *Ham*, 114 U. S. 587, 594 [29: 235, 238]; *Richardson* v. *Green*, 133 U. S. 30, 44 [33: 516, 522]; *Fogg* v. *Blair*, 133 U. S. 534, 541 [33: 721, 724]; *Peters* v. *Bain*, 133 U. S. 670, 691, 692 [33: 696, 703, 704]. But it also proceeded in large part, as the opinion clearly shows, upon the Constitution of Ohio, and the law and policy of that State as declared in previous decisions of its highest court, and should therefore be accepted by this court as decisive of the law of Ohio upon the subject.

It would be an extraordinary result, if the courts of the United States, in exercising the jurisdiction conferred upon them with a view to secure the rights of citizens residing in different States, should hold such a conveyance to be valid against citizens of other States as the Supreme Court of Ohio holds to be void as against its own citizens.

Decree reversed, and case remanded for further proceedings in conformity with this opinion.

Mr. Justice **Brewer**, not having been a member of the court when this case was argued, took no part in its decision.

268] THE CHICAGO RAILWAY EQUIPMENT COMPANY, *Plff in Err.*,

v.

THE MERCHANTS' NATIONAL BANK OF CHICAGO.

(See S. C. Reporter's ed. 268-286.)

Promissory note, what is — Illinois Statutes — sale of cars, retaining lien on them — contingency as to time of payment.

An instrument, by which the maker promises to pay to the order of the payee a sum certain at a fixed time, with interest, and which states that the note is one of a series of notes given for cars sold by the payee to the maker and shall become due on the failure to pay any one of the series, and that it is agreed that the title to the cars shall remain in the payee until all the notes are paid, and that they are secured ratably on the cars, is a promissory note, to be protected in the hands of a bona fide holder for value according to the rules of mercantile law applicable to negotiable instruments.

2. The statutes of Illinois place negotiable promissory notes in the hands of bona fide holders for value on the same footing that they occupy under the general rules of the mercantile law.

3. The note imports a sale of the cars and that the holder is to retain a lien, by way of mortgage, on them for the purchase price.

4. A contingency by which a note may become due earlier than the date fixed does not affect its negotiability.

[No. 64.]

Argued Nov. 4, 5, 1889. Decided May 19, 1890.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment in favor of plaintiff upon certain promissory notes. *Affirmed.*

The facts are stated in the opinion.

Mr. **Greenleaf Clark**, for plaintiff in error:

A negotiable promissory note must contain an absolute unconditional promise in writing to pay a specified sum at a definite time therein limited.

Chitty, Bills, 17; Byles, Bills, 5; *Nunez* v. *Dautel*, 86 U. S. 19 Wall. 560 (22: 161); *Cayuga County Nat. Bank* v. *Purdy*, 56 Mich. 6.

The time of payment of each of the instruments is by the terms thereof so indefinite, uncertain and contingent as to destroy the negotiable character that might otherwise attach thereto.

Andrews v. *Franklin*, 1 Strange, 24; *Cota* v. *Buck*, 7 Met. 588; *Hubbard* v. *Mosely*, 11 Gray, 170; *Way* v. *Smith*, 111 Mass. 523; *Stults* v. *Silva*, 119 Mass. 137; *Mahoney* v. *Fitzpatrick*, 133 Mass. 151; *Brooks* v. *Hargreaves*, 21 Mich. 254; *First Nat. Bank* v. *Carson*, 60 Mich. 432; *First Nat. Bank* v. *Bynum*, 84 N. C. 24; *Chouteau* v. *Allen*, 70 Mo. 339; *Lamb* v. *Story*, 45 Mich. 488; *Smith* v. *Van Blarcom*, Id. 371; *Nunez* v. *Dautel*, 86 U. S. 19 Wall. 561 (22: 161); *Smith* v. *Marland*, 59 Iowa, 645; *Cayuga County Nat. Bank* v. *Purdy*, 56 Mich. 6.

The instruments in question were not negotiable promissory notes in the commercial sense.

Parsons, Bills and Notes, 30; Chitty, Bills (12th Am. ed.) 134 *et seq.*; Story, Bills, §§ 4-47; *Overton* v. *Tyler*, 3 Pa. 346, 1 Am. Lead. Cas. 365; *Harkness* v. *Russell*, 118 U. S. 663 (30: 285).

Until the executory agreement is performed, there is a contingency that the property may be destroyed or the vendor incapacitated from performance when the time for performance arrives.

Third Nat. Bank v. *Armstrong*, 25 Minn. 530; *Sloan* v. *McCarty*, 134 Mass. 245; *Swallow* v. *Emery*, 111 Mass. 355; *Killam* v. *Schoeps*, 26 Kan. 310; *South Bend Iron Works* v. *Paddock*, 37 Kan. 510; *Stevens* v. *Johnson*, 28 Minn. 172; *Deering* v. *Thom*, 29 Minn. 120; *Fletcher* v. *Thompson*, 55 N. H. 308; *Bannister* v. *Rouse*, 44 Mich. 428.

The title did not pass until all the conditions of payment were fully complied with.

Call v. *Seymour*, 40 Ohio St. 670; *Fosdick* v. *Schall*, 99 U. S. 235 (25: 339); *Harkness* v. *Russell*, 118 U. S. 663 (30: 285), and cases cited; *Domestic S. M. Co.* v. *Arthurhults*, 63 Ind. 322; *Cole* v. *Mann*, 62 N. Y. 1; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664 (23: 1003); *Murch* v. *Wright*, 46 Ill. 487.

To come within the operation of the Statute, the promise must be an absolute and unconditional one.

Husband v. *Epling*, 81 Ill. 172; *Turner* v. *Peoria & S. R. Co.* 95 Ill. 145; *Canadian Bank* v. *McCrea*, 106 Ill. 281.

Messrs. **John P. Wilson**, *J. G. Gregory* and *Charles Noble Gregory*, for defendant in error:

The notes in question are payable at a time which must certainly arrive, and therefore the

promise to pay is not made contingent or conditional by reason of any uncertainty as to the time of payment.

The question of the negotiability of the notes in question is to be decided by the laws of the State of Illinois.

Brabston v. *Gibson*, 50 U. S. 9 How. 263 (13: 131); *Musson* v. *Lake*, 45 U. S. 4 How. 262 (11: 967); *Calhoun County* v. *Galbraith*, 99 U. S. 214 (25: 410).

Promissory notes were not negotiable at common law, but are made so by the statute of the State of Illinois.

Newhope D. B. Co. v. *Perry*, 11 Ill. 467; *Lowe* v. *Bliss*, 24 Ill. 168; *Burgess* v. *Seligman*, 107 U. S. 20 (27: 359); *Stewart* v. *Smith*, 28 Ill. 397; *Bilderback* v. *Burlingame*, 27 Ill. 338; *Canadian Bank* v. *McCrea*, 106 Ill. 292; *White* v. *Smith*, 77 Ill. 351; *McCarty* v. *Howell*, 24 Ill. 342.

A note is negotiable if payable certainly at a fixed time, although subject to a contingency by which it may become due earlier.

Ernst v. *Steckman*, 74 Pa. 13; *Cota* v. *Buck*, 7 Met. 588; *Walker* v. *Woollen*, 54 Ind. 164; *Woollen* v. *Ulrich*, 64 Ind. 120; *Charlton* v. *Reed*, 61 Iowa, 166.

A note payable on or before a fixed date is negotiable.

Jordan v. *Tate*, 19 Ohio St. 586; *Mattson* v. *Marks*, 81 Mich. 421; *Riker* v. *A. & W. Sprague Mfg. Co.* 14 R. I. 402; *Curtis* v. *Horn*, 58 N. H. 504; *Ackley School Dist.* v. *Hall*, 113 U. S. 135 (28: 954).

A provision in a note payable in installments, that a failure to pay an installment shall render the whole amount due and payable, does not destroy the negotiability of the note.

Carlon v. *Kenealy*, 12 Mees. & W. 139; *Cooke* v. *Horn*, 29 L. T. N. S. 369; *Andrews* v. *Franklin*, 1 Strange, 24; *Colehan* v. *Cooke*, Willes, 393; *Sea* v. *Glover*, 1 Ill. App. 335; Story, Prom. Notes, § 27; *Riker* v. *A. & W. Sprague Mfg. Co.* 14 R. I. 402; *Curtis* v. *Horn*, 58 N. H. 504; *Ackley School Dist.* v. *Hall*, 113 U. S. 135 (28: 954); *Morgan* v. *United States*, 113 U. S. 476 (28: 1044).

The instruments in question were absolute promises to pay the amounts mentioned therein.

Palmer v. *Howard*, 72 Cal. 293; *Carroll Bank* v. *Taylor*, 67 Iowa, 572; *Marine & R. P. M. Mfg. Co.* v. *Bradley*, 105 U. S. 175 (26: 1034); *Hawley* v. *Bingham*, 6 Or. 76; *Sumner* v. *Parker*, 36 N. H. 449; *Northrup* v. *Northrup*, 6 Cow. 296; *Heryford* v. *Davis*, 102 U. S. 235 (26: 160).

269] *Mr. Justice* **Harlan** delivered the opinion of the court:

This action was brought by the Merchants' National Bank of Chicago against the Chicago Railway Equipment Company, a corporation of Wisconsin, upon two written instruments, one of which is in the words and figures following:

"$5,000. Chicago, Ill., January 20, A. D. 1884.

"For value received, four months after date, the Chicago Railway Equipment Company promise to pay to the order of the Northwestern Manufacturing and Car Company of Stillwater, Minnesota, five thousand dollars at First National Bank of Chicago, Illinois, with interest thereon at the rate of — per cent per annum from date until paid.

"This note is one of a series of twenty-five notes, of even date herewith, of the sum of five thousand dollars each, and shall become due and payable to the holder on the failure of the maker to pay the principal and interest of any one of the notes of said series, and all of said notes are given for the purchase price of two hundred and fifty railway freight cars manufactured by the payee hereof and sold by said payee to the maker hereof, which cars are numbered from 13,000 to 13,249 inclusive, and marked on the side thereof with the words and letters 'Blue Line, C. & E. I. R. R. Co.;' and it is agreed by the maker hereof that the title to said cars shall remain in the said payee until all the notes of said series, both principal and interest, are fully paid, all of said notes being equally and ratably secured on said cars.

"No. 1. Geo. B. Burrows, Vice-President."

"Countersigned by E. D. Buffington, Treasurer."

This writing is indorsed: "Northwestern Manufacturing and Car Co., per J. C. Gorman, Treas."

The other instrument bears the same date, and is in all respects similar to the first one. No question is made as to the genuineness of the signatures to these instruments of the vice-president and treasurer of the defendant, nor as to the plaintiff having paid value for them before maturity. They were declared upon as negotiable promissory notes. In support of the defense certain evidence was offered that was excluded, and the jury, pursuant to the direction of the court, returned a verdict in favor of the plaintiff for the full amount of the two instruments. 25 Fed. Rep. 809.

Are the writings in suit to be regarded as promissory notes, to be protected in the hands of bona fide holders for value, according to the rules of general mercantile law as applicable to negotiable instruments, or are they anything more than simple contracts, subject, in the hands of transferees, to such equities and defenses as would be available between the original parties? This is the question upon which, it is conceded, depends the correctness of the several rulings to which the assignments of error refer.

By the Statute of Illinois revising the law in relation to promissory notes, bonds, due-bills and other instruments in writing, approved March 18, 1874, and in force July 1, 1874 (Rev. Stat. Ill. 1874, p. 718; 2 Starr & Curtis' Anno. Stat. p. 1051, chap. 98; Rev. Stat. 1845, p. 384), it is provided:

"Sec. 3. All promissory notes, bonds, due-bills and other instruments in writing, made or to be made, by any person, body politic or corporate, whereby such person promises or agrees to pay any sum of money or article of personal property, or any sum of money in personal property, or acknowledges any sum of money or article of personal property

to be due to any other person, shall be taken to be due and payable, and the sum of money or article of personal property therein mentioned shall, by virtue thereof, be due and payable as therein expressed.

"Sec. 4. Any such note, bond, bill or other instrument in writing, made payable to any person named as payee therein, shall be assignable, by indorsement thereon, under the hand of such person, and of his assignees, in the same manner as bills of exchange are, so as absolutely to transfer and vest the property thereof in each and every assignee successively."

Other sections of the Statute throw some [276] light on the question before us. The fifth section provides that any assignee to whom such sum of money or personal property is by indorsement made payable, or, he being dead, his executor or administrator, may, in his own name, institute and maintain the same kind of action for the recovery thereof against the person making and executing the note, bond, bill or other instrument in writing, or against his heirs, executors or administrators, as might have been maintained against him by the obligee or payee, in case it had not been assigned. By the sixth section no maker of, or other person liable on, such note, bond, bill or other instrument in writing, is allowed to allege payment to the payee, made after notice of assignment, as a defense against the assignee. The eighth section provides: "Any note, bond, bill or other instrument in writing, made payable to bearer, may be transferred by delivery thereof, and an action may be maintained thereon in the name of the holder thereof. Every indorser of any instrument mentioned in this section shall be held as a guarantor of payment unless otherwise expressed in the indorsement." The ninth section allows the defendant, when sued upon a note, bond or other instrument in writing, for the payment of money or property, or the performance of covenants or conditions, to prove the want or failure of consideration, "provided that nothing in this section contained shall be construed to affect or impair the right of any bona fide assignee of any instrument made assignable by this Act, when such assignment was made before such instrument became due." The eleventh section provides that "if any such note, bond, bill or other instrument in writing shall be indorsed after the same becomes due, and any indorsee shall institute an action thereon against the maker of the same, the defendant, being maker, shall be allowed to set up the same defense that he might have done had the action been instituted in the name and for the use of the person to whom such instrument was originally made payable, or any intermediate holder." Under the twelfth section, if the instrument has been assigned or transferred by delivery to the plaintiff after it became due, "a set-off to the amount of the plaintiff's debt may be made of a demand existing against any per- [277] son or persons who shall have assigned or transferred such instrument after it became due, if the demand be such as might have been set off against the assignor, while the note or bill belonged to him." If the instrument is assigned before the day the money or property therein mentioned becomes due and payable, then, by the thirteenth section, the defendant, in an action brought by the assignee, is allowed to give in evidence at the trial any money or property actually paid on the note, bond or bill, or other instrument in writing, before it was assigned to the plaintiff, on proving that the plaintiff had "sufficient notice of the said payment before he accepted or received such assignment."

It is contended by the defendant that these statutory provisions, so far as they embrace instruments not negotiable at common law, relate only to the manner of their indorsement or transfer, and that the indorsee takes them, as before the Statute, subject to all the defenses that might be interposed in an action between the original parties. This view is inconsistent with the decisions of the Supreme Court of Illinois. Some of these decisions will be referred to as indicating the scope and effect of the local Statute, as well as the views of that court upon the general principles of commercial law involved in this case.

In *Stewart* v. *Smith*, 28 Ill. 397, 406, 408, the principal question was as to the negotiability under the above Statute of the following instrument: "Chicago, 21st of January, 1859. Received from teams in our pork-house, No. 114 West Harrison Street, 280 hogs, weighing 45,545 pounds, the product of which we promise to deliver to the order of Messrs. Stevens & Brother indorsed hereon. G. & J. Stewart." The court said "Testing the writing by this Statute, there cannot be a doubt upon its assignability. It is an instrument in writing; it purports to be made by persons; by it, those persons promise and agree to deliver a certain article of personal property, to the order of certain other persons. By force of the Statute, this article of personal property mentioned in the instrument of writing so made, by virtue of its being so mentioned and in such form of words, must be taken to be due and payable [27 to the person to whom the instrument in writing is made. The Statute does not require that the note or instrument in writing shall be payable at any particular time or place, or be expressed to be for value received, or that any consideration whatever should appear in the writing—an acknowledgment of indebtedness, in the simplest form, would seem to be all the Statute requires to give it the character of negotiability. A writing in this form, probably the simplest, would be a perfect negotiable note under this Statute: 'Due John Brown, ten dollars, July 4, 1862,'—and signed by the maker. Such an instrument is clothed with all the attributes of negotiability, and imports a consideration, and no averments or proofs are necessary on those points. . . . The other point made by plaintiffs, that the instrument was overdue on the 26th of January, 1859, when it was indorsed, to such an extent as to put a prudent man upon inquiry in respect to all equities which the makers might have against it in the hands of the

promisee, we do not consider a strong one. . . . The indorsement being in season cuts off all equities, if there were any, in defendant's favor, and the only hazard incurred in holding it back for payment was that the release of the indorsers might have been caused by it, but not the release of the maker."

In *Cisne* v. *Chidester*, 85 Ill. 524, the action was upon the following note: "$120. May 2, 1871. On the first day of September, 1871 (or before, if made out of the sale of J. B. Drake's horse hay fork and hay carrier), I promise to pay James B. Drake, or to order, one hundred and twenty dollars, for value received, with use." On this note was an indorsement by Drake to Chamberlain, and by the latter to Chidester. The trial court instructed the jury that, in the hands of an assignee before maturity, the question of consideration did not arise until it was shown by evidence that the assignee purchased the note with actual knowledge of the want of consideration; and also that the note was, in its effect, payable absolutely on the 1st day of September, 1871, with interest at six per cent from date. The Supreme Court of Illinois said: "The pleas were, the general issue, and fraud and circumvention in obtaining the making of the [279] note. There was no evidence whatever as to the time of the indorsement of the note, or of any want of good faith in or notice to the indorsee in respect to the consideration of the note, or the circumstances under which it was given, more than appears upon the face of the note itself. The plaintiff was presumed to be a bona fide indorsee of the note for a valuable consideration. As against the plaintiff, there was, under the evidence, no question of consideration before the jury, and the giving of the first instruction could form no just cause of complaint. The construction of the note was a question of law and for the court. The proper construction was put upon the note."

In *White* v. *Smith*, 77 Ill. 351, 352, the principle was said to be undoubted, that to constitute a valid promissory note it must be for the payment of money which will certainly become due and payable one time or another, though it may be uncertain when that time will come. In *Canadian Bank* v. *McCrea*, 106 Ill. 281, 289, 292, the court, construing the local Statute, said that it did not embrace "covenants or agreements for the performance of individual services in and about property—mutual, dependent and conditional covenants and agreements, or covenants and agreements to pay money or deliver property upon uncertain contingencies or events"—but applied "only to absolute and unconditional promises to pay money or deliver property." It was further said to be clear, under previous cases, that "the promise or undertaking must be restricted to the payment of money or delivery of property at a time that will certainly happen." "It may be," the court added, "unknown, in advance, when it will be, but it must be absolutely certain that it will be sometime; and although it may be within the power of the party to whom the promise is made to render it certain, by his subsequent act, that the time will happen, this will not be sufficient—it cannot depend upon his will or pleasure." See also *Harlow* v. *Boswell*, 15 Ill. 56; *McCarty* v. *Howell*, 24 Ill. 341; *Bilderback* v. *Burlingame*, 27 Ill. 338; *Houghton* v. *Francis*, 29 Ill. 244; *Baird* v. *Underwood*, 74 Ill. 176.

It is clear from these cases that the Statute of Illinois has a much wider scope than the counsel for the defendant supposes. It evidently intended to place negotiable promissory notes in the hands of bona fide holders for value on the same footing, substantially, that they occupy under the general rules of the mercantile law. It does not, in our judgment, do anything more. So that we are to inquire whether the notes in suit are not negotiable securities according to the custom and usages of merchants.

The defendant insists that, in view of the agreement for the retention by the payee of the title to the cars until all the notes of the same series, principal and interest, are fully paid, the transaction was only a conditional sale of the cars. It is contended that the promise to pay the notes given for the price, so far from being absolute as required by the mercantile law, is subject to the condition, running with the notes, that the title to the cars should not pass until all the notes were paid, which could not occur if, before payment, the cars had been destroyed or sold to other parties. The fact that, by agreement, the title is to remain in the vendor of personal property until the notes for the price are paid, does not necessarily import that the transaction was a conditional sale. Each case must depend upon its special circumstances. In *Heryford* v. *Davis*, 102 U. S. 235, 243, 244, 245, 246 [26: 160, 162, 163], the question was as to whether a certain instrument, relating to cars supplied to a railway company, and for the price of which the latter gave its notes, showed a conditional sale, which did not pass the ownership until the conditions were performed, or whether, taking the whole instrument together, the seller reserved only a lien or security for the payment of the price, or what is sometimes called a mortgage back to the vendor. In that case, the instrument construed provided that until a certain payment was made, the railway company should have no right, title, claim nor interest in the cars delivered to it, "except as to their use or hire," nor any right or authority in any way to dispose of, hire, sell, mortgage or pledge the same, but that they "are and shall remain the property" of the manufacturing company, and be redelivered to it when demanded, upon default in the above payment. This court, after observing that the true construction of the contract was not to be found in any name which the parties may have given to the instrument, nor alone in any particular provisions it contained, disconnected from all others, but in the ruling intention of the parties, gathered from all the language used, said: "It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account. Though the contract industriously and repeatedly spoke of loaning

the cars to the railroad company, *for hire* for four months, and delivering them for use *for hire*, it is manifest that no mere bailment for hire was intended. No price for the hire was mentioned or alluded to, and in every bailment or letting for hire a price or compensation for the hire is essential. . . . It is quite unmeaning for parties to a contract to say it shall not amount to a sale, when it contains every element of a sale, and transmission of ownership. This part of the contract is to be construed in connection with the other provisions, so that if possible, or so far as is possible, they may all harmonize. Thus construed, it is quite plain these stipulations were inserted to enable the manufacturing company to enforce payment, not of any rent or hire, but of the selling price of the cars for which the company took the notes of the railroad company. They were intended as additional security for the payment of the debt the latter company assumed. This is shown most clearly by the other provisions of the contract. The notes became the absolute property of the vendors. As has been stated, they all fell due within four months, and it was expected they would be paid. The vendors were expressly allowed to collect them at their maturity, and it was agreed that whatever sums should be collected on account of them should be retained by the vendors for their own use. No part of the money was to be returned to the railroad company in any event, not even if the cars should be returned. . . . What was this but treating the notes given for the sum agreed to be the price of the cars as a debt absolutely due to the vendors? What was it but treating the cars as a security for the debt? . . . In view of these provisions, we can come to no other conclusion than that it was the intention of the parties, manifested by the agreement, the ownership of the cars should pass at once to the railroad company in consideration of their becoming debtors for the price. Notwithstanding the efforts to cover up the real nature of the contract, its substance was an hypothecation of the cars to secure a debt due to the vendors for the price of a sale. The railroad company was not accorded an option to buy or not. They were bound to pay the price, either by paying their notes or surrendering the property to be sold in order to make payment. This was in no sense a conditional sale. This giving property as security for the payment of a debt is the very essence of a mortgage, which has no existence in a case of conditional sale."

It is a mistake to suppose that there is any conflict between these views and those expressed in the subsequent case of *Harkness* v. *Russell*, 118 U. S. 663, 680 [30: 285, 291], where the whole doctrine of conditional sales of personal property was carefully examined, and in which the particular instrument there in question was held to import not an absolute sale but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. With the principles laid down in the latter case we are entirely satisfied. But as pointed out in *Arkansas Valley L. & C. Co.* v. *Mann*, 130 U. S. 69, 77, 78 [32: 854, 857, 858], the agreement in *Harkness* v. *Russell* was upon the express condition that neither the title, ownership nor possession of the engine and saw-mill which was the subject of the transaction should pass from the vendor until the note given by the vendee for the stipulated price was paid. Turning to the notes here in suit, we find every element of a sale and transmission of ownership, despite the provision that the title to the cars should remain in the payee, until all the notes of the series were fully paid. The notes, upon their face, show they were given for the "purchase price" of cars "sold" by the payee to the maker, and they are "secured" equally and ratably on the cars, in order to prevent the holder of one of the notes from obtaining out of the common security a preference over holders of others of the same series. This provision placed the parties upon the same footing they would have occupied if a chattel mortgage, covering all the notes, had been executed by the purchaser of the cars. If the notes had been in the usual form of promissory notes, and the maker had given a mortgage back to the payee, the title would technically have been in the payee until they were paid. But they would, in such case, have been negotiable securities protected in the hands of bona fide holders for value against secret defenses, and their immunity from such defenses would have been communicated to the mortgage itself. In *Kenicott* v. *Wayne County*, 83 U. S. 16 Wall. 452, 469 [21: 319, 321], it was said that where a note secured by a mortgage is transferred to a bona fide holder for value before maturity, and a bill is filed to foreclose the mortgage, no other or further defenses are allowed against the mortgage than would be allowed were the action brought in a court of law upon the note. To the same effect is *Carpenter* v. *Longan*, 83 U. S. 16 Wall. 271, 274 [21: 313, 315]. See also *Swift* v. *Smith*, 102 U. S. 442, 444 [26: 193, 194]; *Collins* v. *Bradbury*, 64 Me. 37; *Towne* v. *Rice*, 122 Mass. 67, 73.

The agreement that the title should remain in the payee until the notes were paid—it being expressly stated that they were given for the price of the cars sold by the payee to the maker, and were secured equally and ratably on the property—is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. The agreement, by which the vendor retains the title and by which the notes are secured on the cars, is collateral to the notes, and does not affect their negotiability. It does not qualify the promise to pay at the time fixed, any more than would be done by an agreement, of the same kind, embodied in a separate instrument, in the form of a mortgage. So far as the notes upon their face show, the payee did not retain possession of the cars, but possession was delivered to the maker. The marks on the cars showed that they were to go into the possession of the maker, or of its transferee, to be used. The suggestion that

the maker could not have been compelled to pay if the cars had been destroyed before the [284] maturity of the notes is without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee had no interest remaining in them except by way of security for the payment of the notes given for the price. The reservation of the title as security for such payment was not the reservation of anything in favor of the maker, but was for the benefit of the payee and all subsequent holders of the paper. The promise of the maker was unconditional.

Without deciding whether the notes here in suit would or would not have been negotiable securities if the transaction between the parties had been a conditional sale, we are of opinion that they are of the class of instruments that are negotiable according to the mercantile law, and which, in the hands of a bona fide holder for value, are protected against defenses of which the maker might avail himself if sued by the payee. They are promises in writing to pay a fixed sum of money to a named person or order, at all events, and at a time which must certainly arrive. *Ackley School Dist.* v. *Hall*, 113 U. S. 135, 139, 140 [28: 954, 956]; Story on Promissory Notes, § 27; *Cota* v. *Buck*, 7 Met. 588. It is true that, upon the failure of the maker to pay the principal and interest of any note of the whole series of twenty-five, the others would become due and payable,—that is, due and payable at the option of the holder. But a contingency under which a note may become due earlier than the date fixed is not one that affects its negotiability. In *Ernst* v. *Steckman*, 74 Pa. 13, 15, cited with approval in *Cisne* v. *Chidester*, 85 Ill. 523, the question was whether the following instrument was a negotiable promissory note: "$375. Paradise, Lancaster Co., Pa., June 11, 1869. Twelve months after date (or before if made out of the sale of W. S. Coffman's Improved Broadcast Seeding Machine), I promise to pay J. S. Huston, or bearer, at the First National Bank of Lancaster, three hundred and seventy-five dollars, without defalcation, for value received, with interest." It was there contended that the character of the instrument was changed by the fact that in the contingency of the sum being sooner realized from the sale of the machinery it might become [285] payable within the year. The court, after observing that the general rule to be extracted from the authorities undoubtedly requires that, to constitute a valid promissory note, it must be for the payment of money at some fixed period of time, or upon some event which must inevitably happen, and that its character as a promissory note cannot depend upon future events, but solely upon its character when created, said: "Yet it is an equally well-settled rule of commercial law that it may be made payable at sight, or at a fixed period after sight, or at a fixed period after notice, or on request, or on demand, without destroying its negotiable character. The reason for this, said *Lord* Tenterden, in *Clayton* v. *Gosling*, 5 Barn. & C. 360, is that it 'was made payable at a time which we must suppose would arrive.'" To the same effect are *Cota* v. *Buck*, 7 Met. 588; *Walker* v. *Woollen*, 54 Ind. 164; *Woollen* v. *Ulrich*, 64 Ind. 120; *Charlton* v. *Reed*, 61 Iowa, 166; *Andrews* v. *Franklin*, 1 Strange, 24; *Cooke* v. *Horn*, 29 L. T. N. S. 369.

Upon like grounds it has been held that the negotiability of the note is not affected by its being made payable on or before a named date, or in installments of a particular amount. In *Ackley School Dist.* v. *Hall*, 113 U. S. 135, 140 [28: 954, 956], it was held that municipal bonds, issued under a statute providing that they should be payable at the pleasure of the district at any time before due, were negotiable; for, the court said: "By their terms, they were payable at a time which must certainly arrive; the holder could not exact payment before the day fixed in the bonds; the debtor incurred no legal liability for nonpayment until that day passed." In *Mattison* v. *Marks*, 31 Mich. 421, which was the case of a note payable "on or before" a day named, it was said: "True, the maker may pay sooner if he shall choose, but this option, if exercised, would be a payment in advance of the legal liability to pay, and nothing more. Notes like this are common in commercial transactions, and we are not aware that their negotiable quality is ever questioned in business dealings." *Carlon* v. *Kenealy*, 12 Mees. & W. 139; *Colehan* v. *Cooke*, Willes, 393; *Jordan* v. *Tate*, 19 Ohio St. 586; *Curtis* v. *Horn*, 58 N. H. 504; *Howard* v. *Simpkins*, [2 69 Ga. 773; *Protection Ins. Co.* v. *Bill*, 31 Conn. 534, 538; *Goodloe* v. *Taylor*, 3 Hawks, 458; *Riker* v. *A. & W. Sprague Mfg. Co.* 14 R. I. 402. In the last-named case it was said that if the time of payment named in the note must certainly come, although the precise date may not be specified, it is sufficiently certain as to time. It was consequently held that a reservation in a note of the right to pay it before maturity, in installments of not less than five per cent of the principal at any time the semi-annual interest becomes payable, did not impair its negotiability, the court observing that a note is negotiable if one certain time of payment is fixed, although the option of another time of payment be given. In view of these authorities, as well as upon principle, we adjudge that the negotiability of the notes in suit was not affected by the provision that upon the failure of the maker to pay any one of the notes of the series to which those in suit belonged, the rest should become due and payable to the holder.

Our conclusion is that the court below did not err in holding the notes in suit to be negotiable according to the custom and usage of merchants. They bear upon their face evidence that they were so intended by the maker and the payee. It was well said by *Judge* Bunn, at the trial, that the inference that anyone contemplating the purchase of the notes would naturally and properly draw would be (25 Fed. Rep. 809, 811), "that the freight cars had already been sold by the payee to the maker, and that the payee was to retain a lien and security upon

them, in the way of mortgage, for the payment of the purchase price, which would inure equally and ratably to all the holders of the notes, according to their several amounts, without regard to the time when such notes should fall due. If this be so, the contract was an executed one, the consideration for the notes had already passed and the payment of the notes would not be made to depend upon any condition whatsoever."

Judgment affirmed.

121] THE HOT SPRINGS RAILROAD COMPANY, *Plff. in Err.*,

v.

FANNIE G. WILLIAMSON.

(See S. C. Reporter's ed. 121-130.)

Refusal to charge—railroad company liable for damages to adjoining lot owners, by using street for its track—constitutional right.

1. The refusal of the court to charge upon an abstract question in relation to which the plaintiff has introduced no evidence, and which is not, therefore, before it, is not error.
2. Under a State Constitution which forbids the taking or damaging of private property for public use without compensation, a railroad company cannot use a street for its track, even under legislative or municipal authority, without compensation to adjoining lot owners for injury to their property and its consequent diminution of value.
3. An ordinance by a city, having the power, authorizing such company to construct and maintain its track and embankment in the street, does not impair the constitutional right of an adjoining lot owner to compensation for injury to his ingress and egress.

[No. 93.]

Submitted Nov. 11, 1889. Decided May 19, 1890.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment for damages for injuries to plaintiff's real estate by the construction of a railroad track and embankment in the street on which said real estate is situated. *Affirmed.*

The facts are stated in the opinion.

Mr. **John M. Moore,** for plaintiff in error:

The grant was *in præsenti*, vesting the title at once in the Railroad Company, according to the grant.

Glasgow v. *Hortis*, 66 U. S. 1 Black, 595 (17: 110); *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 60 (22: 554).

The Company may erect on the land, except at crossings, all such structures as are necessary to the maintenance and operation of the road.

Pierce, Railroads (2d ed.) 159, 160; *Atlantic & P. Teleg. Co.* v. *Chicago, R. I. & P. R. Co.* 6 Biss. 158; *Jackson* v. *Rutland & B. R. Co.* 25 Vt. 159; *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 468 (23: 361); Lewis, Em. Dom. §§ 584, 586.

Where a right of way has been acquired by a railroad company in a city or town, the city council cannot open a street through grounds occupied by the railroad and needed for railroad purposes.

New Jersey S. R. Co. v. *Long Branch*, 39 N. J. L. 28; *Bridgeport* v. *New York & N. H. R. Co.* 36 Conn. 255; *St. Paul U.D. Co.* v. *St. Paul*, 30 Minn. 359; *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S. 428 (26: 579).

NOTE.—*As to payment for private property taken for public use*, see *note* to Withers v. Buckley, 15:816.

Railroads occupying streets; rights of, and liability for damages to adjoining owners.

Appropriating a public street to use for an ordinary commercial railroad is not a proper street use. Adams v. Chicago, B. & N. R. Co. 1 L. R. A. 498, 39 Minn. 286, 38 Alb. L. J. 368; Ruttles v. Covington (Ky.) 10 Ky. L. Rep. 766.

The construction and operation of a steam railway in a city street cannot be allowed except by the consent of the abutting lot owners or by right of eminent domain, whether such owners possess the fee to the street or only an easement therein. Theobold v. Louisville, N. O. & T. R. Co. 66 Miss. 279, 4 L. R. A. 735.

The use of steam as a motive power for the movement of cars on a highway, at a place where there is no authority for such use, in consequence of which the buildings of an abutting owner are shaken, and cinders, smoke and dust discharged upon his premises, depreciating the value of his property, constitutes a nuisance. Hussner v. Brooklyn City R. Co. 114 N. Y. 433.

A statute giving a railroad authority to construct a railway "to" a city does not give it authority to use any street or alley in such city, where the city has no authority to give the right. Ruttles v. Covington (Ky.) 10 Ky. L. Rep. 766.

A railroad company has no right, in constructing its road, to change the location or grade of a public way so as to deprive the adjoining owner of his right to enjoy his premises, by preventing ingress or egress, and, if it does so, must answer in damages therefor. Louisville & N. R. Co. v. Finley, 86 Ky. 294.

Where a corporation made a plat of a town and sold lots thereon, a reservation of "the exclusive right to lay a plank or railroad track through and across any of the streets recorded in this map; also the exclusive right to use the same, with cars, engines or any other vehicle they may choose,"—gives the dedicator or its assigns no power to use the street for a railroad so as to destroy the public use for which it is dedicated. Riedinger v. Marquette & W. R. Co. 62 Mich. 29; Ward v. Detroit, M. & M. R. Co. 62 Mich. 46.

The necessity or convenience of obstructing a highway by a railroad company in making up trains and switching cars is not a matter to be considered in determining the question of guilt or innocence on an indictment for obstructing the street. State v. Chicago, M. & St. P. R. Co. 77 Iowa, 442, 4 L. R. A. 298.

The injury sustained by the owner of property when the railroad track is laid in the street on the side next to the property, by means of which the access thereto is rendered dangerous, is an injury for which a recovery may be had, under Pa. Const., art. 16, sec. 8. Pennsylvania S. V. R. Co. v. Walsh, 124 Pa. 544.

An excavation across a public street by a railroad company, under lawful authority, which makes it necessary, in order to pass the railroad, to make a detour by some adjacent street where crossings are provided, is not an injury for which damages can be recovered by an individual, although such inconvenience to the public and to him may depreciate the value of his property fronting on such street,

Mr. **A. H. Garland,** for defendant in error:

The right to use streets of a city by the adjoining lot owners is property, and no such right can be taken, or injured, or appropriated to the use of any corporation, until full compensation therefor shall be first made to the owner.

Elizabeth, L. & B. S. R. Co. v. *Combs*, 19 Am. Rep. 67, 10 Bush, 382; Ark. Const. art. 12, § 9, art. 2, § 22; 2 Dill. Mun. Corp. 620, § 625, *note.*

The City of Hot Springs had no right to grant a right of way along Benton Street.

Const. 1874, art. 2, § 23; Acts 1874, p. 9, § 14; Angell, Highways, §§ 33, 34.

The difference between the present value of the lot or lots so damaged with the embankment and the said track thereon existing, and what such values would be if the embankment and track were removed, or had never existed, is the measure of damages.

St. Louis, A. & T. R. Co. v. *Anderson*, 39 Ark. 167.

The cession of the control of the highways should not be construed to affect the rights or equities of those who own abutting lots.

Dovaston v. *Payne*, 2 Smith, Lead. Cas. *199; *Peck* v. *Smith*, 1 Conn. 103, 132.

The fact that a street dedicated to the public use is in an incorporated town, or that the street was laid out by the corporation, makes no difference as to the ownership of the soil; the title remains in the owner.

Philadelphia & T. R. Co's Case, 6 Whart. 25; *Louisville* v. *United States Bank*, 8 B. Mon. 138, 158.

Where the street is called for as a boundary, it is regarded as a single line. The thread of the road is the monument of abuttal.

Paul v. *Carver*, 26 Pa. 224; *Newhall* v. *Ireson*, 8 Cush. 598; *Champlin* v. *Pendleton*, 13 Conn. 23.

Property may be effectually damaged without a physical invasion or spoliation.

Pumpelly v. *Green Bay & M. C. Co.* 80 U. S. 13 Wall. 177 (20: 559); *Pusey* v. *Allegheny*, 98 Pa. 522; *Reading* v. *Althouse*, 93 Pa. 400; *Reardon* v. *San Francisco*, 66 Cal. 492; *Harmon* v. *Omaha*, 17 Neb. 548; *Werth* v. *Springfield*, 78 Mo. 107; *Gottschalk* v. *Chicago, B. & Q. R. Co.* 14 Neb. 550; *Republican Valley R. Co.* v. *Fellers*, 16 Neb. 169; *Rigney* v. *Chicago*, 102 Ill. 64; *Atlanta* v. *Green*, 67 Ga. 386; *Denver* v. *Bayer*, 7 Colo. 113; *Mollandin* v. *Union P. R. Co.* 14 Fed. Rep. 394; *Johnson* v. *Parkersburg*, 16 W. Va. 402; *Hutchinson* v. *Parkersburg*, 25 W. Va. 226; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635 (25: 336); *Mahady* v. *Bushwick R. Co.* 91 N. Y. 148; *Sheehy* v. *Kansas City C. R. Co.* 13 West. Rep. 653, 94 Mo. 574; *Callanan* v. *Gilman*, 1 Am. St. Rep. 831, 9 Cent. Rep. 900, 107 N. Y. 360; *Heiss* v. *Milwaukee & L. W. R. Co.* 69 Wis. 555; *Pennsylvania R. Co.* v. *Lippincott*, 8 Cent. Rep. 818, 116 Pa. 472; *Pumpelly* v. *Green Bay & M. C. Co.* 80 U. S. 13 Wall. 177 (20: 559).

The damages are the same whether the fee is in the land owner or not.

Mollandin v. *Union P. R. Co.* 14 Fed. Rep. 394; Mills, Em. Dom. § 200; Redf. Railways, 250; *Stack* v. *East St. Louis*, 85 Ill. 377; *Elizabeth, L. & B. S. R. Co.* v. *Combs*, 19 Am. Rep. 67, 10 Bush, 382; *Central Branch U. P. R. Co.* v. *Twine*, 23 Kan. 585, 33 Am. Rep. 203.

---

a short distance from the railroad. Fairchild v. St. Louis, 97 Mo. 85.

The words, "or damage," in Neb. Const., art. 1, sec. 21, include all damages arising from the exercise of the right of eminent domain, which cause a diminution in the value of private property. Omaha v. Kramer, 25 Neb. 489.

Under the Ohio Statute making a railroad company, which lays its tracks upon a street, responsible for injuries to private property, the right to recover damages for such injuries is not limited to owners of property immediately upon the street occupied by the track or structures of the company. The owner of property near to the street is entitled to the remedy given by the Statute, if the injury to it is the result of the occupancy of the street by the railroad company, or can be fairly attributed to such occupancy. Shepherd v. Baltimore & O. R. Co. 130 U. S. 426 (32:970).

The Legislature may grant to a railroad company the right to construct a street railroad in a public street, without providing for compensation to the owners of lots abutting on such street, who have no title to the soil of the street itself. Carson v. Central R. Co. 35 Cal. 325.

But where the fee of the street remains in the owner of the abutting lots, subject to the public easement, the rule is different; because the railway, in such case, is an additional burden upon his land. Stetson v. Chicago & E. R. Co. 75 Ill. 74; Cox v. Louisville, N. A. & C. R. Co. 48 Ind. 178; Gray v. First Div. St. Paul & P. R. Co. 13 Minn. 315.

Although the railroad track has been laid through a street, and the owners of property abutting on the street have received compensation for damages, the location of another railroad in the same street may inflict additional damages, for which the owners of such property will be entitled to compensation. Southern P. R. Co. v. Reed, 41 Cal. 256.

The use of a portion of a turnpike road for the purpose of a passenger railway is held not to be a new and distinct servitude, entitling the owners of land along the line of such turnpike, who have already been compensated for the condemnation of their property, to fresh compensation. Peddicord v. Baltimore, C. & E. M. P. R. Co. 34 Md. 463.

The measure of damages in an action by an abutting owner against an elevated railroad company to recover damages for the interference with his easement of light, is the difference of value with the full and unobstructed use of the easement and the value without it. *Re* New York C. & H. R. R. Co. 15 Hun, 63, 67, 69; *Re* New York, L. & W. R. Co. 39 Hun, 1; *Re* New York, W. S. & B. R. Co. 35 Hun, 260; Pond v. Metropolitan E. R. Co. 42 Hun, 567.

An elevated railroad company is liable to an abutting owner for the operation of its trains and the consequences flowing therefrom, where the evidence establishes the fact that they were destructive of the easements of light, air and access. Lahr v. Metropolitan E. R. Co. 6 Cent. Rep. 371, 104 N. Y. 268; Peyser v. Metropolitan E. R. Co. 13 Daly, 122.

The correct rule of damages is the difference in value of the use of the plaintiff's lots without the elevated railroad and with it between the date of its building and the commencement of the action. Tallman v. Metropolitan E. R. Co. 16 N. Y. S. R. 694.

In an abutter's action for damages by reason of the operation of an elevated railway, the element of noise may be considered. Lahr v. Metropolitan E. R. Co. *supra;* Story v. New York E. R. Co. 90 N. Y. 122; Kane v. Metropolitan E. R. Co. 25 N. Y. S. R. 587.

In a case like the one at bar, damages are allowed.

Louisville v. *Louisville R. M. Co.* 3 Bush, 416.

Mr. Justice **Lamar** delivered the opinion of the court:

This is an action at law brought in the Circuit Court of Garland County, Arkansas, at its February Term, 1883, by Curnel S. Williamson and Fannie G. Williamson, his wife, against the Hot Springs Railroad Company, a corporation organized under the laws of that State, to recover damages for alleged injuries done to certain described real estate belonging to Mrs. Williamson, in the City of Hot Springs, by the defendant Company.

The declaration alleged that the plaintiff, Fannie G. Williamson, was the owner in fee of lots 1 and 2 in block No. 78 and lot 9 in block No. 69 in that city; that lots 1 and 2 are separated from lot 9 by Benton Street, which is one hundred and forty feet wide, and was laid out by the general government and dedicated to the city, with the other streets in the city, before the damages for which suit was brought were committed; that lot 9 lies south of Benton Street, lot 1 directly across the street on the north, and lot 2 lies immediately north of lot 1; that the defendant, a Railroad Company, organized as aforesaid, with its termini at Hot Springs and at Malvern, in Hot Springs County, in that State, by and through its agents and employés, on and prior to the 10th of December, 1881, constructed, threw up and completed in and along the center of Benton Street, between lots 1 and 9, and running the full length of those lots, a permanent embankment of earth and stone, fifty feet wide and of great height, to serve as a road-bed for its railroad track, under a fraudulent and unauthorized contract secretly and clandestinely entered into between it and the city, for the purpose of defrauding and injuring plaintiffs; that the defendant also constructed a turning table at the southeast corner of that embankment and the northeast corner of lot 9, and immediately thereafter proceeded to lay and fix its railroad track permanently on the embankment, which thereby became and thereafter was a part or extension of its railroad; that by the embankment, extension and turning table plaintiffs and others were cut off from and deprived of the use of that street in connection with said lots, and their egress and ingress therefrom and therein impaired and destroyed; that said lots, which, by reason of their lateral frontage upon Benton Street, were of great value, were thereby greatly damaged and decreased in value to the extent of five thousand dollars; and that since the dedication of Benton Street to the city, the defendant had wrongfully appropriated almost the whole of it for its road-bed and other purposes, thereby wantonly injuring plaintiffs and all other owners of land adjoining that street. The prayer of the petition was for a judgment against the defendant for $5,000, and for other relief.

The defendant answered, pleading ignorance as to whether the plaintiff, Fannie G. Williamson, was the owner of the lots described in the petition, and averring that those lots were located upon Malvern Avenue, one of the original streets of the City of Hot Springs, which was laid off by the city and opened and continuously used thereafter as a street, and was never vacated by the city. Further answering, it alleged that its railroad was constructed in and upon its right of way granted it by Congress under the Act of March 3, 1877, entitled "An Act in Relation to the Hot Springs Reservation, in the State of Arkansas," and under the alleged ordinance of the city, which it denied had been passed clandestinely or through any fraud on its part; and also alleged that the turn-table complained of was constructed on its right of way, and upon lots 10 and 11, in block 69, in the city, which were defendant's own property. As a further answer, the defendant alleged that Curnel S. Williamson was improperly joined as a plaintiff in the action.

At the trial of the case before the court and a jury, the following agreed statement of facts, together with a map also agreed upon as correct, was filed:

"1st. The accompanying map shows the location of Malvern Avenue, Benton Street, the plaintiff's lots and the right of way granted by Congress to the defendant under the Act referred to in defendant's answer, and approved by the Hot Springs Commission and the Secretary of the Interior.

"2d. The extension claimed by the defendant under the ordinance of the City of Hot Springs consists of a strip fifty feet wide, the center thereof on a direct line with the center of the right of way granted by Congress and extending westward to Malvern Avenue, a distance of 130 feet.

"3d. The turn-table is fifty feet in diameter; it is located as marked on the map. Lots 10 and 11, in block 69, upon which a part of the turn-table is located, belong to the defendant.

"4th. Gaines Avenue was located as a street of said City of Hot Springs and opened and accepted by the city in 1876, October or September; it was 80 feet wide and the northern boundary thereof was about coterminous with the northern boundary of defendant's right of way. The right of way is 100 feet wide, subject to explanation."

The map referred to shows that Benton Street and the right of way run almost east and west, the right of way extending south to the south line of Benton Street. Immediately east of lot 9, and also adjacent to the right of way, is lot 10, and immediately beyond that is lot 11. The turn-table is located partly on the right of way and in part on the Company's lots 10 and 11; and appears to be about 40 feet east of the east line of lot 9, and nearly the same distance east of the western extremity of the right of way granted by Congress. Malvern Avenue runs nearly from the southeast to the northwest, and is 130 feet west of the western terminus of the right of way.

Considerable testimony was introduced on both sides, on the question of damages as presented by the pleadings, and upon that

question alone the evidence was conflicting. Evidence was also introduced on the part of the defendant to show that the alleged obstructions erected by it were such as are generally used at terminal stations, and were necessary for the operations of the road. One of its witnesses testified that "without the turn-table the train could not be run on the right of way within the City of Hot Springs without great danger to life and property, for without (it) the engines could not be turned and would have to be run in back motion either in departing from the depot or coming to it. This would be specially dangerous at night, as the head-light could not be seen while the engine was in back motion."

The embankment was described by the witnesses as being fifty feet wide and several feet higher than the grade of the street, and is inclosed by a granite wall. It is 25 feet from lot 9 on the south, and 65 feet from lot 1 on the north.

The ordinance of the city council granting a right of way fifty feet wide from the western terminus of the congressional right of way to Malvern Avenue (180 feet) was also [125] introduced, and it was admitted that the Company had filed its written acceptance of the same within ten days from its passage as required by section IV. thereof. It also appeared in evidence that the city had, by an ordinance approved February 26, 1883, "authorized and empowered" the defendant "to erect all necessary and suitable depot buildings and other structures incident to the operation of its road within the limits of its 'right of way,' granted it by Congress, ... and to maintain and continue the same, or any depot buildings or other erections or improvements heretofore constructed or made by it." That ordinance further provided that that part of Benton Street, for two squares east of Malvern Avenue, "within the limits of the 'right of way' granted by Congress, ... and the extension thereto heretofore granted by the City of Hot Springs, except so much thereof as shall be required to leave open the crossing of Cottage Street [first street east of Malvern Avenue], is hereby vacated and closed, and the extensive use and control thereof is granted to the Hot Springs Railroad Company for railroad and depot purposes."

After the testimony in the case had been closed, upon request of the plaintiff, the name of C. S. Williamson was dropped from the complaint, and his evidence was also excluded from the jury.

At the request of the plaintiff the court charged the jury as follows:

"I. The court instructs the jury that the right to use streets in a city by the adjoining lot owners is property and a right of way belonging to the owner of said lots, and that no such right can be taken or injured or appropriated to the use of any corporation until full compensation therefor shall be first made to the owner in money or secured to him by a deposit of money, which compensation is irrespective of any benefit from any improvement made by said corporation.

"II. The City of Hot Springs had no right to pass an ordinance granting the defendant a right of way along Benton Street, and defendant could acquire no right to build any permanent structure or lay its track thereon by virtue of such ordinance.

"III. The court instructs the jury that the [1 measure of damages to adjacent property, caused by the use of a street as a site for a railroad, is the diminution of the value of the property; and the recovery may include prospective as well as past damages when the obstructions to the use of the street are of a permanent nature."

The court, upon its own motion, instructed the jury "that if they believe from the evidence that the defendant, by its agents or employés, constructed in Benton Street, between lot 9, in block 69, and lots 1 and 2, in block 78, in the City of Hot Springs, a permanent embankment, as a road-bed on which to lay and extend its railroad track, and then, or before the commencement of this suit, placed and fixed its track permanently upon said embankment, as charged in the complaint; that said lots, or any of them, were or are permanently injured or damaged thereby, and that said lots were then and still are the property of the plaintiff, Fannie G. Williamson,—they must find in her favor; and, in such case, the difference between the present value of the lot or lots so damaged, with the embankment and the said track thereon existing, and what such value would be if the embankment and said track were removed or had never existed, is the measure of damages." To all of which instructions the defendant at the time excepted.

The defendant requested the court to give several instructions to the jury, which the court declined to do, except in one instance, in a modified form, to which refusals the defendant at the time excepted; but as none of them are relied upon in the argument in this court except the second one, it is only necessary to set that one out in full. It is as follows:

"The right of way was granted by Congress to the defendant from a point on the eastern boundary of the Hot Springs Reservation to the old Malvern Stage Road within said reservation. The grant carried with it the right to erect and maintain all suitable structures usual and necessary to the operation of a railroad, including a depot, station-house and such tracks and other improvements of that nature as are necessary to the proper and convenient dispatch of its business; and if you find that the turn-table and other improvements complained of, or [12 any part of them, are within the right of way granted by Congress to the defendant as aforesaid, and are necessary to the operation of its road, and such as are usual at terminal stations, you cannot find for the plaintiffs by reason of any damage caused to their lots by such improvements."

The jury returned a verdict in favor of the plaintiff for the sum of $2,275, upon which judgment was rendered; and after a motion for a new trial and also a motion in arrest of judgment had both been overruled,

an appeal was taken to the Supreme Court of the State, which affirmed the judgment of the trial court. 45 Ark. 429. This writ of error was then sued out.

The following is the only assignment of error:

The court erred in ruling that the plaintiff in error did not have the lawful right to construct its works, including the turn-table, on the right of way granted it by the Act of Congress of March 3, 1877, and in holding that it was liable to the defendant in error by reason of the alleged obstruction caused by said works."

From the foregoing statement it is observed that the claim for damages in the trial court was based upon two propositions: first, that the plaintiff's property was injured by reason of the embankment in Benton Street alongside it, west of the terminus of the congressional right of way; and, second, that it was also injured by reason of the construction and existence of the turn-table partly upon the congressional right of way—no claim for damages ever having been made by reason of the construction of a road-bed and track upon the congressional grant.

It is also observed that, while the defendant saved exceptions to the various rulings of the court, on the question of damages arising from the construction of the embankment on that part of Benton Street separating the plaintiff's lots, and also as to the rule for the computation of such damages, none of those exceptions are embodied in the assignment of error, nor is any point made in relation to them in the brief of counsel for the Company. In his own language, "The only [128] question before this court is that which arises under the Act of Congress, . . . and relates alone to the turn-table and works constructed on that part of the right of way embraced in the grant by Congress. This excludes from consideration the embankment built upon the western extension of the track, under the city ordinance, and involves the proper construction of the Act of Congress."

The question before us is therefore narrowed down to the ruling of the trial court upon the only issue which the assignment of error presents. Upon an examination of the record it will be found that no evidence was introduced by the plaintiff as to whether the turn-table and other works constructed on the right of way injured and damaged her property at all; and the only evidence on that subject was introduced by the defendant, which evidence tended to show that, by the erection of a depot and other works on the right of way, property in that vicinity had not only not been depreciated, but had, in reality, risen in value.

It is further observed that in its charge to the jury the court made no reference whatever to the question of damages arising out of the construction and operation of the turn-table and other works on the congressional right of way, except that it refused to charge that the defendant had the right to construct and maintain whatever structures thereon it might deem essential to its business, as above set forth in detail; or that, having that right, it was not liable to the owners of abutting real estate for damages caused by the exercise of that right in a proper and skillful manner. Inasmuch, therefore, as the plaintiff introduced no evidence to sustain that branch of her claim for damages, the court was constrained to conclude that it was eliminated from the case. She certainly could not obtain a verdict for any damages arising out of that branch of the claim without introducing any evidence to support it. The evidence which the defendant introduced bearing on that question, if taken into consideration by the jury at all, could not have had any but a favorable effect as to the defendant; but, as already remarked, it was rendered unnecessary by the plaintiff's virtual abandonment of that part of her claim for damages. There [1 is nothing in the record to show that that evidence was considered by the jury in arriving at their verdict, because no charge relative thereto was given by the court, or could legally have been given by it on that question. The refusal of the court to charge upon an abstract question in relation to which the plaintiff had introduced no evidence, and which was not therefore before it, was not error.

Whilst we hold this view upon the sole question involved in the assignment of error, it is proper to add that we concur in the view taken of this case by the Supreme Court of Arkansas. That court held that the Act of Congress granting the right of way to the defendant Company over the strip of land upon which its road was to be operated (which in this case was along the line of Benton Street, an original street in the Town of Hot Springs, and used as such at the time of the passage of the Act), carried with it the right to construct, maintain and operate its line of railroad therein, and to appropriate such right as a location for its turn-table and depots and for any other purpose necessary to the operation of its road; but that it was equally clear, under the provisions of the present Constitution of the State of Arkansas, that if in the exercise of that right the property of an adjoining owner was damaged in the use and enjoyment of the street upon which the road was located, such owner would be entitled to recover such damages from the Company. It further held that the contention of the plaintiff in error that the Act of Congress invested it with an absolute title to the street along which its road was located, and exempted it from any liability for consequential damages resulting to an abutting owner from the laying of its track in a proper and skillful manner, was founded upon cases arising under the familiar constitutional restriction that private property shall not be taken for public use without compensation, which decisions generally turned upon the question, What is a *taking*, within the meaning of such provision? that the Constitution of that State of 1878, which provides that "private property shall not be taken, appropriated or damaged for public use without just compensation," has changed that rule; that all the decisions [1 rendered under similiar constitutional provisions concur in holding that the use of a

street by a railroad company as a site for its track, under legislative or municipal authority, when it interferes with the rights of adjoining lot owners to the use of the street, as a means of ingress and egress, subjects the railroad company to an action for damages, on account of the diminution of the value of the property caused by such use; and lastly, that even conceding the authority of the Town of Hot Springs to pass the ordinance authorizing the Company to construct and maintain the railroad embankment, track and turn-table complained of, it cannot impair the constitutional right of the defendant in error to compensation.

We think those views are sound and in accordance with the decisions of this court in *Pennsylvania R. Co.* v. *Miller*, 132 U. S. 75 [33: 267], and *New York E. R. Co.* v. *Fifth Nat. Bank*, decided May 5th inst., 135 U. S. 432 [34: 231].

The judgment of the court below is affirmed.

---

[348] J. M. B. REYNOLDS, Assignee of JOHN H. ADDEN, *Appl.*,

v.

JOHN ADDEN ET AL.

(See S. C. Reporter's ed. 348-356.)

Removal of causes—proof of citizenship—transfers by insolvent proceedings, when not binding in another State—Louisiana law.

1. That a defendant who removes a cause from a state court to the circuit court of the United States is described in other proceedings as residing in Massachusetts does not prevent his showing in the removal proceedings that he is a citizen of New Hampshire.
2. Mere descriptive words in such other proceedings do not estop him from showing the truth as to his residence.
3. Transfers of a debtor's property by insolvent proceedings in another State are not binding in Louisiana upon its citizens or the citizens of any State except the one in which the insolvent proceedings took place, at least until the assignee has reduced the property into possession.
4. A resident and citizen of New Hampshire is not concluded by insolvent proceedings in Massachusetts, so as to prevent him from attaching the insolvent's property in Louisiana.

[No. 153.]

Submitted Dec. 10, 1889. Decided May 19, 1889.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana dismissing a suit brought by John M. B. Reynolds against John Adden to restrain him from further prosecuting two suits in the Civil District Court for the Parish of Orleans, Louisiana, and to have said suits and the proceedings therein declared illegal and void, said suits having been commenced by attachment against the goods of John H. Adden in a store in New Orleans. *Affirmed.*

The facts are stated in the opinion.

Mr. **Gus A. Breaux** for appellant.

Messrs. **A. A. Ranney** and **A. V. Lynde** for appellees.

Mr. Justice **Bradley** delivered the opinion of the court:

This suit was originally commenced in the Civil District Court for the Parish of Orleans, Louisiana, by petition filed by John M. B. Reynolds against John Adden, to restrain him from further prosecuting two certain suits in the same court, or proceeding upon execution therein, and to have the same declared illegal and void. The suits referred to had been commenced by said John Adden by attachment against the goods of his son, John H. Adden, situated in a store in New Orleans, occupied by said John H. Adden for carrying on his business therein under the management (as alleged) of the father, John Adden, the son being a resident of Reading, Massachusetts. The grounds of the relief sought as stated in the petition are that on the 10th of March, 1882, John H. Adden, a resident of Reading, in the County of Middlesex, and State of Massachusetts, presented a petition of insolvency to the proper court there, from which a warrant was issued for the seizure of all his property, real and personal, and other proceedings were had as usual in such cases; and at a meeting of the creditors on the 23d of March, one Stillman E. Parker and the petitioner, Reynolds, were appointed assignees, and accepted the said trust, and gave bonds as required by law, the said John Adden executing the bond of said Parker as his surety; that in the schedule of assets filed by the insolvent with his petition of insolvency there appeared to be in his store, No. 58 Custom-house Street, New Orleans, about 600 cases of shoes, valued at $18,341.47, and other property, accounts, notes, etc., amounting to about $28,000, notes and accounts due to the Boston store amounting to about $10,000, and other assets in Boston amounting to about $3,000; that on the petitioner going to New Orleans to take possession of the assets there, he discovered that the said John Adden (the father) had instituted suit in that court against John H. Adden for $20,000 on the 16th of March, 1882, and had issued an attachment therein, and attached the property, and obtained judgment by default on the 3d of April, 1882, with lien and privilege on the property attached; and that on the 4th of April, 1882, he had obtained a second attachment in another suit upon notes of said John H. Adden amounting to over $6,000; all which proceedings of John Adden the petitioner alleged to be illegal, null and void by reason of the insolvency proceedings in Massachusetts, he, the said John Adden, being a resident of Massachusetts, and bound thereby, as well as for irregularities in said proceedings themselves, referred to in the petition, and the complicity (as alleged) of thesaid John Adden with his said son, in the measures taken by the latter. The petitioner alleged that he had applied to his co-assignee, Stillman E. Parker, to join him in the petition, but he had refused.

A rule to show cause why a writ of injunc-

NOTE.—*As to removal of causes, under Act of 1875; citizenship,*—see *note* to Meyer v. Delaware R. Const. Co. 25: 898.

350] tion should not issue was granted and heard by the court, upon which hearing a certified copy of the insolvent proceedings in Massachusetts was presented and received in evidence; and on the 15th of May, 1882, a preliminary injunction was issued restraining the defendant, John Adden, from enforcing his judgment in the first suit, and from proceeding further in the second; also restraining the sheriff of the parish from selling the goods seized by him. A motion to dissolve the injunction was subsequently made, and after argument was refused. The principal grounds of refusal were that John Adden was a resident of Massachusetts, and had become surety of one of the assignees of his son, and was therefore estopped and bound by the proceedings in insolvency.

On the 24th of May, 1883, the defendant, John Adden, filed a petition for the removal of the cause into the Circuit Court of the United States for the Eastern District of Louisiana. In this petition Adden contends, amongst other things, that the Insolvent Laws of Massachusetts, under which Reynolds claims the property in controversy, impair the obligation of the contract between the petitioner and John H. Adden, and deprive the petitioner of his property without due process of law, and are in violation of the Constitution of the United States; that he had already, in an answer filed in the case, claimed that the said Insolvent Laws deprived him, who was a citizen of the State of New Hampshire, of the privileges and immunities of citizens in the several States, and were in violation of the 4th article of the Constitution of the United States. And after setting up various other claims of privileges and immunities under the Constitution of the United States, alleged to be violated by said insolvent proceedings, the petitioner further stated that at the commencement of this suit, and continuously since, he had been and still was a citizen of the State of New Hampshire, and that said Reynolds and John H. Adden then were, and had continually been, citizens of Massachusetts, and that Duffy, the sheriff of the Parish of Orleans, was, and is, a citizen of the State of Louisiana. He further represented that in said suit the real controversy was between said Reynolds and the petitioner, and that John H. Adden, and Duffy, the sher-
351] iff, were not necessary, but merely formal, defendants. The civil district court refused the application for the removal of the cause; but a certified copy of the proceedings being presented to the circuit court of the United States, that court took jurisdiction of the case, and ordered it to be docketed on the equity side of the court. A motion was made to remand the cause to the state court, which, after argument, was refused. Evidence was taken as to the residence and citizenship of the defendant, John Adden, and as to his connection with the business of his son, and the general character of the proceedings had in the insolvency case in Massachusetts, and in the suits instituted by John Adden in New Orleans at the final hearing. The court dismissed the petition or bill of complaint, and the petitioner, Reynolds, has appealed.

The first question which we shall consider is as to the jurisdiction of the circuit court of the United States. It is strenuously contended by the appellant that the case ought not to have been removed from the state court, and ought to have been remanded to that court upon the motion made for that purpose. The ground of this contention is that John Adden, the defendant, was a citizen of Massachusetts, and not a citizen of New Hampshire, as alleged by him in his petition for removal; or that if he was not in fact a citizen of Massachusetts, he was estopped from denying that he was such by his acts and declarations in the proceedings, both in Massachusetts and in New Orleans. In the insolvency proceedings in Massachusetts he became, on the 23d day of March, 1882, the surety of Stillman E. Parker, one of the assignees of John H. Adden, and in the same bond he is described as "John Adden, of Reading, in the County of Middlesex." It was also testified by one Ambrose Eastman that John Adden, being examined on oath at the meeting of the creditors of his son in Cambridge, Massachusetts, on the 23d of March, 1882, testified that he resided in the Town of Reading, County of Middlesex, in Massachusetts. It is also shown that in his petition for the attachments issued at his suit in New Orleans on the 16th of March, 1882, and the 4th of April the [352] same year, he is described as "John Adden, residing in the State of Massachusetts." But these petitions were not signed by him, but by his attorneys in New Orleans. On the other hand, the overwhelming evidence of a great number of witnesses puts the matter beyond all doubt, that whilst he had at a former period resided in Reading, Massachusetts, he had removed from thence to Lancaster, in the State of New Hampshire, in October, 1874, and had continued to reside in Lancaster ever since that time. His being described as residing in Reading at the time of the insolvency of his son was a natural inadvertence arising from the fact that in consequence of the intimate relations between him and his son (who did reside at Reading), he was often at that place on business or social visits. The only question, therefore, that arises on this branch of the subject is whether he is permitted to show the truth, or whether he is estopped by the papers before referred to, in which he is described as residing in Massachusetts. The evidence of Ambrose Eastman is contradicted by a number of witnesses equally in a position to hear what Adden did testify, and there is no question in our minds that Mr. Eastman was mistaken in his recollection. As to the papers relied on by the appellant, we are of opinion that Adden was not concluded by the descriptions of person contained in them. He was so often in Boston and Reading, about the business of his son and in intercourse with him, that the descriptive words "of Massachusetts," or "of Reading, Massachusetts," or "residing in Massachusetts" might easily have been overlooked; and the same words in the petitions for attachment in New Orleans were applied and used by his counsel there, and not by himself. They pre-

sent no case upon which an estoppel as to the citizenship of Adden can be founded. He might even have been a temporary resident of Massachusetts, and yet a citizen of New Hampshire. So that if the descriptive words were to be taken as true they would not be decisive. But they were words of mere description, and as such they could not estop him from showing the truth and the fact. They induced no conduct on the part of the appel-
[353] lant, or of any of the creditors of John H. Adden, which operated to their prejudice. They contained no element of estoppel. We are satisfied, therefore, that the cause was properly removed from the state court, and that the circuit court of the United States had jurisdiction thereof.

The next question to be considered is as to the legal right of the defendant, John Adden, to institute the suits and issue the attachments which were prosecuted by him at New Orleans. As a resident and citizen of New Hampshire, was he concluded by the insolvent proceedings in Massachusetts, and the incidental transfer of the property of John H. Adden therein? If he was, then he had no right to take the proceedings which he did take in Louisiana. Had he been a citizen and resident of Massachusetts, the question would have been a different one. We have recently decided, in the case of *Cole* v. *Cunningham*, 133 U. S. 107 [33: 538], that a creditor, who is a citizen and resident of the same State with his debtor, against whom insolvent proceedings have been instituted in said State, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to attach or seize the personal property of the debtor situated in another State, and embraced in the assignment, he may be restrained by injunction by the courts of said State in which he and his debtor reside. That was a case arising in Massachusetts, and the effect and operation of assignments made by debtors of personal property belonging to them in other States is elaborately discussed by the chief justice delivering the opinion of this court. It was held that where a debtor and his creditor were both citizens and residents of Massachusetts, and the former went into insolvency, and regular proceedings under the Insolvent Laws of the State were had, the creditor might be enjoined by the courts of Massachusetts from attaching goods and credits of the debtor in New York, although in the latter State such attachment would be legal
[354] and valid. But that is not the present case. Here it is proved beyond doubt that John Adden was not a citizen or resident of Massachusetts, but was a citizen and resident of New Hampshire; and the question is whether, as such citizen of New Hampshire, he had a right to prosecute his claims against John H. Adden by attachment of the goods of the latter in the State of Louisiana by the laws of the latter State. It is by the laws of Louisiana that the question must be decided. Every State exercises to a greater or less extent, as it deems expedient, the comity of giving effect to the insolvent proceedings of other States, except as it may be compelled to give them full effect by the Constitution of the United States. Where the transfer of the debtor's property is the result of a judicial proceeding, as in the present case, there is no provision of the Constitution which requires the courts of another State to carry it into effect; and, as a general rule, no state court will do this to the prejudice of the citizens of its own State.

But without discussing the rules adopted in different States on this subject, which are fully examined and commented upon in the treatises on private international law, our present inquiry is confined particularly to the doctrine of the courts of Louisiana. And here we are entirely free from embarrassment. By a succession of cases decided by the Supreme Court of Louisiana, it has become the established law of that State, that such transfers by judicial operation are not binding upon the citizens and inhabitants of Louisiana, or of any other State except the State in which the insolvent proceedings have taken place—at least until the legal assignee has reduced the property into possession or done what is equivalent thereto. *Olivier* v. *Townes*, 2 Mart. N. S. 93; *Tyrce* v. *Sands*, 24 La. Ann. 365; *Lichtenstein* v. *Gillett*, 37 La. Ann. 522. In the case last cited, a receiver under a creditor's bill, appointed by a chancery court of Georgia, sought to recover possession of the property of the defendants, adversely to the rights acquired by the plaintiffs under an attachment of that property in Louisiana. The plaintiffs' attachment was effected on the 26th of April, 1883. The intervention of the receiver was filed December 13, 1883. The Supreme Court of Louisiana, speaking through *Mr. Justice* Poché, after adverting to the distinction between a voluntary assignment and a compulsory one executed by order of a court, proceeds to say: "We do not propose to deny to him [the receiver], and we must not be understood as debarring him absolutely of, any right under his appointment to claim and obtain possession of the property of Gillett Brothers, in case the exercise of such right does not militate with or destroy any existing rights acquired by creditors under proceedings instituted in our courts In his brief, his counsel concedes that the claim which he now presses to our favorable consideration could not be enforced to the detriment of previously acquired rights of our own citizens. But he contends that the protection cannot be extended to plaintiffs for the reason that they are residents of the State of New York. . . . In our opinion it is sufficient that the creditor who has acquired rights by legal process in our courts, be not a resident or a citizen of the State whose court has appointed a receiver who urges claims adverse to his acquired rights in our courts. The plaintiffs in this case, residents of New York, are not more amenable to the jurisdiction of the Georgia courts than would be a citizen of Louisiana, and they are legally entitled to the full protection of our courts against the claims of intervenor."

Such, therefore, being the rule of comity applied by the courts of that State, we have no hesitation in saying that the defendant, John Adden, had a perfect right to prosecute

his claims in the manner he did. No rule of law stood in his way, and nothing in the circumstances of the case, so far as we have been able to discover, prevented him from taking the course he did. It will be observed that his first suit in New Orleans was commenced on the 16th of March, 1882, a week prior to the meeting of the creditors in Cambridge and the appointment of the assignees in insolvency. He had not then done anything to interfere with his right to sue, and he did not afterwards do anything to take away that right. His going security on the bond of Parker as one of the assignees of his son is not shown to have any significancy in the matter in question. There was no reason why he should not approve of and acquiesce in the insolvent proceedings that were undertaken, nor why he should not, as an act of friendly accommodation, sign the bond of Parker, who seems to have been his brother-in-law. None of these things committed him to a position inconsistent with the prosecution of his claim in New Orleans.

[356] We have given due attention to the minor points raised by the appellant's counsel, but do not find anything therein which calls for a reversal of the decree. *The decree of the Circuit Court is therefore affirmed.*

---

[356] THE NASHUA AND LOWELL RAILROAD CORPORATION, *Appt.*,

v.

THE BOSTON AND LOWELL RAILROAD CORPORATION ET AL.

(See S. C. Reporter's ed. 356-385.)

Corporation is a citizen—union of two corporations does not destroy their identity or change their citizenship—directors of railroad company, when cannot build depot in another State—when can do so—purchase of stock in other railroads—accounting for net earnings.

1. A corporation is a citizen of the State where created, within the constitutional clause extending the judicial power of the United States to controversies between citizens of different States.

2. Although two corporations of different States unite their interests, and the stockholders of the one become the stockholders of the other, and their business is conducted by the same directors, the separate identity of each, as a corporation of the State by which it was created, and as a citizen of that State, is not thereby lost.

3. The union or consolidation of a corporation of New Hampshire with another corporation of the same name of Massachusetts, does not change its character as a citizen of New Hampshire, or give it citizenship in Massachusetts so as to defeat its right to go into the Circuit Court of the United States in that District.

4. The union of name, of officers, of business and of property does not change their distinctive character as separate corporations.

5. As a general rule, the directors of a railroad company cannot authorize, without the previous approval of its stockholders, the construction of a passenger station in a State foreign to that in which it was created, and to which its own road does not extend, or the payment of any portion of the cost of the construction.

6. But where two railroads in adjoining States are operated together and additional land and depot buildings are necessary in one of the States to enable them to retain their extended business, the directors of the railroad in the other State have power to contract to pay a proper portion of the cost of these increased business facilities.

7. Where one of two railroads operated together purchased a controlling interest in the stock of other railroads, which purchase was not authorized by the directors of the other jointly operated railroad, the additional burden of the purchase cannot be cast upon the latter railroad without the consent of its stockholders.

8. Such non-consenting railroad is entitled to an accounting for so much of the net earnings of the joint management as was expended to pay the interest on the purchase of such stock, and is entitled to the payment of the amount found due it on such accounting.

[No. 166.]

Argued Dec. 16, 17, 1889. Decided May 19, 1890. Question of Jurisdiction of Circuit Court Argued March 31, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Massachusetts dismissing a suit in equity to compel the Boston and Lowell Railroad Corporation to account for moneys received by it and used for its benefit in certain transactions growing out of a joint traffic contract between it and the Nashua and Lowell Railroad Corporation, plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. **E. J. Phelps** and **F. A. Brooks**, for appellant:

The net earnings of the two roads could not be devoted to the payment of interest of debts of the defendant Corporation incurred in making improvements of its own property, or in the purchasing of outside property for investment.

Union P. R. Co. v. *United States*, 99 U. S. 402 (25: 274).

The manager cannot use his position to promote in the slightest degree his own personal interest as a large shareholder in the defendant Corporation.

Morrison v. *Caldwell*, 5 T. B. Mon. 485; Lewin, Trusts (8th Eng. ed.) 285; Underhill, Trusts, 126, art. 41.

The executory agreements of corporate directors, made orally and not committed to

---

NOTE.—*When corporations deemed citizens or persons.* See *note* to United States v. Amedy, 6: 502.

As to citizenship of corporations, with reference to jurisdiction of courts over them, see *note* to National Steamship Co. v. Tugman, 27: 87; also *note* to Hope Ins. Co. v. Boardman, 3: 36.

As to citizenship of voluntary association, see *note* to Hope Ins. Co. v. Boardman, 3: 36.

As to mode of executing powers conferred on corporations; what powers are not implied,—see *note* to Beatty v. Knowler, 7: 813.

As to powers of corporation beyond the territorial limits of the sovereignty which created it, see *note* to Runyan v. Coster, 10: 382.

As to fiduciary position of directors; their contracts and dealings with corporations,—see *note* to Koehler v. Black River Falls I. Co. 17: 339.

When consolidation dissolves former companies. See *note* to Shields v. Ohio, 24: 357.

writing by vote or otherwise, do not subject the corporate body itself to any liabilities whatever.

Edgerly v. *Emerson*, 23 N. H. 568; *Schumm* v. *Seymour*, 24 N. J. Eq. 153; *Stoystown & G. Turnp. R. Co.* v. *Craver*, 45 Pa. 386; *Cammeyer* v. *United G. L. Churches*, 2 Sandf. Ch. 229, 7 N. Y. Ch. L.ed. 574; *D'Arcy* v. *Tamar, K. H. & C. R. Co.* 4 Hurl. & C. 463; *Ross* v. *Crockett*, 14 La. Ann. 823; *Young* v. *Blackhawk County*, 66 Iowa, 460; *Johnson* v. *City*, 5 Phila. 445.

The supposed promise of the plaintiff's directors to bear a portion of the cost or price paid for the shares was gratuitous and not enforceable in law.

Cottage St. M. E. Church v. *Kendall*, 121 Mass. 528; *Burke* v. *Smith*, 83 U. S. 16 Wall. 395 (21: 368).

It was beyond the power of the plaintiff's directors to bind the corporation by contract to contribute to the payment of interest upon the cost of the shares purchased by defendant.

Pearson v. *Concord R. Co.* 62 N. H. 537, 13 Am. & Eng. R. Cas. 102; *Chicago City R. Co.* v. *Allerton*, 85 U. S. 18 Wall. 234 (21: 903); *Thomas* v. *West Jersey R. Co.* 101 U. S. 71 (25: 950); *Davis* v. *Old Colony R. Co.* 131 Mass. 258; *Milbank* v. *New York, L. E. & W. R. Co.* 64 How. Pr. 20; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290 (30: 83); *Mallory* v. *Hanaur Oil Works*, 86 Tenn. 598.

The acts to be ratified in this case were clearly *ultra vires*, even as to the corporation itself, and so binding by way of estoppel upon such stockholders only as had personally assented to the same.

Zabriskie v. *Hackensack & N. Y. R. Co.* 18 N. J. Eq. 178; *Gifford* v. *New Jersey R. & Transp. Co.* 10 N. J. Eq. 171; *Mallory* v. *Hanaur Oil Works*, 86 Tenn. 598; *Keene's Exrs. Case*, 3 DeG. M. & G. 279.

Mr. **J. H. Benton, Jr.**, for appellees:

Corporations are affected like natural persons with obligations arising from implications of law, and from equitable duties.

United States Bank v. *Dandridge*, 25 U. S. 12 Wheat. 64 (6: 552); *Columbia Bank* v. *Patterson*, 11 U. S. 7 Cranch, 299 (3: 351); *Pittsburgh, C. & St. L. R. Co.* v. *Keokuk Bridge Co.* 131 U. S. 371 (33: 157).

The directors had power to do whatever it would be competent for the company itself to do, or direct or order to be done.

Shaw v. *Norfolk County R. Co.* 16 Gray, 407, 414; *United States Bank* v. *Dandridge*, 24 U. S. 11 Wheat. 114 (6: 570); *Despatch Line* v. *Bellamy Mfg. Co.* 12 N. H. 205; *Eastern R. Co.* v. *Boston & M. R. Co.* 111 Mass. 125.

He who asks equity must do equity.

Ohio & M. R. Co. v. *McCarthy*, 96 U. S. 258 (24: 693); *Pneumatic Gas Co.* v. *Berry*, 113 U. S. 322 (28: 1003); *Camden & A. R. Co.* v. *Mays Landing & E. H. C. R. Co.* 48 N. J. L. 530; *Oil Creek & A. R. R. Co.* v. *Pennsylvania Transp. Co.* 83 Pa. 160; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62.

The assent and acquiescence of stockholders must be implied from their silence and failure to object.

Union Gold Min. Co. v. *Rocky Mountain Nat. Bank*, 96 U. S. 640 (24: 648); *Branch* v. *Jesup*, 106 U. S. 468, 476 (27: 279, 281); *Evans* v. *Smallcombe*, L. R. 3 H. L. 249; *Peterborough R. Co.* v. *Nashua & L. R. Co.* 59 N. H. 385.

Neither the Corporation nor its directors could put the management of its business and property out of the hands of its directors.

York & C. R. Co. v. *Ritchie*, 40 Me. 425; *Farmers Mut. F. Ins. Co.* v. *Chase*, 56 N. H. 341; *Gratz* v. *Redd*, 4 B. Mon. 186; *Silver Hook Road* v. *Greene*, 12 R. I. 164.

The parties cannot, by subsequent agreement, change or alter in any way the power given referees by the order of the court.

Woodbury v. *Proctor*, 9 Gray, 18.

An agreement to submit to arbitration may be subsequently modified by parol.

Loring v. *Alden*, 3 Met. 576; *Graham* v. *Graham*, 9 Pa. 254; *Shockey* v. *Glasford*, 6 Dana (Ky.) 9; *Blanchard* v. *Murray*, 15 Vt. 548; Stephens, Nisi Prius, 61; *Re Tunno*, 2 Nev. & M. 328; *Bloomer* v. *Sherman*, 5 Paige, 575, 3 N. Y. Ch. L. ed. 835; *Woods* v. *Page*, 37 Vt. 252; *Wrightson* v. *Bywater*, 3 Mees. & W. 199-207.

Mr. Justice **Field** delivered the opinion of the court:

This is a suit in equity to compel the defendant, the Boston and Lowell Railroad Corporation, to account for various sums of money alleged to have been received by it and used for its benefit, to which the complainant was entitled, and also to charge the defendant Hosford personally with the amount diverted by him to that Corporation. The controversy relates to certain transactions growing out of a joint traffic contract between the plaintiff and the defendant Corporations.

The plaintiff, the Nashua and Lowell Railroad Corporation, is alleged in the bill to have been duly established as a corporation under the laws of New Hampshire, and to be a citizen of that State. It will be convenient hereafter in this opinion to designate it as the Nashua Corporation. On the 1st of February, 1857, it owned and operated a railroad extending from Nashua, in New Hampshire, to Lowell, in Massachusetts, a distance of thirteen miles, of which five miles were in New Hampshire and eight miles in Massachusetts. The suit was brought not only against the Boston and Lowell Railroad Corporation, alleged in the bill to be a corporation duly established by the laws of Massachusetts and a citizen of that State, but against Hocum Hosford, its treasurer, and Charles E. A. Bartlett, of the City of Lowell, also citizens of that State, but as to Bartlett it has been dismissed. On the 1st of February, 1857, this Corporation, which for convenience we shall call the Lowell Corporation, owned and operated a railroad extending from Boston to Lowell, Massachusetts, a distance of twenty-six miles, with a branch to the Town of Woburn a mile and a half in length.

On the 1st of February, 1857, the two Corporations entered into a contract in writing with each other "for the promotion of their mutual interest through a more efficient and

economical joint operation and management of their roads and for the better security of their respective investments, as well as for [16] the convenience and interest of the public," that their roads with their branches should "be worked and managed as one road," under certain conditions and stipulations which were stated at length. The contract recited that a large portion of the business of the two roads was joint business passing over the roads and through the branches of both parties, making desirable a common policy and unanimity of management; and that in the transaction of their business there was a mutual interest, both as to the mode of transaction and as to the tariff upon the same, as well as in all other matters relating thereto; and that the two Corporations, by operating under a common management, would thereby be enabled to do business with greater facility, greater regularity and at a greater saving of expense.

The Nashua Corporation had at this time leases of the Stony Brook Railroad, extending from its line at North Chelmsford to Groton Junction, about fourteen miles in Massachusetts, and of the Wilton Railroad extending from Nashua to Wilton, about thirteen miles in New Hampshire. The contract was originally for three years, but by a supplemental agreement of October 1, 1858, it was extended to twenty years. Among other things, it provided:

That the roads of the parties should be "operated and managed by one agent, to be chosen by the concurrent vote of a majority of the directors of each party, and who might be removed by a like vote or by the unanimous vote of either board;" and that the respective boards of directors should, "by such concurrent action exercise the same control over the management as is usual with boards of railroad directors in ordinary cases."

That the Corporations should each surrender to the joint management thus constituted "the entire control of their respective roads, shops, depots, furniture, machinery, tools or other property necessary for the proper maintenance and working of the joint roads," reserving only certain specified property necessary for the operation of the roads, consisting principally of real estate.

That the contracts of the Nashua Corporation with the Wilton and Stony Brook Roads should be assumed by the joint management and carried out; and that the contract with the Wilton Road, which was to expire on the 1st of April, 1858, might be renewed during the continuance of the joint management.

That the Nashua Corporation should within the year 1857, at its own cost, erect a freight depot, with the necessary approaches and furniture, in the City of Lowell, upon its site at Western Avenue, which during the continuance of the agreement might be used for the accommodation of the joint business.

That the Lowell Corporation should complete within the year 1857, at its own separate cost, the new passenger depot at Causeway Street in Boston, then under construction, together with the tracks, bridges and all necessary fixtures connected with the extension into that city, and at its separate expense make such alterations in the existing Boston Passenger Depot as had been designed by the Lowell Corporation for converting it into a freight depot; and also, without charge to the Nashua Corporation, complete at the earliest practicable time the crossing over the Fitchburg Railroad and the connection with the Grand Junction Railroad.

That the road-bed, bridges, superstructure, depots, buildings and fixtures of each road should be kept as near as might be in like relative repair from their then state and condition, and that all casualties and damages to the same, except fire risks on buildings, should be at the common risk, and charged in the current joint account, and in case of the destruction by fire of any buildings or injury to the same, that the owner should rebuild or replace them at his own cost.

That the income and expense accounts of the joint roads should be made up, as nearly as conveniently might be, by estimate to the close of each month, and the net balance should be divided and paid over, on account, to the respective treasurers of the two Corporations, thirty-one per cent to the Nashua Corporation and sixty-nine per cent to the Lowell Corporation, subject to a final adjustment at the semi-annual closing of accounts; and that on the first days of April and October in each year the said accounts [36] should be accurately closed and balanced by settlement with each party covering and adjusting all previous payments on account, the Nashua Corporation receiving as its proportion thirty-one per cent of the said joint net income and the Lowell Corporation receiving as its proportion sixty-nine per cent thereof.

That each Corporation might separately and on its own account declare such dividends upon its own stock, and payable from its own separate funds, as it might deem expedient, it being distinctly provided that "the interest upon the debts of either party must also be paid out of such separate share, and not from the common fund."

As thus seen, the contract provided that the two roads and their branches should be operated as a single road by a common agent to be appointed by the directors of both companies, and removable by them or by the unanimous action of either; that the roads and property of each party should be kept in a like relative condition and repair as they then were at their joint expense; that the Nashua Corporation should, in 1857, erect as its own expense a freight depot, with necessary approaches, in the City of Lowell, and the Lowell Corporation, in the same year, at its expense complete a passenger depot, with necessary approaches, in the City of Boston, and alter the existing passenger depot there, also at its own expense, into a freight depot; that the interest upon the debts contracted by either party should be paid out of its own share, and not from the common fund; and that the net income should be divided in the proportion of thirty-one per cent to the plaintiff, the Nashua Corporation, and of sixty-nine per cent to the defendant, the Lowell Corporation—payments on account of such division to be made upon

monthly estimates, and final settlement and adjustment to be had semi-annually. The contract did not provide that the property of either Corporation should be improved, or other property be acquired by either, at the joint expense of both.

Under this contract, and during its continuance, the two Corporations united their business and conducted it with marked success. By leases from other companies and the acquisition of branch roads, a large milage 369] was added to their lines and a correspondingly increased business was transacted by them. In 1874, the Nashua Corporation reported to its stockholders that the two corporations then operated under their joint management one hundred and thirty-five miles, more than double the milage at the time the contract was entered into. It is stated that thirty-three miles of this distance were added by the acquisition of the Salem and Lowell and the Lowell and Lawrence Roads in 1858, and sixteen miles of it by the purchase of the Lexington and Arlington Road in 1869. Contracts were made for business with connecting lines to such an extent that the two roads, during the late years of their joint operation, transported annually in the neighborhood of three hundred thousand tons of freight and two hundred thousand passengers. The net income resulting from this extended business was satisfactorily apportioned pursuant to the contract, thirty-one per cent going to the Nashua Corporation and sixty-nine per cent going to the Lowell Corporation, except as they were affected by two transactions of which the Nashua Corporation complains. One of these transactions was the alleged illegal appropriation by the Lowell Corporation of $181,962, for a passenger depot at Boston, erected by that Corporation for its own benefit, and which complainant contends it was entitled to receive as its share of the net earnings of the joint management. The other transaction was the alleged illegal appropriation of $26,124, for interest on the amount expended by the Lowell Corporation in buying a controlling interest in the stock of two other railroad companies, the Lowell and Lawrence Company and the Salem and Lowell Company, which the complainant contends it was also entitled to receive as its share of the net earnings of the joint management. It is to compel an accounting for these sums and their payment to the complainant that the present suit is brought.

Before passing, however, upon the validity of these claims a question raised as to the jurisdiction of the circuit court must be considered. Its jurisdiction was assumed upon the diverse citizenship of the parties, and, upon the allegations of the bill, rightfully assumed. Although a corporation is not a 370] citizen of a State within the meaning of many provisions of the National Constitution, it is settled that where rights of property or of action are sought to be enforced, it will be treated as a citizen of the State where created within the clause extending the judicial power of the United States to controversies between citizens of different States. The plaintiff was created a corporation by the Legislature of New Hampshire in June, 1835. It is therefore to be treated as a citizen of that State. *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 283 [20: 571, 575].

But it also appears that in April, 1836, the Legislature of Massachusetts constituted the same persons a corporation of that State, who had been thus incorporated in New Hampshire, giving to them the same name and authorizing the new corporation to build that portion of the railroad between Nashua in New Hampshire and Lowell in Massachusetts lying within the latter State.

It also appears that in April, 1838, the Legislature of Massachusetts passed an Act to unite the two Corporations—the one created by New Hampshire and the one created by Massachusetts—the first section of which was as follows:

"The stockholders of the Nashua and Lowell Railroad Corporation, incorporated by the Legislature of the State of New Hampshire in the year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the Nashua and Lowell Railroad Corporation, incorporated by the Legislature of this Commonwealth in the year one thousand eight hundred and thirty-six; and the said two Corporations are hereby united into one corporation by the name of the Nashua and Lowell Railroad Corporation; and all the tolls, franchises, rights, powers, privileges and property granted, or to be granted, acquired or to be acquired, under the authority of the said States, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said Corporations."

There were other provisions designed to enable the two Corporations to conduct their business as one corporation. The Act, however, declared that it should not take effect until the Legislature of New Hampshire had passed a similar Act uniting the said stockholders into one corporation, nor until the Acts had been accepted by the stockholders at a meeting called for that purpose.

In June of the same year, 1838, the Legislature of New Hampshire passed an Act authorizing the two Corporations to unite, and providing in such case that "all the tolls, franchises, rights, powers, privileges and property" of the two Corporations should be held and enjoyed by the stockholders in each and both in proportion to their number of shares therein, and that all property owned, acquired or enjoyed by either of the Corporations should be taken and accounted to be the joint property of the stockholders of the two Corporations, and that the two Corporations should be one—the Act to be in force when accepted by the stockholders of the Corporations at a meeting called for that purpose.

It does not appear, so far as disclosed by the record, except in the allegations of the defendant, that there was any formal acceptance of this Act by the stockholders of the two Corporations; but it would seem that the Corporations acted upon its supposed acceptance, for the defendants pleaded to the

jurisdiction of the court on the ground that, by the legislation mentioned, the complainant was not a corporation of New Hampshire, and consequently a citizen of that State, but was a corporation of Massachusetts, and thus a citizen of that State.

In the bill, as originally filed, the Nashua Corporation was the only complainant. By a subsequent amendment three persons, citizens of New Hampshire, stockholders of that Corporation, were united as complainants. To the bill, as thus amended, the defendants pleaded as follows: "That this court ought not to take further cognizance of or sustain the said bill of complaint, because they say that they, the said defendants, at the time of filing said bill, were, and still are, all, each and every one citizens of the State of Massachusetts, and that said plaintiffs, at the time of filing said bill, were not, and still are not, all, each and every one citizens of another State, but that the said Nashua and Lowell Railroad Corporation, one of said [372] plaintiffs, at the time of filing said bill, was, and still is, a Corporation duly established and existing under and by virtue of the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, and, at the time of filing said bill, was not, and still is not, a Corporation established and existing by the laws of the State of New Hampshire, and a citizen of said State of New Hampshire. All of which matters and things these defendants do aver to be true, and are ready to verify. Wherefore they plead the same to the whole of said amended bill, and pray the judgment of this honorable court whether they should be compelled to make any other or further answer to said bill." This plea was argued upon an agreement as to the facts.

This plea was overruled, the court stating in its opinion that it seemed "that the defendant Corporation might go into New Hampshire and there sue the plaintiff, as a New Hampshire corporation, in the federal court, although it could not bring such suit in the District of Massachusetts against the New Hampshire Corporation, because no service upon the New Hampshire Corporation as such could be got in this district, if for no other reason,"—and adding that "if the defendant could sue the plaintiff in the federal court for New Hampshire, notwithstanding the fact of the plaintiff being chartered under the laws of both States, there would seem to be no good reason why the plaintiff, claiming under its New Hampshire charter, should not be allowed to sue the defendant in the federal court for Massachusetts, as it would be impossible for the defendant in such case to deny the title of the plaintiff as predicated upon the New Hampshire charter, or to deprive the plaintiff of the benefit of its New Hampshire citizenship thus acquired." 8 Fed. Rep. 458.

A more satisfactory answer would, perhaps, have been, that whatever effect may be attributed to the legislation of Massachusetts in creating a new corporation by the same name with that of the complainant, or in allowing a union of its business and property with that of the complainant, it did not change the existence of the complainant as a corporation of New Hampshire, nor its character as a citizen of that State, for the enforcement of its rights of action in the national courts against citizens of other States. [373] Indeed, no other State could by its legislation change this character of that corporation, however great the rights and privileges bestowed upon it. The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of name, powers and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the Corporation created by it there can be but one legislative paternity.

But on this point we will hereafter speak more at large. At present it is sufficient to say that the decision of the court overruling the plea in abatement upon the facts agreed upon disposed of the question of jurisdiction in the court below. It is true the defendants, in their answers, subsequently filed, also made the same objection. Formerly the objection to the jurisdiction, from a denial of the complainant's averment of citizenship, could only be raised by a plea in abatement or by demurrer, and not by answer. *De Sobry* v. *Nicholson*, 70 U. S. 3 Wall. 420, 423 [18: 263, 264]; *Sheppard* v. *Graves*, 55 U. S. 14 How. 505, 509 [14: 518, 519]; *Wickliffe* v. *Owings*, 58 U. S. 17 How. 47 [15: 44]. This rule is modified by the Act of March 3, 1875, determining the jurisdiction of the circuit courts of the United States. 18 Stat. 472. That Statute provides that if in any suit commenced in one of such courts "it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall [374] make such order as to costs as shall be just."

By this Statute the time at which such objection may be raised is not thus restricted, but may be taken at any time after suit brought in the cases mentioned. The principal object of the Statute was to relieve the national courts from the necessity of passing upon cases where it was plain that no question was involved within their jurisdiction, and thus free them from a consideration of controversies of a frivolous and questionable character, and to prevent fraudulent and collusive attempts to invoke the jurisdiction of those courts, as had frequently been the practice, by colorable transfers of property or choses in action from a citizen of one State to a citizen of another, to enable the latter to go

into those courts, the original owner still retaining an interest in the property or choses in action transferred, or taking a contract for a retransfer of the same to himself after the termination of the litigation. In such cases it is undoubtedly the duty of the court below, of its own motion, to deny its jurisdiction, and of this court, on appeal or writ of error, to see that that jurisdiction has in no respect been thus imposed upon. *Morris* v. *Gilmer*, 129 U. S. 315, 326 [32: 690, 694]; *Farmington* v. *Pillsbury*, 114 U. S. 138, 143, [29: 114, 116].

If the question of jurisdiction could be raised in the answers of the defendants after the decision upon the issue on the plea in abatement, notwithstanding the decisions cited and the 39th Equity Rule of this court, the result in this case, though not perhaps in all cases, would be the same. Replications were duly filed to the answers, the effect of which was to deny the allegations respecting the acceptance of the Acts having for their object the union of the two Corporations, and those allegations were entirely unsupported by the evidence or by anything in the record; and neither in the final decree of the court, nor in its opinion, was any allusion made to the subject. The only evidence bearing upon the question is found in the legislation of the two States, New Hampshire and Massachusetts, and it is plain, as already stated, that no legislation of Massachusetts could possibly affect the existence of the complainant as a corporation of New Hampshire, or its character as a citizen of that State. The Act of New Hampshire of 1838, whilst in terms authorizing the two corporations to unite, did not confer any new franchise or right upon either of them. All that it did was to permit the funding or conversion of the separate interest of each stockholder in each Corporation, into a common or joint or undivided interest in both; and to declare that after the two Corporations were united all property owned by either should be considered the joint property of the stockholders of both. There is nothing in these provisions looking to any abandonment of its corporate character as a creation of New Hampshire or its citizenship of that State.

375]

There are many decisions both of the federal and state courts which establish the rule that however closely two corporations of different States may unite their interests, and though even the stockholders of the one may become the stockholders of the other and their business be conducted by the same directors, the separate identity of each as a corporation of the State by which it was created, and as a citizen of that State, is not thereby lost.

In *Farnam* v. *Blackstone Canal Corp.*, 1 Sumn. 46, we have an instance of this kind. It there appeared that in January, 1823, the Legislature of Massachusetts created a corporation by the name of the Blackstone Canal Company, for the purpose of constructing a certain canal in that State. It also appeared that in June of that year the Legislature of Rhode Island incorporated a company by the same name, the Blackstone Canal Company, and authorized it to construct a certain canal within the limits of that State. In May, 1827, the Legislature of Rhode Island declared that the stockholders of the Massachusetts company should be stockholders in the Rhode Island company as if they had originally subscribed thereto, if both corporations should agree thereto, and that the books and proceedings of the original and associated stockholders should be deemed the books of both. And the court held that though the two corporations were created in adjacent States by the same name, to construct a canal in each of the States, respectively, and afterwards by subsequent Acts were permitted to unite their interests, their separate corporate existence was not merged, and that the Legislature only created a unity of stock and interest. In giving its decision the court, by *Mr. Justice* Story, said: "Although, in virtue of these several Acts, the corporations" (one of Rhode Island and one of Massachusetts) "acquired a unity of interests, it by no means follows that they ceased to exist as distinct and different corporations. Their powers, their rights, their privileges, their duties, remained distinct and several, as before, according to their respective Acts of incorporation. Neither could exercise the rights, powers or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The Acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations, acting within the sphere of their respective charters for purposes of common interest, and not as a case where all the powers of both were concentrated in one. The union was of interests and stocks, and not a surrender of personal identity or corporate existence by either corporation."

In *Muller* v. *Dows*, 94 U. S. 444 [24: 207], the bill averred that of the three complainants two were citizens and residents of the State of New York and one a citizen and resident of the State of Missouri. The two original defendants were corporations, namely, the Chicago & Southwestern Railway Company and the Chicago, Rock Island & Pacific Railroad Company, and they were alleged to be citizens of the State of Iowa. It was contended that the Chicago & Southwestern Railway Company could not claim to be a corporation created by the laws of Iowa, because it was formed by a consolidation of the Iowa company with another of the same name chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each State. Hence it was argued that the corporation was created by the laws of Iowa and of Missouri, and, as one of the plaintiffs was a citizen of Missouri, it was urged that the circuit court had no jurisdiction. But the court replied, speaking by *Mr. Justice* Strong: "We cannot assent to this inference. It is true the provisions of the statutes of Iowa, respecting railroad consolidation of roads within the State with others outside of the State, were that any railroad company organized under the laws of the State, or that might thus be organized,

should have power to intersect, join and unite their railroads constructed or to be constructed in the State, or in any adjoining State, at such point on the state line, or at any other point, as might be mutually agreed upon by said companies; and such railroads were authorized 'to merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected.' The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago and Southwestern Railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa."

The case of *St. Louis, A. & T. H. R. Co.* v. *Indianapolis & St. L. R. Co.*, which was before the Circuit Court of the United States for the District of Indiana, and is reported in 9 Biss. 144, and which came before this court under the title of *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.*, and is reported in 118 U. S. 290 [30: 83], bears a strong resemblance to the one now before the court. In the bill the plaintiff was alleged to be a corporation created under the laws of Illinois and the defendants were alleged to be corporations created under the laws of Indiana and of Pennsylvania. To the bill a plea was interposed in which it was alleged that under various Acts of the Legislatures of Illinois and Indiana two corporations were created, one the plaintiff, The St. Louis, Alton & Terre Haute Railroad Company, and the other the same company in name in Indiana; that they have been consolidated by those States, and were so inseparably connected together that the plaintiff was really a corporation as well of Indiana as of Illinois; and that, as some of the defendants were corporations of the State of Indiana, the court could not take jurisdiction of the case. But the court held that the fact that the two corporations created by different States had been consolidated under the laws of those States, and that the railroad was operated by virtue of that consolidation as one entire line of road, did not prevent one of those corporations from bringing suit in the federal court as a corporation of the State where it was created, against the corporation with which it was consolidated, which was created by the other State. Said the court, speaking by *Judge* Drummond: "If the defendant corporation, though consolidated with another of a different State, can be sued in the federal court in the State of its creation, as a citizen thereof" (referring to the cases of *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270 [20: 571], and *Muller* v. *Dows*, 94 U. S. 444 [24: 207]), "why can it not sue as a citizen of the State which created it? I can see no difference in principle. It seems to me that when the plaintiff comes into the federal court, if a corporation of another State, it is clothed with all the attributes of citizenship which the laws of that State confer, and the shareholders of that corporation must be conclusively regarded as citizens of the State which creates the corporation, precisely the same as if it were a defendant. So I do not see why, if the plaintiff in this case alleges, as it does, that it is a corporation created by the laws of Illinois, it cannot institute a suit in the Circuit Court of the United States of Indiana against a corporation of that State." The case turned upon the point whether the plaintiff corporation of Illinois had become also an Indiana corporation so as to lose its existence or identity and citizenship as an Illinois corporation. The court held in the negative, that it still remained an Illinois corporation, with all its rights of action as such in the United States courts.

When the case came to this court the decision of the court below was affirmed, but it would seem that when it was considered here the plea to the jurisdiction filed in the court below had been withdrawn. The question of jurisdiction was, however, examined by the court of its own motion. "It does not seem," said the court, "to admit of question that a corporation of one State owning property and doing business in another State by the permission of the latter, does not thereby become a citizen of this State also. And so a corporation of Illinois, authorized [379] by its laws to build a railroad across the State from the Mississippi River to its eastern boundary, may, by the permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line as one road by the permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an Act of the Legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred upon it by the State which created it, constitutes it a corporation of Indiana." And again: "In a case where the corporation already exists, even if adopted by the law of another State and invested with full corporate powers, it does not thereby become such new corporation of another State, until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it. We think what has occurred between the State of Indiana and this Illinois corporation falls short of this."

Many cases might be cited from the state courts illustrative and confirmatory of the doctrine of this case. In *Racine & M. R. Co.* v. *Farmers L. & T. Co.*, 49 Ill. 331, it appeared that in April, 1852, the Legislature of Wisconsin incorporated the Racine, Janesville & Mississippi Railroad Company, and that the Legislature of Illinois, in February, 1853, incorporated the Rockton & Freeport Railroad Company, both companies authorized to construct railways; that in February, 1854, these two companies entered into an agreement to fully merge and consolidate their capital stock, powers, privileges, immunities and franchises. In February, 1855, both the Legislature of Illinois and the Legislature of Wisconsin changed the name of these two companies to that of the Racine &

purchase of the stock of those companies, and to the payment of the amount found due to it upon such accounting.

The decree of the court below will be reversed and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.

Mr. Justice **Blatchford** did not sit in this case or take any part in its decision.

Mr. Chief Justice **Fuller**, *Mr. Justice* **Gray** and *Mr. Justice* **Lamar** dissent on the question of jurisdiction.

---

[130] WILLIAM S. LOVELL, *Appt.*,
v.
GEORGE D. CRAGIN ET AL.

(See S. C. Reporter's ed. 130-151.)

Jurisdictional amount—hypothecary action in Louisiana—rights to proceeds of sale of mortgaged property—necessity of registry—damages for waste, when prescribed.

1. Where the action is against the property itself in the nature of a suit *in rem*, and the judgment is against the property, and the claim in the cross-bill grows out of the property and is incident to the suit as a part of the transaction out of which complainant's claim is derived, the amount thereof may be taken into account in determining the jurisdiction of this court.
2. In Louisiana, the holder of one or more of a series of notes secured by a concurrent mortgage is entitled to a *pro rata* share of the net proceeds of the sale of the mortgaged property at the suit of a holder of any of the other notes, and an hypothecary action lies to enforce such claim.
3. The basis of such hypothecary action is the obligation which the law casts upon the purchaser to pay the *pro rata* share of the debt represented by the notes that were not the subject of the foreclosure suit to the holder of such notes.
4. Such obligation follows the land in the hands of third persons, not parties to the judgment, and is in the nature of a judicial mortgage; but to be effective as to such third persons, it must be inscribed with the recorder of mortgages, and such judgment does not give a lien until so registered, as required by the laws of Louisiana.
5. Damages from wrongful acts in removing personal property from land of which defendant had possession, and for waste committed by him, are, in Louisiana, prescribed in one year.

[No. 212.]

Argued Mar. 12, 13, 1890. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana in favor of complainant for one fourth of the proceeds of a mortgage-foreclosure sale, and that, if such amount should not be paid within sixty days, the property be sold to pay it and the defendant be liable for any deficiency on such sale, and also dismissing a cross-bill. *Affirmed as to the dismissal of the cross-bill. Reversed as to the remainder of the decree.*

Messrs. **W. Hallett Phillips**, *Charles A. Conrad*, and *Joseph P. Hornor* for appellant.

Messrs. **J. D. Rouse** and *William Grant* for appellees.

Mr. Justice **Lamar** delivered the opinion of the court:

This is a suit in equity, in the nature of an hypothecary action, under the Civil Code of Louisiana, brought in the court below by George D. Cragin, a citizen of New York, against William S. Lovell, a citizen of Mississippi, and Orlando P. Fisk, a citizen of Michigan. Its object was to have a lien declared in favor of the complainant, upon certain real property belonging to the defendant Lovell, and, in default of the payment thereof by Lovell, to have the property sold to satisfy it.

The bill was filed on the 18th of January, 1883, and its material allegations were substantially as follows: On the 31st of January, 1870, Louisa S. Quitman and Eliza A. Quitman sold to Orlando P. Fisk a sugar plantation known as the "Live Oak Plantation," and certain other particularly-described real estate, all situated in the Parish of Terrebonne, Louisiana, and received in part payment therefor nine promissory notes made by Fisk, payable to his own order and indorsed in blank by him, of $2,000 each, due in one, two, three, four, five, six, seven, eight and nine years, respectively, from that date, all of which bore interest at seven per cent until maturity, and eight per cent thereafter until paid, and were secured by a mortgage on the said plantation "in favor of said vendors, their heirs and assigns, and all future holder or holders of said promissory notes or any of them." Fisk paid the first of those notes when it came due, but did not pay any of the others. The second one not having been paid at maturity, the Misses Quitman, on the 14th of February, 1872, brought suit on it against Fisk in the Circuit Court of the United States for the District of Louisiana, to foreclose the mortgage. Afterwards the Quitmans, in consideration of $2,386, the amount of that note, including accrued interest, attorneys' fees and costs, paid to them by complainant, sold and transferred to him all their right, title and interest in the note and in that suit, and subrogated him to all their rights in the premises against Fisk, and under the mortgage. Fisk having also failed to pay the third note, the Quitmans brought suit thereon against him on the 21st of May, 1873, in one of the state courts; and a few months afterwards, in consideration of $2,608.65, the amount of the note, including accrued interest, attorneys' fees and costs, paid to them by complainant, sold and transferred to him all their right, title and interest in the note and in that suit, with a like subrogation as in the preceding case. The fourth note not having been paid at maturity, the Quitmans brought suit on it against Fisk on the 26th of February, 1874, in one of the state courts of Louisiana, and foreclosed the mortgage; and, under executory process issued by that court, the mortgaged

NOTE.—*As to jurisdiction of United States Supreme Court, dependent on amount; interest cannot be added to give jurisdiction; how value of thing demanded may be shown; what cases reviewable without regard to sum in controversy,—see note to* Gordon v. Ogden, 7: 502.

property was seized by the sheriff of the parish, and regularly sold by him on the 2d of May, 1884, to the Misses Quitman for $10,900, which sum, after paying costs and expenses, was reduced to $10,447.05, the whole of which portion of the price of said property was retained by the said Louisa S. and Eliza A. Quitman.

The bill further alleged that by the sale to the complainant of the two before-mentioned notes, with subrogation as aforesaid, he acquired a right of priority of payment out of the proceeds of the sale of the property mortgaged to secure the same; that by such sale and transfer to him they made the remaining notes held by them subordinate in rank to those so sold to him; that at the time of the sale the Quitmans were the holders and owners of all of the other notes; and that they, having retained the proceeds of the sale of the property, became and were liable to him for the full amount due upon his two notes, including interest, costs and attorneys' fees, which amount was unpaid and remained secured by lien upon the property.

It was then averred that Louisa S. Quitman afterwards died, leaving her sister, Eliza A. Quitman, as sole heir and legatee, who entered into the property and took possession of it; that Eliza A. Quitman died soon afterwards, having appointed the defendant, Lovell, sole executor of her estate, which was still in the course of administration; and that before the filing of the bill, complainant notified Lovell, as executor, that he was the holder and owner of the two notes purchased by him, and demanded payment of the amount due thereon, including interest and costs, which was refused.

It was then averred that the defendant Lovell is in possession of the property, under a claim of ownership by title derived from the Quitmans, or the last survivor of them, which claim is subject to the demand of complainant; and that, after the aforesaid demand and refusal of payment of his two notes, complainant demanded payment thereof from Lovell, as possessor of the mortgaged property, at least ten days before the filing of the bill, which was also refused, and the defendant Lovell still refused payment of the notes, and also refused to surrender the lands or to permit them to be sold to satisfy complainant's demand.

By reason of the aforesaid premises, complainant averred that he had a first lien and privilege on the mortgaged property in the possession of Lovell, for the amount due on his notes, and had the right to have it seized and sold to pay the same.

The bill prayed that an account be taken of the amount due complainant on his notes; that he be decreed to have a first lien and privilege upon the mortgaged property for the amount found due him, which the defendants should be decreed to pay, together with costs, attorneys' fees, etc.; that in default thereof the property be seized and sold to pay his demand; that, if the amount realized from such sale be insufficient to pay his demand, he might have execution for the deficiency against the estate of Eliza A. Quitman; and for other and further relief.

April 2, 1883, the defendant Lovell filed a general demurrer, which was overruled December 10, 1883, reinstated December 14, 1883, and withdrawn January 9, 1884, with leave to file his plea, which he did on the same day. This plea set up (1) that the notes sued on by the complainant, having been executed by Fisk January 31, 1870, and made payable in two and three years from date, respectively, were barred by prescription of five years. (2) That the act of mortgage by which payment of those notes was secured, having been executed January 21, 1870, and recorded February 12, 1870, lapsed and expired and became extinguished January 21, 1880, it having never been reinscribed. (3) That the foreclosure of the mortgage by the Quitmans on one of the notes secured concurrently with those of the complainant, and the sale of the mortgaged property, had the effect to extinguish the mortgage. (4) That the defendant was not in any manner interested in the notes sued on or in any of the others of the series, nor in the mortgage by which they were secured, but acquired the property by purchase, for a valuable consideration, long after the seizure and sale of it to satisfy the mortgage, and therefore subsequently to the extinction of the mortgage.

This plea was overruled June 9, 1884, and March 6, 1885, the complainant amended his bill. In this amendment complainant alleged that, in a suit brought by him in the court below against Fisk, a decree was entered on the 6th of June, 1873, that he recover from Fisk the sum of $96,526.71, and that, as Fisk had used $4,918 of complainant's money in examining titles, paying taxes and purchase money of the property in dispute, the latter sum was decreed to be an equitable lien upon the plantation, to take effect from February 13, 1872, the date when the bill in that suit was filed, until discharged by the payment of the whole debt of Fisk, as established by the decree. By reason of that lien complainant alleged that he had an interest in paying the amount due upon his two notes, and that, by the payment of the amount due upon them to the Quitmans, he was subrogated of right, by operation of law, to all the rights of the Quitmans to those two notes and the mortgage securing them, as well as by the express subrogation alleged in the original bill.

March 7, 1885, Lovell answered, averring as follows: When Fisk purchased the plantation, as aforesaid, he was not acting for himself, but for complainant, who was the real purchaser and furnished the funds to make the cash payment at that time; that shortly after that purchase complainant called upon the attorneys for the Quitmans several times, and acknowledged and claimed that he was the real purchaser of the plantation, and, as such, promised and bound himself to take up and pay the notes given in part payment therefor, and did pay at maturity the first of those notes with his own funds. About the time of the maturity of the second note, the complainant instituted a suit against Fisk on the equity side of the court below, in which he claimed to be the real owner of the plantation, and to have been the purchaser

of it, instead of Fisk, who illegally took the title in his own name, and was all the time acting as complainant's agent, having paid the cash part of the purchase and the first note with complainant's money; and that complainant had promised the Quitmans to pay them the balance and was ready to do so. A final decree was rendered in that suit upon the pleadings and proofs, adjudging complainant to be the real owner of the plantation, and finding the matters and things set forth in his bill in that suit to be correct. Prior to the institution of that suit complainant took possession of the plantation as sole owner thereof, and pending that suit caused himself to be appointed receiver thereof, and continued in the possession thereof, cultivating the plantation and disposing of the crops raised thereon for his own sole and exclusive benefit, accounting to no one therefor. Fisk abandoned the plantation about that time, has never returned, never contested that suit and never afterwards set up any claim to the plantation. Fisk, at the time of the purchase of the plantation and up to the date of the acts complained of in that bill, was a man in the full confidence of complainant, intrusted with ample funds and credit, but without means of his own, either at that time or since. Complainant was a bona fide owner of the plantation from the date of that sale; and the Quitmans did not sell the two notes to him, as he alleges, but accepted payment thereof from him, as the real obligor thereof. Complainant instigated the suits on the mortgage notes, and then brought them in, and by agreement with the Quitmans was subrogated to all of the Quitmans' rights as against Fisk, solely in order to aid him in his suit against Fisk, he having advised the Quitmans that Fisk had been acting only as his agent in the transactions; and such subrogation was taken by complainant to be used only in case he should fail in his equity suit with Fisk. Complainant was, and had been for a long time, in possession of the plantation when it was sold in the foreclosure suit of the Quitmans, and, having full knowledge of all those proceedings, consented thereto, and in fact requested the institution of the proceedings, and was present at the sale, stating that he was desirous of having some third person purchase the plantation, as he was unwilling to own it longer.

36]

The answer further denied that complainant bought the two notes of the Quitmans; averred that he acquired no right to the proceeds of the sale of the mortgaged property, but on the contrary continued to owe the Quitmans, as before, on the remaining notes of the series, the difference between the amount of them and the proceeds of the sale; alleged that those two notes were extinguished by his payment thereof, so far as the Quitmans and the plantation were concerned, and that the mortgage, as to them, was also extinguished by those proceedings; and further set up that the Quitmans never became liable to complainant in any manner for any amount, by reason of those proceedings, nor did he thereby acquire any lien or privilege upon the plantation. It was then alleged that, on the 17th of February, 1876, the defendant purchased the plantation from its then owner, Eliza A. Quitman, free and unincumbered with any demand or claim of the complainant or of anyone else; that at that time there was no inscription of any mortgage or privilege against the property in the name of anyone, and none could exist against the defendant, because he was a third person, within the meaning of art. 176 of the Constitution of the State; that the notes which the complainant seeks to collect, having been dated January 31, 1870, and made payable in one and two years from date, respectively, were barred by prescription of five years; that the mortgage securing those notes, having been executed January 21, 1870, lapsed and expired and became prescribed under the laws of the State, January 21, 1880, and was therefore extinguished and of no effect, as it had never been reinscribed; and that by virtue of the foreclosure proceedings instituted by the Quitmans, upon one of the notes, the mortgage became extinguished.

37]

The defendant Lovell, by way of cross-bill, then set up (1) that by reason of the facts set forth in the foregoing answer, and of the promises made by the complainant to the Quitmans, as therein set forth, complainant became liable for the payment of the whole of the purchase price of the plantation represented by the notes given by Fisk; that complainant, while in possession of the plantation as owner of it, committed great waste thereon, by destroying and injuring the fences, buildings, out-buildings, fixtures and improvements thereof, and removed therefrom all the movable property which was there when the sale was made by the Quitmans to Fisk, for the benefit of an adjoining plantation owned by him, and greatly depreciated the value of the plantation by reason of improper cultivation and business methods, so that it did not sell for a sufficient sum to pay the mortgage under which the foreclosure was made, as it otherwise would have done. Wherefore complainant is liable to and justly owes the defendant Lovell, as executor of Eliza A. Quitman, the difference between the amount of the unpaid notes, with interest up to the date of the sheriff's sale, to wit, May 1, 1874, and the sum of $10,447.05, the net proceeds of that sale, with interest at eight per cent thereafter until paid.

(2) That Eliza A. Quitman instituted a suit at common law in the court below against the complainant on March 3, 1880, to recover the amount of that difference, and obtained a judgment against him for that amount, which on the 12th of November, 1883, upon appeal, was reversed and ordered to be arrested by this court; and that prescription was thus interrupted, and did not run against this claim urged by the defendant during the pendency of those proceedings. The record in that suit was then referred to, and was made a part of the answer and cross-bill, and the amount for which that suit was brought was claimed as due defendant by complainant.

The prayer of the cross-bill was for an

account, a judgment according to the allegations therein contained, and for other and further relief.

On the 4th of April, 1885, the complainant filed a demurrer, plea and answer to the cross-bill, specifically denying all the material allegations of it and pleading the prescription of one, five and ten years. He pleaded the decision of this court in the suit brought by Eliza A. Quitman against him as an estoppel against her and all those claiming under her in this proceeding, and averred that, having a lien upon the plantation, he had an interest to pay the notes of Fisk if he chose, though he was not at any time personally liable to the Quitmans, and, having paid the two notes set forth in his bill, he was entitled to them, as owner, and was subrogated to the mortgage securing them. He further denied that he took the subrogation made by the Quitmans under an agreement or understanding that it should take effect only against Fisk, and not against the Quitmans and the plantation, but averred that he took it without any restrictions or limitations, for all it was worth under the law. He averred further that the complainant in the cross-bill had been sued individually, as third possessor of the premises in dispute, and not as executor of the Quitmans or of either of them, and that he owned the property personally, and not as executor, and therefore could not maintain his cross-bill, in his capacity as executor.

Fisk was never found and never appeared. On the 28th of May, 1886, upon motion of the attorneys for complainant, suggesting that he had for a valuable consideration transferred to George D. Cragin, Jr., all his interest in this suit, and to the subject matter thereof, with full subrogation to his rights in the premises, it was ordered that the latter be subrogated as complainant, with authority to prosecute and carry on the suit in his own name. A great deal of testimony was adduced on both sides, and on the 12th of June, 1886, the following decree was entered:

"This cause came on to be further heard at this term upon the complainant's bill and the cross-bill of W. S. Lovell, executor of the last will and testament of Eliza A. Quitman, deceased, and the evidence adduced by the parties, and was argued by counsel; whereupon, and in consideration thereof, it was ordered, adjudged and decreed as follows:

"1st. That the complainant purchased the two notes sued upon, and was subrogated expressly as to one, and by operation of law as to the other, to all the rights of action thereon, including the mortgage executed by Orlando P. Fisk to secure the same, as alleged in the complainant's bill, and is entitled to the relief prayed.

"2d. That this cause be referred to J. W. Gurley, master, to take an account of the amount due the complainant on said notes and mortgage, and report the same to this court as soon as practicable.

"3d. It is further ordered and decreed that said cross-bill be dismissed. And further proceedings are suspended until the coming in of the master's report."

On the 14th of June, 1886, the master filed his report, in which he found that, as the sum realized by the Quitmans from the mortgage sale was retained by them, and as they were the holders of six of the unpaid notes and complainant of two, therefore complainant was entitled to one fourth of the net proceeds of the sale, with interest to June 10, 1886, at seven per cent, and also one fourth [14 of the attorneys' fees,—in all, $4,830.64.

June 15, 1889, a final decree was rendered in accordance with the report of the master; and it was further decreed that, in case the amount thus found due should not be paid within sixty days, the property should be sold to pay that sum; and a personal judgment was also entered against Lovell for any amount left over, in case the property should not sell for the amount found due and the costs.

An application for a rehearing having been denied, Lovell brought this appeal.

The assignments of error are that the court erred—(1) In refusing to maintain the defendant's plea of prescription of five years to the notes sued on. (2) In refusing to maintain his plea of prescription of ten years to the mortgage sued on. (3) In refusing to maintain his plea that the mortgage was extinguished by the sale of the plantation under the foreclosure proceedings taken by the Quitmans. (4) In refusing to maintain his plea on the ground that he was a third person purchasing without notice. (5) In decreeing that the complainant purchased the two notes sued upon, and was subrogated expressly as to one, and by operation of law as to the other, to all the rights of action thereof, including the mortgage executed by Fisk to secure them, as alleged in his bill, and is entitled to the relief prayed. (6) In dismissing the defendant's cross-bill.

A motion to dismiss the appeal has been filed, and associated with it is a motion to affirm. The first of these motions is based upon the ground that the amount in dispute, as determined by the judgment rendered, is but $4,830.64, which is less than the amount required to give us jurisdiction. It is then argued that the amount claimed in the cross-bill cannot be added to this amount so as to give jurisdiction, nor can that amount be considered by itself for that purpose, first, because the cross-bill asserts no claim on the part of Lovell in his own behalf, but only as executor of Eliza A. Quitman, deceased, while the original bill was brought against him personally, as third possessor of the property; and, second, because the subject matter of the cross-bill, to wit, the [14 equitable claims of the Quitman estate, of which Lovell was executor, against the complainant, are distinct and separate from the subject matters in the original bill. These two grounds upon which the motion rests are negatived by the express averments of the bill itself, which are that the Misses Quitman, "having retained the price of said sale under said foreclosure, became and were liable to your orator for the full amount then due upon the notes held by him, and all interest, costs and attorneys' fees accrued thereon, which amount remained secured by

lien and privilege upon all said property, and still so remains, the same still remaining wholly unpaid. . . . And your orator avers that . . . more than thirty days before filing this bill, he notified the said Lovell, executor as aforesaid, that he was the holder and owner of said notes purchased by him as aforesaid, and demanded payment of the amount due thereon," etc. And the prayer of the bill was "that an account may be taken under the direction of this honorable court, before one of the masters thereof, or otherwise, as the court may direct, of the amount due your orator, in principal, interest and costs, upon the two notes hereinbefore described, and acquired by him by purchase as aforesaid; that he be decreed to have a first lien and privilege upon the lands and premises herein described, for the amount so found to be due, to date from said 2d day of May, 1874; that said defendants be decreed to pay the same, together with all your orator's costs and charges in this behalf sustained (including attorneys' fees at 2 per cent upon the sum due him), within some short day to be fixed by the court, and, in default thereof, that said mortgaged property be seized and sold under the order and decree of this honorable court, and that your orator be paid out of the proceeds of such sale, and that, if the same be insufficient to pay him, he have execution for the balance, and that his right to recover any deficiency from the estate of said Eliza A. Quitman be reserved to him," etc.

To these averments the cross-bill was directly responsive, and the matters therein set
142] up as equitable claims of the Quitmans against Cragin were directly connected with the transaction which he alleges, in large part, as the gravamen of his complaint. It is true that the bill also presents a claim against Lovell as the possessor of the property to which the complainant alleged he had a lien, but that only shows the alternative nature of the relief sought. The original bill was an hypothecary action, which, by article 61 of the Louisiana Code of Practice, is thus defined: "An hypothecary action is a *real* action which the creditor brings against the property which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt." In the original bill, complainant prayed that the mortgaged property be sold to pay his demand, and if the proceeds of that sale be insufficient for that purpose, that he then "have execution for the balance, and that his right to recover any deficiency from the estate of Eliza A. Quitman be reserved to him."

It is thus observed that the action was against the property itself, very much of the same nature as a suit *in rem* at common law; and it was necessarily brought against Lovell because, by coincidence, he had possession of it. The judgment against him, while in one aspect of it a personal judgment, was also a judgment against the property; and it would seem that the claim in the cross-bill, which is one growing out of, or appurtenant to, the property, was really incident to the suit, as it was a part of the original transaction of the sale and mortgage of the Live Oak plantation, out of which the claim in the original bill is derived. The duty of Lovell, as executor of the estate of Miss Quitman, to protect the property, required him to set up the defense in the cross-bill, as a set-off against the claim and the prayer of the complainant's original bill. We think, therefore, the amount claimed by the cross-bill can properly be taken into consideration in determining the jurisdiction of this court; and, as that amount is more than the jurisdictional amount, the motion to dismiss is denied.

For reasons that will be made manifest as we proceed in our discussion of the case upon its merits, the motion to affirm is also denied.

Assuming for present purposes that the facts relative to the purchase by complainant of the two notes which form the basis of his claim, and also to the subrogation, are as found by the court below, we pass to the assignment of errors. It is clear that if this were an original suit directly on the notes, to foreclose the mortgage, it could not be maintained, because, under the provisions of the Louisiana law, the notes would be prescribed and the mortgage would be peremptied. These notes were both dated January 31, 1870, and matured February 3, 1872, and February 3, 1873, respectively. They were therefore prescribed February 3, 1877, and February 3, 1878, respectively, by virtue of art. 3540 of the Civil Code, which is as follows: "Actions on bills of exchange, notes payable to order or bearer, except bank notes, those on all effects negotiable or transferable by indorsement or delivery, and those on all promissory notes, whether negotiable or otherwise, are prescribed by five years, reckoning from the day when the engagements were payable." The mortgage given to secure these notes was recorded February 12, 1870, and, never having been reinscribed, became perempted in ten years from that date, by virtue of art. 3369 of the Civil Code, which is as follows: "The registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of its date; its effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made."

It is also true that a mortgage, under the law of Louisiana, is indivisible (art. 3282, Civil Code); and that the foreclosure of it has the effect to extinguish it, even if all the parties to the mortgage have not been made parties to the foreclosure proceedings. *Parkins* v. *Campbell*, 5 Mart. N. S. 149; *Pepper* v. *Dunlap*, 16 La. 163.

It is insisted, however, by the complainant that this action is brought not on the aforesaid notes and mortgage directly, but to enforce an obligation growing out of the foreclosure and sale of the mortgaged property—an obligation on the part of the purchaser at that sale to pay to the complainant, out of the net proceeds of the sale, his *pro rata* share thereof. In other words, the contention is, that the net proceeds of the sale should have

been divided ratably among the holders of all the unpaid notes secured by the mortgage; and that, as that was not done by the Quitmans, who purchased the property, an obligation arose on their part to pay the different installments of the debt, which obligation followed the land, and was not prescribable until at least ten years from the date of the sale. Certain provisions of the Civil Code and the Code of Practice, as well as a number of decisions of the Supreme Court of the State, are relied upon to support this view, all which we shall now consider.

The following articles of the Code of Practice relate to the general question involved:

"Art. 679. When there exists a mortgage or privilege on the property put up for sale, the sheriff shall give notice, before he commences the crying, that the property is sold subject to all privileges and hypothecations, of whatsoever kind they may be, with which the same is burthened, and with the condition that the purchaser shall pay in his hands whatever portion of the price for which the property shall be adjudicated may exceed the amount of the privileges and special mortgages to which such property is subject."

"Art. 686. When a seizing creditor has a privilege or a special mortgage on the property seized, for a debt of which all the installments are not yet due, he may demand that the property be sold for the whole of the debt, provided it be on such terms of credit as are granted to the debtor by the original contract for the payment of such installments as are not due."

"Art. 706. But when the property sold is subject to privileges or special mortgages in favor of other persons besides the suing creditor, the sheriff shall require from the purchaser, and he shall be compelled to deliver to the creditor, whether the sale be made for ready money or on credit, only the surplus of price beyond the amount of the privileges or special mortgages, if there be any surplus."

"Art. 709. The hypothecary action lies against the purchaser of a property seized, which is subject to privileges or mortgages, in favor of such creditors as have said privileges and mortgages, in the same manner and under the same rules and restrictions as are applicable to a third possessor of a mortgaged property."

One of the leading cases relied on is *Pepper* v. *Dunlap*, 16 La. 163. In that case the holders of the second and third notes of a series of seven (the first having been paid at maturity), concurrently secured by a mortgage on certain real and personal property, obtained an order of seizure and sale, on their mortgage, against the mortgaged property, praying in their petition that it be sold to satisfy all the notes, but on a credit to meet those not due. The order was issued by the lower court, and the defendant appealed directly to the supreme court. After discussing some incidental questions, the court said: "The mortgage is in its nature indivisible, and prevails over each and every portion of all the immovables subjected to it. Louisiana Code, article 3249 (now 3282). If so, how can property subject to a special mortgage be sold to satisfy a part of the debt the whole of which the mortgage secures? Would the purchaser acquire such title as he is legally entitled to, and would he not, on the contrary, have to run the danger of being disturbed for the payment of the balance of the debt, although the price of his purchase would be the full value of the property? Such proceedings would, in our opinion, be met with such difficulties and inconveniences that an injury must necessarily result to either of the parties, and we cannot sanction the doctrine that the creditor of a part of a debt secured by a special mortgage, for which notes have been given, may be allowed or must be restrained to seeking and obtaining the satisfaction of his claim out of the sale of the property mortgaged for the whole, without any regard to the right of those who may be the holders of the other notes, and with an entire disregard of the consequences as to the purchaser of the property. Our laws being silent on this subject, we must reason by analogy." And after discussing the various articles of the Code of Practice relating to this subject, the court went on to say: "It is clear, then, from [14 these articles, that the purchaser of the property is *personally* bound for the surplus of the adjudication, still secured by special mortgage on the property sold, and that he holds said surplus in his hands, subject to the claim or call of the creditors who had the inferior mortgages, and who had nothing to do with the sale from which said surplus proceeded, and that when it is demanded of him, if he does not pay it, he is subject to being proceeded against in the same manner as if he were a third possessor. This, it seems to us, would be a safe and proper rule to adopt in a case like the present, where the different installments are secured by the same mortgage, and where the rights of the creditors are of equal dignity, and we cannot see any good reason why, in the absence of any law, it should not be adopted. . . . We think, therefore, that we may safely establish, as a rule of practice, that when a seizing creditor only sues for such installments of a debt secured by privilege or special mortgage as are due, the property so mortgaged is to be sold for the whole of the debt, on such terms of credit as are granted by the original contract, although such creditor does not show that the subsequent installments belong to him, or that he is the holder of all the notes mentioned in the contract of mortgage, and that it suffices that the several installments, as are not due, be mentioned in the petition."

Johnson v. *Duncan*, 24 La. Ann. 381, resembles the case at bar in some respects. In that case the plaintiff was the owner and holder of one of a concurrent series of notes secured by mortgage on a plantation. The holder of the other notes of the series foreclosed the mortgage, and the property was sold to the defendant for an amount not quite sufficient to satisfy the whole indebtedness. The court said: "The defendant was bound to retain in his hands for the benefit of the plaintiff's note the *pro rata* of the

price coming thereto by law, and to pay the same with interest when demanded. We do not think he was bound for any more than this, but judgment to this extent may be properly given under the pleadings and evidence; and this view renders it unnecessary to pass upon many technical points presented [147] in the argument. The principal defense urged is that of peremption. The defendant contends that the mortgage was first recorded in 1859, and was not reinscribed, and that the plaintiff, whose suit was not instituted till 1871, lost his rights against defendant by peremption. This we think an error. The obligation of defendant springs from his purchase, and the duty of retaining in his hands the proportion of price coming to a concurrent mortgage note not embraced in the judgment under which the sale was made, and to deliver such proportion to the holder of such note. An hypothecary action is provided against him. As to him, the mortgage of the concurrent creditor requires no reinscription, for he has assumed the debt to the extent of its proportion of the purchase money, which he must retain."

In *Soniat* v. *Miles*, 32 La. Ann. 164, 166, the court, quoting from the syllabus in *parkins* v. *Campbell*, 5 Mart. N. S. 149, said: "When a debt, secured by mortgage, is due in several installments, and the assignee of the second causes the property to be seized and sold, the sale gives a complete title to the purchaser, and the creditor of the first installment cannot seize the property in his hands, unless *he alleges and proves* that the sale is an absolute nullity, or unless he proceeds against that purchaser, by the hypothecary action, for any proportion of the price to which he may be entitled, under a prior or concurrent mortgage."

These authorities establish the principle that the holder of one or more of a series of notes secured by a concurrent mortgage is entitled to a *pro rata* share in the net proceeds arising from the sale of the mortgaged property at the suit of a holder of any of the other notes, and that an hypothecary action lies to enforce such claim. And one of them, *Johnson* v. *Duncan*, lays down the principle that, as regards the purchaser at the foreclosure sale, no reinscription of the mortgage is necessary, because he has assumed, by his purchase, the payment of the proportionate share of the debt. And the reasoning of the court in that case inevitably leads to the conclusion that the basis of the hypothecary action provided by the Code in such cases is the obligation which the law casts upon the [148] purchaser to pay the *pro rata* share of the debt represented by the notes that were not the subject of the foreclosure suit.

But the other proposition advanced by the complainant, that the right of action is not prescribable until at least ten years from the date of sale, is not supported by any of these authorities, or by any that have been brought to our attention, or that we have been able to find.

In *Smith* v. *Johnson*, 35 La. Ann. 943, the court held, as stated in the syllabus of the case, that "the hypothecary action against the third possessor is not barred by the prescription of ten years, when the principal obligation has been kept alive, and the mortgage securing it has been kept alive."

In *Gentes* v. *Blasco*, 20 La. Ann. 403, 405, the court said: "We consider the hypothecary action, as accorded and defined by arts. 61, 62 and 63 of the Code of Practice, to be an original action. It is declared to be a real action, and that it follows the property in whatever hand it may be found. What is said in *Kemp* v. *Cornelius*, 14 La. Ann. 299, in regard to the ten years' prescription being applicable, whenever it becomes necessary to institute a separate and distinct action from the one in which the judgment was rendered, seems not to apply to the hypothecary action. In that case, we have already seen, the action was personal. We do not find in our Code any period expressly fixed for the prescription of the hypothecary action. And the reason seems to be that its duration is contingent upon the existence of the right from which it springs."

Applying this principle to the case at bar, it is to be observed that the right from which the hypothecary action springs was the right of the complainant to his *pro rata* share of the net proceeds of the sale of the mortgaged property; or, in other words, the hypothecary action is based upon the obligation on the part of the purchasers to pay to him that amount—an obligation which, as before stated, follows the land into the hands of third persons. We have also seen that, according to the rule announced in *Johnson* v. *Duncan*, as to the purchaser at the sale, no inscription of the obligation was necessary. But as to third persons, such is not the case. Upon this point the Louisiana Constitution of 1868 and the Constitution of 1879 are positive and peremptory. Article 123 of the Constitution of 1868 is as follows: "The General Assembly shall provide for the protection of the rights of married women to their dotal and paraphernal property, and for the registration of the same; but no mortgage or privilege shall hereafter affect third parties, unless recorded in the parish where the property to be affected is situated. The tacit mortgages and privileges now existing in this State shall cease to have effect against third persons after the first day of January, eighteen hundred and seventy, unless duly recorded. The General Assembly shall provide by law for the registration of all mortgages and privileges."

Article 176 of the Constitution of 1879 provides: "No mortgage or privilege on immovable property shall affect third persons unless recorded or registered in the parish where the property is situated, in the manner and within the time as is now or may be prescribed by law, except privileges for expenses of last illness, privileges for taxes, state, parish or municipal: *Provided*, Such privilege shall lapse in three years."

The obligation in such case partakes of the nature of a judicial mortgage; and to be effective as to third persons it was necessary that it be inscribed with the recorder of mortgages. The judgment of the court from which the aforesaid obligation arose did not give a lien until so registered. *Hanna* v.

Creditors, 12 Mart. O. S. 32; *Adle* v. *Anty*, 5 La. Ann. 631; *Ford* v. *Tilden*, 7 La. Ann. 533; arts. 3322 and 3342, Civil Code; art. 123, Constitution of 1868; art. 176, Constitution of 1879.

Third persons are understood to be "all persons who are not parties to the act or the judgment on which the mortgage is founded." Art. 3343, Civil Code. And in that class must be placed the defendant Lovell, considered in his individual capacity, as possessor of the property; for his character as executor and his obligation as such did not exist until after he became such purchaser. As to him, the obligation aforesaid was of no effect without being registered, as required by the laws of Louisiana; [50] and no action would lie to enforce it. This principle was applied by the Supreme Court of Louisiana in *Delony* v. *George*, 20 La. Ann. 216. That case is well stated in the syllabus, as follows: "A having sold a tract of land to B, retained a mortgage thereon for the unpaid portion of the price, with the *pact de non alienando* in the act of sale. B subsequently sold the same tract of land to C, without an assumption in the act of sale of the existing mortgage. A lost his mortgage by allowing ten years to elapse without reinscription; *Held*, That C, the third purchaser, held the property free from the mortgage of A, after the lapse of ten years from its inscription, notwithstanding the *pact de non alienando* contained in the act of sale from A to B, and that the third purchaser could successfully enjoin the order of seizure and sale taken out by A."

It is to be observed that our discussion of the case hitherto has been upon the theory that the court below was correct in finding that the complainant purchased the two notes in suit and was subrogated to all the rights in and to them enjoyed by the Quitmans. Indeed, the argument of both parties is largely based upon that theory, and the contrary view is presented only incidentally in connection with the issue raised by the cross-bill. In fact, however, it makes no substantial difference in our conclusion on the issues presented by the original bill whether that theory, or, more properly speaking, that finding of fact, be correct or not, as that is the most favorable view of the matter to the complainant that can be taken; and, in any view of the case, his bill cannot be sustained. The decree of the court below in that respect is erroneous and should be reversed.

With respect to the cross-bill, we are of the opinion the decree below was correct, although the grounds upon which the court based its decree are not stated. One of the causes of action alleged in the cross-bill is for damages arising from the alleged wrongful acts of the complainant with respect to removing personal property from the plantation while he had possession of it, and for waste committed by him about the same time. Under the law of Louisiana such acts on the part of the complainant would be [51] considered quasi offenses, and would therefore be prescribed by one year. Art. 3536, Civil Code.

But furthermore, as stated by the attorney for appellant, the cross-bill "is for the same cause of action" as was originally brought in *Cragin* v. *Lovell*, in which judgment was rendered against Cragin in the court below, but on appeal to this court was reversed and ordered to be arrested because the petition set up no cause of action against Cragin, the complainant herein. 109 U. S. 194 [27: 903]. The cause of action in that case was the same as in this, and the parties are the same; and while the plea of *res adjudicata* may not be strictly applicable, because the judgment in that cause was simply arrested and did not therefore adjudicate upon the merits of the case, yet a comparison of the cross-bill here and the petition in that case discloses that they are almost, if not entirely, identical, so far as the substance of both is concerned. And, as we held there that "the petition shows no privity between the plaintiff and Cragin," and "alleges no promise or contract by Cragin to or with the plaintiff," it would seem that the same rule should be applied with reference to this cross-bill, even though it is ostensibly an equity proceeding. *Ballance* v. *Forsyth*, 65 U. S. 24 How. 183 [16: 733]; *New York L. Ins. Co.* v. *Bangs*, 103 U. S. 780 [26: 608]; *Gould* v. *Evansville & C. R. Co.* 91 U. S. 526, 534 [23: 416, 419]; *Alley* v. *Nott*, 111 U. S. 472 [28: 491], and cases cited.

The decree of the court below sustaining the complainant's bill was erroneous, and to that extent is reversed; and with respect to its dismissal of the cross-bill it was correct, and to that extent is affirmed; and the case is remanded to that court with a direction to dismiss the bill, with costs.

SYLVESTER H. KNEELAND, *Appt.*,
v.
THE AMERICAN LOAN AND TRUST COMPANY OF BOSTON ET AL.

SYLVESTER H. KNEELAND, *Appt.*,
v.
GEORGE WILLIAM BALLOU, Trustee.

(See S. C. Reporter's ed. 89-104.)

Right of appeal by purchaser at foreclosure sale—intervening claims—control by court of a railroad through a receiver—expenses of operating road—rental of rolling stock, when prior claim—when not—rental, how fixed or ascertained.

1. A purchaser at a foreclosure sale has the right of appeal as to all matters adjudicated after his bid, which affect the terms of his bid, or the burdens which he assumes thereby, and which are

---

NOTE.—*As to powers and duties of receivers, see note* to Davis v. Gray, 21: 447.

Only parties to record can be heard on appeal or writ of error. See *note* to Harrison v. Nixon, 9: 201.

What questions the United States Supreme Court will review on writ of error; bill of exceptions. See *note* to Parks v. Turner, 13: 883.

What is final decree or judgment of state or other court, from which appeal lies. See *note* to Gibbons v. Ogden, 5: 302.

not settled by the terms of the decree under which he purchases.

2. Where not concluded by the terms of the decree, such purchaser has a right to be heard in the trial court, and by appeal in the appellate court, as to the amount of intervening claims to be subsequently allowed, where the matter affects his interests as a bondholder, and trustee of the other bondholders.

3. The appointment of a receiver does not vest in the court absolute control over the property, nor general authority to displace vested contract liens.

4. If a court appoint a receiver of railroad property, it may contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself.

5. Rentals of rolling stock of a railroad company, while in the hands of a receiver appointed in a suit by a judgment creditor, are not entitled to priority in payment over debts secured by first mortgage out of the proceeds of a foreclosure sale of the property of an insolvent railroad corporation on the prior mortgage.

6. But the rental value of such rolling stock, while it is in the hands of a receiver, appointed at the instance of the mortgagee in a suit to foreclose the mortgage and used by such receiver in operating the road, is properly allowed as a prior claim to the mortgage indebtedness.

7. The rental should be fixed, not at actual milage, but at reasonable value, irrespective of the amount of actual use, and not diminished by the fact that more was taken possession of than was actually needed.

[Nos. 252, 1537.]

Argued April 3, 7, 8, 1890. Decided May 19, 1890.

APPEAL from decrees of the Circuit Court of the United States for the District of Indiana, allowing certain claims out of the proceeds of the foreclosure sale of the property of an insolvent railroad corporation in preference to the payment of the mortgage foreclosed. *Reversed.*

The facts are stated in the opinion.

Messrs. **John M. Butler, Robert J. Ingersoll** and *Clarence Brown*, for appellant:

The contracts under which these appellees delivered their equipment to the railroad company are contracts of conditional purchase and sale.

Herrey v. *Rhode Island Locomotive Works*, 93 U. S. 672, 673 (23: 1004); *Fosdick* v. *Schall*, 99 U. S. 235, 250, 255 (25: 339, 341, 343); *Harkness* v. *Russell*, 118 U. S. 663 (30: 285).

No superior sanctity or inherent priority of lien attaches to claims against a railroad receivership. They stand or fall in obedience to the same general principles of law and equity governing any other indebtedness.

Credit Co. v. *Arkansas C. R. Co.* 15 Fed. Rep. 49; *Union T. Co.* v. *Illinois R. Co.* 117 U. S. 434 (29: 963).

These appellees are not entitled to a lien upon the fund arising from the foreclosure sales of the railroad, prior to the lien of the first-mortgage bonds, for the use of their equipment by the receivers. Their claims are, in law and equity, inferior and subordinate to the lien of the first mortgage bonds upon the entire proceeds of sale.

Huidekoper v. *Hinckley Locomotive Works*, 99 U. S. 258, 260 (25: 344, 345); *Burnham* v. *Bowen*, 111 U. S. 776 (28: 596); *Union T. Co.* v. *Illinois M. R. Co.* 117 U. S. 477, 479, 480 (29: 978, 979); *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C. C. & I. R. Co.* 125 U. S. 658 (31: 832).

No indebtedness of the first receivership, from August 1, 1883, to December 1, 1883, instituted under the general creditor's suit, ought, in equity, to be paid out of the fund arising from the foreclosure sales of the railroad under suits brought by the trustees in the first mortgages, in preference to the payment of first-mortgage bonds, excepting only such indebtedness as was necessarily incurred for the preservation of the mortgaged estate.

Dow v. *Memphis & L. R. R. Co.* 124 U. S. 652 (31: 565); *Sage* v. *Memphis & L. R. R. Co.* 125 U. S. 361, 377 (31: 694, 698); *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459, 483 (20: 199, 207).

Railroad receiverships in aid of floating-debt creditors have never been favored by this court.

Milwaukee & M. R. Co. v. *Soutter*, 69 U. S. 2 Wall. 510 (17: 900); High, Receivers, § 365.

Messrs. **James L. High, Bluford Wilson, Henry D. Hyde** and *Samuel Williston*, for appellees:

Appellant is not entitled to appeal.

Masterson v. *Herndon*, 77 U. S. 10 Wall. 416 (19: 953); *Williams* v. *Morgan*, 111 U. S. 684 (28: 559); *Swann* v. *Wright*, 110 U. S. 590 (28: 252).

Exceptions to a master's report cannot be entertained when the parties excepting have failed to present their objections to the master before his report is returned into court.

2 Harrison, Ch. Pr. 116; 2 Daniell, Ch. Pr. 1, 302; *Vallence* v. *Weldon*, 1 Dick. 290; *Ottey* v. *Pensam*, 1 Hare, 322; *Story* v. *Livingston*, 38 U. S. 13 Pet. 359 (10: 200); *McMicken* v. *Perin*, 59 U. S. 18 How. 507 (15: 504).

A decree settling the rights of the parties cannot be reconsidered except on petition for rehearing, and is final and appealable, although a reference to a master may still be necessary to adjust their accounts in accordance with the principles of such decree.

Forgay v. *Conrad*, 47 U. S. 6 How. 201 (12: 404); *Thomson* v. *Dean*, 74 U. S. 7 Wall. 342 (19: 94); *St. Louis, I. M. & S. R. Co.* v. *Southern Exp. Co.* 108 U. S. 24 (27: 638); *Winthrop Iron Co.* v. *Meeker*, 109 U. S. 180 (27: 898).

The receivership was a continuous one for the benefit of the mortgage bondholders throughout the entire period.

Miltenberger v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286 (27: 117); *Union T. Co.* v. *Illinois M. R. Co.* 117 U. S. 434 (29: 963); *Wallace* v. *Loomis*, 97 U. S. 146 (24: 895).

Car rentals during the receivership are entitled to priority over mortgage indebtedness.

Kinsman v. *Parkhurst*, 59 U. S. 18 How. 289 (15: 385); *The Vanderbilt*, 73 U. S. 6 Wall. 225 (18: 823); *Fosdick* v. *Schall*, 99 U. S. 239, 240 (25: 339); *Hale* v. *Frost*, 99 U. S. 389 (25: 419); *Union T. Co.* v. *Souther*, 107 U. S. 591 (27: 488); *Burnham* v. *Bowen*, 111 U. S. 776 (28: 596); *Myer* v. *Car Co.* 102 U. S. 1 (26: 59); *Barton* v. *Barbour*, 104 U. S. 126 (26: 672).

Mr. Justice **Brewer** delivered the opinion [90] of the court:

These cases were argued and are considered

together, the questions involved being similar, and growing out of the same foreclosure suits. In a general way it may be stated that they arise between a purchaser at foreclosure sales of certain railroad property and intervening creditors. The initial question is as to the right of appellant, the purchaser, to his appeal. It is urged that a purchaser at a sale under a decree has no right to appeal from its terms. He takes under it. His purchase is a voluntary act, and, coming in voluntarily to take under a decree, he may not challenge that under which he takes. The contention of appellant is that his attitude is not thus limited; that his appeal is not from the decree of sale under which he purchased, but from orders made thereafter respecting his bid, the modes of payment thereof and the debts to which it should be applied, matters in which he was interested, and in respect to which, by the terms of the decree of sale, he was given a right of appeal; and that such right springs not alone from the grant of the right of appeal, but also from his relations to the matters determined and adjudged in these subsequent proceedings, and by the final decree. For a correct solution of this question a statement more in detail of the facts is essential.

Decrees of foreclosure,—for there were separate divisions, the Toledo and the St. Louis divisions, separate suits, and several mortgages,—were entered on the 12th day of November, 1885. It is sufficient, however, to notice the proceedings in one, for there was no substantial difference between the cases. It contained these provisions: "The complainants herein and the purchaser or purchasers at the foreclosure sale under this decree reserve the right to appeal from any orders and final decrees made by the court, directing and decreeing the payment of claims and debts found and determined and adjudged and decreed to be due and payable as court and receiver's indebtedness, and to be prior and superior in equity to the lien of said first deed of trust and mortgage herein and hereby foreclosed, if they shall be so advised." "In making payment of any surplus of said purchase money left, after full payment of the court and receiver's indebtedness, the purchaser or purchasers shall be allowed to pay said surplus in the bonds and coupons to which the same may be applicable, as hereinabove provided, each such coupon and bond being received by the master for such sum as the holder thereof is entitled to receive under the distribution herein provided and according to the priorities herein adjudged." So that by the decree the bidders at the sale were notified in advance of their right to be heard, both in the trial and appellate courts, upon the question of what amounts should be paid to intervening creditors and what in the bonds secured by the mortgages. Common experience is that intervening claims have to be paid in cash, while the mortgage bonds of a defaulting and insolvent corporation are generally purchasable much below par. In this case the enormous disproportion between the amount of outstanding bonds and the value of the property suggests that those bonds must have been purchasable at a very low price; and therefore that the question of the amount of intervening claims finally to be charged upon the property was a matter affecting materially the interests of the purchaser, and the right to be heard upon it, one which would largely determine the amount of his bid.

Further, on February 23, 1886, when the master had reported upon the intervening claims, the appellant, among others, filed exceptions to that report, in the following words: "Come now James M. Quigley, Charles T. Harbeck, John McNab, Halsey J. Boardman and Warren D. Hobb, complainants in said causes, and committees representing bondholders holding bonds secured by mortgages on said railroad and property in said causes involved, and the Central Trust Company, trustee in the mortgages in said causes foreclosed, and Sylvester H. Kneeland, purchaser of said railroad and property sold at foreclosure sale under decrees rendered and entered in said above-entitled causes, and owner of and trustee for a vast majority of said mortgage bonds, and now except to each and every of the master's findings and report herein; and said complainants, and said purchaser, for their exceptions, assign the following causes." And in the final decree thereon the exception and allowance of appeal are stated as follows: "To this decree the said Sylvester H. Kneeland, as purchaser and trustee representing the first-mortgage bondholders on said entire line of railroad, concerning both divisions from Toledo, Ohio, to East St. Louis, Illinois, now excepts and prays an appeal to the Supreme Court of the United States, which is granted to operate as a supersedeas on giving bond in the sum of two hundred thousand dollars, which is now filed, with the American Surety Company of New York as surety, and the same is approved by the court, the court, however, reserving the right to resume possession of the property on the terms mentioned in the order confirming the sale and approving the deed."

It appears also that in the early part of these foreclosure proceedings a committee, consisting of James M. Quigley and others, was appointed to represent the bondholders, with authority to employ agents, etc. This committee, by leave of the court, was made co-complainant. It is stated by counsel (though that fact does not appear in the record) that a contract between this committee and Mr. Kneeland, with reference to a purchase in the interest and for the benefit of the bondholders, was presented to the court at the time of signing the decree of sale; and that it was upon that that the provision reserving an appeal to the purchaser was inserted. While no such agreement is found in the record and therefore cannot be a subject of consideration, yet obviously the language in the decree of foreclosure, as well as that of confirmation, suggests that something of the kind must have been presented to the attention of the court. Upon these facts can the appellant's right to an appeal be sustained?

It was adjudged in *Blossom* v. *Milwaukee & C. R. Co.*, 68 U. S. 1 Wall. 655 [17: 673], that a bidder at a marshal's sale makes himself thereby so far a party to the proceedings that

for some purposes he has a right of appeal. It was said by *Mr. Justice* Miller, in the opinion of the court, that "it is certainly true that he cannot appeal from the original decree of foreclosure, nor from any other order or decree of the court made prior to his bid. It, however, seems to be well settled that, after a decree adjudicating certain rights between the parties to a suit, other persons having no previous interest in the litigation may become connected with the case, in the course of the subsequent proceedings, in such a manner as to subject them to the jurisdiction of the court and render them liable to its orders; and that they may in like manner acquire rights in regard to the subject matter of the litigation, which the court is bound to protect." "A purchaser or bidder at a master's sale in chancery subjects himself *quoad hoc* to the jurisdiction of the court, and can be compelled to perform his agreement specifically. It would seem that he must acquire a corresponding right to appear and claim, at the hands of the court, such relief as the rules of equity proceedings entitle him to." It follows from this decision that his right of appeal must extend to all matters adjudicated after his bid, which affect the terms of that bid, or the burdens which he assumes thereby, and which are not withdrawn from his challenge by the terms of the decree under which he purchases. If by the decree the sale is to be made subject to certain conditions, the purchaser acquires no right to be heard as to those conditions, either in the trial or appellate courts. Such was the ruling in *Swann* v. *Wright*, 110 U. S. 590 [28: 252], in which it was adjudged that, where a decree directed that a sale should be made subject to liens established or to be established, on references previously had or then pending before a master, a purchaser at such sale would not be heard either in the trial or appellate court to dispute the validity of the liens thus established. This ruling was placed distinctly on the ground that by the very terms of the decree the purchaser was to take the chances of the allowance of all the claims then pending, and therefore their validity and extent was a matter simply between the claimants and the parties to the mortgage; but the contingency now presented was foreshadowed in the opinion, for it says: "If the court had, in the decree of sale, reserved to the purchaser, although not a party to the proceedings, the right to appear and contest any alleged liens then under examination, and therefore not established by the court, an entirely different question would have been presented. But no such reservation was made; and the purchaser was required, without qualification, to take the property, upon confirmation of the sale, subject to the liens already established, or which might on pending references be established, as prior and superior to the liens of the first-mortgage bondholders."

94]

The right of purchasers at a foreclosure sale to be heard on the question of compensation to trustees and others, both in the trial and appellate courts, was affirmed in *Williams* v. *Morgan*, 111 U. S. 684 [28: 559], when, as in that case, by the terms of the decree, the amount of such compensation placed an additional burden upon the purchasers. The case of *Swann* v. *Wright*, *supra*, was referred to in the opinion, and distinguished on the ground of the express provisions in the decree as to the terms of sale. See also *Stuart* v. *Gay*, 127 U. S. 518 [32: 191]; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207 [34: 97]. Deducible from these authorities, as applicable to the facts in this case, and supported by sound reasons, are the following propositions: First. A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. Secondly. Where not concluded by the terms of the decree any subsequent rulings which determine in what securities, of diverse value, his bid shall be made good, are matters affecting his interests, and in which he has a right to be heard in the trial court, and by appeal in the appellate court. In the case at bar, it is obvious that the amount of intervening claims to be subsequently allowed was a matter affecting the interests of the purchaser, and in terms reserved to him by the decree of sale. Supplementing and strengthening this right, reserved and substantial, is the recital in the allowance of the appeal that the party purchasing is himself a bondholder, and trustee and representative of the other bondholders; which, if not conclusive as to the extent of interest in the litigation, is not to be ignored as wholly a matter of surplusage, but ought to be assumed as correct; and which is not to be disregarded simply because the evidences of that fact are not preserved in the record.

[9

These conclusions compel an inquiry as to the validity of the adjudications in respect to the intervening claims. They were for the rental of rolling stock, and our examination must therefore proceed to the facts upon which the adjudications were made: This rolling stock was obtained by the railroad company, a consolidated corporation, from certain manufacturers, the appellees herein, on contracts of purchase. These in form were leases, but in substance, and properly so adjudged, were contracts of purchase, reserving title in the vendors until after the payment of certain annual sums, called rents, and with the right to retake possession on default in payment. Full payment of the purchase price was never made.

The first bills under which the receiver was appointed were filed August 1, 1883, by a judgment creditor. The trustees in the several mortgages were made parties to these bills. They entered their appearance, and, neither objecting nor consenting, the receiver was appointed. Such receivership was continued four months and until December 1, 1883, at which time bills were filed by the trustees for the foreclosure of their mortgages and a receiver was appointed thereunder. The first inquiry presented is

whether rentals for such period were properly given priority over the mortgage debts. That question must be answered in the negative. It is important to note these facts: First. This case is not embarrassed by any matter of surplus earnings, for it appears beyond any possibility of doubt that, from the time of the purchase of this rolling stock to the time of the final disposition of these cases, the receipts did not equal the operating expenses. There was no diversion of the current earnings, either to the payment of interest or the permanent improvement of the property. In fact, but little interest was ever paid on the bonds. *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C. C. & I. R. Co.* 125 U. S. 658, 673 [31: 832, 837]. Second. The receivership was at the instance of a judgment creditor, and was with a view of reaching the surplus earnings for the satisfaction of his debt. It was not at the instance of mortgagees, nor were they seeking foreclosure of their mortgages. They were asking nothing at the hands of the court. They were not asking it to take charge of the property, or thus impliedly consenting to its management of the property for their benefit. Third. This rolling stock was not included in the sale, but was returned to the intervenors upon orders entered prior to the decree of sale. So that only that property was sold which was covered by mortgages executed prior to any contract with the intervenors with respect to rolling stock, and it is the proceeds of this sale which the intervenors are seeking to appropriate. They cannot say that their property was sold, or that by such fact they have an interest in [97] the proceeds of sale. Fourth. The sale realized only a small proportion of the mortgage debts. There was no surplus above the mortgages for distribution to the intervenors or among general creditors. In fact, only a small fraction of the mortgage debt was realized. Fifth. During these four months no demand for possession or rental was made of the receiver by any of the intervenors, or anyone for them, with the single exception of what may be known as the "Grant" claims, and in respect to them the demand for possession was met by refusal on the part of the receiver and a proposition for purchase at the unpaid portion of the purchase price, which proposition was accepted by such intervenors, but never finally carried into effect.

Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal [98] responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens. *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C. C. & I. R. Co.* 125 U. S. 658-673 [31: 832-837]. So that these intervenors acquired no right of priority by virtue of their antecedent contracts of sale.

But it is urged, and with force, that the court did not allow contract price, but only rental; and the question is asked, May a court, through its receiver, take possession of property and pay no rental for it? If it may legitimately compel the operation of the railroad in the hands of its receiver, in order to discharge the obligations of the company to the public, may it not also, and must it not also, burden that receivership and the property in charge of the receiver, with all the expenses connected with the operation of the road, together with reasonable rentals for the property used and necessary for the operation of the road? As to the general answer to these inquiries, we have no doubt. A court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and the expenses which the court creates in discharge of those obligations are burdens necessarily on the property taken possession of, and this irrespective of the question who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership. So if, at the instance of any party rightfully entitled thereto, a court should appoint a receiver of property, the same being railroad property, and therefore under an obligation to the public of continued operation, it, in the administration of such receivership, might rightfully contract debts necessary for the operation of the road, either for labor, supplies or rentals, and make such expenses a prior lien on the property itself; and it is in reliance on this general proposition that the intervenors insist on an affirmance of the decree.

But as against this we are confronted with [99] these facts: The court never made any order

for the rental of this rolling stock, and the situation of all the parties during this four months' receivership was this: The railroad company, with its franchises for building and operating a railroad, was in equity, whatever may have been the location of the legal title, the owner of realty, subject to certain fixed mortgage indebtedness, and of personalty, the rolling stock in question, subject to certain fixed liens. The creation, in the first instance, of those liens gave to neither lien-holder, as against the other, priority in payment otherwise than in respect to the property specially charged with those liens. The holder of the lien on the real estate could not insist that both the real estate and the personalty should be subjected to the payment of his debt, before payment to the holder of the lien on the personalty of his claim, out of the proceeds of its sale. Neither, on the other hand, could the holder of the lien on the personalty insist that his lien should be first paid out of any proceeds of the realty. Each was limited to his priority of right on the property on which his lien rested. Under those circumstances, neither the holder of the lien on the real or the personal property moving in the premises, a general creditor of the common debtor invoked for the payment of his debt the intervention of a court of equity and the possession of all the property charged with these two liens, and its operation with a view to the collection of his unsecured claim. The operation of the road during that receivership did not pay the operating expenses. May the holder of a lien on the real estate insist that the deficiency be charged to the holder of the lien on the personalty, or that the latter shall become liable to the former for the rental of its property? Unquestionably not. Neither lien-holder asking the aid of the court, no obligation was assumed by either in respect to the management of the property as against the other. If the operation of the property seized by the receiver did not result in the payment of the operating expenses, and the common debtor was unable to pay, the burden of the deficiency is as properly cast upon the holder of a lien upon the personalty as [100] upon the holder of a lien upon the realty; and when the court, in the administration of the receivership, thereafter returns the personalty to the holder of the liens upon it, such lien-holder must be content to be relieved from any burden for a *pro rata* share of the deficiency, and has no equity to claim that he shall be not only thus relieved, but that he may also charge upon the realty, to the detriment of the lien-holder thereon, both the entire burden of the deficiency and compensation to him for the use of his property. Hence it follows that neither by reason of a contract of purchase of the rolling stock, nor by its use for four months at the instance of a general creditor, was any burden cast upon the holder of a lien upon the real estate for the nonpayment of such contract price or the rental value. The court therefore erred in charging rental value of the rolling stock during those four months as a prior lien upon the realty.

On the 1st of December, 1883, however, the situation was changed. At that time the mortgagees upon the realty commenced suits to foreclose their mortgages, and, at their instance, a receiver was appointed for all the property, both real and personal. In respect to the question here involved, the case is as though this was the commencement of judicial proceedings; and in that respect the attitude is this: The railroad company owned real and personal property, each subject to a separate lien. The holder of the lien upon the realty commences suit to foreclose its lien, and asks the court to take possession, through its receiver, of both the real and personal property. In the latter it had a remote interest, though subordinate to existing liens. The court, responding to its demands, takes possession of all the property, real and personal. Now, when the holder of a first lien upon the realty alone asks the court of chancery to take possession not only of the real but also of personal property used for the benefit of the real, that application is a consent on its part that the rental value of the personalty thus taken possession of and operated for the benefit of the realty shall be paid in preference to its own claim. The proposition is a simple one. The application may not be a consent that the contract price of the personalty shall be paid in preference to his lien; but it certainly is a consent that the rental value of that personalty, during the time of the possession by the receiver appointed at his instance, may have priority to his claim. If the holder of a lien upon the realty does not think that the continued possession of the personalty is a benefit to his lien, he should simply omit the personalty from his bill, and ask the court to take possession of the realty alone. But either because he believed that the possession of the personalty was necessary for the operation of the railroad, and the security of his claim; or else because, by virtue of his secondary right, he expected to pay for the personalty and retain both the personalty and the realty,—he has had the court take possession of both by its receiver; and by that act, although subsequently the personalty was returned to the holder of the lien upon it, he consented to the payment of reasonable rental pending the receiver's possession. The conclusion is irresistible that under the circumstances reasonable rental value was properly allowed as a prior claim to the mortgage indebtedness. Indeed, we do not understand that counsel for appellant seriously contest this proposition. Their contention substantially is that the basis of such rental value was wrong; that the rental should only be on the basis of actual use—the "milage system," as it is known in railroad parlance; that, in fact, the railroad company had acquired too much rolling stock, and, so averaging it, the milage was quite small; whereas the master, as approved by the court, fixed the rental not at actual milage, but at a reasonable value irrespective of the actual use. We think that the decision of the court was right. The initiative in the matter was taken by the trustees. They asked, by their bill, that the court take possession of all the personalty. If more was taken possession

of than was needed, it was their mistake. The court is not to be assumed to be an experienced railroad manager, knowing exactly the amount of rolling stock needed for the operation of the road. It may justly assume that what had been contracted for was necessary, and if the trustees ask that all may be taken possession of, it may act upon that as a declaration that all is necessary, and that rental value is to be paid for all. Theirs is [102] the inquiry, and not the court's. It is a mistake to suppose that their duties in respect to the foreclosure proceedings are formal, merely, or limited to the employment of counsel and the handling of securities. They assume all the obligations of a party to the suit. They are charged with the care of the entire mortgage interest. They ask and receive large allowances for caring for that interest; and it is a part of their duty to make examination and become fully informed in respect to the property, its liens, what is needed for its operation, and what can prudently and safely be dispensed with. Upon such information their application should be based. It is true the court is not concluded by their representations; but its information is in the first instance derived therefrom, and it may and does generally act upon them; and its action, based on them, must be held to be conclusive so far as concerns the interest they represent, in respect to all liabilities and obligations flowing from the possession of a receiver. Whatever action the court may take thereafter, on information furnished by its receiver, or by them, or otherwise, in respect to the property not primarily chargeable with their lien, its first action is the recognition of the validity of their application; and the taking possession of all the property they name is in reliance upon their representation that all is needed for the operation of the railroad and that they consent either to the payment of the unpaid purchase price of any property thus taken possession of, or a reasonable rental for the use of the same. Consider for a moment the ordinary experience of railroad building, as developed in the story of this case. The franchise is acquired, the corporation organized and a first mortgage placed upon the property, with the usual "after-acquired property" clause in it. The construction of the railroad proceeds; it is finished; rolling stock is necessary, and the corporation acquires it under conditional contracts of purchase. The enterprise is a failure; the mortgage interest is unpaid; the trustee, discharging its duty, is bound to know that the rolling stock is held subject to the liens attending its purchase. It asks the court to take possession not alone of the realty, but also of the rolling stock thus acquired and held. The application is [3] not resisted. The court is ignorant of the history of the enterprise; it sustains the application and appoints a receiver, and the rolling stock is taken possession of by that receiver. Can it be held that such possession, taken at the instance of the trustee, casts no burden on the road, either for the purchase price or rental prior to the claim of the original mortgage? Can the trustee, forcibly, through the power of the court, compel an appropriation of this rolling stock for the benefit of the property subject to its lien without compensation? Does not its application for possession carry with it an assent that rental for such rolling stock shall be first paid, as one of the expenses of the receivership which it has invoked? But one answer can be made to this inquiry, and that is that its application is a consent to the payment of reasonable rental during the possession of the receiver—a rental not based upon the use actually made by the receiver, but on the ordinary value of the rental of such property. So, although it may be true, as claimed by counsel, that more was taken possession of than was needed, and that there was only a limited use of each car and engine, yet the case is to be taken as though all were needed and full use made of all; and that sum which would be reasonable rental value for such use should be paid. Such value is not to be determined by the amount of actual use, but by what, in the first instance and before the use had been had, would be adjudged a reasonable rental value. Upon such basis no complaint can be made of the amount fixed by the court, reducing as it did the amount reported by the master.

These are the only matters which, by the exceptions filed to the master's report respecting rentals, were reserved for our consideration. Our conclusion, therefore, in the two cases is that the decree must be reversed, and the cases remanded with instructions to strike out all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent thereto.

Counsel for the Grant claims expressly stated, in open court, in his argument, that in case certain appeals from the Sixth Circuit were affirmed there might result a double allowance to his clients, which they did not insist upon. As the details and sum are not clearly presented, we can only say that this matter must be taken into account in the subsequent disposition of the cases.

Reversed.

Mr. Justice **Bradley** dissents.

TEXAS & PACIFIC RAILWAY COMPANY ET AL., *Appts.*, [3

v.

THE CITY OF MARSHALL.

THE CITY OF MARSHALL, *Appt.*,

v.

TEXAS & PACIFIC RAILWAY COMPANY ET AL.

(See S. C. Reporter's ed. 393-407.)

Contract of railroad company to establish its terminus and machine shops and car works at a particular place—construction of same—what is a compliance with it—interests of public—"permanent" does not mean "forever"—if contract be perpetual, equity cannot enforce it—action at law proper—damages.

1. Where a city donated its bonds and land to a railroad company in consideration that the com-

pany would permanently establish its eastern terminus and Texas office, and establish and construct its main machine shops and car works, at said city, to which the company agreed, the essence of the contract is that this should be done in its process of construction, with the purpose that it should be permanent.

2. But it did not amount to a covenant that the company would forever keep its terminus, machine shops and car works there.

3. Such contract is satisfied and performed when the company establishes and keeps a depot and sets in operation car works and machine shops and keeps them going for eight years, and until the interests of the company and of the public demand the removal of some or all of these subjects of the contract to another place.

4. This was the fair meaning of the words "permanent establishment," as there was no intention, at the time of making the contract, of removing or abandoning them; the word "permanent" does not mean "forever," or existing forever.

5. But if the contract is perpetual, it is one not to be enforced in equity; for under a decree of specific performance the court would assume an endless duty, inappropriate to its functions.

6. The injury suffered by the city from the removal of part or all of what the company engaged to establish there, should be compensated by a single judgment in an action at law, leaving the company to pursue the course which its interests and those of the public demand.

7. That there is no rule by which the damages can be estimated with precision is not a conclusive objection against a resort to a court of law.

[Nos. 293, 1105.]

Argued Apr. 23, 24, 1890. Decided May 19, 1890.

APPEALS from a decree of the Circuit Court of the United States for the Eastern District of Texas, forbidding the Texas and Pacific Railway Company from removing any more of its offices from the City of Marshall, and enjoining it to continue at that place those which remained there, and otherwise to perform its contract to establish the eastern terminus of its railroad and its principal offices at said City of Marshall. *Reversed, with directions to the Circuit Court to dismiss the suit.*

The facts are stated in the opinion.

Messrs. **John F. Dillon** and *Harry Hubbard*, for the Railway Company *et al.:*

The Railway Company has completely fulfilled the contract.

Mead v. *Ballard*, 74 U. S. 7 Wall. 290 (19: 190); *Jeffersonville, M. & I. R. Co.* v. *Barbour*, 89 Ind. 375.

The contract is so indefinite and incomplete in its terms as to what the Railway Company agreed to do that a court of equity will not attempt to enforce specific performance, but will leave the complainant to its action at law for damages.

Pomeroy, Spec. Perf. § 145; *Buxton* v. *Lister*, 3 Atk. 383; *Colson* v. *Thompson*, 15 U. S. 2 Wheat. 336, 341 (4: 253, 255); *Hennessey* v. *Woolworth*, 128 U. S. 438, 442 (32: 500, 502); *Wilson* v. *Northampton & B. J. R. Co.* L. R. 9 Ch. 279; *Brace* v. *Wehnert*, 25 Beav. 348; *Norris* v. *Jackson*, 1 Johns. & Hem. 319; *Price* v. *Penzance*, 4 Hare, 506; *Stuart* v. *London & N. W. R. Co.* 1 DeG. M. & G. 721; *South Wales R. Co.* v. *Wythes*, 5 DeG. M. & G. 880; *Taylor* v. *Portington*, 7 DeG. M. & G. 328.

It would be impracticable, if not impossible, for the court to enforce specific performance of this contract, because the acts to be performed under it are complicated and numerous, and would require continued supervision by the court in order to render a decree effective.

Pomeroy, Spec. Perf. §§ 288, 307, 312; *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 339 (19: 955); *Port Clinton R. Co.* v. *Cleveland & T. R. Co.* 13 Ohio St. 544; *Ross* v. *Union P. R. Co.* 1 Woolw. 26; *South Wales R. Co.* v. *Wythes*, 1 Kay & J. 186, 5 DeG. M. & G. 880; *Fallon* v. *Missouri & M. R. Co.* 1 Dill. 121; *Powell Duffryn Steam Coal Co.* v. *Taff Vale R. Co.* L. R. 9 Ch. 331; *Booth* v. *Pollard*, 4 Younge & C. Exch. 61; *Pollard* v. *Clayton*, 1 Kay & J. 462.

Equity cannot enforce performance of this contract as of a negative covenant: both the contract and the decree are affirmative, and require the performance of continuous affirmative acts.

Hooper v. *Brodrick*, 11 Sim. 47; *Pullman P. Car Co.* v. *Texas & P. R. Co.* 11 Fed. Rep. 625; *Marsh* v. *Fairbury, P. & N. W. R. Co.* 64 Ill. 414; *St. Joseph & D. C. R. Co.* v. *Ryan*, 11 Kan. 602; *Williamson* v. *Chicago, R. I. & P. R. Co.* 53 Iowa, 126; *Collins* v. *Plumb*, 16 Ves. Jr. 454; *Caswell* v. *Gibbs*, 33 Mich. 331.

The contract was void as against public policy.

Greenhood, Pub. Pol. 323; *Bestor* v. *Wathen*, 60 Ill. 138; *St. Louis, J. & C. R. Co.* v. *Mathers*, 71 Ill. 592; *St. Joseph & D. C. R. Co.* v. *Ryan*, 11 Kan. 602; *Pacific R. Co.* v. *Seely*, 45 Mo. 212; *Williamson* v. *Chicago, R. I. & P. R. Co.* 53 Iowa, 126; *Fuller* v. *Dame*, 18 Pick. 473; Greenhood, Pub. Pol. 318, case VI.; *Hartford & N. H. R. Co.* v. *New York & N. H. R. Co.* 8 Robt. (N.Y.) 411; *State* v. *Hartford & N. H. R. Co.* 29 Conn. 538.

There was no contract permanently to maintain the "main machine shops" or "car works" at the City of Marshall.

Orient Mut. Ins. Co. v. *Wright*, 68 U. S. 1 Wall. 456, 458 (17: 505, 506); *Garrison* v. *United States*, 74 U. S. 7 Wall. 688, 691 (19: 277, 278); *Noonan* v. *Bradley*, 76 U. S. 9 Wall. 394, 407 (19: 757, 761).

The complainant has an ample remedy in an action at law for damages; and therefore specific performance should be refused.

Pomeroy, Spec. Perf. 3, *note 2*, § 185; *Willard* v. *Taylor*, 75 U. S. 8 Wall. 557 (19: 501).

Messrs. James Turner, C. B. Kilgore, **W. Hallett Phillips** and **A. H. Garland**, for the City of Marshall:

Where the remedy at law is not plain, adequate and complete, equity will decree the specific performance of a contract, unless the agreement involves the exercise of skill or personal labor, or the performance, under the direction of the court, of successive and continuous acts, for a considerable period of time.

2 High, Injunc. § 1106; 1 Wood, Ry. Law, 607, § 210; Pomeroy, Eq. §§ 1402, 1403, 1405; Story, Eq. §§ 725, 1566, 1568; Pomeroy, Spec. Perf. §§ 24, 25, 310–312.

In cases where equity might not decree specific performance of a contract, it will, if the injury is otherwise irreparable, restrain the breach of agreement, not only where it con-

tains a negative covenant, but where such a covenant may be implied.

2 High, Injunc. §§ 1109, 1164, 1165; *Hascall* v. *Madison University*, 8 Barb. 174; *Singer Mfg. Co.* v. *Union B. H. & E. Co.* 6 Fish. Pat. Cas. 480, 1 Holmes, 258; *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co.* L. R. 16 Eq. 433; 3 Parsons, Cont. (6th ed.) 376; *Montague* v. *Flockton*, L. R. 16 Eq. 189; *Webster* v. *Dillon*, 3 Jur. N. S. 432; *Greatrex* v. *Greatrex*, 1 DeG. & Sm. 692; *Murdock's Case*, 2 Bland, Ch. 461, 20 Am. Dec. 392, *note*; *Rolfe* v. *Rolfe*, 15 Sim. 88; *Chicago & A. R. Co.* v. *New York, L. E. & W. R. Co.* 24 Fed. Rep. 516, 22 Am. & Eng. R. R. Cas. 265; *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 339 (19: 955); *People* v. *Louisville & N. R. Co.* (Ill.) 3 West. Rep. 90; *Western U. Teleg. Co.* v. *Union P. Co.* 1 McCrary, 418, 558, 581; *Jones* v. *North*, L. R. 19 Eq. 426; *DeMattos* v. *Gibson*, 4 DeG. & J. 276, 279; *Vincent* v. *Chicago & A. R. Co.* 49 Ill. 33; *Frank* v. *Brunnemann*, 8 W. Va. 462; *Cole S. M. Co.* v. *Virginia & G. H. W. Co.* 1 Sawy. 470.

It will not avail the defendant that the work undertaken in violation of the agreement is one of great public importance, or that great inconvenience is likely to result to the public in case he be compelled to perform his agreement.

2 High, Injunc. § 1135; *Lloyd* v. *London, C. & D. R. Co.* 2 DeG. J. & S. 563; *Raphael* v. *Thames Valley R. Co.* L. R. 2 Ch. 147; *Foster* v. *Birmingham, W. & D. R. Co.* 2 Week. Rep. 378.

The contract bound the defendant to make Marshall its eastern terminus.

Union P. R. Co. v. *Hall*, 91 U. S. 343 (23: 428).

The City, whose inhabitants are beneficiaries of such a contract, is the proper party to sue for the enforcement of the agreement.

Story, Eq. § 901*a*.

In cases where the contract is indefinite or ambiguous, the practical interpretation by the parties themselves is entitled to great, if not controlling, influence.

Nash v. *Towne*, 72 U. S. 5 Wall. 699 (18: 529); *Philadelphia, W. & B. R. Co.* v. *Trimble*, 77 U. S. 10 Wall. 367 (19: 948).

394] *Mr. Justice* **Miller** delivered the opinion of the court:

These are appeals from a decree of the Circuit Court of the United States for the Eastern District of Texas. The suit was originally brought by the City of Marshall in the Court of the Fourth Judicial District of the State of Texas against the Texas & Pacific Railway Company, and was afterwards removed by that Company into the Circuit Court of the United States for the Eastern District of Texas. The suit was a bill in chancery which sought relief for a violation of its contract by the Railway Company that it would establish the eastern terminus of its railroad at the City of Marshall in the State of Texas, and would also establish its principal offices of the road at that place.

The bill sets out as the written evidence of this contract a letter from F. B. Sexton, E. D. Blanch and M. D. Ector on the part of the City of Marshall, to Thomas A. Scott, president of the Railway Company, and the reply of Mr. Scott to this communication. These letters are set out as exhibits to the bill and are as follows:

"Marshall, Texas, June 26th, 1872.

"Col. Thomas A. Scott, President of the Texas & Pacific Railway Company, Philadelphia, Penn.

"Sir: Pursuant to your request we now present to you, to be laid before the board of directors for the Texas & Pacific Railway Company, a written statement of the agreement made at Mrs. King's Hotel, in this City, on the 22d inst., between yourself, on behalf of said Railway Company, and the undersigned, on behalf of the City of Marshall.

"The County of Harrison (of which the City of Marshall is the county seat) has determined, in the manner required by an Act of the Legislature of the State of Texas, passed April 12, 1871, to donate to said Texas & Pacific Railway Company three hundred thousand dollars in the bonds of said county, payable in gold coin, having thirty years to run, and bearing seven per centum interest per annum, and to levy a tax in the manner required by said Act, to provide for the payment of the principal and interest of said bonds, upon the condition that said Company shall establish its eastern terminus and Texas office at the City of Marshall, and shall locate and construct at said City its main machine shops and car works, thereby securing at said City the connections with said terminus provided for by the Act incorporating said Texas & Pacific Railway Company and an Act supplemental thereto. [39

"We understand that a full transcript of the orders and decrees of the County Court of Harrison County in regard to this matter has been furnished you.

"In addition to this, the City of Marshall will donate to said Company sixty-six acres of land at the place and in the shape designated by you on the map of said City, whereon to locate the main machine shops, car works and depot of said Company at said City.

"The City of Marshall will procure said land by issuing its bonds in accordance with the provisions of the Act of the Legislature of Texas already referred to, which bonds will be used in the purchase of said land.

"The citizens of Marshall have already undertaken to cash said bonds to an extent sufficient to purchase all of said land which cannot be procured by donation directly from the owners thereof.

"The details of acquiring the title to said land by your Company will be attended to by the City, and were explained in our conversation with you.

"In consideration of the donation of the said sum of three hundred thousand dollars and said sixty-six acres of land, the said Texas & Pacific Railway Company will permanently establish its eastern terminus and Texas office at the City of Marshall, and will also establish and construct at said City

[396] the main machine shops and car works of said Railway Company.

"Awaiting your reply, we are,

"Respectfully, your ob't servants,

"F. B. Sexton,
"E. D. Blanch,
"M. D. Ector

"Committee on Part of City of Marshall."

"Texas & Pacific Railway Company, Office of the President.

"Philadelphia, July 16, 1872.

"F. B. Sexton, E. D. Blanch, M. D. Ector, Committee on Behalf of the City of Marshall, Texas.

"Gentleman: I am in receipt of your favor of June 26, setting forth arrangement between your committee and myself, as president of the Texas & Pacific Railway Company. The statement, as you make it, is satisfactory, and I will have the matter ratified at the first meeting of our board of directors; but the absence of Judge Pierrepont and Mr. Stebbins in Europe for a few weeks to look after our financial matters may prevent me from getting a quorum of our directors together, but in due time it shall all be arranged.

"Very respectfully,

"Thomas A. Scott, Pres."

The bill alleges that in pursuance of this contract the County of Harrison, of which the City of Marshall was the county seat, issued its $300,000 worth of bonds, which were sold and the proceeds paid over to the Company, and that the City of Marshall purchased, at a cost of $60,000, the sixty-six acres of land mentioned in this contract and conveyed it to the Railway Company. This conveyance was by two separate deeds, and it is pertinent to note that in each one of these deeds it is recited that the ground was conveyed to the Railroad Company "whereon to locate the main machine shops, car works and depot of said Company at said City," and that the Texas & Pacific Railway Com-
[397] pany agreed to establish its eastern terminus and Texas office at the City of Marshall, and also to establish and construct at said City the main machine shops and car works of said Railway Company.

Shortly after these contracts and conveyances, which were made and completed in the years 1872–73, the Railway Company did establish its principal offices at Marshall, constituting that City its eastern terminus; so that the court finds that "the contract was duly executed upon both sides, and that the eastern terminus of said Railway Company and the Texas office of said Company and the main machine shops and car works of said Railway Company are and were established at the City of Marshall." The bill avers that although things remained in this condition until some time in December, 1881, the defendant has since that time moved various parts of its machine shops and its Texas office to other cities, and, in fact, has by various changes, not important to be recited here, caused the City of Marshall to cease to be the terminus of the road.

In the view that we shall take of this case it is not important to inquire what particular offices or what particular machinery, work shops, etc., of the Railroad Company have been removed from the City of Marshall, nor how far the Railroad Company has ceased to hold the City of Marshall as the eastern terminus of its road. It may be conceded that the allegations of the bill and the evidence in the case establish the fact that by the operations of said Railway Company the full and complete object of the City of Marshall in its contract with that Company is not now accorded to it.

To the bill there was a demurrer, which being overruled, there was filed an answer by the Company, and upon the final hearing the circuit court entered a decree forbidding the Company from removing any more of its offices from the City of Marshall, and enjoining it to continue those which remained there, at that place, and otherwise to perform the contract. It did not, however, by any mandatory order, decree that the corporation should restore to the City of Marshall the offices, the shops and the other things connected with its operations under the contract to that City, which it had removed. From this decree both parties have appealed, the Railway Company denying that there was any ground of relief against it, and the City of Marshall on the ground that the complete relief which it sought had not been given to it.

As regards the appeal of the Railway Company, two principal questions are presented. The first of these is, Was there a valid contract that the corporation should not only establish its eastern terminus at Marshall City and put up there the depot buildings and machine shops, car works, etc., included in the contract, but should keep them there perpetually? Second, If this were so, is it a contract which a court of chancery should enforce?

If it were not for the word "permanent," as found in the communication of the committee of the City of Marshall to Mr. Scott, we should not think it easy to justify the inference that the obligation was to maintain forever at that place what the Company engaged to establish there. The clause of the letter of this committee to Col. Scott., which first mentions the conditions, is that the bonds of the County of Harrison were voted upon the condition "that said Company shall establish its eastern terminus and Texas office at the City of Marshall, and shall locate and construct at said City its main machine shops and car works, thereby securing at said City connections with said terminus provided for by the Act incorporating said Texas & Pacific Railway Company and an Act supplemental thereto." The same proposition is afterwards stated in the same letter in this form: "In consideration of the donation of the said sum of three hundred thousand dollars and said sixty-six acres of land, the said Texas and Pacific Railway Company will permanently establish its eastern terminus and Texas office at the City of Marshall, and will also establish and construct at said City the main machine shops and car works of said Railway Company."

The two conveyances by the City of the

land which constituted the sixty-six acres, in reciting the consideration for which the conveyance was made, speak of it, as we have already said, as an agreement to establish the eastern terminus at the City of Marshall, and also to construct at the City the main machine shops and car works of said Railway Company. This shows that while the obligation of the Company to establish its eastern terminus at the City of Marshall and construct its depot and machine shops and car works is spoken of at one time as an agreement to permanently establish these appurtenances to the railroad, yet at other times, when the same subject is mentioned as the consideration for what was done by the City and the same matters recited, the word "permanent" is omitted. The object of the City might very well be supposed to have been attained by the selection of the City as a terminus of the railroad, the construction and establishment there of its offices, its depot, its car manufactory and other machinery, since there was hardly any ground to suppose that the Railroad Company would ever have inducements enough to justify it in removing all these things to another place. And in point of fact it appears that for a period of about eight years they were permanently located at the City of Marshall. If, however, the City desired something more than this, if it desired to make sure that these establishments should forever remain within the limits of the City of Marshall, and that the Railroad Company should be bound to keep them there forever, such an extraordinary obligation should have been acknowledged in words which admitted of no controversy. It would have been very easy to have inserted into this contract language which forbade the Company from ever removing the terminus of the road to some other point, or from ever removing or ceasing to use the depot, or the car and machine shops, and thus have made the obligation perpetual. But it seems to us that the real essence of the contract was that the Railroad Company should, in its process of construction, make this City its eastern terminus, and should establish there its depot, its machine shops and its car works; and that this should be done in the ordinary course of its business, with the purpose that it should be permanent. But it did not amount to a covenant that the Company would never cease to make its eastern terminus at Marshall; that it would forever keep up the depot at that place; that it would for all time continue to have its machine shops and car shops there, and that whatever might be the changes of time and circumstances of railroad rivalry and assistance, these things alone should remain forever unchangeable. Such a contract, while we do not say that it would be void on the ground of public policy, is undoubtedly so far objectionable as obstructing improvements and changes which might be for the public interest, and is so far a hindrance in the way of what might be necessary for the advantage of the railroad itself and of the community which enjoyed its benefits, that we must look the whole contract over critically before we decide that it bears such an imperative and such a remarkable meaning.

It appears to us, so far from this, that the contract on the part of the Railroad Company is satisfied and performed when it establishes and keeps a depot, and sets in operation car works and machine shops, and keeps them going for eight years, and until the interests of the Railroad Company and the public demand the removal of some or all of these subjects of the contract to some other place. This was the establishment at that point of the things contracted for in the agreement. It was the fair meaning of the words "permanent establishment," as there was no intention at the time of removing or abandoning them. The word "permanent" does not mean "forever," or lasting forever, or existing forever. The language used is to be considered according to its nature and its relation to the subject matter of the contract, and we think that these things were permanently established by the Railway Company at Marshall.

A case almost precisely like the one under consideration came before this court and is reported in 74 U. S. 7 Wall. 290 [19: 190] (*Mead* v. *Ballard*). In that case the ancestor of Mead, on the 7th day of September, 1847, conveyed to Amos Lawrence, of Boston, a certain tract of land in Wisconsin, in which conveyance was the following language: "Said land being conveyed upon the express understanding and condition that the Lawrence Institute of Wisconsin, chartered by the Legislature of said Territory, shall be permanently located upon said lands, and on failure of such location being made on or before the 7th day of September, 1848, and on repayment of the purchase money without interest, the said land shall [40 revert to and become the property of said grantors." The board of trustees of the institute, on the 9th of August, 1848, passed a resolution locating the institution on the land described in the deed. The necessary buildings were made, and the institution was in full operation by November, 1849. These buildings cost about $8,000, but were burned down in the year 1857 and were never rebuilt. But in 1853 a larger building, called the "university," was erected on an adjoining tract of land. Under these circumstances, Mead, the heir of the grantor, tendered the purchase money, demanded a reconveyance of the land, and on its refusal brought suit. In that case, the condition was for the permanent location of the university. In the present case, the condition is for the permanent establishment of the eastern terminus of the road, with its machine shops, car works, etc. In that case the court held that the contract was complied with when the trustees of the institution located, by a resolution of its board, the university on the ground conveyed, and built what was then the necessary houses for its use. It also held that the word "permanent" did not require of them to reconstruct these buildings when they were burned down, and that the title to the land was not forfeited because of this failure to rebuild, although they built other houses on an ad-

joining tract of land; and though part of the reasoning of the court is based upon the fact that the contract in that case required the location of the institute to be made within a year from the date of the deed, and that it necessarily meant something which could be done within that year, we do not see that the principle of the present case varies much from that. The court said in that case that "counsel for the plaintiff attach to the word 'permanent,' in this connection, a meaning inconsistent with the obvious intent of the parties, that the condition was one which might be fully performed within a year. Such a construction is something more than a condition to locate. It is a covenant to build and rebuild; a covenant against removal at any time; a covenant to keep up an institution of learning on that land forever, or for a very indefinite time. This [405] could not have been the intention of the parties." So we think of the present case. It cannot be supposed that the parties intended a covenant to build and rebuild, a covenant never to change any of its offices, or the place of manufacturing cars and other machinery necessary for the use of the Company, nor that it would forever keep up, for the benefit of the Town of Marshall, this establishment, when once organized.

But we are further of opinion that, if the contract is to be construed as the appellant insists it should be construed, it is not one to be enforced in equity. We have already shown that to decree the specific enforcement of this contract is to impose upon the Company an obligation, without limit of time, to keep its principal office of business at the City of Marshall, to keep its main machine shops there, and its car works there, and its other principal offices there, although the exigencies of railroad business in the State of Texas may imperatively demand that these establishments, or some of them, should be removed to places other than the City of Marshall, and that this would be also required by the convenience of the public, in which case both the public convenience and the best interests of the Railroad Company would be sacrificed by a contract which is perpetual, that all of its business offices and business shall forever remain at Marshall.

It appears to us that if the City of Marshall has under such a contract a remedy for its violation, it is much more consonant to justice that the injury suffered by the City should be compensated by a single judgment in an action at law, and the railroad placed at liberty to follow the course which its best interests and those of the public demand. Nor do we see any substantial difficulty in ascertaining this compensation. Though there may not be any rule by which these damages can be estimated with precision, this is not a conclusive objection against a resort to a court of law, for it is very well known that in all judicial proceedings for injuries inflicted by one party on another, whether arising out of tort or out of contract, the relief given by way of damages is never the exact sum which compensates for the injury done, but, with all the rules which have been adopted for the measurement of damages, the relief is only approximately perfect.

There would be, in this instance, the sums of money advanced by the City, and possibly the bonds furnished by the county, as a means of ascertaining the compensation due to the City of Marshall. Other considerations, such as the length of time that the contract has been complied with, the value of this compliance to the City, the probable loss of taxable property resulting from the violation of the contract, and other elements not necessary to be enumerated now, might enter into the question of damages, if the contract has really been violated. On the other hand, the enforcement of the contract by a decree of the court requiring the Company to restore in all its fullness the offices, the workshops, and whatever has been removed from the City of Marshall, and the continued and perpetual compliance with all those conditions by the Company, to be enforced in the future under the eye of a court of chancery, against the public interest, and, perhaps, manifestly to the prejudice and injury of the Railroad Company, exercising to some extent the public function authorized by the Acts of Congress or of the Legislature of Texas, present difficulties far more formidable than the action at law.

If the court had rendered a decree restoring all the offices and machinery and appurtenances of the road which have been removed from Marshall to other places, it must necessarily superintend the execution of the decree. It must be making constant inquiry as to whether every one of the subjects of the contract which have been removed has been restored. It must consider whether this has been done perfectly and in good faith, or only in an evasive manner. It must be liable to perpetual calls in the future for like enforcement of the contract, and it assumes, in this way, an endless duty, inappropriate to the functions of the court, which is as ill-calculated to do this as it is to supervise and enforce a contract for building a house or building a railroad, both of which have in this country been declared to be outside of its proper functions, and not within its powers of specific performance.

The cases cited on this subject in the brief of counsel, we think, are conclusive. In *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 339, 358 [19: 955, 961], it was said: "Another serious objection to a decree for a specific performance is found in the peculiar character of the contract itself, and in the duties which it requires of the owners of the quarries. These duties are continuous. They involved skill, personal labor and cultivated judgment. It is in effect a personal contract to deliver marble of certain kinds, in blocks of a kind that the court is incapable of determining whether they accord with the contract or not. The agreement being for a perpetual supply of marble, no decree the court can make will end the controversy. If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine, not only whether the prescribed

quantity of marble has been delivered, but whether every block was from the right place, whether it was sound, and whether it was of suitable size, or shape, or proportion."

This question was very fully considered, in reference to a contract for building a railroad, in the case of *Ross* v. *Union P. R. Co.*, 1 Woolw. 26, in which nearly all the authorities up to that time are fully considered. It was decided that the court could not enter upon the duty of compelling one party to build a railroad and the other party to pay for it according to contract. See also *Port Clinton R. Co.* v. *Cleveland & T. R. Co.* 18 Ohio St. 544; *South Wales R. Co.* v. *Wythes*, 5 DeG. M. & G. 880; *Powell Duffryn S. C. Co.* v. *Taff Vale R. Co.* L. R. 9 Ch. App. 331.

Without more minute examination of the authorities on this subject, we are of opinion that the plaintiff is not entitled to any relief in a court of equity. *The decree of the court granting such relief is therefore reversed, and the case remanded to the Circuit Court with directions to dismiss the bill. As the appeal of the plaintiff therefore fails, it is to pay the costs of this court on both appeals.*

Mr. Justice **Brewer** desires it to be stated that he dissents from both the grounds set forth in the opinion.

104] J. G. McCALL, *Plff. in Err.*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA.

(See S. C. Reporter's ed. 104-114.)

License tax on railroad agent—when unconstitutional—interstate commerce—what is—business of agent.

1. An agent in San Francisco, California, of a railroad corporation having its principal place of business in Chicago and operating a continuous line of road between Chicago and New York, whose duty it was to solicit passenger traffic over such road, cannot be convicted of a misdemeanor for not paying the license tax required by order 1589 of the City and County of San Francisco, imposing municipal licenses.
2. Such order, so far as it affects such agent, imposes a tax on interstate commerce and is therefore repugnant to clause 3, of sec. 8, art. I., known as the "commerce clause" of the United States Constitution.
3. The business of such agent, being to solicit passenger traffic out of California into and through other States to New York City, is a part of interstate commerce.
4. Such commercial clause not only prohibits a State from taxing interstate commerce when it passes through its own territory, but also when it passes through other States.
5. The essentiality of the business of such agent to the commerce of the road he represents is not the test as to whether that business was a part of interstate commerce.

[No. 1190.]

Submitted Oct. 28, 1890. Decided May 19, 1890.

IN ERROR to the Superior Court of the City and County of San Francisco, State of California, to review a judgment of that court affirming a judgment of the Police Court of that City and County convicting plaintiff in error of misdemeanor for violation of an order of the Board of Supervisors of said City and County imposing municipal licenses. *Reversed.*

The facts are stated in the opinion.

Mr. **Joseph P. Kelly,** for plaintiff in error:

Commerce with foreign countries and among the States consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.

Mobile County v. *Kimball*, 102 U. S. 691 (26: 238); *Passenger Cases*, 48 U. S. 7 How. 283 (12: 702); *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 189 (6: 63).

The plaintiff in error is engaged in interstate commerce.

Robbins v. *Shelby County Taxing Dist.* 120 U. S. 489 (30: 694); *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148 (32: 637, 639); *Cooley* v. *Board of Wardens*, 53 U. S. 12 How. 299 (13: 996); *Gilman* v. *Philadelphia*, 70 U. S. 3 Wall. 713 (18: 96).

The fact of intercourse and traffic embraces all the means, instruments and places by and in which intercourse and traffic are carried on.

Pom. Const. Law (7th ed.) 244-247; *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35 (18: 745); *Leloup* v. *Port of Mobile*, 127 U. S. 640 (32: 311); *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 (6: 678); *Asher* v. *Texas*, 128 U. S. 129 (32: 368).

The States may require conditions to be performed by certain corporations before they can transact business therein, but such conditions or licenses can only be required from those corporations which are not engaged in interstate commerce.

Paul v. *Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *List* v. *Com.* 1 Inters. Com. Rep. 784, 118 Pa. 322; *Pembina C. S. M. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 (31: 650); *Norfolk & W. R. Co.* v. *Com.* 114 Pa. 256, 5 Cent. Rep. 240; *Osborne* v. *Mobile*, 83 U. S. 16 Wall. 479 (21: 470).

Mr. **Jas. D. Page,** for defendant in error:

It is not the business of the corporation represented by plaintiff in error that is sought to be taxed, but it is because the plaintiff in error maintains an agency in said city.

Norfolk & W. R. Co. v. *Com.* 114 Pa. 256, 5 Cent. Rep. 240; *Leloup* v. *Port of Mobile*, 127 U. S. 640 (32: 311); *Pembina C. S. M. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 (31: 650); *Smith* v. *Alabama*, 124 U. S. 465 (31: 508); *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 12 (24: 711).

NOTE.—*As to power of Congress to regulate commerce*, see *note* to Gibbons v. Ogden, 6: 23; also *note* to Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress; how far exclusive,—see *note* to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

Mr. Justice **Lamar** delivered the opinion of the court:

Order No. 1589 of the Board of Supervisors of the City and County of San Francisco, "imposing municipal licenses," provides, among other things, as follows:

"Sec. 1. Every person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not more than one thousand dollars or by imprisonment no more than six months or by both."

"Sec. 10. The rates of license shall be according to the following schedule:

"Subdivision XXXIII.

"First. For every railroad agency, twenty-five dollars per quarter."

[105] The plaintiff in error, J. G. McCall, was an agent in the City and County of San Francisco, California, for the New York, Lake Erie & Western Railroad Company, a corporation having its principal place of business in the City of Chicago, and which operated a continuous line of road between Chicago and New York. He had not taken out a license for the quarter ending March 31, 1888, as required by the provisions of the aforesaid order. As such agent his duties consisted in soliciting passenger traffic in that city and county over the road he represented. He did not sell tickets to such passengers over that road or any other, but took them to the Central Pacific Railroad Company, where the tickets were sold to them. The only duty he was required to perform for such company was to induce people contemplating taking a trip east to be booked over the line he represented. He neither received nor paid out any money or other valuable consideration on account thereof.

On the 8d of June, 1888, the plaintiff in error was convicted of misdemeanor in the police judge's court of the City and County of San Francisco for violation of the provisions of the aforesaid order, and on the 16th of November of that year, after a motion for a new trial and a motion in arrest of judgment had both been denied, the court sentenced him to pay a fine of twenty dollars, and in default of the payment thereof to imprisonment in the county jail of the city and county until the same should be paid, for a period not exceeding twenty days. Upon appeal to the Superior Court of the City and County of San Francisco, that court affirmed the judgment below, and this writ of error was then sued out.

There are three assignments of error, which are reducible to the single proposition that the order under which the plaintiff in error was convicted is repugnant to clause 3 of section 8, article I., of the Constitution of the United States, commonly known as the "commerce clause" of the Constitution, in that it imposes a tax upon interstate commerce, and that therefore the court below erred in not so deciding and in rendering judgment against the plaintiff in error.

This proposition presents the only question in the case, and if it appears from this record that the business in which the plaintiff in error was engaged was interstate commerce, it must follow that the license tax exacted of him as a condition precedent to his carrying on that business was a tax upon interstate commerce, and therefore violative of the commercial clause of the Constitution.

In the recent case of *Lyng* v. *Michigan*, 135 U. S. 161 [34: 150], this court said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *Mobile County* v. *Kimball*, 102 U. S. 691, 702 [26: 238, 241], this court defined interstate commerce in the following language: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities."

Pomeroy, in his work on Constitutional Law, section 378, referring to the signification of the word "commerce," says: "It includes the *fact of intercourse and of traffic* and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the *means, instruments* and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise or persons. All these may therefore be regulated."

Tested by these principles and definitions, what was the business or occupation carried on by the plaintiff in error on which the tax in question was imposed? It is agreed by both parties that his business was that of soliciting passengers to travel over the railroad which he represents as an agent. It is admitted that the travel which it was his business to solicit is not from one place to another within the State of California. His business, therefore, as a railroad agent, had no connection, direct or indirect, with any domestic commerce between two or more places within the State. His employment was limited exclusively to inducing persons in the State of California to travel from that State into and through other States to the City of New York. To what, then, does his agency relate except to interstate transportation of persons? Is not that as much an agency of interstate commerce as if he were engaged in soliciting and securing the transportation of freight from San Francisco to New York City over that line of railroad? If the business of the New York, Lake Erie & Western Railroad Company, in carrying passengers by rail between Chicago and New York and intermediate points, in both directions, is interstate commerce, as much so as

is the carrying of freight, it follows that the soliciting of passengers to travel over that route was a part of the business of securing the passenger traffic of the company. The object and effect of his soliciting agency were to swell the volume of the business of the road. It was one of the "*means*" by which the company sought to increase and doubtless did increase its interstate passenger traffic. It was not incidentally or remotely connected with the business of the road, but was a direct method of increasing that business. The tax upon it therefore was, according to the principles established by the decisions of this court, a tax upon a means or an occupation of carrying on interstate commerce, pure and simple.

In *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489 [30: 694], the Taxing District of Shelby County, Tennessee, which included the City of Memphis, acting under the authority of a statute of that State, attempted to impose a license tax upon a "drummer" for soliciting, within that district, the sale of goods for a firm in Cincinnati which he represented; but this court decided that such a soliciting of business constituted a part of interstate commerce, and that the Statute of Tennessee imposing a tax upon such business was in conflict with the commerce clause of the Constitution of the United States, and was therefore void.

A like decision was rendered in *Leloup* v. *Port of Mobile*, 127 U. S. 640 [32: 311]; and in *Asher* v. *Texas*, 128 U. S. 129 [32: 368], both of these decisions were carefully considered and the principle was affirmed. In *Stoutenburg* v. *Hennick*, 129 U. S. 141 [32: 637], the same question came before the court and the principle governing the cases to which we have referred was again carefully considered and affirmed. See also *Pickard* v. *Pullman S. C. Co.* 117 U. S. 34 [29: 785]; *Fargo* v. *Michigan*, 121 U. S. 230 [30: 888]; and the recent cases of *Leisy* v. *Hardin*, 135 U. S. 100 [34: 128], and *Lyng* v. *Michigan*, *supra*.

We might conclude our observations on the case with the above remarks, but we deem it proper to notice some of the points raised by the defendant in error and which were relied upon by the court below to control its decision sustaining the validity of the aforesaid order.

It is argued that the New York, Lake Erie & Western Railroad Company is a foreign corporation operating between Chicago and New York City, wholly outside of and distinct from California; and it is very earnestly contended that the business of soliciting passengers in California for such a road cannot be interstate commerce, as it has not for its end the introduction of anything into the State. We do not think that fact, even as stated, is material in this case. The argument is based upon the assumption that the provision in the Constitution of the United States relating to commerce among the States applies as a limitation of power only to those States through which such commerce would pass, and that any other State can impose any tax it may deem proper upon such commerce. To state such a proposition is to refute it; for if the clause in question prohibits a State from taxing interstate commerce as it passes through its own territory, *a fortiori* the prohibition will extend to such commerce when it does not pass through its territory. The argument entirely overlooks the fact that in this case the object was to send passenger traffic out of California into and through the other States traversed by the road for which the plaintiff in error was soliciting patronage.

It is further said that the soliciting of passengers in California for a railroad running from Chicago to New York, if connected with interstate commence at all, is so very remotely connected with it that the hindrance to the business of the plaintiff in error caused by the tax could not directly affect the commerce of the road, because his business was not essential to such commerce. The reply to this proposition is, that the essentiality of the business of the plaintiff in error to the commerce of the road he represented is not the test as to whether that business was a part of interstate commerce. It may readily be admitted, without prejudicing his defense, that the road would continue to carry passengers between Chicago and New York even if the agent had been prohibited altogether from pursuing his business in California. The test is—Was this business a part of the commerce of the road? Did it assist, or was it carried on with the purpose to assist, in increasing the amount of passenger traffic on the road? If it did, the power to tax it involves the lessening of the commerce of the road to an extent commensurate with the amount of business done by the agent. [111]

The court below relied mainly upon *Norfolk & W. R. Co.* v. *Com.*, 114 Pa. 256, 5 Cent. Rep. 240; *Pembina C. S. M. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 [31: 650], and *Smith* v. *Alabama*, 124 U. S. 465 [31: 508], to support its judgment. But we are of opinion that neither of the cases in this court sustains that position. The other case we have disposed of in a separate opinion, reversing the judgment of the court below.

Pembina C. S. M. & M. Co. v. *Pennsylvania* manifestly is not an authority in favor of the position of the court below, but rather the reverse. In that case a company incorporated under the laws of Colorado for the purpose of doing a general mining and milling business in that State had an office in Philadelphia "for the use of its officers, stockholders, agents and employés." The State of Pennsylvania, through her proper officers, assessed a tax against the corporation for "office license," which the company resisted on the ground that the Act under which the assessment was levied was in conflict with the "commerce clause" of the Constitution of the United States, in that it was an attempt to tax interstate commerce, as such. [112] The Pennsylvania courts affirmed the validity of the assessment, and, a writ of error having been sued out, the case was brought here for review. This court held that the state legislation in question did not infringe upon the commercial clause of the Constitution, because it imposed no prohibition upon the transportation into the State of the products

of the corporation or upon their sale in the State, but simply exacted a license tax from the corporation for its office in the Commonwealth; and went on to say: "The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation created by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied,"—quoting at some length from *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 [19: 357], to sustain the conclusion there reached. But the court further remarked that "a qualification of this doctrine was expressed in *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.*, 96 U. S. 1, 12 [24: 708, 711], so far as it applies to corporations engaged in commerce under the authority or with the permission of Congress;" and in conclusion said: "The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by state authority." The reference to *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* clearly indicates that the court did not intend to lay down any rule recognizing the power of a State to interfere in any manner with interstate commerce. The latter case was one in which the Legislature of Florida had granted to the Pensacola Company the exclusive [113] right of establishing and maintaining telegraph lines in two counties in that State, and this court held that such legislation was in conflict with the Act of Congress of July 24, 1866, granting to any telegraph company the right "to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by Act of Congress, and over, under or across the navigable streams or waters of the United States," etc. This court held such state legislation unconstitutional, as interfering with interstate commerce, and in its opinion announced no doctrine not in harmony with the principles of the later decisions to which we have referred.

Smith v. *Alabama* was a case in which an Act of the State Legislature imposing a license upon any locomotive engineer operating or running any engine or train of cars on any railroad in that State was resisted by an engineer of the Mobile and Ohio Railroad Company, who ran an engine drawing passenger coaches on that road from Mobile in that State to Corinth in Mississippi, on the ground that the Statute of the State was an attempt to regulate interstate commerce, and was therefore repugnant to the commercial clause of the Constitution of the United States. We held, however, that the Statute in question was not in its nature a regulation of commerce; that so far as it affected commercial transactions among the States, its effect was so indirect, incidental and remote as not to burden or impede such commerce, and that it was not therefore in conflict with the Constitution of the United States or any law of Congress. It having been thus ascertained that the legislation of the State of Alabama did not impose any burden or tax upon interstate commerce, there is nothing to be found in the opinion in that case that is not in harmony with the doctrines we have asserted in this case. That opinion quoted at length from *Sherlock* v. *Alling*, 93 U. S. 99, 102, 103 [23: 819, 820], where it was expressly held that "the States cannot by legislation place burdens upon commerce with foreign nations or among the several States. The decisions go to that extent and their soundness is not questioned. But, upon an examination of the cases in which they were rendered, it will be found that the legislation adjudged invalid imposed a tax upon some *instrument* or subject of commerce, or *exacted a license fee from parties engaged in commercial pursuits*, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels or conditions for carrying it on."

It results from what we have said that the judgment of the court below should be, and it hereby is, reversed, and the case is remanded to that court for further proceedings in conformity with this opinion.

Mr. Chief Justice **Fuller**, *Mr. Justice* **Gray** and *Mr. Justice* **Brewer** dissented.

THE NORFOLK & WESTERN RAILROAD COMPANY, *Plff. in Err.*,
v.
THE COMMONWEALTH OF PENNSYLVANIA.

(See S. C. Reporter's ed. 114-121.)

Corporations, when not citizens—state restrictions upon—State cannot impose a license tax on corporations for carrying on interstate commerce—railroad, when part of continuous line—license tax for keeping an office.

1. Corporations are not citizens within the meaning of clause 1, sec. 2, of art. IV., of the U. S. Constitution, declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

NOTE.—*As to power of Congress to regulate commerce*, see *note* to Gibbons v. Ogden, 6: 23; also *note* to Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress; how far exclusive,—see *note* to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

2. Section 1 of the Fourteenth Amendment to the Constitution, declaring that no State shall "deny to any person within its jurisdiction the equal protection of the laws," does not prohibit a State from imposing such conditions upon foreign corporations as it may choose, as a condition of their admission within its limits.

3. A State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, nor impose any burdens upon such commerce within its limits.

4. Where the business of a through line of railroads consists, in part, of carrying passengers and freight into Pennsylvania from other States and out of that State into other States, and a railroad company which is a corporation of Virginia is a link in that line, such company is engaged in interstate commerce in Pennsylvania.

5. A license tax assessed under the Pennsylvania Act of June 7, 1879 (P. L. 112, 120), by the auditor-general of that State against such company for keeping an office in Philadelphia for the use of its officers, stockholders, agents and employés, is a tax upon the company's business of interstate commerce, and is a violation of the commercial clause of the Constitution of the United States.

[No. 294.]

Argued April 24, 25, 1890. Decided May 19, 1890.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment for a license tax assessed by the auditor-general of Pennsylvania against the Norfolk and Western Railroad Company, a corporation of Virginia and West Virginia, for its having an office in Philadelphia for the use of its officers, stockholders, agents and employés. *Reversed.*

The facts are stated in the opinion.

Mr. **M. E. Olmsted,** for plaintiff in error:

Corporations are not citizens within the meaning of that clause of the Constitution of the United States which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

Augusta Bank v. *Earle*, 38 U. S. 13 Pet. 519 (10: 274); *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 (19: 357).

The State may discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction.

Lafayette Ins. Co. v. *French*, 59 U. S. 18 How. 404 (15: 451); *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410 (19: 972).

A State may exclude from its jurisdiction corporations of other States not engaged in interstate commerce. The right of exclusion cannot be exercised against corporations of other States thus engaged, any more than against individuals.

Home Ins. Co. v. *Morse*, 87 U. S. 20 Wall. 445 (22: 365); *Indiana* v. *Pullman Palace Car Co.* 16 Fed. Rep. 193; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727 (28: 1137); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (29: 158); *Philadelphia & S. M. S. Co.* v. *Pennsylvania*, 122 U. S. 326 (30: 1200); *Stockton* v. *Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9; *Pembina C. S. M. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 (31: 650); *Leloup* v. *Port of Mobile*, 127 U. S. 640 (32: 311).

Railroads may contract to carry goods and passengers beyond their own lines and beyond the limits of their respective States.

Nashua Lock Co. v. *Worcester & N. R. Co.* 48 N. H. 339-363; *Bradford* v. *South Carolina R. Co.* 7 Rich. L. 201; 2 Redf. Railways, 104; *Wyman* v. *Chicago & A. R. Co.* 4 Mo. App. 35; *Stewart* v. *Erie & W. Transp. Co.* 17 Minn. 372; *Ogdensburg & L. C. R. Co.* v. *Pratt*, 89 U. S. 22 Wall. 123 (22: 827); *Ohio & M. R. Co.* v. *McCarthy*, 96 U. S. 258 (24: 693); *Baltimore & P. S. B. Co.* v. *Brown*, 54 Pa. 77; *Chouteaux* v. *Leech*, 18 Pa. 224; *The Daniel Ball*, 77 U. S. 10 Wall. 557 (19: 999); *State Freight Tax*, 82 U. S. 15 Wall. 232 (21: 146); *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 (30: 244).

The power to regulate commerce is exclusive in Congress.

Almy v. *California*, 65 U. S. 24 How. 169 (16: 644); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (29: 158).

The States cannot require license fees where the business involved is interstate or foreign commerce.

Welton v. *Missouri*, 91 U. S. 275 (23: 347); *Moran* v. *New Orleans*, 112 U. S. 69 (28: 653); *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *Pickard* v. *Pullman S. C. Co.* 117 U. S. 34 (29: 785); *Fargo* v. *Michigan*, 121 U. S. 230 (30: 888).

Messrs. **John F. Sanderson,** *Deputy Atty-Gen.*, and *William S. Kirkpatrick, Atty-Gen.*, for defendant in error:

The license tax in question is not in conflict with clause 1 of section 2 of article IV. of the Constitution, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

Nor does such tax deny to the plaintiff in error the equal protection of the laws contrary to the provisions of the 14th Amendment to the Constitution.

Pembina C. S. M. & M. Co. v. *Pennsylvania*, 125 U. S. 181 (31: 650); *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Augusta Bank* v. *Earle*, 38 U. S. 13 Pet. 519 (10: 274); *Ducat* v. *Chicago*, 77 U. S. 10 Wall. 410 (19: 972); *Philadelphia F. Asso.* v. *New York*, 119 U. S. 110, 120 (30: 342, 347).

While a State cannot exact conditions for allowing a corporation to do business or hire offices there, where its business is commerce, interstate or foreign (*Com.* v. *Standard Oil Co.* 101 Pa. 119), yet the plaintiff in error is not in operation in this State (*Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 732, 28:1137, 1138), and a license tax for maintaining an office may be exacted.

Mr. Justice **Lamar** delivered the opinion [115
of the court:

The 16th section of an Act of the Legislature of the Commonwealth of Pennsylvania, approved June 7, 1879 (P. L. 112, 120), provides as follows:

"That from and after the first day of July, Anno Domini one thousand eight hundred and seventy-nine, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth for the use of its officers, stockholders, agents or employés, unless it shall have first obtained from the auditor-general an annual license so to do, and for

said license every such corporation shall pay into the state treasury, for the use of the Commonwealth, annually, one fourth of a mill on each dollar of capital stock which said company is authorized to have, and the auditor-general shall not issue a license to any corporation until said license fee shall have been paid. The auditor-general and state treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section, for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license fee shall be necessary for any corporation paying a tax under any previous section of this Act, or whose capital stock or a majority thereof is owned or controlled by a corporation of this State which does pay a tax under any previous section of this Act."

Under the authority vested in him by that Statute the auditor-general of the State assessed a license tax against the Norfolk and Western Railroad Company, a corporation existing under the laws of Virginia and West Virginia, for each of the two years ending July 1, 1885, on its capital stock of $25,000,000, at the rate prescribed in the Act, amounting to $6,250 a year, on account of its having an office for the use of its officers, stockholders, agents and employés in the City of Philadelphia. The case now before this court involves the claim of the State for the year ending July 1, 1884, only. As permitted by the laws of Pennsylvania, the Company appealed from the auditor-general's settlement to the Court of Common Pleas of Dauphin County, in that State. The case was tried in that court without the intervention of a jury, under an Act of the State Legislature approved April 22, 1874, and the court made the following findings of fact.

116]

"1. The defendant is a railroad corporation existing under the laws of the States of Virginia and West Virginia, and its main line and branches lie wholly within these States.

"2. Its line of railroad connects at several points with the railroads of other corporations, and, by virtue of these connections, and certain traffic contracts and agreements, it has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth.

"3. Its authorized capital stock is twenty-five millions of dollars.

"4. From July 1, 1883, to July 1, 1885, it had an office in this Commonwealth for the use of its officers, stockholders, agents and employés. Its main office is at Roanoke, Virginia.

"5. During this period it expended a considerable amount of money in Pennsylvania in the purchase of materials and supplies for the use of its road; but, with trifling exceptions, it owns no property and has no capital invested for corporate purposes within this Commonwealth.

"6. It has paid no office license fee for the years named, as required by section sixteen of the Act of 1879 (P. L. 120). Upon this section these settlements are based."

Judgment was rendered against the Company on that finding, sustaining the settlement made by the auditor-general of the State, for the sum of $7,503.12. That judgment having been affirmed by the Supreme Court of the State, this writ of error was sued out. The assignment of errors is to the effect that the court below erred in refusing to sustain the following points, urged by the Company, both in the trial court and in the Supreme Court of the State, viz.:

"(1) Inasmuch as the sixteenth section of the Act of June 7, 1879, denies to foreign corporations, and to the officers, agents and employés of foreign corporations, the right to have an office or place of meeting in the State of Pennsylvania, the said section is in conflict with clause one of section two of article IV. of the Constitution of the United States, which provides that 'the citizens of each State shall be entitled to all privileges . . . of citizens in the several States.'

"(2) The sixteenth section of the Act of June 7, 1879, is an abridgment of the privileges and immunities of the citizens of the United States; it discriminates between corporations of the State of Pennsylvania and corporations of other States; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natural persons connected with such corporations, particularly this defendant and its officers, agents and employés, who were in the State maintaining an office and doing business at and before the passage of the said Act, the equal protection of the laws, and is for these reasons void, because in conflict with article XIV. of the Amendments to the Constitution of the United States, and also because in conflict with the Act of Congress—Revised Statutes, section 1977.

"(3) Inasmuch as the Norfolk & Western Railroad Company is engaged in the business of transporting freight and passengers to or from other States out of or into the State of Pennsylvania, or from other States to other States, passing through the State of Pennsylvania; and for the successful carrying on of said interstate business it is necessary for the said Company to maintain one or more offices in the State of Pennsylvania,—therefore the sixteenth section of the Act of June 7, 1879, if it requires that the said Company cannot lawfully maintain an office in said State without first obtaining from the auditor-general thereof a license so to do, and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause three of section eight of article I. of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States.'"

The first two points are disposed of adversely to the Company by the decision of this court in *Pembina C. S. M. & M. Co.* v. *Pennsylvania*, 125 U. S. 181 [31: 650]. In that case we held, following *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168 [19: 357], that

corporations are not citizens within the meaning of clause 1, sec. 2, of art. IV., of the Constitution of the United States, declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." And we also held that section 1 of the Fourteenth Amendment to the Constitution, declaring that no State shall "deny to any person within its jurisdiction the equal protection of the laws," does not prohibit a State from imposing such conditions upon foreign corporations as it may choose, as a condition of their admission within its limits. See also *Philadelphia F. Asso.* v. *New York*, 119 U. S. 110 [30: 342].

The only question for consideration therefore arises under the third assignment of error, above set forth. It is well settled by numerous decisions of this court that a State cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits. Some of the cases sustaining this proposition are collected in *McCall* v. *California*, just decided [*ante*, p. 891], and need not be repeated here.

The question before us is thus narrowed to the two following inquiries: (1) Was the business of this Company in the State of Pennsylvania interstate commerce? (2) If so, was the tax assessed against it for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employés, a tax upon such business? We have no difficulty in answering the first of these inquiries in the affirmative. Although the findings of fact are somewhat meagre on this question—much more so, indeed, than the undisputed evidence in the case warranted—enough is stated in the second paragraph of the aforesaid finding to show that the Company is engaged in interstate commerce in the State. It is there said, in substance: By virtue of its connections and certain traffic contracts with other railroads the Norfolk and Western Railroad Company "has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth." That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business—that is, the business of this through line of railroad—is interstate commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce, since the business of each one of those roads serves to increase the volume of business done by that through line.

On this point *The Daniel Ball*, 77 U. S. 10 Wall. 557, 565 [19: 999, 1002], is an authority. In that case the steamer Daniel Ball was engaged in transporting goods on Grand River, wholly within the State of Michigan, destined for other States, and goods brought from other States destined for places in the State of Michigan, but did not run in connection with, or in continuation of, any line of vessels or railway leading to other States; and the contention was, that she was not engaged in interstate commerce. But this court held otherwise and said: "So far as she was employed in transporting goods destined for other States, or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and, however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced. The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

See also *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557 [30: 244], and cases cited.

We pass to the second inquiry above stated, viz.: Was the tax assessed against the Company for keeping an office in Philadelphia, for the use of its officers, stockholders, agents and employés, a tax upon the business of the Company. In other words was such tax a tax upon any of the *means* or *instruments* by which the Company was enabled to carry on its business of interstate commerce? We have no hesitancy in answering that question in the affirmative. What was the purpose of the Company in establishing an office in the City of Philadelphia? Manifestly for the furtherance of its business interests in the matter of its commercial relations. One of the terms of the contract by which the plaintiff in error became a link in the through line of road referred to in the findings of fact, provided that "it shall be the duty of each initial road, member of the line, to solicit and procure traffic for the Great Southern Despatch (the name of said through line) at its own proper cost and expense."

Again, the plaintiff in error does not exercise, or seek to exercise, in Pennsylvania any privilege or franchise not immediately connected with interstate commerce and required for the purposes thereof. Before establishing its office in Philadelphia it obtained from the secretary of the Commonwealth the certificate required by the Act of the State Legislature of 1874 enabling it to maintain an office in the State. That office was maintained because of the necessities of the interstate business of the Company, and for no other purpose. A tax upon it was therefore a tax upon one of the means or instrumentalities of the Company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States. *Gloucester Ferry Co.* v.

Pennsylvania, 114 U. S. 196 [29: 158]; *Philadelphia & S. M. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [30: 1200], and cases cited; *McCall* v. *California*, *ante*, p. 391.

[121] *For the foregoing reasons the judgment of the court below is reversed, and the case is remanded to that court for further proceedings in conformity with this opinion.*

Mr. Chief Justice **Fuller**, *Mr. Justice* **Gray** and *Mr. Justice* **Brewer** dissented.

---

[408] THE RICHELIEU AND ONTARIO NAVIGATION COMPANY, *Plff. in Err.*,
v.
THE BOSTON MARINE INSURANCE COMPANY.

(See S. C. Reporter's ed. 408-436.)

Marine insurance, when loss recoverable—error in charge to jury—peril by unseaworthiness—defective compass—fog—knowledge of unseaworthiness—province of jury—right to abandon—acceptance, acts showing—captain, when insurer's agent—custom—protest—former suit.

1. Where a Canadian steamer, with a defective compass, while navigating Canadian waters without a lookout and violating a Canadian statute requiring its going at a moderate speed in a fog, was stranded in a fog on an island miles out of her course and abandoned, her owner, a Canadian corporation, cannot recover for her loss, on a policy insuring her against perils of the sea, except those occasioned by want of ordinary care and skill or of seaworthiness, without showing that neither such breach of the statute nor the defect of the compass caused or contributed to the disaster, and that it was caused by perils insured against.
2. It was not error in the court to refuse to instruct the jury that the stranding in a dense fog was an accident which was prima facie covered by the policy, and for which the insurers were prima facie liable, and that if the fog contributed proximately to the stranding, the insurers would be liable.
3. If the peril was caused by negligence or unseaworthiness, notwithstanding it was the fog which prevented the island being seen, the negligence or unseaworthiness was the efficient and proximate cause.
4. If there were any defects in the compass rendering it unsafe or unsuitable for use, and the stranding of the vessel was caused by, or consequent upon, such defects, the vessel was not seaworthy.
5. The exception of losses occasioned by unseaworthiness is in effect a warranty that a loss should not be so occasioned, and whether the fact of unseaworthiness was known or unknown is immaterial.
6. The jury are to decide from all the facts, and instructions based upon a partial view of the evidence should be refused.
7. If the loss was the result of a peril not insured against, there was no right to abandon.
8. Any act of the underwriter in consequence of an abandonment, which can be justified only under a right derived from it, may be decisive evidence of an acceptance.
9. Any act done for the purpose of making the most of the property, to whomsoever it may prove to belong, ought not to be construed against the party who thus seeks the common interest.
10. When there is no acceptance of an abandonment, the acts of the captain in moving the vessel on to a dry dock and repairing her are not done by him as the insurer's agent; it is only after an actual abandonment and the passage of the title that the captain becomes the insurer's agent.
11. Evidence of a custom to run at full speed in a dense fog without a lookout is inadmissible.
12. A protest is admissible in evidence with the proofs of loss as an explanatory writing when made part of the proofs by being referred to therein.
13. Where the insurers were not parties to a suit upon the decree in which the vessel was sold for repairs, the record of the suit is not evidence against them to prove an acceptance of abandonment.

[No. 296.]

Argued April 25, 1890. Decided May 19, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Michigan to review a judgment for defendant in an action upon a policy of marine insurance to recover for the loss of a steamship. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller**:

This is an action upon a policy of insurance, bearing date May 1, 1883, insuring the steamer Spartan, a Canadian vessel of six hundred and seventy-eight tons burden, from April 1 to November 30, 1883. The plaintiff in error, a Canadian corporation, chartered [the Spartan in the spring of 1883 to the Owen Sound Steamship Company, also a Canadian corporation or association, and she was being run by that company on the route between Owen Sound on Georgian Bay, Ontario, to Fort William, Ontario, on the north shore of Lake Superior, when the loss occurred. The perils insured against are thus stated in the policy:

"Touching the adventures and perils which the said Insurance Company is content to bear and take upon itself by this policy, they are of the lakes, rivers, canals, fires, jettisons, that shall come to the damage of the said vessel or any part thereof, excepting all perils, losses, misfortunes or expenses consequent upon and arising from or caused by the following or other legally excluded causes,

---

NOTE.—*Misrepresentation or fraud vitiates policy of insurance.* See *note* to M'Lanahan v. Universal Ins. Co. 7: 98; also *note* to Columbian Ins. Co. v. Lawrence, 7: 335.

As to abandonment, what is; effect of; when insured may abandon; not bound to abandon,—see *note* to Bradlie v. Maryland Ins. Co. 9: 1123.

As to marine insurance; what is a total loss,—see *note* to Great Western Ins. Co. v. Fogarty, 22: 216.

As to seaworthiness; implied warranty of,—see *note* to Work v. Leathers, 24: 1012.

As to "rotten clause" in policy of insurance, see *note* to Janney v. Columbian Ins. Co. 6: 354.

As to deviation, see *note* to Columbian Ins. Co. v. Catlett, 6: 664.

As to barratry; what is,—see *note* to Waters v. Merchants L. Ins. Co. 9: 691.

As to insurance: breach of conditions by third parties; when policy invalidated,—see *note* to Liverpool & L. & G. Ins. Co. v. Gunther, 29: 575.

viz.: damage that may be done by the vessel hereby insured to any other vessel or property; incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel and in loading, stowing and securing the cargo of said vessel; rottenness, inherent defects, overloading and all other unseaworthiness; theft, barratry or robbery."

The steamer was valued at $50,000 and was insured in all to the amount of $40,000. Her crew consisted of the master, two mates, two engineers, two wheelsmen, four firemen, a full complement in the cabin and four or five deck hands. She had made three trips from the opening of the season of navigation; and on the 18th of June, 1883, left Fort William, on her return trip to Owen Sound, and stopped *en route* at Silver Island on the north shore of Lake Superior, leaving that port at 12.45 P. M., and was stranded on the southwest point of Caribou Island, in Lake Superior, at about two o'clock in the morning of June 19. The evidence tended to show that on this occasion, for the first time, she laid her course from Silver Island for Passage Island, thence direct for White Fish Point on the south shore of Lake Superior. Between Silver Island and Passage Island a thick fog arose which continued until after the stranding. She passed Passage Island at 2.30 P. M., thence the chart course laid S. E. by E. ½ E. to White Fish Point, passing about eight miles to the southward of Caribou Island, one hundred and thirty-two miles from Passage Island. About eight o'clock in the evening of June 18 the master retired to his stateroom, leaving the second mate on watch, and gave him the following written instructions:

"Monday Evening.

"Mr. Harbottle: If it continues thick at 10 o'clock P. M., keep her S. E. by E. until 3 A. M.; then keep her S. E. by E. ½ E. small. If it clears continue on your course S. E. by E. ½ E."

The fog continued dense during Harbottle's watch, and he made the course prescribed until he came off watch about 1 o'clock A. M. on the 19th, running the steamer at full speed, which was twelve or twelve and a half miles per hour, the master testifying that his instructions "were based on the steamer's running on time." At twenty minutes past one in the morning, Wagner, the first mate, relieved Harbottle and took charge, navigating the vessel under the same orders, the fog being so dense, he says, "that you could not see anything." There was no lookout forward; no one else on deck during either watch, beside the mate and the wheelsman; no soundings were taken; and the steamer was kept running at her full rate of speed, carrying her regular steam of forty-five pounds, her maximum pressure being forty-seven pounds. She struck on the southwest point of Caribou Island, in Canadian waters, though she should have passed seventeen miles to the southward of that Island. Upon the ordinary course from Passage Island to White Fish Point, she would have passed about eight miles south, but the testimony tended to show that she took a course somewhat southerly of the most direct course between the two points, which should have carried her some seventeen miles south.

Notice of the disaster and request for assistance was sent by the master to the insurers' agents, who received it June 22, and sent to the aid of the Spartan a tug and wrecking expedition, under command of Captain Swain, which left Detroit June 23 and arrived at Caribou Island June 25. June 26 plaintiff sent a telegram to the insurance agent at Toronto, who was the broker who negotiated this insurance, through defendant's agents [41
at Buffalo, as follows: "Spartan ashore on Caribou Island, and this Company beg to inform you that they abandon the boat and claim a total loss. Please inform the underwriters."

The steamer was brought to Detroit, as alleged on the one side, by the order of her master, and there docked and repaired under his instructions, which is denied on the other. The cost of rescuing the steamer and towing her to Detroit was $7,455.13, which was paid by the underwriters. It is in dispute as to who ordered the repairs, or claimed or exercised control over them or the steamer, or directed where she should be brought, but it is not shown that either plaintiff or defendant did. The repairs were made by the Detroit Dry Dock Company, and completed in September, at a cost of from $23,000 to $24,000. In November, plaintiff served on the insurers proofs of loss, verified November 8, 1883, in which it is stated: "That the said vessel, in the prosecution of a voyage from Fort William, on the north shore of Lake Superior, in the Province of Ontario, to Owen Sound, on Georgian Bay, in said Province of Ontario, at about 2 o'clock on the morning of the 19th of June last, in a fog, ran ashore on the southwest shore of Caribou Island, and became a wreck and total loss, and was duly abandoned by her owners to her insurers, as will appear by certified copy of the protest of her master and mariners, heretofore served upon you; in consequence of which the said Richelieu and Ontario Navigation Company suffered damage, sustained loss or damage within the perils insured against under the said policy No. 1,965, to the amount of ten thousand dollars, as will further appear by particular statement herewith."

The agents of the insurers knew nothing of the facts attending the stranding, except what the protest showed, until after March, 1884. Up to that time plaintiff and the underwriters had been negotiating for a settlement of the loss, but could not agree upon the liability for duties upon the repairs, but after discovery of the facts the defendant and the other insurers refused to pay. Upon the trial the jury found a verdict for the defendant, on which judgment was entered.

The opinion of *Judge* Brown, the district [41
judge, on the motion for a new trial, will be found in 26 Fed. Rep. 596.

The cause was brought to this court by writ of error, and errors were assigned as follows: That the circuit court erred

1. In ruling that no authority was shown on the part of Captain Gibson to bind the

defendant in respect to the repairs made upon the steamer Spartan.

2. In striking out all the testimony respecting the acts and statements of Gibson.

3. In excluding this question put by plaintiff's counsel to the witness Patterson: "*Q.* What is the custom of Canadian vessels about carrying a lookout forward?"

In refusing to instruct the jury, according to the requests made by plaintiff's counsel, as follows:

4. "*First:* If the jury find that the Spartan, while navigating Lake Superior on June 19th, 1883, and while a dense fog prevailed, was stranded on Caribou Island, and that the insurers were promptly notified of the disaster, and that proper proofs of loss were furnished to the insurers, then the plaintiff has made a case which prima facie entitles it to a verdict in this case."

5. "*Second:* The stranding of the Spartan on Caribou Island while a dense fog was prevailing was an accident which is prima facie covered by the policy and for which the insurers are prima facie liable."

6. "*Third:* If the jury find that the fog contributed proximately to the stranding of the Spartan, then the insurers are liable for the loss caused by such stranding."

7. "*Fourth:* There is no evidence in the case which even tends to prove the unseaworthiness of the Spartan except in regard to her compass, and if the jury find that the compass had not varied more than vessels' compasses ordinarily do, that the steamer had been navigated by the same compass without trouble from the time she left La Chene, on the St. Lawrence River, up to the time of the disaster, and that the officers of the steamer at the time she started upon the voyage on which the stranding took place believed the compass to be reliable, and had reason for [413] so believing, then the insurers would not be relieved from liability on account of any supposed defect in the compass."

8. "*Fifth:* If the jury find that the insurers received the notice of abandonment which has been offered in evidence, and that without notice to the owners of the steamer they sent Captain Swain with a wrecking expedition to her rescue, and that Captain Swain brought her to Detroit for repairs, and was paid for so doing by the insurers; that the steamer was subsequently surveyed for repairs by the insurers and repaired, and that the owners never interfered with the making of the repairs,—then the jury may consider these facts as evidence of an acceptance of the abandonment."

9. "*Sixth:* If the jury find that the insurers, upon receiving notice of the abandonment from the owners, sent a rescuing expedition for the purpose of rescuing the Spartan and taking her to a place of repair, and that the Spartan was gotten off by the wreckers and brought to Detroit for repairs and was there repaired without any notice whatever to the plaintiff, and that the plaintiff never interfered with or exercised any control over or made any claim to said steamer after their abandonment, then the jury may consider *these facts as* evidence tending to prove an acceptance of the abandonment on the part of the insurers."

10. "*Seventh:* If the jury find that the insurers sent the wrecking expedition to the Spartan with the intention of rescuing and repairing her without consulting the plaintiff, then it was the duty of the insurers to repair her within a reasonable time and tender her back to the owners free from all liens for such repairs. Their failure to do so is evidence of an acceptance of abandonment and their liability to pay as for a total loss."

11. "*Eighth:* If the jury find that the insurers brought the Spartan to Detroit with the intention of repairing her, and that she was subsequently repaired without interference on the part of the plaintiff; that the insurers failed to pay for said repairs, but allowed the steamer to be libeled and sold by the court of admiralty to satisfy the lien for such repairs without notice to the plaintiff, —then this would amount to an acceptance of abandonment."

12. "*Ninth:* If the jury find that there was [4 an actual or constructive acceptance of the abandonment, then the plaintiff is entitled absolutely to recover as for a total loss."

And in instructing the jury as follows:

13. "The law of Canada provides that all vessels shall run in a fog at a moderate rate of speed; and I do not undertake to direct you one way or the other in regard to this fact—that is, the rate of speed—but merely to say in general terms that if you find that the loss was occasioned by the excessive speed of the vessel, or by her want of a lookout, or by the defects of the compass, the defendant is not liable."

14. "With regard to the defective compass, the master and crew state in their protest that they attribute the loss to a defective compass; and while that statement is not binding upon the plaintiff, and while the plaintiff is not estopped, as we say, or prevented from showing that the loss is attributable to other causes, it undoubtedly is entitled to considerable weight."

15. "In case you shall find, as I have said before, that this loss was occasioned by a defective compass, the defendant is entitled to your verdict. On the other hand, if you shall find that the loss occurred through peril of the sea and from no want of skill in navigation and no want of competency in the master or insufficiency of the crew, and from no fault on the part of the vessel, then your verdict should be for the plaintiff."

16. "I charge you, as requested by the defendant, that under the policy of insurance in this case the expense of bringing her to Detroit must be shown by the plaintiff to have been occasioned by the risk against which the defendant had insured the steamer; and if the stranding of said steamer and the expense incurred in effecting her relief resulted from any incompetency of the master or insufficiency of the crew or want of ordinary care and skill in navigating said vessel, or from any unseaworthiness of said vessel, then the plaintiff cannot recover."

17. "I charge you, as requested by the defendant in his seventh request, that under

the evidence in this case the burden of proof is upon the plaintiff to show that the stranding of said steamer could not have been guarded against or prevented by the ordinary exertions of human skill and prudence."

18. "As the Spartan was violating the statute laws of Canada in running at full speed in a dense fog, the plaintiff must show affirmatively that neither the speed of the steamer nor the defects of the compass could have caused or have contributed to cause the stranding of the steamer. The burden of proving a loss of this kind is upon the plaintiff. There is no presumption that the loss was occasioned by the peril insured against by the defendant."

19. "If there were any defects in the compass, known or unknown, rendering it unsafe or unsuitable for use in Lake Superior, and the stranding of the vessel was caused by, consequent upon or arose from such defect in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover."

Messrs. **F. H. Canfield** and **Joseph H. Choate**, for plaintiff in error:

The court erred in not charging the jury, in accordance with plaintiff's requests, that the stranding of the Spartan on Caribou Island, while a dense fog was prevailing, was an accident which was prima facie covered by the policy, and for which the insurers were prima facie liable. And that if the fog contributed proximately to the stranding, the insurers would be liable.

Columbia Ins. Co. v. *Lawrence*, 35 U. S. 10 Pet. 507 (9: 512); *Waters* v. *Merchants L. Ins. Co.* 36 U. S. 11 Pet. 213 (9: 692); *Peters* v. *Warren Ins. Co.* 39 U. S. 14 Pet. 99 (10: 371); *Orient Mut. Ins. Co.* v. *Adams*, 123 U. S. 67 (31: 63); *General Mut. Ins. Co.* v. *Sherwood*, 55 U. S. 14 How. 351 (14: 452); *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. Div. 581, L. R. 2 App. Cas. 284; Lee, Ship. and Ins. 443, 444; 1 Parsons, Marine Ins. 532, 549; *Davidson* v. *Burnand*, L. R. 4 C. P. 117; *Ionides* v. *Universal M. Ins. Co.* 14 C. B. N. S. 259; *Union Ins. Co.* v. *Smith*, 124 U. S. 405 (31: 497); *Western Ins. Co.* v. *Tobin*, 32 Ohio St. 92; *Anderson* v. *Morice*, L. R. 10 C. P. 58.

If the underwriters defend upon the ground that there was a want of ordinary care and skill in the navigation, the burden of proof is with them to show that such want of ordinary care and skill was the proximate cause of the loss.

1 Parsons, Marine Ins. 380; 1 Phillips, Ins. § 1160; 2 Arnould, Ins. § 1345.

The exceptions are to be construed most strongly against the underwriters.

Palmer v. *Warren Ins. Co.* 1 Story, 364; *Orient Mut. Ins. Co.* v. *Wright*, 68 U. S. 1 Wall. 468 (17: 505); *Tudor* v. *New England Mut. M. Ins. Co.* 12 Cush. 554; 1 Duer, Ins. 161, § 6; 1 Phillips, Ins. § 1160.

In actions of tort the negligence of the plaintiff will not defeat his recovery, unless it contributed proximately to his injury.

Beach, Cont. Neg. 7, 9, 27, and cases cited; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21: 745); Smith, Neg. 226.

If a carrier's negligence has exposed the goods to loss from an excepted cause, he is not liable, unless such negligence contributed proximately to the loss.

Memphis & C. R. Co. v. *Reeves*, 77 U. S. 10 Wall. 176 (19: 909); *Morrison* v. *Davis*, 20 Pa. 171; *Denny* v. *New York C. R. Co.* 13 Gray, 481; *Daniels* v. *Ballantine*, 23 Ohio St. 532; Cooley, Torts, 68; *Hoffman* v. *Union Ferry Co.* 68 N. Y. 385; 2 Arnould, Ins. 808.

Any loss directly caused by a peril insured against is to be paid for by the insurers, notwithstanding the loss may have been brought about by bad navigation, neglect or fault of the master or seaman, excepting only the fault of the assured himself, or any other cause not directly insured against.

Lowndes, Ins. §§ 122, 124; *Dudgeon* v. *Pembroke*, L. R. 9 Q. B. 581; *Cory* v. *Burr*, L. R. 9 Q. B. Div. 463; *Wilson* v. *The Xantho*, L. R. 12 App. Cas. 503; *Hamilton* v. *Pandorf*, L. R. 12 App. Cas. 518; *Davidson* v. *Burnand*, L. R. 4 C. P. 117; *West India & P. Teleg. Co.* v. *Home & C. M. Ins. Co.* L. R. 6 Q. B. Div. 51; *Livie* v. *Janson*, 12 East, 648.

The provisions of the Canadian Statute were not intended to apply to cases of insurance, but only in cases of collision.

Grill v. *General Iron S. C. Co.* L. R. 1 C. P. 600, L. R. 3 C. P. 476; *The Pennsylvania*, 86 U. S. 19 Wall. 125 (22: 148).

The owner of an appliance on a vessel which has been known to operate safely may continue to use it without subjecting himself to the charge of negligence simply because an accident occurs subsequently, he being in ignorance of its actually having become defective.

Burke v. *Witherbee*, 98 N. Y. 562; *Loftus* v. *Union Ferry Co.* 84 N. Y. 455; *Cleveland* v. *New Jersey S. B. Co.* 68 N. Y. 306; *Dougan* v. *Champlain Transp. Co.* 56 N. Y. 1.

This being a time policy, there is no warranty of seaworthiness. If the vessel was seaworthy at the time the policy was issued, no subsequent unseaworthiness would affect the liability of the insurers.

Barber, Ins. 263; *Thompson* v. *Hopper*, 6 El. & Bl. 172; Lee, Ins. 410; *Merchants Ins. Co.* v. *Morrison*, 62 Ill. 242; *Gibson* v. *Small*, 24 Eng. L. & Eq. 17; *American Ins. Co.* v. *Ogden*, 20 Wend. 287; *Adderly* v. *American Mut. Ins. Co.* Taney, 126.

The court erred in admitting the protest in evidence.

Christian v. *Coombe*, 2 Esp. 490; 2 Arnould, Ins. 1353; Hillyard, Ins. 808; 2 Phillips, Ins. 668; *Senat* v. *Porter*, 7 T. R. 158; 3 Phillips, Ev. (C. & H. *notes*) 283.

The admissions of the master, not made as part of the *res gestæ*, are not admissible in evidence.

Northwestern U. P. Co. v. *Clough*, 87 U. S. 20 Wall. 528 (22: 406); *American S. S. Co.* v. *Landreth*, 102 Pa. 131; *American L. Ins. Co.* v. *Mahone*, 88 U. S. 21 Wall. 152, 157 (22: 593, 595); *Adams* v. *Hannibal & St. J. R. Co.* 74 Mo. 553, 557, 559; *Lane* v. *Bryant*, 9 Gray, 245; *Bacon* v. *Charlton*, 7 Cush. 581; *Luby* v. *Hudson River R. Co.* 17 N. Y. 131; *Randall* v. *N. W. Teleg. Co.* 54 Wis. 140; *Bellefontaine R. Co.* v. *Hunter*, 33 Ind. 335; 1 Evans, Prin. and A. 190.

Mere failure to reply to a notice of abandon-

ment may not of itself be sufficient to prove an acceptance of an abandonment; but silence, coupled with such action on the part of the underwriters as is shown in this case, is evidence from which the jury may find an acceptance.

Northwestern Transp. Co. v. *Thames & M. Ins. Co.* 59 Mich. 238; *Cincinnati Ins. Co.* v. *Bakewell*, 4 B. Mon. 557; *Provincial Ins. Co.* v. *Le Duc*, L. R. 6 Pr. C. Cas. 224; 2 Arnould, Ins. 1175; Barber. Ins. 372, and cases cited.

The taking possession of the vessel, the raising and rescuing of her after receiving notice of abandonment, without protest or notice to the owners that they did not intend to accept the abandonment, amounts to a constructive acceptance, and renders the insurers liable as for a total loss, irrespective of the causes which brought about the loss.

Northwestern Transp. Co. v. *Continental Ins. Co.* 24 Fed. Rep. 171; *Northwestern Transp. Co.* v. *Thames & M. Ins. Co.* 59 Mich. 214; *Richelieu & O. Nav. Co.* v. *Thames & M. M. Ins. Co.* 72 Mich. 571; *Copeland* v. *Phœnix Ins. Co.* 1 Woolw. 278, 76 U. S. 9 Wall. 461 (9: 739); *Norton* v. *Lexington F. L. etc. Ins. Co.* 16 Ill. 235; *Provincial Ins. Co.* v. *LeDuc*, L. R. 6 Pr. C. Cas. 224; *Shepherd* v. *Henderson*, L. R. 7 App. Cas. 49; *Cincinnati Ins. Co.* v. *Bakewell*, 4 B. Mon. 541; *Reynolds* v. *Ocean Ins. Co.* 22 Pick. 191, 1 Met. 160.

If the underwriters did not have actual notice of the circumstances surrounding the loss, they had the means of knowledge, and a person with the means of knowledge at his command is to be regarded as one having actual notice.

Angell, Lim. §§ 188, 190; *Farnam* v. *Brooks*, 9 Pick. 246; *Reynolds* v. *Ocean Ins. Co.* 22 Pick. 197.

Under the law of marine insurance, the master, after abandonment, becomes the agent of the insurers.

2 Parsons, Marine Ins. 198; 2 Arnould, Ins. 1191; 2 Phillips, Ins. § 1732; Lee, Ins. 488; *Smith* v. *Manufacturers Ins. Co.* 7 Met. 448; *United Ins. Co.* v. *Robinson*, 2 Caines, 280; *Chesapeake Ins. Co.* v. *Stark*, 11 U. S. 6 Cranch, 268 (3: 220); Story, Agency, § 118; 2 Parsons, Ins. 125.

The court erred in excluding as evidence the record in the suit instituted by the Detroit Dry Dock Co. against the Spartan, to enforce its lien for repairs made upon the steamer in consequence of her stranding.

Provincial Ins. Co. v. *Le Duc*, L. R. 6 Pr. C. Cas. 224.

Mr. **Henry H. Swan**, for defendant in error:

The Canadian Statute is applicable to the Spartan's navigation while in Canadian waters.

1 Phillips, Ins. § 736; *The Farragut*, 77 U. S. 10 Wall. 334, 338 (19: 946, 947).

A custom contrary to the Statute is void, and will be disregarded by the court.

Walker v. *Western Transp. Co.* 70 U. S. 3 Wall. 150, 155 (18: 172, 174); *Thompson* v. *Riggs*, 72 U. S. 5 Wall. 680 (18: 708); *The Duke of Sussex*, 1 W. Rob. 274, 277; *The Sylph*, 2 Spinks, 75; *The Hand of Providence*, Swaby, 107; *The Velocity*, L. R. 3 Pr. C. Cas. 44, 50; Marsden, Collisions, 318.

A custom to navigate without a lookout, especially in a heavy fog, is unreasonable.

The Rebecca, Blatchf. & H. 351; *The Genesee Chief*, 53 U. S. 12 How. 443, 463 (13: 1058, 1067); *The Belgenland*, 114 U. S. 355, 372 (29: 152, 158).

It was the right and duty of the jury to draw their conclusions, not from a part, but the whole, of the facts in the case.

Greenleaf v. *Birth*, 34 U. S. 9 Pet. 292, 299 (9: 132, 135); *Scott* v. *Lloyd*, 34 U. S. 9 Pet. 418, 445, 460 (9: 178, 187, 193); *Catts* v. *Phalen*, 44 U. S. 2 How. 376, 382 (11: 306, 308); *Smith* v. *Condry*, 42 U. S. 1 How. 28, 35 (11: 35, 38); *Northwestern Mut. L. Ins. Co.* v. *Muskegon Nat. Bank*, 122 U. S. 502, 511-513 (30: 1100, 1104).

The courts will not, upon a view of the testimony which is partial or imperfect, give an instruction which the entire evidence in a cause when developed would forbid.

Rhett v. *Poe*, 43 U. S. 2 How. 457, 483 (11: 338, 348); *Adams* v. *Roberts*, 43 U. S. 2 How. 486, 496 (11: 349, 353); *Ranney* v. *Barlow*, 112 U. S. 207, 214 (28: 662, 665).

The burden is upon the insured of proving a loss from a cause and to an amount for which the underwriter is liable.

Bullard v. *Roger Williams Ins. Co.* 1 Curt. 149; *Union Ins. Co.* v. *Smith*, 124 U. S. 424, 427, 428 (31: 505); *Cory* v. *Boylston F. & M. Ins. Co.* 107 Mass. 140, 147; *Baker* v. *Manufacturers Ins. Co.* 12 Gray, 603; *Heebner* v. *Eagle Ins. Co.* 10 Gray, 131; *Berwind* v. *Greenwich Ins. Co.* 53 N. Y. 253, 114 N. Y. 231; *Sohier* v. *Norwich F. Ins. Co.* 11 Allen, 336; *Hicks* v. *Fitzsimmons*, 1 Wash. C. C. 282; 2 Phillips, Ins. § 2122; 2 Parsons, Marine Ins. 518; 2 Greenl. Ev. §§ 385, 387; *Donnell* v. *Columbian Ins. Co.* 2 Sumn. 366, 372, 373.

The term "perils of the seas" has the same meaning in policies of insurance and bills of lading.

Wilson v. *The Xantho*, L. R. 12 App. Cas. 503; *Hamilton* v. *Pandorf*, L. R. 12 App. Cas. 518, 525; *The Reeside*, 2 Sumn. 571; *Liverpool & G. W. S. Co.* v. *Phœnix Ins. Co.* 129 U. S. 428 (32: 788); *The Portsmouth*, 76 U. S. 9 Wall. 682, 684 (19: 754, 755); *Lawrence* v. *Minturn*, 58 U. S. 17 How. 100, 111 (15: 58, 62); *General Mut. Ins. Co.* v. *Sherwood*, 55 U. S. 14 How. 365 (14: 457); *Adams* v. *Roberts*, 43 U. S. 2 How. 486, 496 (11: 349, 353); *Ranney* v. *Barlow*, 112 U. S. 215 (28: 665).

The conceded want of a lookout was unseaworthiness.

1 Parsons, Marine Ins. 374; *The Niagara* v. *Cordes*, 62 U. S. 21 How. 23 (16: 46); *Ward* v. *Chamberlain*, 62 U. S. 21 How. 570 (16: 219); *The Armstrong*, Brown, Adm. 130, 135; *The Steamer Webb*, 81 U. S. 14 Wall. 414, 416 (20: 775, 776).

The negligence of the master in running the steamer by a compass known to be erratically defective discharges the insurer from any loss which is the consequence of such want of prudence or diligence.

Union Ins. Co. v. *Smith*, 124 U. S. 427 (31: 506); *Williams* v. *New England Mut. M. Ins. Co.* 3 Cliff. 244.

The charterer was, as between the insurer and insured, the agent of the owner.

Williams v. *New England Mut. M. Ins. Co.* 3 Cliff. 244, 250.

It is not allowable to assume as existing facts not proved, and ask a direction to the jury on such assumption.

Washington & G. T. R. Co. v. *Gladmon*, 82 U. S. 15 Wall. 409 (21: 116); *New Jersey Mut. L. Ins. Co.* v. *Baker*, 94 U. S. 611 (24: 268); *Knickerbocker L. Ins. Co.* v. *Foley*, 105 U. S. 353 (26: 1056); *Phœnix Ins. Co.* v. *Copelin*, 76 U. S. 9 Wall. 461 (19: 739) *Bradlie* v. *Maryland Ins. Co.* 37 U. S. 12 Pet. 378, 404, 409 (9: 1123, 1134, 1136).

There is no evidence that the insurer accepted the abandonment.

Peele v. *Merchants Ins. Co.* 3 Mason, 27, 81; 2 Parsons, Marine Ins. 177; *Haffin* v. *Mason*, 82 U. S. 15 Wall. 674 (21: 197); *Catts* v. *Phalen*, 48 U. S. 2 How. 382 (11: 308); *Eastern Transp. Line* v. *Hope*, 95 U. S. 301 (24: 478); 2 Phillips, Ins. § 1692; *Congress & E. S. Co.* v. *Edgar*, 99 U. S. 659 (25: 491); *Billings* v. *Breinig*, 45 Mich. 65, 71.

There was no error in the court's comment on the weight to be given to the protest.

Rucker v. *Wheeler*, 127 U. S. 85, 93 (32: 102, 106); *Lovejoy* v. *United States*, 128 U. S. 173 (32: 390); *United States* v. *Philadelphia & R. R. Co.* 123 U. S. 113 (31: 138).

The loss should be attributed to negligence and inattention.

Western Transp. Co. v. *Downer*, 78 U. S. 11 Wall. 133 (20: 161); *The Steamer Webb*, 80 U. S. 14 Wall. 415 (20: 775).

Plaintiff must show affirmatively that neither the speed of the steamer nor the defect of the compass could have caused or contributed to the stranding.

The Pennsylvania, 86 U. S. 19 Wall. 125, 136 (22: 148, 151); *Hayes* v. *Michigan C. R. Co.* 111 U. S. 228 (28: 410); *The Fenham*, L. R. 3 P. C. 212, 216; *The Stoomvaart Maatschappy Nederland* v. *Peninsular & O. Steam Nav. Co.* L. R. 5 App. Cas. 894, 900; *The Northern Indiana*, 3 Blatchf. 93; *The Leo*, 11 Blatchf. 225, 232; *Taylor* v. *Harwood*, Taney, 437, 444; *Grey* v. *Mobile*, 55 Ala. 387; *Jetter* v. *New York & H. R. Co.* 2 Keyes, 154; *Levi* v. *New Orleans Mut. Ins. Asso.* 2 Woods, 63, 67; *Citizens Ins. Co.* v. *Marsh*, 41 Pa. 396; *The Portsmouth*, 76 U. S. 9 Wall. 682 (19: 754).

The policy contains an express exception of liability for losses occasioned by unseaworthiness, and whether it was known or unknown would be immaterial.

The Glenfruin, L. R. 10 Prob. Div. 103; *Work* v. *Leathers*, 97 U. S. 379 (24: 1012); 1 Parsons, Marine Ins. 337, 368; *Quebec M. Ins. Co.* v. *Commercial Bank*, L. R. 3 Pr. C. Cas. 234, 242; *Union Ins. Co.* v. *Smith*, 124 U. S. 427 (31: 506).

The evidence offered for the purpose of showing the amount due to the dry dock company for the repairs furnished to the Spartan, etc., was rightly rejected.

The Ship Packet, 3 Mason, 255, 257; *The Schooner Boston*, 1 Sumn. 328, 333: *Bradlie* v. *Maryland Ins. Co.* 37 U. S. 12 Pet. 378, 404, 409 (9: 1123, 1134, 1136); *Clement* v. *Packer*, 125 U. S. 309, 320 (31: 721, 724).

If the proofs showed the loss, they were also evidence of the cause of loss, and that it occurred in such a manner as to relieve the insurer of responsibility.

Mutual Ben. L. Ins. Co. v. *Newton*, 89 U. S. 22 Wall. 33, 35 (22: 793, 795); *Atkins* v. *Elwell*, 45 N. Y. 753; *Re Washington Park Comrs.* 52 N. Y. 131; *Tonnele* v. *Hall*, 4 N. Y. 140.

Mr. Chief Justice **Fuller** delivered the [42
opinion of the court:

In *Liverpool & G. W. S. Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 438 [32: 788, 791], it is said: "Collision or stranding is doubtless a peril of the seas; and a policy of insurance against perils of the seas covers a loss by stranding or collision, although arising from the negligence of the master or crew, because the insurer assumes to indemnify the assured against losses from particular perils, and the assured does not warrant that his servants shall use due care to avoid them." But in the case at bar there is an [42
express exception of all perils and losses occasioned by the want of ordinary care and skill in navigation and of seaworthiness.

The Spartan was a Canadian vessel and was navigating Canadian waters between two Canadian ports, and was bound to comply with the laws of Canada. The Canadian Statute put in evidence (vol. I., Stat. Can. 1880, p. 286) is entitled "An Act to Make Better Provisions Respecting the Navigation of Canadian Waters," and prescribes certain rules, among them that every ship, whether a sailing ship or steamship, shall go at a moderate speed in a fog, mist or falling snow, and shall not be exonerated by anything in the rules from the consequences of any neglect to keep a proper lookout, or of the neglect of any ordinary precaution, or precaution required by the special circumstances of the case. These statutory rules correspond with those revised by an order of Council in England in August, 1879 (see 4 Prob. Div. 241), and prescribed by Congress (Rev. Stat. sec. 4233; Act March 3, 1885, 23 Stat. 438), and recognized as international rules. *The Belgenland*, 114 U. S. 355, 370 [29: 152, 157]; *The Scotia*, 81 U. S. 14 Wall. 170 [20: 822]. Section seven of the Canadian Statute provides that "in case any damage to person or property arises from the non-observance by any vessel or raft of any of the rules prescribed by this Act, such damage shall be deemed to have been occasioned by the willful default of the person in charge of such raft or of the deck of such vessel at the time, unless the contrary be proved, or it be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary; and the owner of the vessel or raft, in all civil proceedings, and the master or person in charge as aforesaid, or the owner, if it appears that he was in fault, in all proceedings, civil or criminal, shall be subject to the legal consequences of such default."

In *The Pennsylvania*, 86 U. S. 19 Wall. 125 [22: 148], it was held that where a vessel has committed a positive breach of statute, she must show not only that probably her fault did not contribute to the disaster, but that it could not have done so. And this was but the statement of the settled rule in collision cases. In this case, in view [42
of the seventh section of the Canadian Stat-

ute, and the fact that perils occasioned by the want of ordinary care and skill or of seaworthiness were excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to cause, the stranding. If it appeared that the misconduct or unseaworthiness was *causa sine qua non*, it was an excepted peril, and that, as stated by *Judge* Brown, "ought to suffice for the exoneration of the underwriter in a case where a steamer, equipped with a compass known to be defective, is driven in a dense fog, with unabated speed, and in direct violation of a local statute, upon an island lying but eight miles off her usual track." We think there was no error in giving the eleventh instruction asked by the defendant, and forming the subject of the eighteenth assignment of error. And this disposes also of the sixteenth and seventeenth errors assigned, as the burden was upon the plaintiff to show that the stranding and its consequent losses, misfortunes and expenses were caused by perils insured against, and as to the perils consequent upon and arising from or caused by the want of ordinary care and skill in navigating the vessel, the plaintiff was its own insurer.

And the same result must attend the fourth, fifth and sixth errors assigned, which question the refusal of the court to instruct the jury, as requested in the first, second and third of the plaintiff's instructions, that the stranding of the Spartan, while a dense fog was prevailing, was an accident which was prima facie covered by the policy, and for which the insurers were prima facie liable, and that if the fog contributed proximately to the stranding, the insurers would be liable.

The jury were entitled to draw their conclusions, not from a part, but from the whole, of the facts in the case, and the difficulty in these instructions is that they are based upon a partial view of the testimony. It was necessary to the plaintiff's case that it should appear from the whole proof that the loss was not occasioned by the want of ordinary care by the master, or on account of unseaworthiness, and was not within exceptions contained in the policy, against [124] which plaintiff was not insured. *Union Ins. Co.* v. *Smith*, 124 U. S. 405 [31: 497]. The jury were the judges of all the facts proved; and the court charged that if they found that the vessel "was carried ashore by the current or by any mysterious cause which you are unable to explain, then the loss will be within the policy and the plaintiff would be entitled to recover;" and again, "if you find that this vessel was stranded by reason of want of ordinary care and skill in her navigation or by reason of a defective compass, the plaintiff is not entitled to recover; on the other hand, if you find that she was stranded by circumstances by reason of the current or by perils of the sea—any other peril of the sea—then the plaintiff would be entitled to your verdict;" and also: "Stranding is one of the perils insured against in the policy, and if the jury find that the stranding was the *proximate* result of the fog or currents of the lake prevailing, then the owners of the steamer have made a case which entitles them to your verdict in this case."

It appears to us that this branch of the case was left to the jury in a manner in respect to which the plaintiff has no ground of complaint. Certainly the state of facts disclosed by the record precludes the claim that instructions more favorable to the plaintiff could reasonably have been given, and this is illustrated by cases cited.

Bazin v. *The Steamship Company*, 8 Wall. Jr. 229, 238, was a suit for loss of merchandise under a bill of lading, which absolved the carrier from "accidents from machinery, boilers, steam or any other accidents of the seas, rivers and steam navigation, of whatever nature or kind soever." The steamer was wrecked on Cape Race in a snow storm, under the following circumstances: "She struck the point of Cape Race—up to that time she continued perfectly seaworthy. If she had not struck, at the average rate of our passage, we would have been in Philadelphia in five days more. The steamer was wrecked. We backed off the point of Cape Race, and run her on shore to save the lives of the passengers, and to keep her from sinking. There was no tempest; she struck in a dense fog—and the sinking of the vessel, and the damage done, resulted from her striking the cape." "Here, then," said *Mr. Justice* Grier, "we have no other reason given by the captain, nor any testimony whatever, as to how or why this great mistake of running against a cape occurred. The answer and the witness both seem to assume that running against a cape or a continent is one of the usual accidents and unavoidable dangers of the sea. That cannot be termed an 'accident of the sea', within the exceptions of the bill of lading, which proper foresight and skill in the commanding officer might have avoided. If the compass on the new iron vessel was not sufficiently protected to traverse correctly, the vessel was as little seaworthy as if she had no compass—and this should have been carefully ascertained before she started on her voyage. If there was no fault in the compass, then it is very evident that the officer who is thirty or forty miles wrong in his calculation, and driving through a thick fog with a full head of steam, and first discovers his true position by running on an island, a cape or a continent, has neither the skill nor the prudence to be intrusted with such a command—and for want of such officer the vessel is not seaworthy. . . . That a steamboat has been either ignorantly, carelessly or recklessly dashed against a cape in a thick fog, cannot be received as a plea to discharge the carrier."

In *The Kestrel*, L. R. 6 Prob. Div. 182, the master was suspended by the wreck commissioner, with the concurrence of two captains sitting as assessors, because of the stranding of the steamship Kestrel, by reason of negligent navigation, and this decision was affirmed by the Court of Appeals, *Mr. Justice* Hannen and *Sir* Robert Phillimore, assisted on the hearing by two of the elder brethren of the Trinity House.

The wreck commissioner, among other

reasons for his report, said: "It appears to us that the master is in this dilemma; either the weather was so foggy that it was not possible to see the island until they were within a ship's length of it, and in that case he would not have been justified in going at full speed, which we are told was ten knots an hour; or it was not very foggy, and in that case it is difficult to account for the island not having been seen until they were within a ship's length of it, unless indeed there was a very bad lookout being kept on board. In either case the master would seem to have been guilty of a neglect of the ordinary precautions required from seaman for the safe navigation of their vessels."

The Court of Appeals held that the master was guilty of a wrongful act in running the vessel at such a rate of speed as he did in the state of the weather which existed, and also in that he continued to steer the course he did in a fog.

The exceptions in this policy protect the insurer against the excepted perils, as a shipper is protected under a bill of lading from loss to which the negligence of the carrier has contributed. And, as already remarked, if the peril was caused by negligence or unseaworthiness, notwithstanding it was the fog which prevented the mate from seeing the island, the predominating and efficient cause was the negligence or unseaworthiness and must be regarded as the proximate cause, under the circumstances. *Waters* v. *Merchants L. Ins. Co.* 36 U. S. 11 Pet. 213 [9: 692]; *Howard F. Ins. Co.* v. *Norwich & N. Y. Transp. Co.* 79 U. S. 12 Wall. 194, 199 [20: 378, 379].

The unseaworthiness especially relied on was the alleged defect of the compass.

The plaintiff in error complains of the refusal to give the fourth instruction asked by his counsel, as follows:

"There is no evidence in the case which even tends to prove the unseaworthiness of the Spartan except in regard to her compass, and if the jury find that the compass did not vary more than vessels' compasses ordinarily do, that the steamer had been navigated by the same compass without trouble from the time that she left La Chene, on the St. Lawrence River, up to the time of the disaster, and that the officers of the steamer at the time she started upon the voyage on which the stranding took place believed the compass to be reliable, and had reason for so believing, then the insurers would not be relieved from liability on account of any supposed defect in the compass."

Exceptions were also taken to the parts of the charge italicized in the following:

"Upon the question of speed I will have a word to say, although it is covered, so far as the law of the case is concerned, by my general charge, that if you find the loss occurred by her being navigated at an excessive speed, there can be no recovery; still it is for you to judge whether, under all the circumstances of the case, she was navigating at too great a speed. *The law of Canada provides 'that all vessels shall run in a fog at a moderate rate of speed.'* Now, it strikes me—but the question is one for your determination—that a vessel is not under an obligation while navigating the open lake to slacken her speed because of a fog unless there is some reason to apprehend collision with another vessel, or unless the vessel is so near the shore or known to be so near the shore that she might run upon it unless she was navigated at a less rate of speed; and if this compass had been a proper compass, and there was no reason to think it was otherwise, I should feel loth myself to charge the vessel with fault on account of excessive speed. On the other hand, if this compass were known to the captain, or he had good reason to believe it was defective, then it would strike me that in passing in the neighborhood of Caribou Island he should have directed the speed of the steamer to be slowed. But, as I said before, gentlemen, that is a question for your consideration, *and I do not undertake to direct you one way or the other in regard to this fact, but merely to say in general terms that if you find that the loss was occasioned by the excessive speed of the vessel or by her want of a lookout or by the defects of the compass the defendant is not liable. With regard to the defective compass, the master and crew state in their protest that they attribute the loss to a defective compass, and while that statement is not binding upon the plaintiff here, and while the plaintiff is not estopped, as we say, or prevented from showing that the loss is attributable to other causes, it undoubtedly is entitled to considerable weight.* On the other hand, it is shown that the vessel had navigated from Owen Sound up to Sault St. Marie and from the Sault up to Port Arthur with this compass, and that no unusual deviation had been detected, except that the captain thought the compass was a little slow, as he said. Now, then, gentlemen, *in case you shall find, as I* [42 *have said before, that this loss was occasioned by a defective compass, the defendant is entitled to your verdict. On the other hand, if you shall find that the loss occurred through peril of the sea and from no want of skill in navigation and no want of competency in the master or sufficiency of the crew and from no fault on the part of the vessel, then your verdict should be for the plaintiff.*"

The court also instructed the jury:

"The stranding of said steamer at a point 17 miles out of the course on which said steamer was running in navigating the distance of about 130 miles is prima facie evidence that the compass was defective, and throws the burden of proving that the compass was correct upon the plaintiff.

"I charge you, as requested by the plaintiff in his eighth request, that the jury are entitled to consider the fact that the Spartan had been successfully navigated by this compass during the season up to the time of her stranding, and that on her final trip she had made a good course from Fort William to Silver Island and from Silver Island to Passage Island, and that she was upon her usual course when she passed the Quebec, as evidence tending to show that the officers had reason for believing that the compass was a

proper one, and to rebut the charge that they were negligent in using that compass.

"The steamer is presumed to have been seaworthy, and that her officers were competent to navigate and manage her, and the insurers are not entitled to a verdict on account of unseaworthiness unless they prove by a preponderance of evidence that she was unseaworthy.

"But that is to be construed in connection with the charge I gave you that the fact that she ran ashore, on a still night, upon Caribou Island, 17 miles out of her course, raises the presumption of unseaworthiness, which it devolves upon plaintiff to explain."

The court charged that there was but one defect in connection with the defense of unseaworthiness to which attention need be called, and that was "the want of a proper compass;" and, among other things, said: "It was the duty of the plaintiff to keep the Spartan in a seaworthy condition for the safe
429] navigation of the waters in which she might be run under the policy. In order to be seaworthy the steamer must have been supplied with a good and reliable compass or compasses, which must have been kept in proper repair and condition for the safe navigation of all waters described in the policy. *If there were any defects in the compass, known or unknown, rendering it unsafe or unsuitable for use in Lake Superior, and the stranding of the vessel was caused by, consequent upon or arose from such defects in the compass, the vessel was not seaworthy for Lake Superior navigation, whatever her fitness for navigation elsewhere, and the plaintiff cannot recover.*" To the italicized portion of this the plaintiff excepted.

The declaration before the notary by the captain, two mates and wheelsman, states that "from the course taken the steamer should have passed seventeen miles to the southward of Caribou Island." The master had the words "fogs and defective compass" inserted among the causes pretested against.

There was no lookout, and both that and the rate of speed were contrary to the Canadian Statute. The exception of losses occasioned by unseaworthiness was in effect a warranty that a loss should not be so occasioned, and whether the fact of unseaworthiness were known or unknown would be immaterial. This is so stated by the learned district judge in his opinion on the motion for a new trial, and the decisions referred to fully sustain the position. *Work* v. *Leathers*, 97 U. S. 379 [24: 1012]; *The Glenfruin*, L. R. 10 Prob. Div. 103; *Union Ins. Co.* v. *Smith*, 124 U. S. 405 [31: 497]. But the testimony of the captain and his mates leaves but little, if any, room for doubt that the compass was known to be defective on former trips. The captain testified that he thought the loss was occasioned by a defective compass, but qualified that as merely given as a supposition; that the compass was defective more or less; "it was running in opposite courses;" that when the protest was signed he had the words "fogs and defective compass" inserted; that the loss was occasioned by a defective compass or fogs, or the current; that he had experienced on previous trips no more variation than was general on iron vessels; that "another compass on that vessel might be just the same and different on wooden vessels;" that the stranding must be attributed to the compass or some other cause aboard the vessel; that all compasses on Lake Superior vary more or less at different points; that he could not tell the extent of the variation; that he discovered a little difference from some other vessels in the compass on former trips; that he found the compass out in the other channel; and that every vessel he was on varied there in the same place. The first mate testified that the captain spoke to him about the defect, and said the compass was "a little out; it was not like the compass he had on the Smith;" that the captain laid the stranding solely to the compass; and further, that the compasses "all vary up there; those that have not been adjusted, they vary more at certain points than others; a compass that is adjusted should not vary at all;" that he did not know how much the variation of the compass was; that he steered the small boat by the spirit compass after the stranding, on a S. E. by E. course, and brought up 40 miles from the point for which he steered; "the course actually run must have been ½ south, or something like that, judging from where she fetched up." The second mate, when asked what took them on Caribou Island, answered, "It must have been the fault of the compass." Patterson, the charterer's manager, said that there was more attraction on an iron than on a wooden vessel; that to meet and obviate this, it is usual to adjust compasses; that this compass had never been adjusted; that the Spartan had been fitted out by the plaintiff; that the compass was a little slow in its movements; that he did not know that compasses are specially adjusted to run on Lake Superior. The evidence taken together did not fairly leave the inquiry open as to whether the compass did not vary more than vessels' compasses ordinarily did, or whether the officers, at the time the Spartan started on the voyage, believed the compasses to be reliable or had reason for such belief, any further than was covered by what the court said on that subject. And the slight inaccuracy in the reference to the protest is of no moment.

The eighth, ninth, tenth, eleventh and twelfth assignments of error relate to the question of abandonment. It is not contended that there was any evidence establishing an actual acceptance of abandonment, but it is argued that the evidence tended to show a constructive acceptance. If the loss was the result of a peril not insured against, there was no right to abandon; but it is insisted that if the abandonment is accepted, it is too late to recede, and that an acceptance in ignorance that the loss was occasioned by perils not insured against would be equally binding. And this was so held by the Supreme Court of Michigan—*Richelieu & O. Nav. Co.* v. *Thames & M. M. Ins. Co.*, 72 Mich. 571, which was an action by the present plaintiff against another of the insurers of the Spartan.

But the testimony in that case in regard to the repairs was not the same as in the case in hand, as is conceded by plaintiff's counsel, and it is upon that very point of the repairs that the plaintiff chiefly relies to make out the alleged constructive acceptance.

The "sue and labor clause" of the policy was as follows: "It is agreed that the acts of the insured or insurers, or their agents, in recovering, saving and preserving the property insured in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party." The bill of exceptions shows that the officers and crew of the steamer were unable to get her off, and notice was sent to the owners and charterers, and notice of the loss was also communicated to the underwriters, with a request for assistance, and the underwriters sent a wrecking expedition, under the command of Captain Swain, to rescue the steamer. The request for assistance was received June 22 and the wrecking expedition left Detroit June 23 and reached the Spartan June 25. The telegraphic notice of abandonment was sent to the underwriters on June 26. The policy provided that in case of loss or misfortune it should be lawful and necessary for the assured "to make all reasonable exertions in and about the defense, safeguard and recovery of the said vessel or any part thereof, without prejudice to this insurance;" and in case of neglect or refusal on the part of the insured to adopt such measures, "then the said insurers may and are hereby authorized to interpose and recover the said vessel." Captain Swain, who had command of the wrecking expedition, testified that he had no orders where to take the steamer when she was got off, and he and the first mate agreed in testimony that she was towed to Detroit under the orders of her master. The captain denied that he gave such orders. The survey was held by Gibson, acting for the underwriters, and Kirby, for the charterer. The superintendent of the dry dock testified that the dock was engaged by the captain, "who had something to do with ordering the repairs," and it appeared that by direction of officers of the charterer work was done not made necessary by the stranding. The captain testified that he directed the repairs, because Gibson told him both need not be there, and that after that Crosby, the agent of the underwriters, told him to keep a strict supervision over the work; that he received no instructions from any person representing the plaintiff or the charterer.

Crosby's evidence was that he gave no orders or instructions to any person or persons as to the repairs on the steamer, nor did he assume any responsibility therefor. He did tell the captain to be careful "to keep what is in the survey separate from what is outside." There was a dispute between the plaintiff's manager, the charterer's treasurer, the captain and Crosby about the payment of duties charged by the Canadian government on the repairs. And as late as March 24, 1884, these duties, and the fact that the repairs included work not specified in the survey, still divided the parties; nor from June 26 to the date of the proofs of loss, November 3, was there any claim of total loss made, nor did such seem to be the attitude of the parties until defendant refused to pay.

In *Richelieu & O. Nav. Co.* v. *Thames & M. M. Ins. Co.*, *supra*, the Supreme Court of Michigan, in a careful opinion, held that the company could not defend on the ground that the peril and loss were not insured against, because, as found by the jury in that case, the abandonment had been accepted. The plaintiff there rested its case entirely upon the acceptance of the abandonment of the vessel, and the evidence upon that question was, for some reason, largely different from the evidence on this trial.

The court in this case left the question of abandonment to the jury, and the finding was against the plaintiff. No reference is made, in the opinion on the motion for a new trial, to this question, though it is stated that the opinion "covers all the points made in the briefs of counsel." But certain rulings of the court in relation to this subject are questioned by the alleged errors under consideration.

"Whether the insurer accepts or not is a matter of construction of his words and conduct. Any act done for the purpose of making the most of the property, to whomsoever it may prove to belong, ought not to be construed against the party who thus seeks the common interest." 2 Phillips on Ins. §§ 1692, 1693. Any act of the underwriters in consequence of an abandonment, which could be justified only under a right derived from it, may be decisive evidence of an acceptance. *Peele* v. *Merchants Ins. Co.* 3 Mason, 27; *Gloucester Ins. Co.* v. *Younger*, 2 Curt. 322. The question for the jury was whether upon the evidence, taken in connection with the provisions of the policy, there were any such acts.

As it is not contended that there was any evidence of actual acceptance, and as it clearly appeared that the rescuing expedition was sent before the telegraphic notice of abandonment was given, and as the evidence did not tend to show that that expedition was sent with the intention of rescuing "and repairing" the Spartan, or that the insurers brought the Spartan to Detroit (if they did bring her) with the intention of "repairing her," each one of the requested instructions was objectionable.

Assuming that an offered abandonment may be accepted even when the assured has no right to abandon, and that taking possession to make partial repairs, not amounting to indemnity, may not be authorized by the policy, and that taking possession of and holding of a vessel for an unreasonable time, or taking possession after a peremptory abandonment, without qualification or reservation, are such acts as imply and constitute an acceptance of the abandonment and liability for total loss, and that by the abandonment and acceptance the whole interest is transferred to the underwriters (*Phœnix Ins. Co.* v. *Copelin*, 76 U. S. 9 Wall. 461 [19:

739]; *Shepherd* v. *Henderson*, L. R. 7 App. Cas. 49; *Northwestern Transp. Co.* v. *Thames & M. Ins. Co.* 59 Mich. 214; *Cincinnati Ins. Co.* v. *Bakewell*, 4 B. Mon 541; *Reynolds* v. *Ocean Ins. Co.* 22 Pick. 191), the question still remains what the facts really are in respect to the conduct of the underwriters. The plaintiff insists that although the captain moved the Spartan to Detroit and placed her in the dry dock, and to some extent, if not wholly, superintended the repairs, the plaintiff was not bound by his action, because he was not employed by it, but by the charterers, and that the master, after abandonment, becomes the agent of the insurers.

But it is only after a valid abandonment and the passage of the title that the captain thus becomes the insurer's agent, and to concede that here begs the very question which was at issue. Phillips on Insurance, § 1732.

The first and second errors were that the court ruled that no authority was shown on the part of Captain Gibson to bind the defendant in respect to the repairs made upon the Spartan, and in striking out the testimony respecting Gibson's acts and statements. Crosby, who was the agent of the Insurance Company at Buffalo, testified that he "gave no orders or instructions to any person or persons whatsoever as to the repairs on the steamer, nor did he assume any responsibility therefor; that he sent Gibson to Detroit to act on the survey on the Spartan, and afterwards sent him to see that no more repairs were put on the steamer than were called for by the survey, as the Spartan had been damaged on previous occasions and not properly repaired;" and further, that "Mr. Gibson was sent by the insurers from Buffalo to hold a survey on the steamer before she was repaired." This is all the evidence bearing on Gibson's authority, and the court was justified in its action. Why Gibson was not called as a witness does not appear.

435] It is urged, thirdly, that the court erred in excluding the question put to the witness Patterson: "What is the custom of Canadian vessels about carrying a lookout forward?" The Canadian Statute provided that every steamer should, in a fog, mist or falling snow, go at a moderate speed, and that nothing in the rules prescribed should exonerate any ship, or the owner, or master or crew thereof, from the consequences of any neglect to keep a proper lookout, etc.

In *The Farragut*, 77 U. S. 10 Wall. 334, 338 [19: 946, 947], it was held that the rule laid down by Congress to the same effect intimated that the lookout was one of the ordinary precautions which a careful navigation involved; and *Mr. Justice* Bradley, delivering the opinion of the court, said: "A lookout is only one of the many precautions which a prudent navigator ought to provide; but it is not indispensable where, from the circumstances of the case, a lookout could not possibly be of any service." Evidence of a custom to run at full speed in a dense fog, without a lookout and contrary to the Statute, would be clearly inadmissible, and would be of no avail if established.

It is also objected that the protest was admitted in evidence. That protest consists of the statement signed by the master, mates and wheelsman, and the declaration of the notary that he protests at the request of the master, as well on his own behalf as on the behalf of the owners, freighters, officers and crew, against all and singular the cause and causes operating as aforesaid, etc., and more especially "against the storm and heavy winds and gales, high and dangerous seas, fogs and defective compass, experienced on her late voyage;" all of which is certified by the notary public as being a true copy filed in his office. Undoubtedly the protest of the captain, so long as he was living, would not be evidence on one side or the other, unless to contradict him if he varied from it; and it is said in Arnould on Insurance (2d ed. by Perkins), vol. 2, p. 1353, that it would not be made evidence as against the assured, if the brokers showed it to the underwriters with other papers relating to the loss on demand of payment. But it was admissible in this case, not on the ground of agency, but because it was made part of the proofs of loss, being directly referred to in the proofs in the statement that the vessel ran ashore, "and became a wreck and total loss, and was duly abandoned by the owner to her insurers, as will appear by certified copy of the protest of her master and mariners, heretofore served upon you." Hence the admission of the proofs of loss involved the admission of the explanatory writing. *Mutual Ben. L. Ins. Co.* v. *Newton*, 89 U. S. 22 Wall. 32 [22: 793].

Finally, it is said the court erred in excluding the record in a suit instituted by the dry dock company against the Spartan to enforce a lien for repairs, because the record was admissible to show the amount due to the dry dock company, and also to show that the steamer was sold to satisfy the decree in that suit, and thereby to establish a constructive acceptance of abandonment by the insurers; but we do not think that it was admissible on either ground. The insurers were not parties to that suit, and the cost of the repairs and the amount of the loss were properly shown by other and competent evidence, while the sale of the vessel had no tendency to prove the acceptance of the abandonment, but rather that the underwriters did not consider themselves bound in the premises. The result is that *the judgment of the Circuit Court must be affirmed.*

D. P. THOMPSON, Receiver, *Appt.*,

v.

THE PHENIX INSURANCE COMPANY, OF BROOKLYN, NEW YORK.

(See S. C. Reporter's ed. 287-300.)

Insurance by receiver, when valid—when policy may be reformed—change of receiver—construction of policy—stipulation limiting time to sue—waiver of—estoppel—delay of suit.

1. If a receiver, without a previous order of the court, applies funds in his hands to insure the property in his custody, the contract of insurance

will not, for that reason, be void, as between him and the insurance company.

2. He can make a valid contract of insurance on such property, although the use of the funds in his hands for such purpose is subject to the approval of the court.

3. If, by inadvertence, accident or mistake, the terms of the contract are not fully set forth in the policy, it may be reformed so as to express the real agreement.

4. Where a policy runs to a receiver in a designated suit, a mere change of receiver does not involve a change in title or possession.

5. If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured.

6. A stipulation in a policy, limiting the time within which a suit against the company for a claim arising out of its provisions may be brought, may be waived by the company.

7. Such waiver need not be in writing, but may arise from such a course of conduct upon the part of the company as will equitably estop it from pleading the prescribed limitation in bar of a suit by the insured.

8. If the failure to sue within the time prescribed by the policy is due to the conduct of the company, it cannot avail itself of the limitation therein prescribed.

9. An insurance company cannot hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then plead the delay, caused by its own conduct, as a defense to the action when brought.

[No. 311.]

Argued Apr. 29, 30, 1890. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Oregon, dismissing a suit to reform a policy of insurance and for a decree for the amount insured. *Reversed.*

The facts are stated in the opinion.

Messrs. Samuel Shellabarger and **Jeremiah M. Wilson**, for appellants:

Insurers cannot take advantage of a stipulation in the policy that an action for a loss shall be barred if not brought within a specified period, where they have been mainly instrumental in procuring the delay by holding out hopes of an amicable adjustment.

May, Ins. (2d ed.) §§ 488, 511; *Grant* v. *Lexington, F. L. & W. Ins. Co.* 5 Ind. 26; *Ames* v. *New York U. Ins. Co.* 14 N. Y. 260; 1 Duer, Ins. 161; *Curtis* v. *Home Ins. Co.* 1 Biss. 485; *Killips* v. *Putnam F. Ins. Co.* 28 Wis. 472; *Black* v. *Winneshiek Ins. Co.* 31 Wis. 74; *Davis* v. *Canada Farmers Mut. Ins. Co.* 39 U. C. Q. B. 467; *Derrick* v. *Lamar Ins. Co.* 74 Ill. 404; *Peoria M. & F. Ins. Co.* v. *Whitehill*, 25 Ill. 466; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 80 U. S. 13 Wall. 222, 234 (20: 617, 623); *American L. Ins. Co.* v. *Mahone*, 88 U. S. 21 Wall. 152-155 (22: 593, 594); *New Jersey Mut. L. Ins. Co.* v. *Baker*, 94 U. S. 610 (24: 268); *Eames* v. *Home Ins. Co.* 94 U. S. 630 (24: 301).

Although the language of the policy is "unless such suit or action shall be commenced within twelve months next after the date of the fire," yet this is satisfied if suit is brought within twelve months after the cause of action accrued.

Vette v. *Clinton F. Ins. Co.* 30 Fed. Rep. 668; *Steen* v. *Niagara F. Ins. Co.* 89 N. Y. 315; *New York* v. *Hamilton F. Ins. Co.* 39 N. Y. 45; *Chandler* v. *St. Paul F. & M. Ins. Co.* 21 Minn. 85; *Spare* v. *Home Mut. Ins. Co.* 17 Fed. Rep. 568; May, Ins. § 479; *Hay* v. *Star F. Ins. Co.* 77 N. Y. 235, 33 Am. Rep. 607.

Mr. **Robert Rae**, for appellee:

The receiver had no authority to incur expenses on account of the property trusted to his charge by the court beyond what were absolutely necessary to its preservation and use.

Cowdrey v. *Galveston, H. & H. R. Co.* 93 U. S. 352 (23: 951); Beach, Receivers, §§ 249, 257.

The policy cannot be reformed and turned into an open policy.

Hooper v. *Robinson*, 98 U. S. 528 (25: 219); *Meiswinkel* v. *St. Paul F. & M. Ins. Co.* 75 Wis. 147; *Howland* v. *Blake*, 97 U. S. 624 (24: 1027).

There is no allegation in the bill that the defendant, the appellee, said or did anything to warrant the assured in delaying his suit. The Insurance Company, upon notice of the loss by fire, at once notified the appellant that it denied all liability.

Gooden v. *Amoskeag F. Ins. Co.* 20 N. H. 73; *Hocking* v. *Howard Ins. Co.* 130 Pa. 170; *Riddlebarger* v. *Hartford F. Ins. Co.* 74 U. S. 7 Wall. 386 (19: 257); *Wilkinson* v. *First Nat. F. Ins. Co.* 72 N. Y. 499; *Arthur* v. *Homestead F. Ins. Co.* 78 N. Y. 462; May, Ins. § 485.

The agent has no authority to waive, alter or modify the terms of the contract. The policy limits such agent merely to an agency to receive and forward the application for insurance, deliver the policy and receive the premium.

Wood, Ins. (1st ed.) 640; *Bohart* v. *Oberne*, 36 Kan. 284; May, Ins. 156; *Walsh* v. *Hartford F. Ins. Co.* 73 N. Y. 5; *Kyte* v. *Commercial U. Assur. Co.* 144 Mass. 43; *Hankins* v. *Rockford Ins. Co.* 70 Wis. 1.

After the contract of insurance has been fully made and executed, and a loss has occurred, the agent has no authority *per se* whatever to enlarge the scope of the insurer's liability.

Barre v. *Council Bluffs Ins. Co.* 76 Iowa, 609; *Hollis* v. *State Ins. Co.* 65 Iowa, 454; *Knudson* v. *Hekla F. Ins. Co.* 75 Wis. 198; *Hankins* v. *Rockford Ins. Co.* 70 Wis. 1.

With these limitations of authority in the policy, the burden of proof is upon the assured to show that the acts relied upon were within the scope of the agent's apparent authority.

Wood, Ins. (2d ed.) § 420; *Lohnes* v. *Ins. Co. of North America*, 121 Mass. 439; *Bush* v. *Westchester F. Ins. Co.* 63 N. Y. 531; *Bowlin* v. *Hekla F. Ins. Co.* 36 Minn. 433.

Mr. Justice **Harlan** delivered the opinion of the court: [288

This suit was brought, July 10, 1885, by the appellant, who is the receiver in the case of *Holladay* v. *Holladay*, in the Circuit Court of the County of Multnomah, in the State of Oregon. He seeks a decree reforming a policy of insurance issued by the Phenix Insurance Company of Brooklyn, New York, on the 21st day of April, 1884, and which purported, in consideration of the sum of three hundred dollars, and subject to the conditions named in the policy, to insure, for the term of one year, "E. S. Kearney, receiver for *Holladay* v. Holladay, against

loss or damage by fire to the amount of five thousand dollars," of which sum four thousand dollars was on one-half interest in the Clarendon Hotel, in Portland, Oregon, and one thousand dollars on a like interest in the furniture in the hotel building; and, the policy being reformed, for a decree for the amount insured with interest from the time when the loss was payable. The loss occurred on the night of May 19, 1884. A demurrer to the original bill was sustained. 25 Fed. Rep. 296. Subsequently an amended bill was filed, to which also a demurrer was sustained, and the suit dismissed. From that decree the present appeal was prosecuted.

By the terms of the policy the amount of the loss was payable sixty days after the required proofs were received at the Company's office in Chicago, and the loss ascertained in accordance with the conditions prescribed, unless the property was replaced or the Company gave notice of their intention to rebuild or repair the damaged premises.

The policy contained these among other provisions: "1. . . . If the property be sold or transferred, or upon the commence-
[289] ment of foreclosure proceedings against, or sale under a trust deed of or the existence of a judgment lien upon, or the issue or levy of an execution against, any kind of property herein described, or if the property be assigned under any bankrupt or insolvent law, or any change take place in the title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree or voluntary transfer or conveyance, . . . then and in every such case this policy is void."

"4. If the interest of the assured in the property be any other than the absolute fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, . . . it must be so represented to the Company and so expressed in the written part of this policy; otherwise the policy shall be void. . . . *Note*—By 'property held in trust' is intended property held under a deed of trust or under the appointment of a court of law, or property held as collateral security; in which latter case this Company shall be liable only to the extent of the interest of the assured in such property."

"9. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the Company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance had been made on the same property, giving copies of the written portion of all policies thereon."

"10. . . . It shall be optional with the Company to repair, rebuild or replace the property lost or damaged with like kind and quality within a reasonable time, giving notice of their intention to do so within sixty days after receipt of the proofs herein required, and until such proofs, plans and specifications, declarations and certificates, are produced and examinations and arbitrations permitted by the claimant and had, the loss shall not be payable."

"13. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this Company for the recovery of any claim by virtue of this policy shall be sustained in any court of law or chancery until after an award shall have [290] been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the date of the fire from which such loss shall occur, and should any suit or action be commenced against this Company after the expiration of the aforesaid twelve months the lapse of time shall be taken as conclusive evidence against the validity of such claim, any Statute of Limitations to the contrary notwithstanding."

It will not be necessary to set out the allegations of the original bill because the case turns upon the question whether the amended bill states facts sufficient to constitute a cause of action. The latter makes substantially the following case:

From the 17th of November, 1883, up to and including the 19th of May, 1884, Edward S. Kearney was the receiver in the above suit of *Holladay* v. *Holladay*. From the first of those dates continuously to the time of the fire, the hotel building, with its furniture and the land upon which it stood, was in the joint possession and under the control of Kearney as receiver, and of R. Koehler and J. N. Dolph, the owners of one undivided half interest, the title to the remaining half being involved in the above suit, and in the possession and under the control of Kearney as receiver. By the order appointing the receiver he was directed and empowered to take possession of, manage, control and keep the property safely and for the best interests of the parties who should be adjudged entitled thereto, or as the court might direct. Kearney being desirous to effect insurance for himself and his successors in the receivership, as well as for the benefit of whom it might concern, on an undivided half interest in the hotel building for the sum of four thousand dollars, and on a like interest in the furniture for one thousand dollars, pending the suit of *Holladay* v. *Holladay*, and having been solicited by the defendant to take insurance in his capacity as receiver, it was understood and agreed, on the 21st of April, 1884, between the Company and himself as receiver, that the former would insure, as above indicated, against loss or damage by fire, for the full term of one year from April 27, 1884, noon, making the loss and the policy payable to him as receiver and to his successors, as well as for the benefit of whom it might concern, and that it would take from him, as receiver, the sum of three hundred dollars as premium. On the day last named the Company, with the intent to carry this agreement into effect, made the policy in question and delivered it to Kearney. At the time of this agreement it was distinctly informed that the property agreed to be insured was in dispute in the above suit, and that Kearney

had no interest in it except as receiver. Nevertheless, by accident and mistake of both Kearney and the Company, the loss was made payable to Kearney, receiver in the above suit, instead of to the receiver and his successors, and for the benefit of whom it might concern; and the policy was issued without the usual clause, commonly inserted in such policies and agreed upon, namely, that the insurance was effected for whom it might concern. It was delivered by the Company, and received by Kearney, in the full belief and understanding that the interests of the parties to that suit were insured and protected by it in accordance with the direction of Kearney and with the above understanding and agreement between him and the Company. The Company did not at once collect the premium, but extended the customary credit therefor to the receiver as such and not otherwise.

On the 14th of May, 1884, an order was made, accepting the resignation of, and removing, Kearney as receiver, and appointing the present plaintiff in his stead, such resignation to take effect when the latter duly qualified and entered upon the performance of his duties as receiver. The order directed the delivery to plaintiff upon his qualification of all property held or controlled by Kearney as receiver, which embraced, among other things, the policy in suit and the property insured or intended to be thereby insured. The plaintiff qualified as receiver on the 19th of May, 1884, but the fire resulting in the loss sued for occurred before Kearney surrendered the possession and control of the property. Subsequently to May 19, 1884, the policy was delivered by Kearney to the plaintiff.

The plaintiff immediately after the fire delivered to the Company written notice of it, and, as soon as possible thereafter, and more than sixty days prior to the commencement of this suit, rendered, under oath, a particular account of the loss, in which was included a statement of other policies, with the written portions thereof. The proofs of loss were delivered to the Company and were accepted and retained by it without making any objections to them.

About thirty days after the fire and after the acceptance of the proofs of loss, the plaintiff threatened to commence suit, and informed the Company's agent that he would do so. The defendant thereupon, by its duly authorized agents, stated to the plaintiff that under the provisions of the policy no suit could be brought until sixty days had elapsed after the receipt of the proofs of loss, and directed the plaintiff's attention to the provisions of the policy. These agents then and there further represented to the plaintiff that no question was made as to the loss or its payment, except that the Company was considering the fact that a change had occurred in the receivership. They also asserted and represented to him that they had written to the Company advising payment, and informed him that it would undoubtedly so do. Afterwards, on the 27th of June, 1884, the defendant, by its agents, demanded the payment of the premium upon the policy of insurance, assuring the plaintiff at the time that the loss would undoubtedly be paid as soon as the home office could act thereon. Relying on that representation, the plaintiff, on the day just named, paid to the Company the sum of three hundred dollars as premium on the policy, and three dollars for the state stamp thereon. These sums were paid to the Company out of the funds in his hands as receiver. Subsequently, and after the expiration of sixty days from the receipt of the proofs of loss, the Company, by its agents, repeatedly assured the plaintiff that it would pay the loss. By reason of those repeated assurances and promises he neglected, failed and was prevented, for some time after sixty days from the delivery of the proofs of loss, to bring suit for the amount insured. Long prior to the commencement of this suit the plaintiff applied to and requested the Company to act toward him in such a way as was fair, equitable and just, to correct and [29 reform the policy, and to adjust and pay to him as receiver the sum named in the policy; but it has neglected and refused to comply with any of those requests.

By an order entered July 9, 1885, in the suit of *Holladay* v. *Holladay*, the plaintiff was directed to institute this suit, and take all necessary steps to have the policy reformed and to recover the amount due thereon.

Do these facts, which are admitted by the demurrer, make a case for reforming the policy, and entitle the plaintiff to a decree for the amount insured?

The first contention of the Company is that the receiver, Kearney, had no authority, without special instructions from the court, to incur expenses or liability for insurance premiums. In support of this proposition its counsel cites *Cowdrey* v. *Galveston, H. & H. R. Co.*, 93 U. S. 352 [23: 950], where one of the questions was whether a receiver of a railroad company should be allowed for expenditures made by him, without the previous action of the court, in defeating a proposed municipal subsidy in aid of the construction of a railroad parallel with the one in his hands. It was held that such expenses were properly disallowed, although the proposed road, if constructed, might have diminished the future earnings of the one in his charge. This court said that to permit a receiver to determine questions of that character, and, upon such a determination, appropriate funds in his custody, would sanction a principle that would open the door to all sorts of abuses. It added that "a receiver is not authorized, without the previous directions of the court, to incur any expenses on account of property in his hands beyond what is absolutely essential to its preservation and use, as contemplated by his appointment." Of the soundness of this general principle no doubt can exist, though difficulty may sometimes arise in its application to particular cases. Due regard must always be had not only to the nature and surroundings of the property in the custody of the receiver, but to the exigencies of the moment when he may be required to take

action involving the safety of property in his charge. We do not doubt that under some circumstances a receiver would be derelict in duty if he did not cause property in his hands to be insured against fire. The case last cited is authority for the principle that, without the previous sanction of the court, a receiver may incur expenses that are absolutely essential for the preservation of the property in his custody. But if this were not so, and if, without the previous order of the court, he applies funds in his hands for such a purpose, the contract of insurance will not, for that reason, be void, as between him and the insurance company. It appears from the policy that the Company was informed as to the capacity in which Kearney acted, namely, "as receiver for *Holladay* v. *Holladay*." According to the amended bill, it knew the precise nature and extent of the interest represented by him, and that he had no personal interest in the property insured. If the court, whose officer he was, had directed him to procure insurance, the present objection could not be urged with the slightest expectation of its being sustained. And yet, whether Kearney exceeded his authority, or rightly applied the funds in his hands, are questions in which no one is concerned, except himself, the court to which he was amenable, and the parties interested in the property in his charge. If he was not, technically, authorized to use the funds in his hands to pay for insurance, still, upon the settlement of his accounts, if he acted in good faith, the court might allow him any sums paid out for that purpose. He held such relations to, and was under such personal responsibility for the safety of, the property, that he could make a valid contract of insurance, although his use of the funds in his hands for that purpose was subject to the approval of the court. In *Tempest* v. *Ord*, 2 Meriv. 55, *Lord Chancellor* Eldon said that "formerly, the court never permitted a receiver to lay out money without a previous order of court. But now, where the receiver had laid out money without such previous order, it was usual to refer it to the master to see if the transaction was beneficial to the parties, and if found so, the receiver was allowed the money so laid out." Upon this point, *Brown* v. *Hazlehurst*, 54 Md. 26, 28, is instructive. In that case, objections were made to allowing a receiver for sums paid by him, without the previous sanction of the court, for insurance. The court said: "There is no doubt of the general rule, and it is a wholesome one, that a receiver will not be permitted to lay out more than a small sum at his own discretion, in the preservation or improvement of the property under his charge; but he should, in all cases where it is practicable, or the circumstances of the case will permit, before involving the estate in expenses, apply to the court for authority for so doing. But this general rule, however salutary it may be, should not be so rigidly and sternly enforced as to work wrong and injustice where the receiver has acted in good faith, and under such circumstances as will enable the court to see that if previous authority had been applied for it would have been granted. The justice and right of the matter must depend, to a great extent, upon the special circumstances of each case that may be presented." In the present case, the only question that should concern the Insurance Company is whether, under the terms of the contract, it is liable for the loss. That question is to be determined by the contract it made, without inquiring where the receiver got the money with which to pay premiums, or as to his authority to use the funds in his hands for the purpose of effecting insurance. If the Company is not compelled to pay for the loss in question except as the contract provides, it ought to be satisfied, especially as the demurrer admits that, after the loss, it collected from the plaintiff the premium of three hundred dollars, which it knew or had reason to believe came out of funds in his hands as the successor of Kearney in the receivership.

The next question to be considered is whether the amended bill makes a case for the reformation of the policy. Its allegations, which are admitted by the demurrer to be true, show that before the policy was issued, the agreement between Kearney and the Company was that the insurance should run to him as receiver, and to his successors, and also to those whom it might concern; and that by inadvertence, accident and mistake, upon the part both of Kearney and the Company, the policy was not so framed. The policy runs to "E. S. Kearney, Receiver for *Holladay* v. *Holladay*." Whether Kearney's successor in the receivership might not recover upon the policy as it is (there being no question of limitation in the case), especially upon proof that the parties intended the insurance to cover the interest which the receiver (whoever he was at the time of the loss) represented, is a question that need not be considered. If, by inadvertence, accident or mistake, the terms of the contract were not fully set forth in the policy, the plaintiff is entitled to have it reformed, so as to express the real agreement, without the necessity of resorting to extrinsic proof. The case made by the amended bill is within the decision in *Snell* v. *Atlantic F. & M. Ins. Co.*, 98 U. S. 85, 88 [25: 52, 54], where the court said: "We have before us a contract from which, by mistake, material stipulations have been omitted, whereby the true intent and meaning of the parties are not fully or accurately expressed. A definite, concluded agreement as to insurance, which, in point of time, preceded the preparation and delivery of the policy, is established by legal and exact evidence, which removes all doubt as to the understanding of the parties. In the attempt to reduce the contract to writing there has been a material mistake, caused chiefly by that party who now seeks to limit the insurance to an interest in the property less than that agreed to be insured. The written agreement did not effect that which the parties intended. That a court of equity can afford relief in such a case is, we think, well settled by the authorities."

It is said that a decree reforming the policy ought not to be made, because it appears

from one of its clauses, in respect to which no mistake is alleged, that the policy is void. If this position be correct there is an end of the case; for, as was well said by the learned judge below, the court will not reform a contract merely for the sake of reforming it, but only to enable some party to assert rights under it as reformed. The clause alluded to is the one declaring that if "any change takes place in title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree or voluntary transfer or conveyance, . . . then and in every such case this policy is void." It is contended that there was a change in [r] title and possession before the fire, and that such change occurred when, under the order of the court, the plaintiff qualified as the successor of Kearney in the receivership. If this position be well taken, it only renders clearer the right of the plaintiff to a decree correcting the policy; for, if it be made to conform to the original agreement, there would be no pretense to say that the accession of the plaintiff to the receivership would have been a change in title or possession, within the meaning of the parties. But it is not true that the amended bill shows a change of possession before the fire. It distinctly alleges that Kearney had not surrendered possession of the property when the fire occurred. By the order appointing him, his resignation took effect when his successor entered upon his duties. It may therefore be said that the plaintiff had not, when the fire occurred, actually entered upon the performance of his duties. But, in our judgment, the above clause of the policy does not necessarily import that a mere change of receivers would work a change either in title or possession. The title to property in the hands of a receiver is not in him, but in those for whose benefit he holds it. Nor in a legal sense is the property in his possession. It is in the possession of the court, by him as its officer. *Wiswall* v. *Sampson*, 55 U. S. 14 How. 52, 65 [14: 322, 328]; *Heidritter* v. *Elizabeth Oil Cloth Co.* 112 U. S. 294, 304 [28: 729, 732]; *Union Nat. Bank* v. *Kansas City Bank*, 136 U. S. 223 [34: 341]. So that where a policy runs to a receiver in a designated suit, a mere change of receiver does not involve a change in title or possession. If an insurance company intends its policy to mean otherwise it must express that intention more distinctly than was done by the defendant. If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company. *First Nat. Bank* v. *Hartford F. Ins. Co.* 95 U. S. 673, 678 [24: 563, 565].

It remains only to consider the question arising out of that clause of the policy limiting the time within which a suit or action against the Company for the recovery of a [s] claim arising out of its provisions may be sustained. While the validity of such a stipulation cannot be disputed (*Riddlesbarger* v. *Hartford F. Ins. Co.* 74 U. S. 7 Wall. 386, 389 [19: 257, 259]), we do not doubt that it may be waived by the Company. And such waiver need not be in writing. It may arise from such a course of conduct upon its part as will equitably estop it from pleading the prescribed limitation in bar of a suit by the insured. It is to be observed that, by the terms of the policy, the Company is not obliged to pay any claim until after the expiration of sixty days from the receipt of the proofs of loss at its office in Chicago, and the ascertainment of the loss in accordance with the terms of the policy. A suit, therefore, within the sixty days after the loss is so ascertained would, upon the theory of the Company, be of no avail to compel payment if it chose to plead the above clause in bar of the action. So that, practically, the assured is limited to ten months within which he may sue as of right. And yet the twelve months within which suit must be brought is made to commence at "the date of the fire," not from the date when the loss is payable. There are, it is said, adjudged cases that would authorize such a construction of this policy as would give the insured the whole term of twelve months from the date when he could demand, as of right, that his claim for loss be satisfied. *Vette* v. *Clinton F. Ins. Co.* 30 Fed. Rep. 668; *Steen* v. *Niagara F. Ins. Co.* 89 N. Y. 315, 322; *Spare* v. *Home Mut. Ins. Co.* 17 Fed. Rep. 568, 570; *New York* v. *Hamilton F. Ins. Co.* 39 N. Y. 45, 48; *Hay* v. *Star F. Ins. Co.* 77 N. Y. 235, 244; *Chandler* v. *St. Paul F. & M. Ins. Co.* 21 Minn. 85; May on Ins. (2d ed.) section 479, *notes*. We waive, however, any expression of opinion, in the present attitude of the case, as to the view announced in those cases, for its disposition only requires us to hold, as we do, that the allegations of the amended bill, bearing upon this point, sustain the right of the plaintiff to bring this action, although it was not commenced until after the expiration of twelve months from the date of the fire. Those allegations are to the effect that the Company, by its duly authorized agents, assured the plaintiff about thirty days after the fire and after the acceptance of the proofs [29 of loss, that no question was made as to the loss or its payment, except that the Company was considering the fact of the change in the receivership, and that it would undoubtedly pay the loss claimed; that as late as June 27, 1884, the premium of three hundred dollars was paid to the Company, which, by its agents, again assured the plaintiff that the loss would be paid as soon as action could be taken; that after sixty days had elapsed from the delivery of the proofs of loss, the Company, by its agents, repeatedly gave the same assurances; and that, by reason of such promises and assurances, he neglected, for some time after sixty days from the delivery of proofs of loss, to bring suit for the recovery of the loss sustained. We need not stop to consider the suggestion that the agents referred to had no authority to give those assurances or to make those promises. No such question can arise upon the amended bill, for it alleges that the

Company, by its duly authorized agents, made the promises and gave the assurances. What the fact may be, in respect to the authority of the agents, or whether the plaintiff had the right to rely upon those assurances and promises, and, if he did, whether the Company's rights were thereby affected, are questions not now to be decided. Their determination will depend upon the answer and the evidence at the trial. If, as the allegations of the amended bill imply, the failure of the plaintiff to sue within the time prescribed by the policy, computing the time from the date of the fire, was due to the conduct of the Company, it cannot avail itself of the limitation of twelve months. *Curtis* v. *Home Ins. Co.* 1 Biss. 484, 487; *Ide* v. *Phœnix Ins. Co.* 2 Biss. 333; *Grant* v. *Lexington F. L. & M. Ins. Co.* 5 Ind. 23, 25; *Mickey* v. *Burlington Ins. Co.* 35 Iowa, 174, 180. In the case last cited it was properly said that it would be contrary to justice for the insurance company to hold out the hope of an amicable adjustment of the loss, and thus delay the action of the insured, and then be permitted to plead this very delay, caused by its course of conduct, as a defense to the action when brought.

00] We are of opinion that the court erred in sustaining the demurrer to the amended bill.

The decree is reversed with directions for such further proceedings as may be consistent with this opinion.

00] J. H. ALLEN ET AL., *Appts.*,
v.
HELENA HANKS.

(See S. C. Reporter's ed. 300-312.)

Husband's interest in wife's property—when can be sold on execution—equity jurisdiction to remove or prevent cloud on title.

1. In Arkansas a husband has no interest in his wife's property conveyed to her since the Constitution of that State of 1868, the deed of which has been recorded under the Act of 1873, which can be seized and sold for his debt contracted since such recording.
2. One in possession of land may ask a court of equity to remove a cloud upon his title or to prevent one being placed thereon, when attempted.

[No. 316.]

Submitted Apr. 30, 1890. Decided May 19, 1890.

APPEAL from a decree of the District Court of the United States for the Eastern District of Arkansas in favor of plaintiff perpetually enjoining the sale of her lands on execution against her husband. *Affirmed.*

The facts are stated in the opinion.

Mr. **Jacob Trieber,** for appellants:

A court of equity will not interfere and grant relief, if there is a full, complete and adequate remedy at law.

New York G. & I. Co. v. *Memphis Water Co.* 107 U. S. 205 (27: 484); *Holland* v. *Challen*, 110 U. S. 15 (28: 52); *Lawrence* v. *Zimpleman*, 37 Ark. 643; *Sturdy* v. *Jackaway*, 71 U. S. 4 Wall. 174 (18: 387); *Parker* v. *Winnipiseogee Lake C. & W. Co.* 67 U. S. 2 Black, 545 (17: 333).

Appellee's husband had under the laws of Arkansas an estate, either by virtue of the marriage or by curtesy initiate, in the lands of his wife.

Berlin v. *Cantrell*, 33 Ark. 618; *Tiller* v. *McCoy*, 38 Ark. 95; *Humphries* v. *Harrison*, 30 Ark. 85.

The construction of a state law by the highest tribunal of that State is binding and conclusive on this court, especially in determining the title to realty.

Thatcher v. *Powell*, 19 U. S. 6 Wheat. 119 (5: 221); *Miles* v. *Caldwell*, 69 U. S. 2 Wall. 35 (17: 755); *Townsend* v. *Todd*, 91 U. S. 452 (23: 413).

The marital rights of the husband became vested at the time of the marriage, and the estate by the curtesy initiate as soon as issue capable of inheriting the estate was born of such marriage, and no subsequent alteration of the law could take them away.

Cooley, Const. Lim. 360; *Tiller* v. *McCoy*, 38 Ark. 91; *Shryock* v. *Cannon*, 39 Ark. 434; *Jones* v. *Freed*, 42 Ark. 357; *Chrisman* v. *Partee*, 38 Ark. 31; *Erwin* v. *Puryear*, 50 Ark. 356.

When in 1859 issue capable of inheriting this estate was born of this marriage, the husband at once acquired an estate by the curtesy initiate or an estate for life, which he could convey without his wife's consent, and which was subject to execution for his debts.

Mattocks v. *Stearns*, 9 Vt. 326; *Roberts* v. *Whiting*, 16 Mass. 186; *Tiller* v. *McCoy*, 38 Ark. 91; *Erwin* v. *Puryear*, 50 Ark. 356.

Lands acquired after the death of the issue are as much subject to the husband's curtesy as those owned by her at the time of the birth.

Guion v. *Anderson*, 8 Humph. 298; *Phillippe* v. *Ditto*, 2 Duv. 549; *Jackson* v. *Johnson*, 5 Cow. 74; *Heath* v. *White*, 5 Conn. 235; 1 Washb. Real Prop. (4th ed.) 178.

When a statute is re-enacted, the construction of that statute, prior to its re-enactment, becomes a part of the statute.

Scruggs v. *Blair*, 44 Miss. 406; *Duramus* v. *Harrison*, 26 Ala. 326; *Galbraith* v. *Galbraith*, 5 Kan. 402; *Gulf, C. & S. F. R. Co.* v. *Fort Worth & N. O. R. Co.* 68 Tex. 98; *Howell* v. *Howell*, 19 Ark. 339; *Berlin* v. *Cantrell*, 33 Ark. 619.

Messrs. **James C. Tappan** and **John J. Hornor,** for appellee:

A chancery court has the power to intervene to prevent the sale of real estate under legal process upon the allegation that such proceeding would culminate in casting a cloud upon complainant's title.

High, Injunc. § 269; *Irwin* v. *Lewis*, 50 Miss. 363; *Pettit* v. *Shepherd*, 5 Paige, 493, 3 N. Y. Ch. L. ed. 801; *Christie* v. *Hale*, 46 Ill. 117;

NOTE.—*Conveyances between husband and wife upheld in equity.* See *note* to Bank of United States v. Lee, 10: 81.

Voluntary deed to wife or child, when good or void, as to creditors. See *note* to Sexton v. Wheaton, 5: 603.

Obligations of married woman, as surety or guarantor for her husband or others; rights as creditor of her husband. See *note* to Bein v. Heath, 12: 416.

As to mortgage on her separate estate to secure husband's debts, see *note* to Lippincott v. Mitchell, 24: 315.

As to wife's separate property, how charged,—see *note* to Dodge v. Knowles, 29: 144.

Hinckley v. *Haines*, 69 Me. 76; *Oakley* v. *Williamsburg*, 6 Paige, 262, 8 N.Y. Ch. L. ed. 978.

It is no objection to the jurisdiction of the chancery court that the sale would confer no title upon the purchaser.

Bank of United States v. *Schulte*, 2 Ohio, 471; *Norton* v. *Beaver*, 5 Ohio, 178; *Key City Gas-Light Co.* v. *Munsell*, 19 Iowa, 305; *Pixley* v. *Huggins*, 15 Cal. 127; *Bennett* v. *McFadden*, 61 Ill. 334; *Vogler* v. *Montgomery*, 54 Mo. 577; *Uhl* v. *May*, 5 Neb. 157.

A court of equity will not interfere to remove a cloud when the title of the adverse claimant is void on its face.

Lawrence v. *Zimpleman*, 37 Ark. 643; *Chapelin* v. *Holmes*, 27 Ark. 414; *Allen* v. *Buffalo*, 39 N. Y. 390; *Marsh* v. *Brooklyn*, 59 N. Y. 282.

The husband, J. M. Hanks, the execution debtor, had no estate in the lands levied upon subject to seizure and sale.

Cooley, Const. Lim. 359, 361.

The Legislature possesses full power to change the rights of the husband in the property acquired by the wife after the passage of the Act.

Moore v. *New York*, 8 N. Y. 110; *Westervelt* v. *Gregg*, 12 N. Y. 208; *Norris* v. *Beyea*, 13 N. Y. 273; *Clarke* v. *McCreary*, 12 Smedes & M. 347; *Tiller* v. *McCoy*, 38 Ark. 91; *Chrisman* v. *Partee*, Id. 81; *Criscoe* v. *Hambrick*, 47 Ark. 285.

Four things are requisite to tenancy by the curtesy, viz.: marriage, actual seisin of the wife, issue and death of the wife.

McDaniel v. *Grace*, 15 Ark. 465; 1 Washb. Real Prop. (3d ed.) 155; *Hathon* v. *Lyon*, 2 Mich. 94; *Thurber* v. *Townsend*, 22 N. Y. 517.

[301] *Mr. Justice* **Harlan** delivered the opinion of the court:

This suit involves the title to certain lands in Arkansas, which the appellee, a married woman, claims to constitute her separate estate, and, as such, not liable for the debts of her husband, James M. Hanks.

By the laws of Arkansas in force when the appellee and her husband were married, it was provided (Rev. Stat. Ark. 1858, Gould's Dig. p. 765, chap. 111) that "any married woman may become seised and possessed of any property, real and personal, by direct bequest, devise, gift or distribution in her own right and name and as of her own property: *Provided*, The same does not come from the husband after coveture" (§ 1); that "before any married woman shall be entitled to the privileges and benefits of the provisions of this chapter, she shall cause to be filed in the recorder's office, in the county where she lives, a schedule of the property derived through her, and no property belonging to any married woman shall be exempt from the payment of any debts contracted by her husband previous to the filing of the schedule aforesaid" (§ 7); and that "whenever the deed, bequest, grant, decree or other transfer of property of any kind to any married woman shall expressly set forth that the same is designed to be held exempt from the liabilities of her husband, such property, with the natural increase thereof, shall be deemed and considered as belonging exclusively to such married woman, under the provisions of this chapter, and shall not be liable to execution or sale for the payment of debts of her husband, whether contracted before or after the accruing of the title of the wife: *Provided*, That no conveyance from any married man to his wife, either directly or indirectly, shall entitle her to any benefits or privileges of this Act" (§ 8). In 1868 a new Constitution was adopted, and among its provisions was one declaring: "The real and personal property of any female in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain the separate estate and property of such female, and may be devised or bequeathed by her, the same as if she were a *feme sole*. Laws shall be passed providing for the registration of the wife's separate property, and when so registered, and so long as it is not intrusted to the management or control of the husband otherwise than as an agent, it shall not be liable for any of his debts, engagements or obligations." Art. XII. § 6.

This was followed in 1873 by an Act (Gantt's Dig. Stat. Ark. 1874, p. 756) providing that "the property, both real and personal, which any married woman now owns or has had conveyed to her by any person in good faith and without prejudice to existing creditors, or which she may have acquired as her sole and separate property, that which comes to her by gift, bequest, descent, grant or conveyance from any person, that which she has acquired by her trade, business, labor or services carried on or performed on her sole or separate account, that which a married woman in this State holds or owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall, notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such debts as may have been contracted for the support of herself or her children by her as his agent" (§ 4193); that "before any married woman shall be entitled to the privileges of this Act in respect to property held by her separately as aforesaid, she shall cause her said separate property to be recorded in her name in the county where she lives or has a residence" (§ 4201); and that "the property of a woman, whether real or personal, and whether acquired before or after marriage, in her own right, shall not be sold to pay the debts of the husband contracted or damages incurred by him before marriage" (§ 4203).

By the Constitution of Arkansas of 1874, it was declared that "the real and personal property of any *feme covert* in this State, acquired either before or after marriage, whether by gift, grant, inheritance, devise or otherwise, shall, so long as she may choose, be and remain her separate estate and property, and may be devised, bequeathed or conveyed by her the same as if she were a *feme sole*, and the same shall not be subject to the debts of her husband." Art. 9, § 7.

The present suit depends upon the construction of these statutory and constitutional pro-

visions, as applied to certain facts disclosed in this case, in respect to which there is no dispute. These facts will now be stated.

James M. Hanks and the appellee were married in the State of Arkansas in the year 1859. During that year a child was born to them, alive, and capable of inheriting. It died in 1862. John F. Hanks, the owner of considerable property, real and personal, in the State of Arkansas, including the lands in dispute, died in 1864, his sole heirs-at-law being his father, Fleetwood Hanks, and his [304] brother, James M. Hanks, the husband of appellee, and his sister, Ann A. Porter, the wife of William Porter. Fleetwood Hanks took a life interest in the estate left by his son, James M. Hanks and Mrs. Porter inheriting subject to that interest. The father died in 1870, whereupon the brother and sister of the decedent became the owners in common of the realty. In 1871 they agreed upon a partition; and James M. Hanks, for the purpose of having the title to his share vested in his wife—he being then perfectly solvent—executed, January 2, 1871, a deed conveying all his interest in the lands so inherited to Mrs. Porter, his wife joining in it for the purpose of relinquishing her dower. At the same time Mrs. Porter, her husband joining with her, conveyed to the appellee what was regarded as one half in value of the lands inherited from John F. Hanks, including those here in controversy. From the date of that deed forward the lands in dispute have been cultivated by James M. Hanks "as agent of his wife and in her name, for her, and not in his own right." The deed from Porter and wife to Mrs. Hanks was filed for record and recorded May 24, 1875, in the county where the lands are situated, and in which the appellee then, and has ever since, resided and had her home; but "no other schedule of it, nor other record, nor intention to claim it as her separate property, was ever filed by her."

On the 14th of October, 1884, the appellants, J. H. Allen, Thomas H. West and John C. Bush, constituting the firm of Allen, West & Bush, recovered in the court below a judgment against W. L. Nelson and James M. Hanks for $14,645.29, with interest at the rate of six per cent per annum from the above date. The judgment was for a debt contracted in 1881. Execution upon that judgment having been levied on the interest of James M. Hanks in the lands in dispute, and the marshal, Fletcher, having advertised the same to be sold in satisfaction of the execution, the appellee brought the present suit, and seeks a decree perpetually enjoining the sale. The appellants, Allen, West & Bush, answered, insisting that James M. Hanks had an interest in the lands subject to their execution. The decree asked by the appellee was entered, and is now here for review. [305] The question to be determined is, whether the appellee's husband has any interest in these lands that may be seized and sold for the debt due Allen, West & Bush, contracted in 1881.

The contention of the appellants is that upon the marriage of the appellee and her husband in 1859, he acquired, at once, a right to take the rents and profits of all lands owned by the wife at any time during coverture, unless the deed or devise under which she held them expressly excluded his marital rights, or unless the property was "scheduled" in conformity with the laws then in force; and, as to the latter, not even then if acquired either directly or indirectly from the husband; that upon issue born of the marriage in 1859, capable of inheriting, he at once acquired an estate by the curtesy initiate or an estate for life, which he could convey without his wife's consent, was subject to execution for his debts, and was not, and could not be, affected by any subsequent change in the law. The contention of appellee is that she owned no property at the time of marriage or at the birth of her child, or when it died; that before she acquired any lands whatever the Married Woman's Law was changed by the Constitution of 1868, so as to vest in her an absolute title to all property subsequently acquired by her, exempt from any estate in the husband that would be subject to seizure by his creditors; that the only limitation upon such right was that she should comply with the Acts of the Legislature passed in reference thereto; and that when the Act of 1873 was passed, and she recorded her deed under its provisions, the real estate acquired by her under the Constitution of 1868 was free from liability for the debts and contracts of her husband.

If the case depended entirely upon the statutes in force prior to the adoption of the Constitution of 1868, it may be that the law would be for the judgment creditors of the appellee's husband, because the provisons of the Revised Statutes of 1858 (Gould's Digest, chap. 111, p. 765), declaring that any married woman might become seised and possessed of property by direct bequest, devise, gift or distribution in her own right and as of her own property, did not apply where the property came from the husband after coverture, or was conveyed by him to his wife directly or indirectly; and also because the appellee did not file in the recorder's office, where she lived, the required "schedule." But we are of the opinion that the Constitution of 1868 made changes in the previous law that had a material bearing upon the rights of the parties. The declaration in that Constitution that the property of any female in the State, acquired before or after marriage, whether by gift, grant, inheritance, devise "or otherwise," should, so long as she chose, be and remain her separate estate and property, and subject to be devised or bequeathed by her as if she were a *feme sole*, placed the property acquired by the appellee after that Constitution went into effect, as between herself and her husband, under her exclusive control (unless the deed or other instrument under which she held it otherwise directed), with power to dispose of the proceeds as she pleased—a power inconsistent with any right in the husband to take the rents and profits. We limit this effect of the Constitution of 1868 to property acquired after its adoption, because that instrument, upon this point, should receive the same construction as the Supreme Court

of Arkansas has given to the Constitution of 1874, namely, that it could not take from the husband any rights *vested* in him prior to its adoption. *Tiller* v. *McCoy*, 38 Ark. 91, 96; *Ward* v. *Ward*, 36 Ark. 586, 588; *Shryock* v. *Cannon*, 39 Ark. 434, 437; *Erwin* v. *Puryear*, 50 Ark. 356, 358.

Did the Constitution of 1868 take from the husband any rights previously vested, in virtue of his marriage, to the lands in dispute? Clearly not. Obviously the appellee had no interest in them at the time of marriage, or at the birth or death of her child, because they were not, at either date, owned by her husband. Nor had she any interest in them at the time of the adoption of that Constitution, except that after the death of John F. Hanks, in 1864, she may, perhaps, have had a contingent right of dower in such real estate as might fall to her husband upon the termination of the life estate of Fleetwood Hanks, and after partition between her husband, James M. Hanks, and his sister, Mrs. Porter. When, in 1871, the title to these lands was conveyed by Porter and wife to the appellee by directions of her husband, the conveyance was necessarily subject to the constitutional provision then in force, that the lands as between herself and husband should constitute her separate property, and, as such, be free from his control. It is true that the lands so conveyed to her did not by the conveyance of 1871 become exempt from liability for the debts of her husband until they were "scheduled," as required by chapter 111 of the Revised Statutes of 1858, which chapter was not, in the matter of scheduling the property of married women (other than property in slaves), superseded by the Constitution of 1868. *Berlin* v. *Cantrell*, 33 Ark. 611, 618; *Tiller* v. *McCoy*, 38 Ark. 91, 95; *Humphries* v. *Harrison*, 30 Ark. 79, 88. But the provision in that Constitution as to the registration of the wife's separate property had reference to its protection against the debts, engagements and obligations of her husband. As between herself and husband, no registration was required or necessary. A law for registration, such as the Constitution of 1868 directed to be passed, was not enacted until 1873, when the Act of that year, already referred to, was passed, declaring, among other things, that any property then owned by a married woman, or which had been conveyed to her by any person in good faith and without prejudice to existing creditors, or which she might have acquired as her separate property, should be and remain her sole and separate property, and might be used, collected and invested in her own name, and should not be subject to the interference or control of her husband, or liable for his debts, except such debts as might have been contracted for the support of the wife or her children by her as his agent. That Act, as we have seen, provided that before any married woman should be entitled to its privileges, in respect to property held by her separately as aforesaid, she should cause her said property to be recorded in her name in the county where she lived or had a residence. When it was passed, the appellee, by virtue of the deed of 1871 by Porter and wife, and of the Constitution of 1868, certainly held the lands in dispute as her separate property; and when the deed to her, under which she acquired title, was recorded in the county where she lived or had a residence, all was done that the Act of 1873 required to be done in order to protect her estate against the creditors of her husband.

[307]

But it is said that, as the conveyance to the appellee in 1871 did not, in express terms, create a separate estate in her favor, the placing it upon record did not meet the requirements of the statutes in force when the Constitution of 1868 was adopted, or of the Act of 1873; and that, in order to protect the property against the creditors of the husband, it was necessary that there be a record of the wife's property distinctly as her separate estate. Such, perhaps, may have been the state of the law in Arkansas prior to the Act of 1873, although there is language in *Tiller* v. *McCoy*, 38 Ark. 91, 96 (which was a case between a married woman and the creditors of the husband) indicating that there was some difference between the recording required by that Act and the "scheduling" provided for in previous statutes. The court, in that case, said: "Appellee did not schedule her land as required by the Act in Gould's Digest (chap. 111, p. 765), and she held it by inheritance, and not by any conveyance or bequest, etc., showing that it was to be exempt from liability for her husband. Nor did she cause the land to be recorded in her name as required by the Act of April 28, 1873." This language implies that some distinction was made between the recording required in the Act of 1873 and the "scheduling" prescribed in previous statutes. Be this as it may, the Constitution of 1868 was itself notice that property acquired by a married woman after its adoption, whether by gift, grant, inheritance, devise "or otherwise," should be and remain, so long as she chose, her separate estate; and when the deed of 1871 was recorded in 1875, all had notice of record that, if that deed be interpreted in the light of the Constitution in force when it was executed, the property described in it was, by force of that instrument, the separate estate of Mrs. Hanks, until by conveyance or in some other mode she choose that it should not remain her separate property. The effect of the Constitution of 1868, and of the Act of 1873, in respect to property acquired by a married woman after the adoption of the former and after the passage of the latter, was to make that property her separate estate as between herself and her husband, whether the deed conveying the title to her was recorded or not; and, as between her and the creditors of her husband, from the time the property so held by her separately was recorded in her own name in the county where she lived or had a residence. It was so recorded in 1875. If, as between the appellee and her husband, the latter could not, of right, take the rents and profits of the wife's land, it is not perceived that he had any interest that could be seized by his creditors, at least after the deed of 1871 was recorded in the proper county.

When to these considerations is added the fact that the deed under which the appellee claims was recorded after the Constitution of 1874 took effect, and long before the debt of Allen, West & Bush was contracted, there would seem to be no just ground for the claim that her property is liable to be sold for that debt. It may be also observed that, while the Constitution of 1874 is not to be so construed as to devest the husband of any right previously vested in him, we see no reason why the appellee, as between herself and the appellants, may not invoke the protection of the clause in that instrument exempting the wife's property, whenever and in whatever mode acquired, from the debts of her husband. The husband, as between himself and his wife, had no vested right in these lands when the Constitution of 1874 was adopted, nor, indeed, any interest subsequent to the execution, by his direction, of the deed of 1871, the effect of which deed was, as we have seen, to create a separate estate for her in the property conveyed.

It is contended, however, that the Constitution of 1868 could not devest the appellee's husband of his marital rights in respect to the property that he caused to be conveyed to his wife in 1871. This contention proceeds upon the ground that immediately upon marriage and birth of issue, an estate by the curtesy vested in the husband, not only in the real property then owned by the wife, but in such as she might acquire at any time during coverture; and that no constitutional or statutory provision could affect his rights, in this respect, even as to property acquired by the wife after the change in the law. We do not concur in this view. It is not sustained by any decision of the Supreme Court of Arkansas to which our attention has been called, or of which we have any knowledge. On the contrary, the cases above cited, while holding that the Constitution of 1874 could not affect any interest vested in the husband prior to its adoption, concede, by necessary implication, that in all other respects that Constitution would control every acquisition of property by a married woman after its adoption. When the Constitution of 1868 was adopted, the appellee's husband could have no estate by the curtesy in lands not then owned by her; for, as was said by the Supreme Court of Arkansas in *McDaniel* v. *Grace*, 15 Ark. 465, 483, except when from the nature and circumstances of the real property of the wife she may be regarded as constructively in possession (as where it consists in wild lands, or it is impossible or impracticable to enter upon them), marriage, actual seisin of the wife, issue, and death of the wife, are all requisite to create an estate by the curtesy; and that the husband was not entitled to his curtesy, according to the common law, unless the wife was seised in fact and in deed. *Mercer* v. *Sheldon*, 42 U. S. 1 How. 87, 54 [11: 38, 45]; *Davis* v. *Mason*, 26 U. S. 1 Pet. 503, 507 [7: 239, 240]; 4 Kent, Com. 29, 30. There was, upon the part of the wife, no seisin of the lands in dispute until 1871, when the title came to her. That it is competent for the State, in its fundamental law or by statute, to provide that all property thereafter acquired by or coming to a married woman shall constitute her separate estate, not subject to the control, nor liable for the debts, of the husband, and that such regulations do not take away or impair any vested right of the husband, is, in our judgment, a proposition too clear to require argument or the citation of authorities to support it. Upon the whole case, we are of opinion that the appellee's husband has no interest in the lands in dispute that may be taken under the execution of the appellants, Allen, West & Bush. The decree in her favor was therefore right, unless, as contended, the appellee has sufficient remedy at law for the protection of her rights. It is not sufficient that she has a remedy at law; "it must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce* v. *Grundy*, 28 U. S. 3 Pet. 210, 215 [7: 655, 657]; *Watson* v. *Sutherland*, 72 U. S. 5 Wall. 74 [18: 580]. Now, what remedy at law is adequate to the relief she seeks, and to which she is entitled if these lands constitute her separate estate and may not be taken for her husband's debts? She is in possession, and therefore cannot bring ejectment. Must she remain inactive while the sale proceeds, and until the purchaser obtains and has recorded the marshal's deed to her lands, and then bring an action to have the deed canceled and the sale set aside, as clouds upon her title? It needs no argument to show that the existing levy upon the appellee's land constitutes itself a cloud upon her title, which, if not removed and the proposed sale prevented, will injure the salable value of the lands, and otherwise injuriously affect her rights. In *Orton* v. *Smith*, 59 U. S. 18 How. 263, 265 [15: 393, 394], the right of those who have a clear legal and equitable title to land, connected with possession, to claim the interference of a court of equity to give them peace, or dissipate a cloud on the title, is recognized. And such is the established rule in Arkansas, where the general distinction between the functions of courts of law and equity has been maintained. In *Branch* v. *Mitchell*, 24 Ark. 431, 439, the court said: "When a party has the only or the better *legal* title to land, as against that which he wishes to put at rest, he may obtain or regain possession by an action of ejectment, if he is out of possession; and it is reasonable that equity should decline to interfere where he may obtain all the relief he needs at law. If he is *in* possession, then, as he can bring no action at law, it has been held that he may ask the court of equity to remove a cloud upon his title, which makes it less valuable, and may prevent his disposing of it to others." The same principle is recognized in *Miller* v. *Neiman*, 27 Ark. 233; *Chaplin* v. *Holmes*, Id. 414, 417; *Crane* v. *Randolph*, 30 Ark. 579, 585. In *Pettit* v. *Shepherd*, 5 Paige, 493, 501, 3 N. Y. Ch. L. ed. 801, 805, the chancellor said: "If a court of chancery would have jurisdiction to set aside the sheriff's deed which might be given on a sale, and to order the same to be given up and canceled, as forming an improper cloud upon the complainant's title to his

310]

farm, it seems to follow, as a necessary consequence, that the court may interpose its aid to prevent such a shade from being cast upon the title, when the defendant evinces a fixed determination to proceed with the sale." "It is better," the court said in *Gerry* v. *Stimson*, 60 Me. 186, 189, "to prevent the creation of a fictitious or fraudulent title, than to compel the cancellation or release after it has been created." So in *Hinchley* v. *Greany*, 118 Mass. 595, 598: "The plaintiff is not required to wait until somebody obtains a title under a sale before he can seek his remedy. Even when this remedy [which in that case was a petition summoning the defendant to show cause why he should not bring an action to try his title] may be availed of under the statute, it is not necessarily so adequate and complete as to supersede the remedy in equity." *Irwin* v. *Lewis*, 50 Miss. 363, 368; *Christie* v. *Hale*, 46 Ill. 117, 122; *Merriman* v. *Polk*, 5 Heisk. 717, 718; *Jones* v. *De Graffenreid*, 60 Ala. 145, 151.

For the reasons stated, we are of opinion that the relief asked was properly granted.

Decree affirmed.

ROBERT HAMILTON, *Plf. in Err.*,
v.
THE LIVERPOOL AND LONDON AND GLOBE INSURANCE COMPANY OF GREAT BRITAIN.

(See S. C. Reporter's ed. 242-256.)

Stipulation in policy of insurance as to ascertaining amount of loss, when valid—construction of correspondence, question for the court—breach of stipulation, effect of.

1. A stipulation in a policy of insurance, not ousting the jurisdiction of the courts, but leaving the general question of liability for a loss to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is valid.
2. Where the question whether the defendant has duly requested, and the plaintiff has unreasonably refused, to submit to such an appraisal and award as the policy called for, does not depend in any degree on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, the question is one of law, to be decided by the court.
3. Where the insurance company defendant has requested in writing, and the plaintiff, the insured, has declined, the appraisal provided for in the policy, the plaintiff cannot maintain an action for the loss.

[No. 326.]

Argued May 2, 1890. Decided May 19, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio to review a judgment for defendant in an action to recover a loss on a policy of insurance against fire. *Affirmed.*

Statement by *Mr. Justice* **Gray**:

This was an action upon a policy of insurance, numbered 2,907,224, against fire for a year from September 5, 1885, upon a stock of tobacco in the plaintiff's warehouse at 413 and 415 Madison Street in Covington in the State of Kentucky. Among the printed "conditions relating to the methods of adjustment of loss and the payment thereof," were the following:

The tenth condition, after provisions relating to proofs of loss, certificate of a magistrate, submission to examination on oath and production of books and vouchers and certified copies of lost bills and invoices, further provided: "When property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, [243
separating the damaged from the undamaged; and shall cause an inventory to be made and furnished to the Company of the whole, naming the quantity, quality and cost of each article. The amount of sound value and of the loss or damage shall be determined by agreement between the Company and the assured; but if at any time differences shall arise as to the amount of any loss or damage, or as to any question, matter or thing concerning or arising out of this insurance, every such difference shall, at the written request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement; and the award in writing of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter or thing so submitted, but shall not decide the liability of this Company; and until such proofs, declarations and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the Company of the property insured, but the Company reserve the right to take the whole or any part thereof at its appraised value."

By the eleventh condition, "it is furthermore hereby expressly provided and mutually agreed that no suit or action against this Company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until after an award shall have been obtained fixing the amount of such claim in the manner above provided."

The answer put in issue the amount of loss; and set up that the plaintiff had not performed the conditions of the policy on his part, but had refused to submit a difference between the parties, as to the amount of loss, to appraisal and award as provided in the policy; and, against the defendant's protest, had sold the property insured, and deprived the defendant of its right under the policy to have an appraisal made and to take the property or any part thereof at its appraised value, and had thereby waived the right to recover under the policy.

At the trial, the plaintiff offered evidence tending to prove the execution of the policy; [244
a loss by fire on April 16, 1886, occasioned by the tobacco becoming saturated and im-

pregnated with smoke, and thereby greatly damaged, and proofs of loss, in accordance with the policy. The only other evidence introduced was a correspondence between the parties at Cincinnati, the material parts of which were as follows:

April 23, 1886,—defendant to plaintiff: "If any claim for loss is to be made under policy No. 2,907,224 of this Company, you will be expected to conform strictly to the conditions of said policy respecting the method of presenting claims for loss; and no conditions of the policy, or rights of the Liverpool and London and Globe Insurance Company thereunder, are in any manner waived or abandoned by that Company. You will, of course, understand the necessity of not removing or disposing of any part of said stock, upon which loss is proposed to be claimed, pending the settlement of the claim, unless by agreement with the insurance companies."

April 24, 1886,—plaintiff to defendant: "It is necessary that I should have the room in which the property now is for the purpose of prosecuting my business. I propose to the Company, furnishing it with the invoice of the cost or value of the property before the loss, to send the entire stock to be sold at auction." "If this is not assented to by the Company, I shall be obliged to remove the property from my warehouse and put it in storage; and, in my judgment, the expense attending it and the disposition of it will considerably increase the amount of the loss. The property is ready for examination by your Company. I desire that such examination as you wish to make shall be made at once, and that you will advise me forthwith whether you assent to the sale of the property by public auction in the manner proposed, as the fairest and most satisfactory mode of ascertaining its present value."

April 24, 1886,—defendant to plaintiff: "This Company will be pleased to have your claim presented in due course and form, giving" (among other things) "the amount of loss or damage you claim on the whole, and [145] also as against this Company, as it may be necessary to have the stock appraised by disinterested appraisers after receipt of proofs. We cannot consent to its removal, unless it be at your own expense. It should, if possible, be left where it is, though there can be no objection to your removing it to some other warehouse at your own expense, where it can be readily inspected by appraisers. We cannot consent to your disposal of it by sale. The matter of determining the value or damage will be one for mutual conference and agreement."

April 26, 1886,—plaintiff to defendant: "I inclose proof of loss under policy of your Company, with invoice attached, in compliance with the requirement of the policy." "The property described and damaged has been invoiced and arranged, and is ready for examination by your Company. Such examination must be made at once, for the reason that I am obliged to occupy the premises in the prosecution of my business, and each day of delay involves considerable loss and expense to me. As before advised, I propose to send the entire stock to be sold at public auction in a few days, whereof I will give you notice. It can be readily inspected in a short time where it now lies."

April 27, 1886,—defendant's agent to plaintiff: "I beg to acknowledge receipt of papers purporting to be proofs of loss under our policies 2,907,224 and 2,823,517. The same will have prompt examination and attention. Noting your purpose soon to sell the stock, permit us to say that we protest against such disposition of it at this stage, and against this *ex parte* way of determining the loss sustained. Conditions of our policy provide the manner and mode of determining the loss or damage; and we hereby formally demand an appraisal of the stock, as to value and damage, under each policy, each party to name a competent and disinterested party."

April 27, 1886,—plaintiff's counsel to defendant: "Mr. Hamilton is obliged, for the prosecution of his business, to remove at once the property covered by the insurance from his factory in which the property was insured." "I do not find any provision in your policy restricting the assured, under such circumstances, from removing or selling the damaged property. If you claim [2 that any such provision has that force, I should be glad if you should at once call my attention to it." "The property covered by the policy above referred to will require at least two weeks from this date to remove and bring to sale, and during that time it will be subject to whatever examination you may wish to make." "It does not occur to me that there can be any impediment in ascertaining the amount of the loss by an arbitration, in the manner provided by the policy, from the course which Mr. Hamilton indicates that he proposes to pursue."

April 28, 1886,—defendant to plaintiff's counsel: "It may be sufficient to point out that the appraisement provided by the terms of our policies, in the printed clause referred to, contemplates the possibility of the Company exercising the right therein reserved to take the property or any part thereof 'at its appraised value.' A sale of the property prior to such appraisement would deprive the Company of this right. We have refused and still refuse to consent to any disposition of the property, prior to the appraisement, or to any *ex parte* method of fixing the amount of the loss, which our policies provide shall be determined 'by agreement between the Company and the assured,' and by appraisement in case of difference. As to the removal of the property, your client has stated that the loss would thereby be materially increased. You will understand, therefore, that such additional loss would necessarily be borne by him and not by the Company, whose protest against such removal has been made. The proposed removal is expressly designed by Mr. Hamilton for his own advantage in the ordinary prosecution of his business, and the indemnity furnished by insurance does not extend to losses sustained in that direction. We protest against this removal, furthermore, because it takes away from the view of the appraisers the actual surroundings, location and condition of the property at the time difference of opin-

ion arose, and would thus materially affect the judgment if the appraisers as to the loss sustained. We ask you for a direct answer to our request for an appraisement, and desire that any further communication be directed to that point only. You will please take notice that any disposition of the property by sale prior to the appraisement will be understood and accepted by us as a refusal upon the part of your client to permit such appraisement and as a relinquishment of all claims under the policies of this Company."

April 28, 1886,—defendant and other insurance companies to plaintiff: "The undersigned, representing the several insurance companies against which you have made claim for loss under their respective policies of insurance upon stock in your tobacco factory, Nos. 413 and 415 Madison Street, Covington, Ky., claimed to have been damaged by fire on April 16, 1886, beg leave jointly to take exception to the amount of claim made, and to demand that the question of the value of and loss upon the stock be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance under which claim is made; and we hereby announce our readiness to proceed at once with this appraisement, so soon as your agreement to the demand is declared. We further desire jointly to protest against the removal, sale or other disposition of the property, until such an appraisement has been had, and to notify you that the insuring companies will in no way be bound by such *ex parte* action."

April 29, 1886,—plaintiff's counsel to defendant and other insurance companies: "Mr. Hamilton is not endeavoring to obtain any unfair advantage or unfair adjustment of his loss against the companies. He has believed that, in view of the fact that the traffic in tobacco is so large in this city, and substantially all of it, at least ninety-nine per cent of the leaf-tobacco business, is transacted by sale at public auction, that a sale of this tobacco presented the fairest mode of ascertaining its actual value as it stands. It is in substance and effect an appraisement in detail of every package by the entire trade in this City. But in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco, to act as arbitrator in your behalf, Mr. Hamilton will accede to your proposition, upon the express understanding that the arbitrators selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award." "If the proposed arbitration is satisfactory, will you at once inform me of the arbitrator selected by you and submit to me the form of agreement of arbitration which you propose? Mr. Hamilton will do the like in respect to the arbitrator selected by him."

April 30, 1886,—defendant and other insurance companies to plaintiff's counsel: "We must insist upon arbitration, in accordance with the terms of our several contracts, without importing into it any conditions as to the sale of the property. Such conditions would be incompatible with the provisions of our several policies of insurance and the rights of the insuring companies thereunder. As soon as Mr. Hamilton indicates his readiness to proceed with the arbitration called for, we will submit the name of an arbitrator, and also a form of agreement for arbitration."

April 30, 1886,—plaintiff's counsel to insurance companies: "Mr. Hamilton, and I in his behalf, deny that the arbitration in the manner indicated is in violation of the terms of any of the policies, or imports any condition into it which the insured is not entitled to insist upon, or which is incompatible with the provisions of the several policies of insurance or the rights of the insurance companies thereunder. Mr. Hamilton is ready, and has directed me to express his readiness, to proceed at once with an arbitration, which, as he understands it, is in substantial compliance with the arbitration provided for in all the several policies." "I wish to say that, as I understand the expression in my letter of the 29th, that 'it' (the tobacco) 'shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award,' does not in any wise call upon the companies to consent to a sale of the property. Mr. Hamilton is quite ready to take upon himself the responsibility of selling it. It simply requires that the arbitration shall be commenced before the sale, when the arbitrators may have an opportunity of examining the property, and that the award shall not be made until after the sale has taken place and the assured has had an opportunity to submit the result of it, with other competent evidence, to the arbitrators before the award is made." [249

May 3, 1886,—insurance companies to plaintiff's counsel: "We herewith inclose a form of agreement for 'submission to appraisers,' which is in practical accordance with the conditions of the policies of the several companies, and which all the companies are willing to sign and abide by the award reached thereunder. We must again decline to entertain your proposition that the arbitrators, after examining the stock, shall postpone their award until after the stock shall have been sold, when the result of such sale, with other evidence, shall be submitted to the arbitrators. We insist that the arbitration provided for in such case by our policies is in no sense a court for the hearing of evidence. The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information, and the forming of their own judgments as to the value and damage of the goods; but we insist that under the conditions of the several policies there can be no abandonment of the stock to the companies, and that after an award has been reached the companies have the right to take the stock in whole or in part at their appraised value. The compa-

nies propose to stand upon the conditions of their policies, and decline all propositions looking to a waiver thereof, or adding new and inconsistent conditions thereto."

The principal part of the form of submission to appraisers inclosed in this letter was as follows: "It is hereby agreed by Robert Hamilton of the first part, and the several insurance companies, by their representatives, whose names are hereunto affixed, of the second part, that—— ——and—— —— shall appraise and estimate the loss by fire of April 16, 1886, upon the property of Robert Hamilton, as specified below and as hereinafter provided. In case of disagreement [250] said appraisers shall select a third, who shall act with them in matters of difference only. The award of said appraisers or any two of them, made in writing in accordance with this agreement, pursuant to the terms of the policies, shall be binding upon both parties; but it is understood that this agreement and appraisement are only for the purpose of fixing the sound value of the property before the fire, and the loss or damage thereon occasioned by said fire, and shall not waive, invalidate or terminate the right of the insurers to take said property at its appraised value, or any other rights of either party hereto, but the same are to be construed solely by reference to said policies."

May 4, 1886,—plaintiff's counsel to insurance companies: "There can be no misunderstanding as to the position taken by the companies and the assured in this matter. (1st) I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made. This Mr. Hamilton declines to do. (2d) Mr. Hamilton is willing that the companies jointly, or as they may arrange between themselves, shall make their own appraisement through their own appraisers of the value of the stock, and that they shall jointly, or either of them with the consent of the rest, have the right to take the stock, in whole or in part, at their appraisal. (3d) Mr. Hamilton has made and makes no claim to abandon the property, and he has made and makes no claim that the companies shall consent to the sale by him of the damaged stock."

Inclosed in this letter, and signed by the plaintiff's counsel, was the following: "To the Liverpool and London and Globe Insurance Company and the companies jointly acting with it in respect to the loss sustained by Robert Hamilton on the property in Nos. 413 and 415 Madison Street, Covington, Ky.: Mr. Hamilton demands of the several insurance companies an arbitration of the amount of the loss sustained upon the goods covered by fire on the 16th of April, and will select [251] an arbitrator to represent him in pursuance of the provisions of the policy, it being stipulated in the agreement for arbitration that the several companies and the assured shall be duly notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, as well as personally examine the damaged goods, in considering and awarding the amount of the loss."

May 5, 1886,—insurance companies to plaintiff's counsel: "Your communication of the 4th is at hand. We have nothing to add to our letter of the 3d; and if, as we are made to understand, Mr. Hamilton declines to consent to a form of 'submission to appraisers' that does not provide for the introduction of 'all competent legal testimony that may be offered by either party' (under which provision, as you have repeatedly declared, Mr. Hamilton would seek to present evidence based on a sale of the property), we must accept your communication as a refusal to comply with our request and with the conditions of the policies of insurance, which are clearly incompatible with your wishes in the matter."

May 7, 1886,—insurance companies to plaintiff's counsel: "Referring to your letter of the 4th, setting forth your understanding of the position taken by the two parties, permit me, on behalf of the companies, to take exceptions to your first statement, to wit: 'I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made.' This does not correctly state our position, which remains now as stated in our communication of the 3d, to wit: 'The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information.' What we do object to and protest against is the sale of the goods, or the consideration by the appraisers of evidence founded on that fact or result. If the form of 'submission to appraisers' we submitted contains any provision or condition limiting or defining the duties of the appraisers and not prescribed by the several policies, each company will submit its own form, as we desire and demand a submission free from any conditions imposed by either party."

May 8, 1886,—defendant to plaintiff's counsel: "On behalf of the Liverpool and London and Globe Ins. Company, we demand an appraisal of the value of and damage to the goods insured under our policies Nos. 2,823,517 and 2,907,224, issued to Robert Hamilton, of Covington, Ky., as the same could not be determined by mutual agreement between us, and we take exceptions to the amount of loss and damage as stated in your claim. We herewith submit a form of agreement of submission to appraisers which we deem in strict accordance with the terms and conditions of our policies, and upon your assent thereto will be prepared to name our appraiser."

The form inclosed in this letter did not materially vary from that inclosed in the letter of May 3, 1886.

May 10, 1886,—plaintiff's counsel to defendant: "In view of the number and di-

verse povisions of the several policies upon Mr. Hamilton's property, and of what has transpired, I do not conceive that the several companies are now entitled each to demand a separate submission to arbitration by Mr. Hamilton. It does not seem to me that any provision in the policies of your Company provides for a submission to appraisers in the manner expressed in the form of agreement inclosed; and I have already expressed in the correspondence, upon the joint demand of all the companies, my reasons for this opinion, and my objections to this form of submission."

May 13, 1886,—defendant to plaintiff: "Objecting to the amount of your claim for loss and damage under policies 2,823,517 and 2,907,224, we demand, according to condition 10 of the policies, that the differences which have arisen between us as to sound value and loss or damage to the goods covered by said policies shall be submitted, at equal expense between us, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall elect an umpire to act with them in case of their disagreement. We name as our appraiser Wm. Spear, of St. Louis, and upon the naming of your appraiser we will meet you to sign an agreement embodying the provisions of our policies without any conditions. Please take notice that this Company reserves the right to take the whole or any part of the property insured at its appraised value; and you are further notified that until such an appraisal is permitted and had, our loss, if any, will not be payable."

May 15, 1886,—plaintiff's counsel to defendant: "Mr. Hamilton adheres to the position taken by him in the joint correspondence between the insurers and Mr. Hamilton and myself in his behalf. Mr. Hamilton has acted upon the conclusion reached in that correspondence, and I do not understand that your Company proposes to change its own attitude as taken in that correspondence."

May 20, 1886,—plaintiff's counsel to defendant,—inclosing a notice in a newspaper of the sale by auction on May 29, 1886, at the plaintiff's warehouse in Covington, of the tobacco insured by the policy in suit.

June 3, 1886,—plaintiff's counsel to defendant: "Mr. Hamilton has disposed of the property claimed to have been damaged in the fire of April 16, by sale at public auction, in pursuance of the notice communicated to your Company. If your Company really desire to submit to arbitration the question of the amount of loss sustained by Mr. Hamilton, notwithstanding all that has transpired, Mr. Hamilton is quite ready now to submit that question to competent and impartial arbitrators. He simply demands, the arbitrators being chosen, that in the agreement for submission it shall be provided that the Company and the assured shall be notified of the time of the hearing of the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, and that a reasonable time shall be prescribed within which an award shall be rendered."

June 7, 1886,—defendant to plaintiff's counsel: "As you have, in spite of our protest, sold and scattered the goods so that an appraisement within the terms of our policies is now impossible, and have thereby deprived us of our right to take the property or any part thereof at its appraised value, we must accept your action as a refusal to accede to our demand for submission of the differences that have arisen between us. By the course pursued Mr. Hamilton has, in our judgment, waived any rights he may have had under the policies, and this Company will stand upon its legal rights in the premises."

The court, after the case had been argued, instructed the jury that it appeared from the evidence that the defendant requested the plaintiff in writing to submit the amount of his loss or damage under the policy to competent and impartial persons, and the plaintiff refused so to do; and instructed the jury to return a verdict for the defendant, which was acccordingly rendered. The plaintiff excepted to these instructions, and, after judgment on the verdict, sued out this writ of error.

Mr. **Joseph Wilby** for plaintiff in error.

The court declined to hear counsel for defendant in error, *Messrs. Charles H. Stephens, Channing Richards, Thos. B. Paxton, Ledyard Lincoln, Rufus King* and *S. J. Thompson*, who filed briefs.

Mr. Justice **Gray** delivered the opinion of the court:

The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the Company; that the Company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the Company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action.

Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. *Scott* v. *Avery*, 5 H. L. Cas. 811; *Viney* v. *Bignold*, L. R. 20 Q. B. Div. 172; *Delaware & H. Canal Co.* v. *Pennsylvania Coal Co.* 50 N. Y. 250; *Reed* v. *Washington F. & M. Ins. Co.* 138 Mass. 572, 576; *Wolff* v. *Liverpool & L. & G. Ins. Co.* 50 N. J. L. 453; *Hall* v. *Norwalk F. Ins. Co.* 57 Conn. 105, 114. The case comes within the general rule long ago

laid down by this court: "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so." *United States* v. *Robeson*, 34 U. S. 9 Pet. 319, 327 [9: 142, 145]. See also *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549 [29: 255].

Upon the evidence in this case the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and award as the policy called for, did not depend in any degree (as in *Uhrig* v. *Williamsburgh City F. Ins. Co.*, 101 N. Y. 362, cited for the plaintiff) on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law to be decided by the court. *Turner* v. *Yates*, 57 U. S. 16 How. 14, 23 [14: 824, 829]; *Bliven* v. *New England Screw Co.* 64 U. S. 23 How. 420, 433 [16: 510, 513]; *Smith* v. *Higgins*, 12 Gray, 251.

[256] That correspondence clearly shows that the defendant explicitly and repeatedly in writing requested that the amount of the loss or damage should be submitted to appraisers in accordance with the terms of the policy; and that the plaintiff as often peremptorily refused to do this, unless the defendant would consent, in advance, to define the legal powers and duties of the appraisers (which the defendant was under no obligation to do), and that the plaintiff throughout, against the constant protest of the defendant, asserted, and at last exercised, a right to sell the property for the completion of an award according to the policy, thereby depriving the defendant of the right, reserved to it by the policy, of taking the property at its appraised value, when ascertained in accordance with the conditions of the policy.

The court therefore rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that the plaintiff therefore could not maintain this action. If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented.

Judgment affirmed.

SAMUEL NORRIS, *Appt.*, [3
v.
JAMES B. HAGGIN ET AL.

(See S. C. Reporter's ed. 386-393.)

Statute of Limitations in equity cases—laches, when a bar—concealment of fraud, effect of on laches.

1. A court of equity is governed by the analogies of the Statute of Limitations of a court of law.
2. Where the object of a suit is to do what could be done at law, namely, recover possession of real estate, and the plaintiff is guilty of the laches which a court of equity regards equivalent to the Statute of Limitation, such unexplained delay is a bar to the suit.
3. Although time does not begin to run against a party on whom fraud has been committed until that fraud has been discovered, yet, to avoid the lapse of time or Statute of Limitation, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment.

[No. 333.]

Submitted May 2, 1890. Decided May 19, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of California dismissing, on demurrer, a suit in equity to set aside certain conveyances for fraud and for an account of the rents and profits. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. H. McKune**, for appellant:

The rule that in cases of fraud the Statute of Limitations begins to run only from the time of the discovery of the fraud, will not apply when the party affected by the fraud might with ordinary diligence have discovered it. But the failure to use such diligence may be excused when there exists some relation of trust and confidence, as principal and agent, client and attorney, *cestui que trust* and trustee, between the party committing the fraud and the party who is affected by it, rendering it the duty of the former to disclose to the latter the true state of the transaction, and when it appears that it was through confidence in the acts of the party who committed the fraud that the other was prevented from discovering it.

Vigus v. *O'Bannon*, 118 Ill. 346; *Atlantic Nat. Bank* v. *Harris*, 118 Mass. 147-152; *Harrisburg Bank* v. *Forster*, 8 Watts, 12-18; *Wear* v. *Skinner*, 46 Md. 257; *Wilson* v. *Ivy*, 32 Miss. 233; Bigelow, Frauds, 445; *Bricker* v. *Lightner*, 40 Pa. 199; *Way* v. *Cutting*, 20 N. H. 187; *First Mass. Turnp. Corp.* v. *Field*, 3 Mass. 201; *Livermore* v. *Johnson*, 27 Miss. 284.

Messrs. **Louis T. Haggin and S. C. Denson**, for appellees:

The parties to an action cannot impeach or set at naught the judgment, in any collateral proceeding, on the ground that it was obtained through fraud or collusion.

NOTE.—*As to limitation of time in equity cases*, see *note* to Pratt v. Carroll, 3: 627; also *note* to Thomas v. Brockenbrough, 6: 287.

Length of time no bar to a trust. See *note* to Prevost v. Gratz, 5: 311; also *note* to Thomas v. Brockenbrough, 6: 287.

As to Statute of Limitations in cases of fraud in equity, see *note* to Stearns v. Page, 12: 998.

Union Trust Co. v. *Rochester & P. R. Co.* 29 Fed. Rep. 609; *Allison* v. *Chapman*, 19 Fed. Rep. 488; *Anderson* v. *Anderson*, 8 Ohio, 109; *The Acorn*, 2 Abb. U. S. 444; *Christmas* v. *Russell*, 72 U. S. 5 Wall. 304 (18: 479) *et seq.*; *Gunn* v. *Plant*, 94 U. S. 669 (24:306); *Mason* v. *Messenger*, 17 Iowa, 272; *Smith* v. *Smith*, 22 Iowa, 518; *Hayes* v. *Shattuck*, 21 Cal. 52; *Mayo* v. *Foley*, 40 Cal. 282; Bigelow, Frauds, 170; Story, Eq. Jur. § 1575; Wells, Res. Adjud. §§ 6, 468, 469; Rorer, Jud. Sales, § 466 *et seq.*; Bigelow, Estop. 133, 135, 137.

Appellant has been guilty of such laches as disentitles him to any relief in equity, and his claim is also barred by the Statute of Limitations.

Laches and neglect have always been discountenanced in courts of equity.

7 Wait, Act. and Def. 229; *Badger* v. *Badger*, 69 U. S. 2 Wall. 87 (17: 836); *New Albany* v. *Burke*, 78 U. S. 11 Wall. 96-107 (20: 155-159); *Manning* v. *San Jacinto Tin Co.* 7 Sawy. 430; *Baker* v. *Read*, 18 Beav. 398; *Farnam* v. *Brooks*, 9 Pick. 212; *Sullivan* v. *Portland & K. R. Co.* 94 U. S. 806 (24: 324).

He who asks the interposition of a court of equity must show that he has been diligent.

Wood v. *Carpenter*, 101 U. S. 135 (25: 807); *Buford* v. *Brown*, 6 B. Mon. (Ky.) 553; *Beckford* v. *Wade*, 17 Ves. Jr. 87; *Bowman* v. *Wathen*, 42 U. S. 1 How. 189 (11: 97); *Boone* v. *Chiles*, 35 U. S. 10 Pet. 223 (9: 404); *Hardy* v. *Harbin*, 4 Sawy. 546; *Nudd* v. *Hamblin*, 8 Allen, 130; *Martin* v. *Smith*, 1 Dill. 85.

A party put by the circumstances on inquiry as to a fact is affected with constructive notice of that fact.

Oliver v. *Piatt*, 44 U. S. 3 How. 333 (11:622); *Wood* v. *Carpenter*, 101 U. S. 135 (25: 807); *Kane* v. *Bloodgood*, 7 Johns. Ch. 110, 2 N. Y. Ch. L. ed. 238; *Broderick's Will Case*, 88 U. S. 21 Wall. 518 (22: 599); *Marquis of Clanricarde* v. *Henning*, 30 Beav. 175; *Bremond* v. *McLean*, 45 Tex. 19; *Kuhlman* v. *Baker*, 50 Tex. 637; *Hardy* v. *Harbin*, 4 Sawy. 546; *Nudd* v. *Hamblin*, 8 Allen, 130; *Buford* v. *Brown*, 6 B. Mon. 553; *Taylor* v. *S. & N. Alabama R. Co.* 13 Fed. Rep. 158.

Mr. Justice **Miller** delivered the opinion of the court:

This is an appeal from the Circuit Court of the United States for the District of California. The plaintiff, Samuel Norris, who is appellant here, brought his suit in the Superior Court of the County of Sacramento, against James B. Haggin and Lloyd Tevis, by way of a bill in chancery. The bill gives a very lengthy account of what the plaintiff calls a "fraud and imposition" practised upon him by the defendants, who had been his agents and attorneys, and who, when he became so enfeebled in mind as to be incapable of understanding his rights or attending to business at all, procured from him conveyances, and mortgages, and other instruments in writing, by means of which they secured the title to over a million and a half dollars' worth of property, principally real estate.

This suit was commenced on the 21st day of August, 1884, and after a demurrer by defendants had been filed in the state court, it was, on their motion, removed into the Circuit Court of the United States for the District of California. There the case was heard on the demurrer, which was sustained by the circuit court and the bill dismissed. 28 Fed. Rep. 275. From the decree dismissing the bill the present appeal is brought.

The statements of the bill are very full and profuse in their recital of the advantages taken, by the defendants, of the plaintiff. He sets out in the amended bill, which was filed in the circuit court, that he was a citizen of the Kingdom of Denmark, and a resident of the Sandwich Islands. That from the 1st day of December, 1849, until the 2d day of April, 1861, he was the owner in fee, in possession and entitled to the possession, of a certain piece or tract of land consisting of 45,000 acres, in the County of Sacramento, on the right bank of the American River, and known as the Rancho del Paso, and more particularly described in a patent from the government of the United States to him, which was duly recorded in the office of the recorder of Sacramento County. That also he was the owner of certain other parcels and lots of ground, the value of which in the aggregate amounted to $1,535,000. He then says that on or about the 1st day of January, 1855, said Haggin and Tevis became, and until a short time prior to the commencement of this suit were, the trusted agents, business managers and attorneys of plaintiff in and about the management of his business affairs connected with said property; that the defendants, for a valuable consideration, promised and undertook to act as his agents and confidential advisers, and that, having faith and confidence in their integrity and ability, he from said first day of January, 1855, to the last of December, 1867, trusted them, and took and acted on their advice in all his business affairs, and counselled with them in all matters of importance, and confided to them all matters pertaining to his affairs. He then states that on the 4th day of March, 1859, he was injured by a severe blow on his head, whereby his senses and faculties were impaired, so that he then and thereby became deaf, and that for several months his hearing was wholly gone, and his left eye became and for several years was sightless. That his [388] nervous system was so far injured by said blow that for several years thereafter he was unable to take refreshing sleep, and for more than ten years thereafter he was unable, and mentally and physically incompetent, to attend in person to his business affairs or comprehend or understand what had been done in or about his said business, or to direct his agents how to act therein.

The specific acts of fraud charged to have been committed against him by the defendants are, mainly, that on the 29th day of April, in the year 1859, while in this unfortunate condition, they procured from him a note for $64,000, with a mortgage upon all his property to secure its payment; that this note was without consideration; that he did not understand it; that it was never read to him; and that, also without his knowledge, they brought suit and foreclosed the mort-

gage by a decree of court, under which they purchased it at the sale, and now have the legal title; also, that they procured other judgments to be rendered against him in favor of other parties, on alleged contracts of which he had no knowledge or recollection, and in which, also, certain of this property was sold and purchased, and came ultimately to the hands of defendants Haggin and Tevis, all of which was through their contrivance. It is further alleged that, in order to make sure of their claim to this property, they procured from defendant on the 23d day of June, 1863, a conveyance, executed and delivered by him to said Tevis, of all the estate hereinbefore described, and also all other lands owned by him in California, which deed was recorded in the proper office on the 10th day of September, 1863.

The bill also alleges that these frauds did not come to his knowledge until a short time before the commencement of this suit, and then only through information derived from his counsel in the case.

There are many things about the bill which are peculiar and calculated to throw suspicion on the claims here asserted. The original bill filed in the state court was afterwards supplemented by two amended bills in the circuit court of the United States. The allegations of these bills are, in the [389] main, the same; but there are some differences in them which are calculated to attract attention. Among these is the fact that in the first amended bill filed in the circuit court of the United States, the execution of the note and mortgage for $64,000 is thus described: "That on the 29th day of April, 1859, your orator became indebted to said defendant Tevis in the sum of $64,000, and on that date gave said Tevis his note, due on demand, for that sum, for the benefit of both defendants; and to secure said note, and on the same date, executed and delivered to said Tevis, for the benefit of both defendants, his certain indenture of mortgage securing the payment of said note by pledge of all the real estate hereinbefore mentioned; that on the 12th day of January, 1860, said Tevis commenced his suit to foreclose said mortgage in the District Court of the Sixth Judicial District; that your orator, if he had at said time been able and competent to transact business and manage his affairs, might easily have arranged to pay and discharge said note without the sacrifice of his property."

In his second amended petition he declares that he knew nothing about the giving of this note; that he was ignorant of the proceedings to foreclose the mortgage; that the whole was a fraud from beginning to end, and that the note was entirely without consideration.

Another feature of the case is that, although there are three bills, including the original and amended bills, each of which purports to be complete in itself, none of them are sworn to either by complainant or by anybody for him; and this is true, although the first and second amended bills *purport* to be bills of discovery, and some fifteen interrogatories are propounded to the defendants by the second amended bill, which they are required to answer under oath. There is also some ambiguity about the length of time during which the plaintiff was in this disabled condition, and there is no clear statement at all of what was the extent and character of that disability. It is not averred anywhere that he was insane.

As to the length of time of the existence of his disability, it is stated in one paragraph of the last amended bill that it existed from the time of his attack in 1859 for [3 something more than ten years, and it is averred, and apparently in accordance with this, as fixing the time of his recovery of capacity to attend to business, "that in the year 1869 he applied to H. O. Beatty, who had in some early cases been his attorney, for information concerning his affairs with defendants, and was advised by him that he could not act for him as he had been employed by the defendants;" and he excuses himself for not seeking other advice or making other investigations, by saying that he was "ignorant of all the facts necessary to lay before an attorney, and could not communicate with a stranger so as to make himself intelligible, and felt himself compelled to accept the status of his affairs as he found them, and was incompetent to investigate and discover for himself the facts and matters hereinbefore recited."

It is to be observed that the facts which it was necessary for him to know in order to institute legal proceedings to recover his rights were those of which he could not well have been ignorant, and with reference to or on account of which he undoubtedly applied to Beatty for advice. These were the facts: that at that time all of his property was in the possession of Haggin and Tevis, who had been receiving the rents and profits, and in their actual use, for five or six years; that the mortgage he had given for $64,000 was on record in the proper office; that the foreclosure proceedings were of record in the court; that all the judgments under which his property was sold were open and notorious, and required only an attorney or person of ordinary capacity to examine them to know their existence, and that if his story, as now stated, of the imposition of the parties upon him were true, he must have known of that fraud, and could easily have ascertained about it, there being no difficulty in examining into the facts, and in obtaining his knowledge of whether he was bound by the proceedings.

We take it for granted, then, that in 1869 the plaintiff had so far recovered his mental faculties as to be aware of the fact that all of his property had passed from him, and was in the possession of the defendants. This, of course, brought to his knowledge the fact that it was all done by fraudulent means, if the story told in his bill is true. It was therefore his duty to at once institute proceedings to correct the wrong done him, and the fact that one lawyer to whom he applied had already been retained by the defendants, instead of being a reason for not proceeding in the matter, was a clear intimation to him

that the defendants expected to contest his right, instead of conceding it, and that it was time he should assert that right in a court of justice.

This principal note and mortgage were executed in 1859. The defendants foreclosed and got possession of the property in 1862. The present suit was brought in 1884, twenty-two years after the foreclosure proceedings, and after the possession by the defendants, everything about it being notorious and open to be known to anybody. And if we can suppose that the plaintiff's mental life was a blank up to 1869, there are still fifteen years of silence and inaction and laches unaccounted for. It is obvious that at that time he had sufficient knowledge to understand that his property had passed from him; that it was in the possession of the defendants; that it was claimed that the transfer was obtained under judicial proceedings, and that he must have known that these proceedings were open to investigation; and yet from that time up to 1884, a period of fifteen years, no movement was made to subject the parties to legal proceedings for relief against the frauds and impositions that had been practised upon him.

No hindrance is suggested during all this time to any action by him. The sole reason given is that, because he could not get Mr. Beatty, he could not get any other lawyer whom he could rely upon, or who could put him in possession of the facts he needed; and this declaration is made in the face of the fact that every step on which the defendants had to rely were mortgages, duly recorded judgments rendered in open court, sales made in public and actual possession for twenty-two years of the property in controversy.

We do not need to rely exclusively on the Statute of Limitations of the State of California, which makes five years the longest period allowed for bringing suit in cases of this kind. It is sufficient to say that as a court of equity is governed by the analogies of the Statute of Limitations of a court of law, and as the object of this suit is to do what generally could be done at law, namely, recover possession of real estate, and as the plaintiff is equally guilty of the laches which a court of equity regards in the same spirit it does the Statute of Limitation, this unexplained delay, after the plaintiff had recovered whatever mental capacity he now has, must stand as a sufficient bar to the successful prosecution of this suit.

Even the principle of a court of equity, that time does not begin to run against a party on whom a fraud has been committed until that fraud has been discovered, can do the plaintiff no good in the present case. That he knew about the fraud, if there was one, in 1869, when he applied to Beatty, who refused to take his case; and that the facts out of which he was bound to know this fraud, if his bill be true, existed, were open, were patent and could not fail to be discovered by any sort of inquiry or investigation,—is so clear that there is no room for the doctrine of his having discovered these facts only a year or two before the suit was brought, or indeed after he had employed counsel.

It is a part of this general doctrine, that to avoid the lapse of time or Statute of Limitation, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of these principles can apply to the defendants in this case. The acts which constituted the fraud as alleged in the bill were open and public acts. The note and the mortgage were recorded in the proper public office of the proper county. The possession of defendants was obtained by judicial proceedings which were open to everybody's examination, and which were probably well known in the entire community. The very circumstance that in 1869 the plaintiff consulted a lawyer upon this subject, shows that he was aware of the fact that defendants were contesting his rights to the property, and that, if he had made any inquiry at all, he must have known of the proceedings on which they rested their title.

Under all the circumstances of the case, we are satisfied that the two judges who held the circuit court were justified in sustaining the demurrer to the bill. *The decree is therefore affirmed.*

THE CORNELL UNIVERSITY and DOUGLASS BOARDMAN, Ex'r., ET AL., *Plffs. in Err.*
v.
WILLARD FISKE ET AL.

(See S. C. Reporter's ed. 152-211.)

Review of state decision—federal question—Cornell University—construction of charter—limit as to property—agreement between State of New York and Ezra Cornell—profits to be made not part of purchase price—gift to the University—State, as custodian—obligation of State—proceeds of sale of lands.

1. This court, in reviewing a decision of a state court, can only consider federal questions.
2. The decision of the New York Court of Appeals that Cornell University had no power to take or hold any more property than $3,000,000, and that the husband, heirs and next of kin of Mrs. Fiske could avail themselves in this case of the fact that the University at her death held property up to the prescribed limit,—does not involve any federal question, but depends on the charter of the University and the state law, and such decision is binding on this court.
3. This court is also bound by the findings of the New York Supreme Court and Court of Appeals that the property of Cornell University exceeded $3,000,000.
4. By the true construction of the agreement of Aug. 4, 1866, between the State of New York and Ezra Cornell, sixty cents per acre was the purchase price of the land scrip sold to him under the New York Act of Apr. 10, 1866, being the same previously donated by the Act of Congress of July 2, 1862, for a college.
5. Under said agreement, the profits to be made by Mr. Cornell, although to be paid into the state

treasury, were no portion of the purchase price of the scrip, but were to be paid in by him as his profits and to be received by the State as a separate fund to be the property of the Cornell University and to be known as the "Cornell Endowment Fund," the income of which was to be paid to the University for its general purposes.

6. By the terms of the agreement, the legal title to the lands located by Mr. Cornell under the scrip was vested in him, on his receiving the patents therefor; and the profits realized from the sale of the lands, beyond the purchase price, were a gift by him personally to the University, and not from him as agent of the State or of the United States.

7. The State became the custodian of such profits, not under the Act of Congress, but under the duty it assumed to take care of the fund as one belonging to the University, and to appropriate the income to its general purposes.

8. The State was under no obligation to treat as falling within the provisions of the Act of Congress any other moneys than those derived from the said sale of such scrip, nor any moneys derived from the sale of the lands which Mr. Cornell, the purchaser of the scrip, should locate and receive patents for.

8. Such Act of Congress was not violated in the transaction between the State and Mr. Cornell, and the moneys and property derived from the sale of the lands by the latter formed part of the $3,000,000 of property held by the University.

[No. 1224.]

Argued April 8, 9, 1890. Decided May 19, 1890.

IN ERROR to the Supreme Court of the State of New York to review the judgment of said court entered Dec. 12, 1888, establishing as its judgment the judgment of the Court of Appeals of New York rendered Nov. 27, 1888, affirming the judgment of the said Supreme Court entered Dec. 14, 1887, reversing the surrogate's decree and adjudging that at the time of the death of Jennie McGraw Fiske the Cornell University had already reached the limit of property prescribed by its charter and was not entitled to and could not take or hold any of the property devised or bequeathed to it by her last will and testament, and had no right, title or interest in or to the same; and that, at her decease, the legal right and title in and to all of the property so devised and bequeated by her to the Cornell University passed to and vested in the appellants according to their several rights therein. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Edwin Countryman, Geo. F. Edmunds** and *Samuel D. Halliday*, for plaintiffs in error:

The state appellate courts erred in holding that such portion of the avails and profits of the sales of land scrip, under the Cornell contract with the State, as were included in what is known as the "Cornell Endowment Fund," was not a part of the trust fund created by the Act of Congress, and was not controlled and regulated by the provisions of the Federal Statute.

The capacity of the United States to contract is co-extensive with the duties and powers of government. Every contract which subserves the performance of a duty may be rightfully

United States v. *Maurice*, 2 Brock. 96, 109, 110; *United States* v. *Tingey*, 30 U. S. 5 Pet. 114 (8: 66); *United States* v. *Bradley*, 35 U. S. 10 Pet. 343 (9: 448); *United States* v. *Hodson*, 77 U. S. 10 Wall. 395, 407 (19: 937, 940); *United States* v. *Linn*, 40 U. S. 15 Pet. 290, 311 (10: 742, 750).

The same principle, in all its plenitude, applies to the State.

Danolds v. *State*, 89 N. Y. 37, 44; *People* v. *Stephens*, 71 N. Y. 527; *McMaster* v. *State*, 108 N. Y. 542.

The grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract binding upon the State.

McGehee v. *Mathis*, 71 U. S. 4 Wall. 143, 155 (18: 314, 318); *Chicago & N. W. R. Co.* v. *Auditor-General*, 53 Mich. 79, 91.

The contract created a trust, setting apart a permanent fund for educational purposes.

Baring v. *Dabney*, 86 U. S. 19 Wall. 1, 9 (22: 90, 94); *Swann* v. *Lindsey*, 70 Ala. 520.

Trusts so declared correspond to those between individuals, and the same remedies will apply.

Sinking Fund Comrs. v. *Walker*, 6 How. (Miss.) 143, 184; 1 Perry, Trusts, § 30.

Everyone competent to enter into a contract, or to deal with the legal title to property, may vest it in trustees for the purpose of carrying out his intention.

1 Perry, Trusts, §§ 28, 287; *Equitable Trust Co.* v. *Fisher*, 106 Ill. 189.

Congress may grant public lands for educational purposes upon such terms and conditions as that body may choose to insert in the grant.

United States v. *Hall*, 98 U. S. 357, 358 (25: 184, 185).

The State has a legal capacity to take and execute trusts for every purpose.

1 Perry, Trusts, §§ 40, 41; *McDonogh* v. *Murdoch*, 56 U. S. 15 How. 367, 415 (14: 782, 753); *Mitford* v. *Reynolds*, 1 Phill. (Ch.) 185, 194.

The trust, irrespective of the Act of Congress, would be sustained as valid in the courts of England and the United States.

Odell v. *Odell*, 10 Allen, 1, and cases cited; *Perin* v. *Carey*, 65 U. S. 24 How. 466 (26: 701); *Vidal* v. *Girard*, 43 U. S. 2 How. 127 (11: 205); *Magdalen College* v. *Atty-Gen.* 6 H. L. Cas. 189; *Philpott* v. *St. George's Hospital*, 6 H. L. Cas. 338.

The courts will enforce the provisions of the trust according to law and the terms of the trust.

2 Perry, Trusts, § 707, and cases cited; *Barnum* v. *Baltimore*, 62 Md. 277, 298, 299; *People* v. *Canal Board*, 55 N. Y. 390; 2 Dillon, Mun. Corp. §§ 567, 909, and cases cited.

The legal title to the trust property vested, under the grant, in the State, as trustee, for the particular purpose specified.

Schulenberg v. *Harriman*, 88 U. S. 21 Wall. 44, 60 (22:551, 554); *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 741 (23: 634, 637); *Missouri, K. & T. R. Co.* v. *Kansas Pac. R. Co.* 97 U. S. 491, 496 (24: 1095, 1096); *St. Joseph & D. C. R. Co.* v. *Baldwin*, 103 U. S. 426, 429 (26: 578, 579); *Wood* v. *Burlington & M. R. R. Co.* 104 U. S. 329, 332 (26: 772, 773); *Van Wyck* v. *Knevals*, 106 U. S. 360, 365 (27: 201, 202); *Wright* v. *Roseberry*, 121 U. S. 488, 500 (30: 1039, 1041);

Rutherford v. *Greene*, 15 U. S. 2 Wheat. 196 (4: 218).

A legislative grant operates as a law as well as a transfer of the property.

St. Paul, M. & M. R. Co. v. *Greenhalgh*, 26 Fed. Rep. 563.

Both in respect to real and personal property, a trustee to receive, manage and disburse is the owner of the property.

1 Perry, Trusts, § 305; *Harris* v. *American Bible Soc.* 2 Abb. App. Dec. 320; *Brewster* v. *Striker*, 2 N. Y. 19, 31; *Hathaway* v. *Hathaway*, 37 Hun, 265; *Leggett* v. *Perkins*, 2 N. Y. 297, 305; *Adams* v. *Perry*, 43 N. Y. 487, 497; *Marx* v. *McGlynn*, 88 N. Y. 375, 376; *Goodrich* v. *Milwaukee*, 24 Wis. 422, 431; *Devin* v. *Hendershoot*, 32 Iowa, 194; *Neilson* v. *Lagow*, 53 U. S. 12 How. 98, 107 (13: 909, 913); *Culbertson* v. *Witbeck Co.* 127 U. S. 327 (32: 134); *Western R. Co.* v. *Nolan*, 48 N. Y. 513, 517; *Bennett* v. *Garlock*, 79 N. Y. 302; *Bramhall* v. *Ferris*, 14 N. Y. 46; *Donovan* v. *Van De Mark*, 78 N. Y. 244; *Woodward* v. *James*, 115 N. Y. 346, 356, 357; *Savage* v. *Burnham*, 17 N. Y. 569, 570.

Title to fund must forever remain in trustee.

Equitable Trust Co. v. *Fisher*, 106 Ill. 195; 2 Perry, Trusts, § 602, *note g*, and cases cited; *Barber* v. *Cary*, 11 N. Y. 397; *Kissam* v. *Dierkes*, 49 N. Y. 602.

The duties and powers of trustees cannot be delegated to others.

1 Perry, Trusts, §§ 287, 402, and cases cited; *Newton* v. *Bronson*, 13 N. Y. 587; *Grover* v. *Hale*, 107 Ill. 638, 642; *Flower* v. *Elwood*, 66 Ill. 440, 449; *St. Louis* v. *Priest*, 88 Mo. 612.

The trustee, after accepting office, cannot be relieved nor discharged without the consent of all the parties in interest, except for cause and by the decree of a competent court.

1 Perry, Trusts, §§ 268, 274, 401, and cases cited; *Diefendorf* v. *Spraker*, 10 N. Y. 246, 250; *Thatcher* v. *Candee*, 4 Abb. App. Dec. 387; *Oruger* v. *Halliday*, 11 Paige, 314, 319, 5 N. Y. Ch. L. ed. 148, 149; *Brennan* v. *Willson*, 71 N. Y. 502, 506.

The trustee cannot, when the trust is created for a specific purpose, divert the property from the appointed purpose.

1 Perry, Trusts, § 886, *note a*, and cases cited; *Dunham* v. *Milhous*, 70 Ala. 596; *Loring* v. *Brodie*, 134 Mass. 453, 459; *Isham* v. *Delaware, L. & W. R. Co.* 11 N. J. Eq. 227; *Lee* v. *Horton*, 104 N. Y. 541, 542; *Wetmore* v. *Porter*, 92 N. Y. 77.

The subject of the trust cannot be used for another and foreign purpose without the consent of the party for whose benefit it was created.

Story v. *New York E. R. Co.* 90 N. Y. 124, 157; *Watertown* v. *Cowen*, 4 Paige, 510, 3 N. Y. Ch. L. ed. 536; *Hunter* v. *Sandy Hill*, 6 Hill, 407, 412; *Adams* v. *Saratoga R. Co.* 11 Barb. 414, 450; *Barclay* v. *Howell*, 31 U. S. 6 Pet. 498 (8: 477); *Warren* v. *Lyons*, 22 Iowa, 351; *Hellman* v. *McWilliams*, 70 Cal. 449.

The right of the beneficiary to the income may be so limited by the terms of the trust that his creditors cannot reach it.

Broadway Nat. Bank v. *Adams*, 133 Mass. 170; *Nichols* v. *Eaton*, 91 U. S. 716 (23: 254); *Hyde* v. *Woods*, 94 U. S. 523 (24: 264); *Wetmore* v. *Truslow*, 51 N. Y. 338; *Locke* v. *Mubbett*, 3 Abb. App. Dec. 69.

The courts have no power to destroy or impair a valid trust nor to authorize the fund to be alienated or diverted from its proper purpose or custody.

Douglas v. *Oruger*, 80 N. Y. 15; *Lent* v. *Howard*, 89 N. Y. 171, 181; *Harvard College* v. *Society*, 3 Gray, 280, 301; *Inches* v. *Hill*, 106 Mass. 575, 578; *Taylor* v. *Huber*, 13 Ohio St. 288; *Bowditch* v. *Andrew*, 8 Allen, 339, 341; *Smith* v. *Harrington*, 4 Allen, 566; *Short* v. *Wilson*, 13 Johns. 33.

An Act of the Legislature would be ineffectual to terminate the trust.

Stone v. *Framingham*, 109 Mass. 303; *Swann* v. *Lindsey*, 70 Ala. 507, 521; *Baring* v. *Dabney*, 86 U. S. 19 Wall. 1, 9 (22: 90, 94).

The United States, as donor, cannot revoke the trust or resume the title to, or control of, the fund, without the consent of all the parties in interest, except for a forfeiture of conditions in the grant.

1 Perry, Trusts, § 104, and cases cited; *Gilchrist* v. *Stevenson*, 9 Barb. 9, 15; *Isham* v. *Delaware, L. & W. R. Co.* 11 N. J. Eq. 227; *Adams* v. *Saratoga R. Co.* 11 Barb. 414, 450; *Cincinnati* v. *White*, 31 U. S. 6 Pet. 431 (8: 453); *Van Wyck* v. *Knevals*, 106 U. S. 360 (27: 201).

Nor can the trustee, by any act of his own, devest himself of or convey away the legal title to the fund, particularly to persons having knowledge or notice of the trust.

Reid v. *Bank of Mobile*, 70 Ala. 199; *Swann* v. *Lindsey*, Id. 507, 521; *Lee* v. *Horton*, 104 N. Y. 451; *Wetmore* v. *Porter*, 92 N. Y. 77; *Stockton* v. *Newark*, 42 N. J. Eq. 531; *Pierce* v. *Weaver*, 65 Tex. 45; *Deobold* v. *Opperman*, 2 L. R. A. 644, 111 N. Y. 532, 538; *Garner* v. *Germania L. Ins. Co.* 1 L. R. A. 256, 110 N. Y. 266, 270; *Brennan* v. *Willson*, 71 N. Y. 502; *Litchfield* v. *Parker*, 64 N. H. 443; *Hoadley* v. *San Francisco*, 124 U. S. 640 (31: 554).

Any conveyance or disposition of the fund, in violation of the terms of the trust, would be nugatory and ineffectual to pass the title.

Farnsworth v. *Minnesota & P. R. Co.* 92 U. S. 50, 65 (23: 530, 535); *Swann* v. *Miller*, 82 Ala. 530.

Whoever receives property knowing that it is the subject of a trust, and has been transferred by the trustee in violation of his duty or power, takes it subject to the right not only of the *cestui que trust*, but also of the trustee, to reclaim possession or to recover for its conversion.

Wetmore v. *Porter*, 92 N. Y. 77; *Dow* v. *Berry*, 18 Fed. Rep. 121; *Smith* v. *Bowen*, 35 N. Y. 83; *Zimmerman* v. *Kinkle*, 108 N. Y. 282.

Property once charged with a valid trust will be followed in equity into whosesoever hands it comes, and he will be charged with the execution of the trust, unless he is a purchaser for value, and without notice.

1 Perry, Trusts, §§ 38, 334, and cases cited.

Every sale or transfer of property, in breach or contravention of a trust, is void.

Oruger v. *Jones*, 18 Barb. 467; *Douglas* v. *Oruger*, 80 N. Y. 15, 19.

Where one party has acquired the legal title to property to which another has a better right, a court of equity will convert him into a trustee of the true owner.

Johnson v. *Towsley*, 80 U. S. 13 Wall. 72. 85

(20: 485, 486); *Lindsey* v. *Hawes*, 67 U. S. 2 Black, 554 (17: 265); *Southern Pac. R. Co.* v. *Dull*, 22 Fed. Rep. 490, 498; *Winona & St. P. R. Co.* v. *St. Paul & S. C. R. Co.* 26 Minn. 179, 182.

The officers of the government are the agents of the law. They cannot act beyond its provisions, nor make compromises not sanctioned by it.

Cunningham v. *Ashley*, 55 U. S. 14 How. 388 (14: 467); *White* v. *Douglass*, 71 Cal. 116.

The State, in its contracts, must abide by the rules which govern the rights of private citizens contracting.

People v. *Stephens*, 71 N. Y. 527, 549, 550; *Danolds* v. *State*, 89 N. Y. 37, 44; *McMaster* v. *State*, 108 N. Y. 542, 555.

The University assumed the liability of Mr. Cornell for the unpaid purchase price of the scrip. This indebtedness must be deducted from the value of the property in determining whether the University holds in excess over the limitation clause in the charter.

Wetmore v. *Parker*, 52 N. Y. 451; *Chamberlain* v. *Chamberlain*, 43 N. Y. 425.

Legislative grants must be construed so as to give effect to the intention of the grantor, but strictly against the grantee; and if the language is ambiguous, nothing passes by implication.

Leavenworth, L. & G. R. Co. v. *United States*, 92 U. S. 733, 740 (23: 634, 637); *Dubuque & P. R. Co.* v. *Litchfield*, 64 U. S. 23 How. 66, 88 (16: 500, 509); *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet. 421, 545 (9: 774, 823); *Slidell* v. *Grandjean*, 111 U. S. 413, 437, 438 (28: 321, 329, 330).

If the title granted was not in the grantor at the time of the grant, no estate passes to the grantee.

Rice v. *Minnesota & N. W. R. Co.* 66 U. S. 1 Black, 359, 374 (17: 147, 151); *Doe* v. *Winn*, 24 U. S. 11 Wheat. 380, 384 (6: 500, 501); *Polk* v. *Wendal*, 13 U. S. 9 Cranch, 87, 101 (3: 665, 670), 18 U. S. 5 Wheat. 293, 303 (5: 92, 94); *Jackson* v. *Lawton*, 10 Johns. 23.

Neither the State nor the United States is precluded by lapse of time from asserting the true and legal title to all the property.

United States v. *Hoar*, 2 Mason, 311; *Swearingen* v. *United States*, 11 Gill & J. 373; *People* v. *Gilbert*, 18 Johns. 227; *United States* v. *White*, 2 Hill, 59; *Burbank* v. *Fay*, 65 N. Y. 57; *United States* v. *Beebe*, 127 U. S. 338 (32: 121).

This is an executory trust in the State, as trustee.

Wood v. *Burnham*, 6 Paige, 518, 3 N. Y. Ch. L. ed. 1084, 26 Wend. 19; 1 Perry, Trusts, § 359, and cases cited.

The State has a direct beneficial interest in the proper administration of the trust.

Home of Friendless v. *Rouse*, 75 U. S. 8 Wall. 430, 437 (19: 495, 497); *Washington University* v. *Rouse*, 75 U. S. 8 Wall. 440 (19: 499); *Vincennes University* v. *Indiana*, 55 U. S. 14 How. 269, 274 (14: 416, 418).

Congress could not repeal the Act of 1862, so as to devest the interest of the State, without its consent, after it had accepted the trust.

Terrett v. *Taylor*, 13 U. S. 9 Cranch, 43, 50 (3: 650, 653); *Pawlet* v. *Clark*, 13 U. S. 9 Cranch, 292, 332, 336 (3: 735, 749, 751); *Farrington* v. *Tennessee*, 95 U. S. 679, 683 (24: 558, 559).

The Act cannot be repealed, where the grant is founded on a consideration.

Fletcher v. *Peck*, 10 U. S. 6 Cranch, 87, 135 (3: 162, 177); *Curran* v. *Arkansas*, 56 U. S. 15 How. 304 (14: 705); *VonHoffman* v. *Quincy*, 71 U. S. 4 Wall. 535 (18: 403); *Baring* v. *Dabney*, 86 U. S. 19 Wall. 1, 10 (22: 90, 95).

The clause in the charter conferring the right to the income from the trust fund cannot be repealed without the concurrence of the University.

Dartmouth College v. *Woodward*, 17 U. S. 4 Wheat. 518 (4: 629); *Woodruff* v. *Trapnall*, 51 U. S. 10 How. 190 (13: 583); *Curran* v. *Arkansas*, 56 U. S. 15 How. 304 (14: 705); *State Bank* v. *Knoop*, 57 U. S. 16 How. 369 (14: 977); *Dodge* v. *Woolsey*, 59 U. S. 18 How. 331 (15: 401); *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 (17: 113); *Carondelet C. & Nav. Co.* v. *Tedesco*, 37 La. Ann. 100; *State Board of Assessors* v. *Morris & E. R. Co.* 49 N. J. L. 193.

Messrs. **Esek Cowen, S. S. Gregory, G. F. Comstock,** *James S. Harlan, William M. Booth* and *John G. Sears*, for defendants in error:

In the proceedings below, Cornell University did not claim any right, title or immunity under any statute of the United States.

Montgomery v. *Hernandez*, 25 U. S. 12 Wheat. 132 (6: 576); *Menard* v. *Aspasia*, 30 U. S. 5 Pet. 517 (8: 211); *Bowman* v. *Chicago & N. W. R. Co.* 115 U. S. 611 (29: 502).

Where the decision of the state court is in favor of a right or title under a federal statute, etc., neither party can appeal to this court.

Commonwealth Bank v. *Griffith*, 39 U. S. 14 Pet. 56 (10: 352); *Burke* v. *Gaines*, 60 U. S. 19 How. 388 (15: 655); *Ryan* v. *Thomas*, 71 U. S. 4 Wall. 603 (18: 460).

The Statute gives a party no appeal on account of the denial of another's title.

Long v. *Converse*, 91 U. S. 105 (23: 233); *Miller* v. *National Bank*, 106 U. S. 542 (27: 289); *Henderson* v. *Tennessee*, 51 U. S. 10 How. 311 (13: 434); *Owings* v. *Norwood*, 9 U. S. 5 Cranch, 344 (3; 120).

An appeal will not lie if this court can see that the decision of the court below was, or may have been, placed upon some ground which did not involve the construction of the Federal Constitution, treaty or Statute.

Ocean Ins. Co. v. *Polleys*, 38 U. S. 13 Pet. 157 (10: 105); *Steines* v. *Franklin County*, 81 U. S. 14 Wall. 15 (20: 846); *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 81 U. S. 14 Wall. 23 (20: 850).

As where the state court certified that the validity of a state statute was drawn in question, as repugnant to the Federal Constitution, and this court decided that only the construction of the Statute was involved.

Commercial Bank v. *Buckingham*, 46 U. S. 5 How. 317 (12: 169); *Lawler* v. *Walker*, 55 U. S. 14 How. 149 (14: 364).

The ownership of the entire income, in perpetuity, necessarily involves the ownership of the fund that produces it. And it makes no difference whether the gift or grant of the income is directly to the beneficiary or to trustees for his benefit.

Haig v. *Swiney*, 1 Sim. & Stu. 489; *Adamson* v. *Armitage*, 19 Ves. Jr. 418; *Page* v. *Leaping-*

well, 18 Ves. Jr. 463; *Mason* v. *Methodist Episcopal Church*, 27 N. J. Eq. 47; *Gulick* v. *Gulick*, 27 N. J. Eq. 498; *McMichael* v. *Hunt*, 83 N. C. 344; *Fox* v. *Carr*, 16 Hun, 566.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a proceeding which originated in the Surrogate's Court of the County of Tompkins, in the State of New York. John McGraw, a resident of Ithaca, in that county, died May 4, 1877, leaving as his only child and heir Jennie McGraw, who, on the 14th of July, 1880, at Berlin, Germany, intermarried with Willard Fiske, and died September 30, 1881, at Ithaca, her place of residence, after reaching the age of 41, without issue, leaving her husband surviving her. John McGraw left a last will and testament, which was duly admitted to probate by the surrogate of Tompkins County, and of which his daughter, Jennie McGraw, and Douglass Boardman, and the survivor of them, were made sole executors. His daughter, Jennie McGraw Fiske, also left a last will and testament, by which she made Douglass Boardman her sole executor, and which was duly proved and admitted to probate by the surrogate. Excepting about from $130,000 to $150,000 in value, which came to her by devise and bequest from her grandfather, John Southworth, the title to the estate and property which formed the subject of disposition by her will came through the will of her father, John McGraw.

On the 8th of January, 1883, after due citation of all parties interested, there was a judicial settlement of the accounts of Douglass Boardman, as executor of Mrs. Fiske's estate, and a decree entered by the surrogate confirming all payments theretofore made by the executor, and directing the balance of said estate to be paid to Cornell University, as her residuary legatee, and also a decree settling the accounts of said Boardman as surviving executor of John McGraw, and transferring the balance of his estate to the estate of Mrs. Fiske.

On the 6th of September, 1883, on the petition of Willard Fiske, as her surviving husband, the decree settling her estate was opened by the surrogate, and he was permitted to be heard with like effect as if he had appeared on the 8th of January, 1883, such opening being without prejudice to payments made or acts done by the executor in pursuance of her will and of said decree, but leaving the validity and effect of those acts and the rights of the respective parties therein for future adjudication; and on the 24th of October, 1883, a similar order was made opening the said decree of settlement in both estates, on the application of certain persons as the heirs and next of kin of Mrs. Fiske, and also on the application of certain legatees and devisees under John McGraw's will. Proofs were taken, the case was heard by the surrogate in November, 1885, and on the 25th of May, 1886, he made and filed his findings and entered his decision and decree, affirming in all things his original decrees as to the two estates. On the 23d of June, 1886, the several contestants made and served their exceptions to his findings, and duly appealed to the supreme court from his decision and decree. They also requested him to make certain findings upon questions of fact, and rulings upon questions of law, some of which requests he granted and some of which he refused, and exceptions were taken to his refusals.

The controversy in the case, so far as it presents itself for our consideration, is between Cornell University on the one side and the husband, heirs-at-law and next of kin of Mrs. Fiske, on the other side. It was provided by section 5 of the charter of Cornell University that it might "hold real and personal property to an amount not exceeding three millions of dollars in the aggregate;" and the material question in dispute is as to whether, at the time of the death of Mrs. Fiske, on the 30th of September, 1881, the University held real and personal property to the amount of three millions of dollars in the aggregate.

Of the findings of fact made by the surrogate the following are the only ones which seem material to the case as it is before us:

"62. The Cornell University has had at all times since its incorporation, and now has, legal and corporate capacity to take by gift, grant or devise real property in the States of Michigan, Wisconsin, Iowa, Minnesota, Ohio, Indiana, Kansas and New Jersey, and such is the law in those States respectively concerning foreign corporations like the University.

"63. The Cornell University has legal capacity to take, and did take by devise, all the real property the title to which was in Jennie McGraw Fiske at the time of her death, under her last will and testament, situate in the States of Michigan, Wisconsin, Iowa, Ohio, Indiana and New Jersey."

"66. The absolute title to the whole of the land situated in New Jersey passed under the will of Mrs. Fiske to Cornell University."

"75. At the date of Mrs. Fiske's death, September 30, 1881, Cornell University had, held and owned real and personal property which it [155 derived from the founder and other friends of the University, or which was purchased with funds furnished by them or with the income of such funds, and which property, September 30, 1881, was of the value of five hundred and ninety-eight thousand five hundred and eighty-eight and $\frac{65}{100}$ dollars ($598,588.65) in the aggregate." Then follows a description, by items, of the property thus held and owned by the University, with the separate value of each item, as of September 30, 1881. The last item is as follows: "The farm and grounds on which the university buildings are located, consisting of about 260 acres, including the buildings and reservoir, $69,683.33."

"93. The following is a recapitulation of the findings of fact relating to the property of Cornell University, viz.:

"September 30, 1881, Cornell University had, held and owned the property derived from individuals and described in the forgoing 75th finding of fact, to the amount and value of not exceeding $598,588.65 in the aggregate. At the same time Cornell University had, held and owned the property derived from the Nation and State and described in the foregoing findings, to the amount and value of not exceeding $2,088,012.78 in the aggregate, as follows: western land contracts, $439,834.22; western lands, $1,648,178.56; total, $2,088,012.78.

"But under and in pursuance of the Cornell contract of August 4, 1866, the whole net proceeds of the avails of said last-mentioned property, being the proceeds of the sale of said college land scrip or lands located therewith, was at that time due or payable by Cornell University to the State of New York, and the total amount and value of the property had, held and owned by Cornell University, September 30, 1881, over and above its obligations to the State of New York, as defined by said contract, was $598,588.65.

"At that time Cornell University had, held and owned the right to 'the income, revenue and avails which should be received from the investment of the proceeds of the sale of the lands or the scrip therefor, or any part thereof, granted to the State of New York by the Act of Congress entitled "An Act Donating Public Lands to the Several States and Territories Which may Provide Colleges for the Benefit of Agriculture and the Mechanic Arts," approved July 2, 1862,' which right to said 'income, revenue and avails' was granted, and for a valuable consideration, paid by Ezra Cornell, was contracted, to Cornell University by section 6 of its charter. The right to the income, etc., of the proceeds of said sales, September 30, 1881, extended to the College Land Scrip Fund and Cornell Endowment Fund, as they then existed, and to all the proceeds of said sales which would or might come to said funds by virtue of the sale to Ezra Cornell of said college land scrip under his contract of August 4, 1866.

"At that time also Cornell University had possession of the Cornell Endowment Fund, and the State of New York had possession of the College Land Scrip Fund.

"Tabular Statement.

"Funds derived from individuals, described in 75th finding of fact	$598,588 65
"Funds derived from Nation and State:	
"Western lands	1,648,178 56
"Western land contracts	439,834 22
"Cornell Endowment Fund	128,596 61
"College Land Scrip Fund	473,402 87
	$3,288,600 91

"Making the total funds which belonged to Cornell University, September 30, 1881, under section 5 of its charter, $598,588.65; and the total funds already realized and to be realized, only the right to the income of which at that date belonged to Cornell University, under section 6, was $2,690,012.26.

"94. I find that the sum of all the property, real and personal, which the said Cornell University had taken before September 30th, 1881, by gift, grant, devise or bequest, did not exceed one million and six hundred thousand dollars."

"95. It has not been proved nor established that the property of the Cornell University, owned and held by it on the 30th day of September, 1881, the date of the death of Jennie McGraw Fiske, together with that devised and bequeathed by her last will and testament to said University, exceeded the sum of three millions of dollars."

On his findings of fact the surrogate decided and held as follows, as conclusions of law:

"I decide and hold, as conclusions of law, that Douglass Boardman, as executor of the last will and testament of Jennie McGraw Fiske, deceased, and as sole surviving executor of John McGraw, deceased, and Cornell University, are entitled to a decree directing—

"(a) That the accounts of Douglass Boardman, as executor of Jennie McGraw Fiske, deceased, and as sole surviving executor of John McGraw, deceased, filed in the Tompkins County surrogate's office on the 8th day of January, 1883, be and in all respects allowed, and the decrees, including the summary statements therein contained, recorded and entered upon said accounts, be in all respects ratified and affirmed, including all payments heretofore made by said executor to Cornell University.

"(b) That the said executor pay over to Cornell University the sum of one hundred forty-one thousand six hundred and seventy-six and $\frac{72}{100}$ dollars ($141,676.72), being the balance on hand January 1, 1885, and ready for distribution.

"(c) And adjudging that said Cornell University is the owner and entitled to all the rest, residue and remainder of said estate, and directing said executor to pay the same, when sold, to said Cornell University, in money, or in such other form, or at such other time, as may be mutually agreed upon between said Cornell University and said executor."

The decree of the surrogate being in accordance with his findings and conclusions of law, the husband and the heirs-at-law and next of kin of Mrs. Fiske appealed to the supreme court of the State of New York from the whole of the decree, the appeal being taken both upon the facts and upon questions of law. The case was heard by the general term of that court, and is reported in 45 Hun, 354. *Judge* Hardin, the presiding judge, delivered an opinion, in which *Judge* Follett concurred, and *Judge* Merwin also delivered a concurring opinion. The three judges were unanimous in reversing the decree of the surrogate.

In the judgment entered by the general term of the supreme court, on the 14th of December, 1887, the surrogate's finding of fact numbered 62 was modified so as to read as follows: "62. The Cornell University has had at all times since its incorporation, and now has, legal and corporate capacity to take, by gift, grant or devise, real property in the States of Michigan, Wisconsin, Iowa, Minnesota, Ohio, Indiana, Kansas and New Jersey, subject to the limitation in its charter; and such is the law in those States respectively concerning foreign corporations like the University." His finding of fact numbered 63 was reversed and stricken out. His finding, above recited, in No. 66, as to the title to the land situate in New Jersey, was reversed and stricken out. All those parts of his finding numbered 75, which fixed the value of the last item mentioned therein at $69,683.33, and which fixed the total value of the items named in that finding at $598,588.65, and each clause in any of his findings which recapitulated those values respectively at the sums so stated, especially so much of finding numbered 93 as stated that, on the 30th of September, 1881, "Cornell University had, held and owned the property derived from individuals and described in the foregoing 75th finding of fact,

to the amount and value of not exceeding $598,588.65 in the aggregate," were reversed and stricken out, but only in so far as the aggregate of $598,588.65 was made up of the last item in the 75th finding, namely, the farm and university buildings located thereon, valued by him at $69,688.33. The following parts of his finding numbered 93 were reversed and stricken out: "But under and in pursuance of the Cornell contract of August 4, 1866, the whole net proceeds of the avails of said last-mentioned property, being the proceeds of the sale of said college land scrip, or lands located therewith, was at that time due or payable by Cornell University to the State of New York, and the total amount and value of the property had, held and owned by Cornell University, September 30, 1881, over and above its obligations to the State of New York, as defined by said contract, was $598,588.65." "Making the total funds which belonged to Cornell University September 30, 1881, under section 5 of its charter, $598,588.65; and the total funds already realized and to be realized, only the right to the income of which at that date belonged to Cornell University, under section 6, was $2,690,012.26." His finding numbered 95 was reversed and stricken out.

The judgment of the supreme court then went on to provide as follows:

"And it is further found, adjudged and decided by this court, in pursuance of the statute in such case made and provided, that at the death of Jennie McGraw Fiske, September 30, 1881, the value of the farm and grounds on which the university buildings are located, consisting of about 260 acres, including the buildings and reservoir, was the sum of $400,000, instead of $69,688.33, as found by the surrogate, and the total value of the items set forth in the finding of the surrogate numbered 75, including this last item, viz., $400,000, was $928,905.32.

"And it is further found, decided and adjudged by this court, that the property of the Cornell University which was held and owned by it when Jennie McGraw Fiske died, on the 30th day of September, 1881, amounted in value to the sum of $3,015,414.71, made up as follows:

"Funds derived from individuals, described in the 75th finding of fact (excluding the last item thereof), as valued by the surrogate	$528,905 32
"The last item in said finding, viz.: farm of about 260 acres and university buildings, as valued by this court	400,000 00
"Property derived from Cornell contract with the State, as valued by the surrogate in his findings:	
"Western lands	1,648,178 56
"Western land contracts	439,334 22
"Cornell Endowment Fund	128,596 61
"Total	$3,145,014 71
"Less amount due to the College Land Scrip Fund, for the last 30 cents an acre on 432,000 acres	129,600 00
"Balance	$3,015,414 71

"Making the total funds which belonged to Cornell University September 30th, 1881, under section five of its charter, $3,015,414.71.

"And it is further found, decided and adjudged that there was at that time due to the College Land Scrip Fund, and to be treated as a part thereof, the sum of $129,600 mentioned above.

"And it is further found, decided and adjudged that the College Land Scrip Fund, consisting of $473,402.87, together with the sum of $129,600 as found above, is not the property of Cornell University, and should not be reckoned or included as a part thereof, or subject to its charter limitation.

"And this court does further find and decide that, at the date of the death of said Jennie McGraw Fiske, the said Cornell University held and owned real and personal property, of which the yearly income or revenue was more than ($25,000) twenty-five thousand dollars, exclusive of the College Land Scrip Fund then held by the comptroller of the State of New York for the benefit of said University, and such yearly income and revenue was derived in part from lands and avails of sales of land which came to Cornell University through the Cornell contract of August 4, 1866.

"And it is further found, decided and adjudged by this court, that at the time of the death of Jennie McGraw Fiske the Cornell University had already reached the limit of property prescribed by its charter, as found above, and was not entitled to and could not take or hold any of the property or funds devised or bequeathed to it by her last will and testament, and never had any right, title or interest in or to the same or any part thereof; and that, at her decease, the legal right and title in and to all of the property and funds so devised and bequeathed by her to the Cornell University passed to and vested in the appellants, according to their several rights therein as between themselves, as the same may hereafter appear." [16]

The judgment then went on to reverse the surrogate's decree of May 25, 1886, with costs to be paid by the executor out of the funds of the estate, and to order the proceedings to be remitted to the surrogate, and that he enter a decree in conformity with the judgment of the supreme court, and make a distribution to the appellants according to their respective rights as between themselves, they having already agreed upon such rights, of all the property in the hands of the executor of Mrs. Fiske, after paying debts, expenses and legacies other than those to Cornell University, together with all the property and funds which had come into the possession of the executor, and which he had delivered or paid over to Cornell University; and that the University restore into his hands all money and property received from him, and all dividends, interest and income therefrom, received by the University, less any expenses necessarily incurred in investing and managing the same; and that the surrogate ascertain and fix the amount so received by the University from the executor, with the gains, profits and income thereof, less such expenses, and enforce restitution of the same to the executor, by a decree.

Boardman, as executor of John McGraw and of Mrs. Fiske, and also Cornell University,

appealed to the Court of Appeals of the State of New York from the judgment of December 14, 1887. The court of appeals affirmed the judgment, and a remittitur from that court having been sent to the supreme court, an order was entered in the latter court on the 12th of December, 1888, making the judgment of the court of appeals the judgment of the supreme court, and awarding the costs of the court of appeals against the executor and the University.

[52] The opinion of the court of appeals, delivered by *Judge* Peckham, is reported in 111 N. Y. 66, 2 L. R. A. 387. The judges were unanimous, except that *Judge* Finch took no part. Cornell University and Boardman, as executor of John McGraw and of Mrs. Fiske, have brought the case to this court by a writ of error, directed to the supreme court of the State of New York.

The questions for consideration here fall within a narrow compass, for they can embrace only federal questions.

The court of appeals, in its opinion, discussed only two questions: (1) whether Cornell University had power to take and hold property of the value of more than $3,000,000; and (2) if it had no such power, whether it held real and personal property in the aggregate up to such limit, at the time of the death of Mrs. Fiske, on the 30th of September, 1881.

The first question was examined most elaborately by that court; and it arrived at the conclusions that the University had no power to take or hold any more real and personal property than $3,000,000 in the aggregate, at the time of the death of Mrs. Fiske; and that, under the jurisprudence of the State of New York, her husband and her heirs-at-law and next of kin had a right to avail themselves of the fact, if it existed, in the controversy before the court, that at the time of her death, on the 30th of September, 1881, the University already held real and personal property up to the prescribed limit. The propositions thus decided by the court of appeals do not involve any federal question. They depend entirely upon the construction of the provisions of the charter of the University, and upon the municipal law of the State of New York. The decision upon [75] those questions is binding upon this court in the present case. Therefore the only question subject to review by us is whether the property held by the University prior to and at the time of the death of Mrs. Fiske, on the 30th of September, 1881, exceeded the amount which by law it could hold, if a federal question is involved in that proposition. The court of appeals decided that the property so held by the University exceeded $3,000,000.

It is contended by the defendants in error that in the proceedings in the state courts the University did not "claim" any "title, right, privilege or immunity," under any statute of the United States, or which was derived directly or indirectly from any such statute; that, even if the judgment of the court of appeals was binding as between the University and the State, the latter being a stranger to the proceeding, the title of the University to the lands and land contracts conveyed to it by Cornell, if held under the Act of Congress involved in the controversy, has been affirmed, and not denied, by the the state court; that assuming that the decision of the court of appeals was binding as between the University and the State, and that the right of the University to the lands and contracts conveyed to it by Cornell was involved in the proceeding, still the writ of error will not lie, because the state court decided, not against the title of the University, but against the title of the State; that the decision of the court of appeals did not affirm the validity of any statute of the State which the plaintiffs in error claimed to be in contravention of any Act of Congress, nor was the validity of any such statute "drawn in question" in that court; that the plaintiffs in error did not draw in question, in the state court, the validity of any authority exercised by or under the State, nor was there any decision in the state court in favor of an authority so exercised, and so questioned by the plaintiffs in error; and that, aside from any construction of the Act of Congress of which the plaintiffs in error complain as that on which the court of appeals based any conclusion, there are other grounds which would have led to the same result, if the construction of such Act of Congress insisted upon by the plaintiffs in error had been adopted by the court.

On the other hand, it is insisted by the plaintiffs in error that this court has jurisdiction to review the judgment of the state court, under the second clause of section 709 of the Revised Statutes, because there was drawn in question the validity of statutes of the State of New York and of an authority exercised under those statutes, on the ground of their being repugnant, as they were finally construed by the state court, to the provisions of an Act of Congress.

Without discussing this question of jurisdiction, it is sufficient to say that a majority of the court are of opinion that this court has jurisdiction. As our conclusion is that the judgment of the state court must be affirmed, it is not important to discuss at any length the question of jurisdiction, because whether the writ of error is dismissed, or whether the judgment is affirmed, the result is the same, of allowing the judgment of the state court to stand in full force.

We proceed now to give our views as to the case upon its merits. The conclusion of the court of appeals, in its concurrence with the supreme court, that the property of the University exceeded $3,000,000, was based upon the modifications made by the supreme court, in its judgment, of the finding of the surrogate as to the value of the buildings and grounds. The court of appeals, in its opinion (p. 131), states that it agrees with the supreme court in those modifications, although it was probably bound by the findings of that court, as there was contradictory evidence in regard to such value. This court certainly is bound by the findings of the supreme court and of the court of appeals on that subject. The remainder of the question before us depends wholly upon documentary evidence, and upon the construction of statutes and of written papers.

The court of appeals, in approaching the question as to whether the property in contro-

versy, if taken and held by the University, would exceed the amount which by law it could hold, says (p. 113): "The decision of such question depends partly upon the view which should be taken of the character of the holding under which the University now possesses certain property, which is described in the finding of the surrogate as property derived from the Nation and State, and which he finds amounted to $2,088,012.78, and which was made up, as he also finds, of western land contracts, $439,834.22, and of western lands to the amount of $1,648,178.56; and he states, as part of his finding, that this total of $2,088,012.78 was due or payable by the University to the State, or, in other words, that the University owed the State that sum, and consequently that it should not be regarded as any part of its property. This finding has not been concurred in by the general term, which has modified it by holding that the same is to be taken into account as part of the property of the University. The state of facts under which the question arises is undisputed, and it becomes a question of law as to what is the proper legal inference to be drawn from the undisputed facts, and the decision of that question is reviewable in this court."

On the 2d of July, 1862, Congress passed the following Act (12 Stat. 503, chap. 130):

"An Act Donating Public Lands to the Several States and Territories Which may Provide Colleges for the Benefit of Agriculture and the Mechanic Arts.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be granted to the several States, for the purposes hereinafter mentioned, an amount of public land, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty: *Provided*, That no mineral lands shall be selected or purchased under the provisions of this Act.

"Sec. 2. *And be it further enacted*, That the land aforesaid, after being surveyed, shall be apportioned to the several States in sections, or subdivisions of sections not less than one quarter of a section; and whenever there are public lands in a State subject to sale at private entry at one dollar and twenty-five cents per acre, the quantity to which said State shall be entitled shall be selected from such lands within the limits of such State, and the Secretary of the Interior is hereby directed to issue to each of the States in which there is not the quantity of public lands subject to sale at private entry at one dollar and twenty-five cents per acre, to which said State may be entitled under the provisions of this Act, land scrip to the amount in acres for the deficiency of its distributive share; said scrip to be sold by said States and the proceeds thereof applied to the uses and purposes prescribed in this Act, and for no other use or purpose whatsoever: *Provided*, That in no case shall any State to which land scrip may thus be issued be allowed to locate the same within the limits of any other State, or of any Territory of the United States, but their assignees may thus locate said land scrip upon any of the unappropriated lands of the United States subject to sale at private entry at one dollar and twenty-five cents, or less, per acre: *And provided, further*, That not more than one million acres shall be located by such assignees in any one of the States. *And provided, further*. That no such location shall be made before one year from the passage of this Act.

"Sec. 3. *And be it further enacted*, That all the expenses of management, superintendence and taxes from date of selection of said lands, previous to their sales, and all expenses incurred in the management and disbursement of the moneys which may be received therefrom, shall be paid by the States to which they may belong, out of the treasury of said States, so that the entire proceeds of the sale of said lands shall be applied without any diminution whatever to the purposes hereinafter mentioned.

"Sec. 4. *And be it further enacted*, That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stock; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section fifth of this Act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this Act, to the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the Legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life. [176

"Sec. 5. *And be it further enacted*, That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative Acts:

"First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the fourth section of this Act, except that a sum not exceeding ten per centum upon the amount received by any State under the provisions of this Act may be expended for the purchase of lands for sites or experimental farms, whenever authorized by the respective Legislatures of said States.

"Second. No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretense whatever, to

the purchase, erection, preservation or repair of any building or buildings.

"Third. Any State which may take and claim the benefit of the provisions of this Act shall provide, within five years, at least not less than one college, as described in the fourth section of this Act, or the grant to such State shall cease; and said State shall be bound to pay the United States the amount received of any lands previously sold, and that the title to purchasers under the State shall be valid.

"Fourth. An annual report shall be made regarding the progress of each college, recording any improvements and experiments made, [180] with their costs and results, and such other matters, including state industrial and economical statistics, as may be supposed useful; one copy of which shall be transmitted by mail free, by each to all the other colleges which may be endowed under the provisions of this Act, and also one copy to the Secretary of the Interior.

"Fifth. When lands shall be selected from those which have been raised to double the minimum price, in consequence of railroad grants, they shall be computed to the States at the maximum price, and the number of acres proportionally diminished.

"Sixth. No State while in a condition of rebellion or insurrection against the government of the United States shall be entitled to the benefit of this Act.

"Seventh. No State shall be entitled to the benefits of this Act unless it shall express its acceptance thereof by its Legislature within two years from the date of its approval by the President.

"Sec. 6. *And be it further enacted*, That land scrip issued under the provisions of this Act shall not be subject to location until after the first day of January, one thousand eight hundred and sixty-three.

"Sec. 7. *And be it further enacted*, That the land officers shall receive the same fees for locating land scrip issued under the provisions of this Act as is now allowed for the location of military bounty land warrants under existing laws; *Provided*, Their maximum compensation shall not be thereby increased.

"Sec. 8. *And be it further enacted*, That the governors of the several States to which scrip shall be issued under this Act shall be required to report annually to Congress all sales made of such scrip until the whole shall be disposed of, the amount received for the same and what appropriation has been made of the proceeds."

On the 5th of May, 1863, the Legislature of the State of New York passed an Act (Laws of New York of 1863, chap. 460) entitled "An Act Relative the Lands Granted to this State by the Act of Congress Entitled 'An Act Donating Public Lands to the Several States and [181] territories Which may Provide Colleges for the Benefit of Agriculture and the Mechanic Arts,' Approved Second July, Eighteen Hundred and Sixty-two, and Authorizing the Sale thereof, and the Investment of the Proceeds of Such Sales." By this Act, the State duly accepted the grant and gave its assent to the conditions thereof. The comptroller was authorized to receive the land scrip (as the State had no public lands of the United States, unappropriated, within its borders), and to sell the same, and to make all necessary arrangements, employ agents, etc., as he deemed expedient, for effecting a judicious sale of such scrip. Land scrip representing 989,920 acres of land was then issued by the Secretary of the Interior to the comptroller, and was embraced in 6,187 pieces of scrip for 160 acres each. The comptroller sold scrip for 68,000 acres at the rate of 85 cents an acre, and for 8,000 at 88 cents an acre.

By an Act passed May 14, 1863 (Laws of New York of 1863, chap. 511), the Legislature appropriated the income and revenue which might be received from investment of the proceeds of the sale of any of the lands granted to the State by the Act of Congress of July 2, 1862, to the People's College, located at Havana, in Schuyler County, on certain conditions expressed in the Act.

On the 27th of April, 1865 (Laws of New York of 1865, chap. 585), the Legislature passed an Act creating Cornell University as a corporation, and appropriating to it the "income, revenue and avails which shall be received from the investment of the proceeds of the sale of the lands, or of the scrip therefor," granted to the State by the Act of Congress of July 2, 1862, to be paid over to the trustees of the University "for its use and behoof, in the mode and for the purposes in said Act of Congress defined." This gift was expressed in the Act to be upon the condition that Ezra Cornell should give $500,000 to the University and $25,000 to the trustees of Genesee College, located at Lima, New York, and the provisions of the Act were to take effect only in case of the noncompliance of the trustees of the People's College at Havana with the provisions of the Act of May 14, 1863. Section 5 of the Act of April 27, 1865, was in these words: "§ 5. The corporation hereby created may hold real [1 and personal property to an amount not exceeding three millions of dollars in the aggregate." Both of the gifts above specified were made by Mr. Cornell.

In this state of things, as the court of appeals says in its opinion (p. 116), "the great question then arising was in regard to the best means of disposing of such scrip for the best price, so that the income for the University should be increased to the greatest extent therefrom. The result of throwing into market such an enormous amount of the public lands as had been donated by Congress to the several States was a fall in the market value of the land, and, of course, of the scrip which represented it. In the fall of 1865, Mr. Cornell had purchased some scrip of the comptroller, representing 100,000 acres, for $50,000, and had given his bond for that sum upon condition that all the profits which should accrue from the sale of the land should be paid to the Cornell University."

The Legislature then passed, on the 10th of April, 1866, an Act (Laws of New York of 1866, chap. 481) entitled "An Act to Authorize and Facilitate the Early Disposition by the Comptroller of the Lands or Land Scrip Donated to this State by the United States," and which was in the following words:

"Section 1. The comptroller is hereby au-

thorized to fix the price at which he will sell and dispose of any or of all the lands or land scrips donated to this State by the United States of America, by Act of Congress approved July second, eighteen hundred and sixty-two, and entitled "An Act Donating Public Lands to the Several States and Territories Which may Provide Colleges for Instruction in Agriculture and the Mechanic Arts." Such price shall not be less than at the rate of thirty cents per acre for said lands. He may contract for the sale thereof and sell the same to the trustees of the Cornell University. If the said trustees shall not agree with the said comptroller for the purchase thereof, then the commissioners of the land office may receive from any person or persons an application for the purchase of the whole or any part thereof at the price so fixed by the said comptroller, and may, if they are satisfied that the said person or persons will fully carry out and perform the agreement hereinafter mentioned, sell the same or any part thereof to the said person or persons. But said trustees or such person or persons shall at the same time make an agreement and give security for the performance thereof to the satisfaction of the comptroller, to the effect that the whole net avails and profits from the sale of scrip or the location and use by the said trustees, person or persons, of the said lands or of the lands located under said scrip, shall from time to time, as such net avails or profits are received, be paid over and devoted to the purposes of such institution or institutions as have been or shall be created by the Act chapter five hundred and eighty-five of the Laws of eighteen hundred and sixty-five, of the State of New York, in accordance with the provisions of the Act of Congress hereinbefore mentioned. And the said trustees, person or persons to whom the said land or scrip shall be sold, shall report to the comptroller annually, under such oath and in such form as the comptroller shall direct, the amount of land or scrip sold, the prices at which the same have been sold, and the amount of money received therefor, and the amount of expenses incurred in the location and sale thereof.

"§ 2. The comptroller is authorized from time to time, as he shall see fit, to make such examination into the actions and doings of his vendees of said lands or scrip therewith as he shall deem necessary to ascertain and determine what are the net avails of the said lands or scrip from the sale or from the location and use thereof by his said vendees.

"§ 3. This Act shall take effect immediately."

Under this Act, the comptroller fixed the price of the land at fifty cents per acre, which, under all the circumstances, was considered a fair amount. The trustees of the University did not apply to purchase the scrip under the Act of 1866, and on the 4th of August, 1866, the commissioners of the land office made an agreement with Ezra Cornell for the sale to him of all the remaining scrip undisposed of, represented by 5,087 certificates of 160 acres each. The agreement was entered into between the commissioners and Mr. Cornell, under the authority of the above Act of 1866, and was in these words:

"This agreement, made this fourth day of [184
August, eighteen hundred and sixty-six, between the People of the State of New York, through their commissioners of the land office, acting under and by virtue of chapter 481 of the Laws of 1866, of the first part, and Ezra Cornell of Ithaca, N. Y., of the second part, witnesseth:

"That the said party of the first part hereby agrees to sell and assign and deliver to the party of the second part all of the agricultural land scrip now in the possession or ownership of the State of New York, consisting of five thousand and eight-seven certificates, each representing one hundred and sixty acres, on the following terms and conditions:

"First. That said party of the second part shall receive said scrip, from time to time, as the same can be judiciously located, in parcels representing not less than twenty-five thousand acres, paying therefor into the treasury of the State, on its assignment and delivery to him by the comptroller, at the rate of thirty cents per acre, in lawful money of the United States, or in the stocks of the United States, or of the State of New York, or in other good and safe stocks or bonds, to be approved by the comptroller, and drawing not less than five per cent interest per annum, and at the same time depositing with the comptroller stocks or bonds, to be approved by him, to an amount equal to an additional thirty cents per acre, as security for the fulfillment, by the party of the second part, of the conditions of this agreement, so far as they relate to the execution of a mortgage to the State on the land to be entered and located with said scrip, on the fulfillment of which said stock or bonds so deposited as security shall be returned to said party of the second part.

"Second. That whenever any parcel of scrip, sold and delivered to the said party of the second part, under and by virtue of this agreement, shall have been located by him or his agents, the said party of the second part hereby agrees that he will, without delay, furnish to the commissioners of the land office of this State, or to some member thereof, to be designated by a resolution of the board, a full and complete list and description of the land so located. And said board of commissioners shall, [18
within at least sixty days thereafter, and from time to time subsequently as may be found expedient, affix a minimum valuation by quarter-sections, at which the same may be sold by said party of the second part. And the said party of the second part further agrees that he will annually, and from time to time, whenever required by the commissioners of the land office, render, for their information, to the comptroller, a full, just and true account of all sales and leases made by him, said report to be made in such form and under such oath as the comptroller shall direct, and will pay into the treasury of the State the whole of the net profits arising therefrom, which shall be ascertained by deducting from the gross receipts on sales the original cost of thirty cents per acre, the cost and expenses attending the location, management and sale of said lands, the taxes assessed and paid on the same by the party of the second part, and the interest at the rate of seven per cent per annum on the several

amounts actually expended and liabilities incurred for such purposes. But it is expressly agreed by the party of the second part that he will not sell any portion of said lands at a price below the minimum valuation thereon, which may from time to time be fixed by the commissioners of the land office, without first obtaining their consent to do so in writing.

"Third. That the stipulations and conditions of this agreement shall apply to each and every parcel of scrip assigned and delivered to said party of the second part; under this agreement, and the comptroller shall defer or suspend further assignments and deliveries of scrip whenever the party of the second part fails to perform such stipulations and conditions in respect to any scrip sold and delivered to him under this agreement, until they have been complied with. Except, nevertheless, that stocks or bonds as security for the return and mortgage of lands located under scrip issued to the party of the second part shall in no case be required when there shall remain in the hands of the comptroller, by virtue of this agreement, mortgaged lands not released, equal in quantity to the scrip which may be issued to the party of [186] the second part, and remain not located and mortgaged as provided by this agreement.

"Fourth. That as often as and whenever the party of the second part shall furnish a description of any of the lands selected and located by him under and by virtue of said scrip, he shall immediately execute a mortgage thereon to the people of this State, to be approved by the attorney-general, conditioned that the said party of the second part will fully keep and perform each and every of the terms and conditions he is required to do, keep and perform. And this agreement is declared to be a continuing agreement, and a suit or suits at law or in equity may be from time to time instituted and maintained thereon, and upon any or all of said mortgages, for any violation of such terms and conditions, whenever such violation may occur. Said mortgages shall be delivered to the comptroller, or to the commissioners of the land office.

"Fifth. Whenever the party of the second part shall sell or dispose of any section of the lands acquired by him under this agreement, and pay into the treasury of the State the net profits resulting from such sale, after the deductions hereinbefore mentioned and provided for, the party of the first part shall execute and deliver to the party of the second part a full and sufficient release of the portion sold from the lien of the mortgage, so that a clear title can be vested in the purchaser or purchasers.

"Sixth. That of the moneys arising from sales or leases made by the party of the second part, and paid into the state treasury, as herein provided, a proportion equal to thirty cents per acre shall be added to and form a part of the fund known and designated on the records of the comptroller's office as the 'College Land Scrip Fund,' and the remainder shall constitute a separate and distinct fund, which shall be the property of the Cornell University, to be known as the 'Cornell Endowment Fund,' the principal of which shall forever remain unimpaired, the income to be annually appropriated *by the Legislature*, and paid over from time to time to the trustees of the Cornell University, to be by them devoted to the purposes of the institution.

"Seventh. That the said party of the second part further agrees to purchase the whole of the aforesaid scrip and select and locate lands under and by virtue thereof, and execute mortgages thereon as hereinbefore provided, within four years from the date hereof, and that he will sell the lands within twenty years from date, and pay the net profits arising from such sales into the treasury of this State, and until the same shall be so sold and the net profits so paid he will pay all taxes which may be assessed thereon, and preserve and maintain a title thereto unimpaired, to which the liens created by said mortgages shall attach. And if any event shall occur making it needful for the people of this State to incur any expense to preserve the lien of said mortgages, the same shall be paid out of the proceeds of the sales of said lands. And if, after the expiration of the period of four years hereinbefore fixed, any of said scrip shall remain with this State, and not have been paid for by the party of the second part, the same shall be released thereafter from the conditions and stipulations of this agreement."

The court of appeals says (p. 122): "There was no sum provided in the Act of Congress for the sale of the scrip. It was in the discretion of the State to sell it at any price it could obtain, either at public or private sale; and it could sell the whole or any part of such scrip at any time, but the proceeds of such sale were to be invested under the Act of Congress and the income applied as therein provided for. If there be any ambiguity in the meaning of the agreement as a whole, it is not improper to see what meaning was attached to it by the persons who executed it, if possible, and also to look at the surrounding facts, so that we may place ourselves in the same position as the contracting parties and thus learn what was in contemplation.

"It is known that at the time of the passage of the Act of April 10, 1886, sales of the scrip had almost ceased. It was thought that there was a good chance that the land which might be located under this scrip would in the future greatly appreciate in value, and it was the wish of those interested in its welfare that the University should in some way reap the benefit of this increase. But it had no funds to purchase the scrip, and it needed ready money as an income to aid it in the discharge of its duties as an educational institution. Hence the problem was to find someone who would purchase the scrip and pay for it, and then locate and sell the lands at the higher prices which it was hoped they would attain and give the profits to the University. A glance at the correspondence between Mr. Cornell and the comptroller, and at the minutes of the proceedings of the land commissioners, and the other evidence in the case, shows that there was no one else than Mr. Cornell who was ever thought of as a person who would take upon himself such burdens, troubles, labors and responsibilities, for the purpose of giving away all the profits which might in the future arise from such sales. It is seen by reference to that correspondence that Mr. Cornell and the comp-

troller differed in regard to the construction of the Act, the comptroller holding that the Act really meant that the net avails of the scrip should be placed under the custody of the State, while it may be inferred that the idea of Mr. Cornell was that the *profits*, after paying the original thirty cents and the additional thirty cents (if realized) as the purchase price of the scrip, might be placed as he should choose, provided the University should receive the benefit of the whole income arising from such profits. Under date of June 9, 1866, Mr. Cornell, in his letter to the comptroller, speaks of his differing with the comptroller in his construction of the law, but adds: 'Appreciating, as I do most fully, your motives for desiring to give the utmost possible security and permanency to the funds which are in a great degree to constitute the endowment of the Cornell University, I shall most cheerfully accept your views so far as to consent to place the entire profits to be derived from the sale of the lands to be located with the college land scrip in the treasury of the State, *if the State will receive the money as a separate fund from that which may be derived from the sale of the scrip, and will keep it permanently invested, and appropriate the proceeds from the income thereof annually to the Cornell University, subject to the direction of the trustees thereof, for the general purposes of said institution, and not to hold it subject to the restrictions which the Act of Congress places upon the fund derivable from the sale of the college land scrip, or as a donation from the government of the United States, but as a donation from Ezra Cornell to the Cornell University.*'

"Mr. Cornell thus plainly understood that the purchase price of the scrip from the State was thirty cents an acre, with a possible thirty cents more if he should realize that sum on the sale of the land, and that any sum beyond that came to him as profits on his sale of the scrip or land to third parties; and that sum, being his own profits, he was willing to donate to the University, and for that purpose to pay the same into the treasury of the State, the same to be invested and the income therefrom to be paid by the State to the University for the general purposes of the institution, and not as part of the purchase price of the scrip to be invested under the Act of Congress. It was after the receipt of this latter that the agreement was made, the subdivision six containing, in substance, the provision asked for by Mr. Cornell.

"While, in some portions of this agreement, if read alone and laying aside all knowledge of the contemporary history of the events surrounding it, there might arise some doubt as to the meaning of such portion, yet when read as a whole, and in the light of those events, I think no real and grave doubt can exist as to the meaning of this instrument. It seems clear to my mind that the State sold this land scrip at thirty cents per acre, with an additional thirty cents if so much should thereafter be realized upon the sale by the vendee of the State, and that this constitutes the purchase price of such scrip, which, when assigned to Mr. Cornell by the State, in accordance with the terms of the contract, he became the legal owner of. He, it is true, also agreed that his profits should be paid into the treasury of the State, but they were to be paid therein *as profits* and not as any portion of the purchase price of the scrip, and they were to be paid, and were in fact paid, as profits of Mr. Cornell, and they were received under that agreement as the property of the Cornell University, the income of which was to be paid to it for its general purposes, and the principal was to constitute the Cornell Endowment Fund. I cannot see that in all this there was nothing but an agency created in behalf of the State, and that Mr. Cornell was such agent, and that the whole profits realized were really nothing but the proceeds of the sale of the lands by the State. The State, on the contrary, by the very terms of the agreement, sold the scrip, and the legal title, by patents from the government of the United States, was vested in Mr. Cornell when he located the lands under the scrip which he had purchased, and took out his patents upon such location. Neither can I see that the purchaser of the scrip gave, or intended to give, or was supposed to give, his profits as part of such purchase price. His agreement is plain, and in it he stated what such purchase price was, and what he would give for the scrip, and the fact that he agreed to pay his profits, if any were realized, into the treasury of the State, as the property of the University, which was to have the income thereof paid over to it for its general purposes, does not, to my mind, render such profits any portion of the purchase price of the scrip. They were profits which he hoped to be able to realize in the future, but were entirely speculative in character and amount, dependent largely upon the judgment with which the lands were located, and the time and manner of their sale. All this Mr. Cornell was willing to do for this University, but the agreement shows that he was to do it as a gift of his own, and not as a mere agent of the State or of the United States; and that all the compensation he sought for his services, his trouble and his responsibilities, great and onerous as they were, was the fact that all this should go to the University as his gift, and the State become the custodian of the profits under the duty to appropriate the income to the trustees for the general purposes of the University.

"The counsel for the institution may be entirely right in his statements as to the law regarding this branch of the question, if he is right in the fundamental proposition as to the *profits* being a part of the purchase price or the avails of the sale of the scrip by the State; but until he can maintain the correctness of that proposition, I do not think his argument reaches the trouble. I do not think the proposition is correct. The profits were the avails of the sale of the scrip by Mr. Cornell, not in any sense the avails of the sale of scrip by the State. I think, also, that the agreement is fully authorized by the Act of April 10, 1866. It gives the right to the commissioners of the land office to sell the scrip, or any part thereof, for the price which was to be fixed by the comptroller, and not less then thirty cents per acre. The right to sell the scrip at the price fixed by the comptroller was based upon the condition that the persons who purchased at such price should also agree to pay over the net avails or profits from the sale by them of the scrip or lands

under it, as they should be received, t they should be 'devoted to the purposes n institution or institutions as have been ll be created by the Act—chapter 585 of ws of 1865' (the charter of Cornell Uni- y)—in accordance with the provisions of Act of Congress before mentioned. This not mean that all these possible profits are e deposited in the state treasury, subject to same rules that would obtain in the case of e purchase price of the scrip, but only that ey shall be devoted to the institution created y the Act of 1865, in accordance with the pro- isions of the Act of Congress already men- ioned. Of course the purchase price—that which was fixed by the comptroller—was to go into the treasury and be invested as provided for by the Act of Congress.

"The reference in the above section of the Act of 1866 to such institution or institutions as have been or shall be created by the Act—chapter 585 of the Laws of 1865—can, of course, be to none but the Cornell University, and hence the provision in the agreement that the profits shall all be devoted to that institution was proper. As that University had complied with all the conditions imposed upon it by the State as a condition to its right to receive all the income from this fund, the right to it could not be taken from it. This the commissioners of the land office stated in their report to the constitutional convention in answer to a request from that body for information as to this land scrip. And in this report, under date of July 22, 1867, the comptroller, as a member of the board of commissioners of the land office, and one of the officers who executed the contract with Mr. Cornell in August, 1866, stated as follows: 'In deciding what portion of the income of the money paid into the treasury under the agreement with Mr. Cornell would be subject to this limitation' (set forth in the Act of Congress) 'as to its use and application, the commissioners of the land office assumed that the prohibition applied only to the purchase money received by the State on a sale of the scrip, and that the ultimate profits to be derived from the location and sale of the lands by the purchaser formed no part of the purchase money and need not therefore be included. The nominal price, however, which was fixed on the scrip by the Act of 1866, and for which it was sold, in consideration of the stipulation to pay over the net profits, being less than the market rates, it was stipulated in the sixth section of the agreement that an additional thirty cents per acre from the net profits should, when such profits were paid into the treasury, be added to the purchase money, thus increasing the price to sixty cents per acre, the current rate for the scrip at the date of the transaction, and limiting the purposes to which it may be applied in conformity with the terms of the grant by Congress.'

"Here, then, in addition to the language as used in the agreement itself, which, when read as a whole, seems to me quite plain, we find what Mr. Cornell was willing to do, as set forth in his letter to the comptroller above quoted from, in which he claims the Act permitted it, and he would donate the profits as a gift from himself to the University; and we find in an official report of one of the officers executing the contract, speaking for himself and associates, what was their understanding of this agreement. From all sources, the agreement itself and the separate views of the parties to it, it appears the construction should be, and was, that the profits formed no part of the purchase price or the avails of the sale of the scrip by the State (over the thirty cents per acre, if realized), and that such profits belonged to the University by the gift of Mr. Cornell, the vendee of the scrip from the State, the income to be paid to the trustees of the University for the general purposes of the same."

[192]

[193]

By an Act passed May 4, 1868 (Laws of New York of 1868, chap. 554), the Legislature authorized the comptroller to invest the moneys which might be received in excess of sixty cents per acre, under the contract of August 4, 1866, and which thereunder went into "the Cornell Endowment Fund," not only in stocks of the United States or of the State of New York, or in some other safe stocks yielding not less than five per cent per annum on the par value thereof (according to the restriction in section 4 of the Act of Congress of July 2, 1862), but also "on bonds secured by mortgage upon uncumbered real estate, situated within this State, worth at least double the amount secured by such mortgage." The Statute also provided as follows: "The said fund and the interest and income thereof, subject to the expenses of the care and management of the same, shall be held for and devoted to the purposes of the said Cornell University, in pursuance of the contract before mentioned."

As to this Statute, the court of appeals says (p. 127): "This must be taken as a legislative recognition of the fact that the agreement of sale to Mr. Cornell was for thirty (possibly sixty) cents an acre, and that all profits belonged to Mr. Cornell, but that by an agreement he had agreed to give them to the University for the general purposes thereof. We cannot assume that the State would have run counter to the express provisions of the Act of Congress, by enacting that the purchase price of the scrip might be invested in a manner forbidden by that Act."

In 1873 the Legislature appointed a commission, consisting of William A. Wheeler, John D. Van Buren and Horatio Seymour, to ascertain the condition of the land grant and to report whether the Acts of Congress and the Legislature had been complied with in the sale and disposition of the lands. The five two named of the commissioners reported April, 1874, that the profits realized by Cornell from the sale of the lands formed of the purchase price of the scrip, while ernor Seymour reported that he was of a trary opinion.

The Legislature ultimately, and by a passed May 18, 1880 (Laws of New Y 1880, chap. 317), directed the comptroller the request of Cornell University, to transfer, pay and deliver to the lat moneys, securities, stocks, bonds and constituting a part of or relating to known as the 'Cornell Endowment Fu held by the State for the use of sa sity." This was done because, unde ment made between Ezra Cornell a and the University, on the 13th

1874, with the consent of the comptroller and the commissioners of the land office, Mr. Cornell and his wife had conveyed to the University all their rights under any agreement between him and the State relating to the land scrip or to any lands located or to be located under it, and the University had covenanted that it would assume and perform all the agreements made between him and the State in reference to the land scrip or the land, and would discharge his obligations held by the State. The University had paid to the State a part of the additional thirty cents per acre which the State was to receive, if realized, as the purchase price of the scrip.

On all these facts the court of appeals says, in its opinion (p. 128): "The State has made and makes no claim that any portion of these profits over the thirty cents an acre forms any portion of the purchase price of the sale of the scrip by it. The University, by its agreement with Mr. Cornell and by taking exactly his position, and by receiving the moneys and securities of the Cornell Endowment Fund by virtue of the Act of 1880, clearly has taken the position that it was the owner of this fund, and was not indebted to the State therefor. Its reports show that they (the trustees of the University) claimed that it had no debts, and they acknowledged none to the State on account of this fund. If it existed, it would certainly be a somewhat onerous position for the State to be in. It must have all the proceeds of the sale of this scrip, including in such case all the profits of the past and what may hereafter arise; it must pay all expenses, etc., after location, in the way of taxes, and all incurred in the management and disbursement of the money, and must invest in stocks of the kind described in the Act of Congress, and must forever guarantee the whole amount, so that if any of the principal is lost it must be supplied by the State, and it must pay over the five per cent interest on the whole of this fund to the University. This, of course, does not weigh in case the decision were that the law is in that condition. For the reasons already given, I do not think it is."

On the question whether the legislation of New York, or the agreement of August 4, 1866, was in violation of the Act of Congress, the Court of Appeals says (p. 129): "Interpreted as we have interpreted the agreement and the Act of the Legislature of New York, the remaining inquiry is, Does the New York Statute, or the agreement under it, run counter to the Act of Congress creating this land-scrip trust? I think not. It provides that all moneys derived from the sale of the land scrip by the State shall be invested, etc., as therein prescribed. The scrip is to be sold by the State, which could not itself locate the land, and the avails of such sale are to be invested. The avails of the sale of the scrip by the State were the purchase price thereof; and if I am right, that the profits formed no part of such purchase price, but were the property of the vendee of the State, which *he* agreed to give to the University for general purposes, as his gift and to form the property of the University, then the Act of Congress has no concern with it.

"Another consideration may be adverted to. It is exceedingly doubtful, in my mind, whether the University can be heard to claim the existence of this alleged debt under the facts of this case. The State has made, and makes, no claim upon the University for the property or any portion of it. It was placed in its possession by virtue of the consent of the State, evidenced by the passage of an Act authorizing and directing it. The University has claimed to be the owner of it, and no one has drawn its rightful title in question. Can it now, while enjoying, without hostile claim from any source, the full control of the property, as its absolute owner, set up, as a reason why it should be allowed to take other property, that perhaps hereafter someone may make a claim that the property does not belong to the University, but that it is a trust fund originating in the Act of Congress? If the State or the United States were to commence some proceeding, based on the counsel's argument, to reclaim possession of the property, there is nothing in the present attitude of the University which would necessarily estop or in any way conclude it from denying that any such trust exists, or that any case had been made for taking the possession of the property out of its hands. [19

"So far as appears, it seems that this assumed indebtedness is entirely gratuitous on its part, and that there is no creditor who makes the claim, no one who questions its title. It is going a good ways, under such circumstances, to lay much weight on the liability which, up to this proceeding, was never admitted by the University, and is not now asserted by anyone else. It would seem as if property which was thus in the possession of the corporation, unclaimed by anyone else, was held by it within the meaning of its charter, and that the question in regard to the character of its holding was merely an abstract one with which courts would not deal, at least so far as this proceeding is concerned.

"In all these matters it must be borne in mind the parties have all been acting in the most entire and perfect good faith. This was no scheme to avoid or evade the provisions of the Act of Congress. The price of sixty cents an acre which the State got for the land was all it was worth at that time. Its future value depended upon many contingencies. The State had the right to sell the scrip for such price as it might agree on with a purchaser. This it did. The University wanted money to pay its expenses. It could not very well wait for twenty or even five years for the purpose of seeing how the value of this scrip would appreciate, if at all. The Legislature was equally in earnest in its desire for the prosperity of the institution; so were the state officers, and, above and beyond all, so was Mr. Cornell, its generous founder, and already the donor of such a large amount of money. Taking all the circumstances into consideration, the plan carried out was hit upon, and the amount of the Cornell Endowment Fund and the property arising therefrom must be regarded as a gift of the donor and founder, and not as a violation of either the Act of Congress, or of the Act of our own Legislature." [19

The Court of Appeals then states (p. 131) the position of the University with reference to the value of its property as follows: funds from individuals (including the value of the university

buildings, farm, grounds, etc., at $69,683.33), as fixed by the surrogate, $598,588.65; western lands, $1,648,178.56; western land contracts, $439,334.22; total, $2,686,101.43. It states that the supreme court advanced the $69,683.33 to "$385,000," being an advance of "$315,-316.67," and that, adding this $315,316.67 to the $2,686,101.43 makes a total of $3,001,418.-10, without counting as property the College Land Scrip Fund in the hands of the State.

The statement that the supreme court advanced the $69,683.33 to $385,000 would appear by the record to be a clerical error, for, although *Judge* Merwin, in his opinion in the supreme court, states that the appellants there were entitled to a finding that the property represented by the item of $69,683.33 was at the date of the death of Mrs. Fiske, of the value "at least" of $385,000, the judgment of the supreme court expressly adjudges that the item of $69,683.33 is fixed by it at $400,000, and that it finds that the value of the property of the University held and owned by it at the death of Mrs. Fiske was $3,015,414.71. But, in either case, the amount exceeded $3,000,000.

We concur with the court of appeals in the conclusion that the sixty cents per acre was the purchase price of the land scrip; that, under the agreement of August 4, 1866, the profits to be made by Mr. Cornell, although to be paid into the treasury of the State, were not any portion of the purchase price of the scrip, but were to be paid in, and were in fact paid in, as his profits, and were received by the State, as the sixth section of the agreement states, as "a separate and distinct fund, which shall be the property of the Cornell University, to be known as the 'Cornell Endowment Fund,'" and that the income of the money was to be paid to the University for its general purposes, and the principal was to constitute the "Cornell Endowment Fund."

[198] The court of appeals states that it cannot see that in all this there was nothing but an agency created in behalf of the State, and that Mr. Cornell was such agent, and that the whole profits were really nothing but the proceeds of the land scrip sold by the State. In this connection, a reference may not be inappropriate to the clear and incisive statement of Governor Seymour, in his minority report before referred to. After stating that his associates were of opinion that the contract was an actual sale to Mr. Cornell, but that all profits made from the land were part of the purchase money, and so subject to the restrictions of the Act of Congress, Governor Seymour says that he is forced to the conclusion that the construction which involves merging the two funds into one is inconsistent with the pledges of the State to Congress. He adds: "When New York accepted the grant of the general government, it did so with the full knowledge of this clause in the Act of Congress, viz.: 'That the grant of land and of land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative Acts.' One of these conditions is, 'that in no case shall any State to which land scrip may thus be issued be allowed to locate the same within the limits of any other *State.' This State only* had the right to sell its scrip. If it has no right to locate land openly and directly, can it do the same thing under cover and indirectly? If the State can claim all the proceeds of the lands entered by its scrip in the State of Wisconsin, after deducting the costs of taxes and expenses and the price of its scrip, does it not claim and get everything it would if the land had been taken up in the name of the State? Is there any stronger or clearer way of saying that a man is entitled to all there is of value in any property, than to say he has a right to all the money it will bring after paying taxes and expenses? Does any citizen of our country hold a more ample interest in land, by virtue of deeds or patents, than is held by him who has a right to all that it will bring by sales or leases, after paying taxes and expenses? All of our citizens who have lands in Western States, or elsewhere, in fact own them upon these terms. Is the case [19 in any way changed by using the term *profit* in place of the word *proceeds*, to express the amount the State can claim by their construction of the contract? Any construction of the contract with Mr. Cornell, which makes the State the substantial owner of these lands and converts the transactions into any agency, is not merely a technical and immaterial violation of its pledges. It conflicts with the Act of Congress and infringes in a serious way upon the rights of Wisconsin and other States where the lands held by Mr. Cornell are situated. The careful way with which the Law of Congress distinguishes between the proceeds of land and of land scrip was designed to protect such States. But for the restraints of the Act the old States could enter all their scrip at the land offices of the west. Their wealth would enable them to pay taxes and keep the lands from market for an advance of price. For this reason the restriction was put into the Act. Ownership by this State under cover, no matter what terms are used to hide its interest, or what objects or pretexts are displayed as an excuse for its action, is a violation of its pledges to Congress and of the rights and interests of other States. As a rule, individuals are unable, for any length of time, to hold large tracts of land. Nearly the whole amount of scrip given by Congress to the several States has been used by settlers to buy homes in the west, and has thus promoted their prosperity. Congress contemplated this when it forbade one State to take up land within the bounds of another. The agreement is a sale of the scrip to Mr. Cornell, and the profits made by him out of the lands taken up by him with the scrip, when given to the University, will be a gift for the general purposes of the institution, 'and not subject to the restrictions of the Act of Congress.' These profits will be the result of his skill and labor. It is the intent of the Act of 1862 that no State shall, under any pretense, in any manner, or in any degree, acquire title or right to lands in another State."

We are of opinion that, by the terms of the agreement, the State sold the scrip to Mr. Cornell, and that the legal title to the lands located by him under the scrip was vested in him when he took out patents upon such location. The terms of the agreement show that the profits [20 which Mr. Cornell hoped to realize from the sale of the lands, beyond the second thirty cents

per acre, were intended by both parties to the agreement to be a gift from Mr. Cornell personally to the University, and not from him as a mere agent of the State or of the United States; and that the State became the custodian of such profits, not under the Act of Congress, but under the duty which it assumed to take care of the fund as a fund belonging to the University, as the property of the University, and to appropriate the income to the trustees of the institution for its general purposes. The State has provided, as required by the Act of Congress, for the investment in the manner prescribed by that Act, of the moneys derived from the sale of the land scrip. It was under no obligation to treat as falling within the provisions of the Act of Congress any other moneys than those derived from the sale of such scrip, or any moneys derived from the sale of the lands which the purchaser of the scrip should locate and obtain patents for. The State could not itself, or by an agent acting in its behalf, locate or obtain patents for any land which the scrip represented. Therefore the claim of the University, and of Mr. Boardman as executor, that the Act of Congress was violated in the transaction between the State and Mr. Cornell, and that the moneys and property derived from the sale of the lands by Mr. Cornell formed, on the actual facts, no part of the $3,000,000 of property held by the University, is not warranted by law.

The judgment of the Supreme Court of the State of New York, entered December 12, 1888, establishing as its judgment the judgment of the Court of Appeals of New York, rendered November 27, 1888, affirming the judgment of the Supreme Court herein, entered December 14, 1887, is affirmed.

Mr. Justice **Brewer:**

Mr. Justice Gray and myself dissent from the views expressed and the conclusions reached in the foregoing opinion.

By the Act of Congress of July 2, 1862, making a grant, and the Act of the Legislature of the State of New York, of May 5, 1863, accepting the same, a trust was created in the State of New York in respect to this land scrip. This is evident from these sections:

"An Act Donating the Public Lands to the Several States and Territories Which may Provide Colleges for the Benefit of Agriculture and the Mechanic Arts.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there be granted to the several States for the purposes hereinafter mentioned, an amount of public lands, to be apportioned to each State a quantity equal to thirty thousand acres for each senator and representative in Congress to which the States are respectively entitled by the apportionment under the census of eighteen hundred and sixty: *Provided,* That no mineral lands shall be selected or purchased under the provisions of this Act.

"§ 2. *And be it further enacted,* That the land aforesaid, after being surveyed, shall be apportioned to the several States in sections or subdivisions of sections, not less than one quarter of a section; and whenever there are public lands in a State subject to a sale at private entry at one dollar and twenty-five cents per acre, the quantity to which said State shall be entitled shall be selected from such lands within the limits of such State, and the Secretary of the Interior is hereby directed to issue to each of the States in which there is not the quantity of public lands subject to sale at private entry at one dollar and twenty-five cents per acre, to which said State may be entitled under the provisions of this Act, land scrip to the amount in acres for the deficiency of its distributive share; said scrip to be sold by said States and the proceeds thereof applied to the uses and purposes prescribed in this Act, and for no other use or purpose whatsoever: *Provided,* That in no case shall any State to which land scrip may thus be issued be allowed to locate the same within the limits of any other State, or of any Territory of the United States, but their assignees [201 may thus locate said land scrip upon any of the unappropriated lands of the United States subject to sale at private entry at one dollar and twenty-five cents, or less, per acre: *And provided further,* That not more than one million acres shall be located by such assignees in any one of the States: *And provided further,* That no such location shall be made before one year from the passage of this Act.

* * * * *

"§ 4. *And be it further enacted,* That all moneys derived from the sale of the lands aforesaid by the States to which the lands are apportioned, and from the sales of land scrip hereinbefore provided for, shall be invested in stocks of the United States, or of the States, or some other safe stocks, yielding not less than five per centum upon the par value of said stocks; and that the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undiminished (except so far as may be provided in section fifth of this Act), and the interest of which shall be inviolably appropriated, by each State which may take and claim the benefit of this Act, to the endowment, support and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the Legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

"§ 5. *And be it further enacted,* That the grant of land and land scrip hereby authorized shall be made on the following conditions, to which, as well as to the provisions hereinbefore contained, the previous assent of the several States shall be signified by legislative Acts:

"First. If any portion of the fund invested, as provided by the foregoing section, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished; and the annual interest shall be regularly applied without diminution to the purposes mentioned in the [202 fourth section of this Act, except that a sum, not exceeding ten per centum upon the amount

y any State under the provisions of nay be expended for the purchase of sites or experimental farms whenever d by the respective Legislatures of es.

* * * *

nth. No State shall be entitled to the of this Act unless it shall express its nce thereof by its Legislature within ars from the date of its approval by the ent."

der this Statute, the action of the State nating one beneficiary was not final; and uld withdraw, thereafter, the income from institution and bestow it upon another, n as it did, in fact, in this case, as shown the record. Suppose, hereafter, Cornell iversity should be so conducted that its eading object" should not be "to teach such anches of learning as are related to agricul- ure and the mechanic arts," as required by he Act of Congress, it would be the right and he duty of the State to take the fund and ap- ply it to that purpose by other means and in- struments.

The sacredness of the duties cast upon a trustee, recognized from time immemorial, ob- tains; and the subsequent transaction by which the land scrip was disposed of cannot be inter- preted as if it were a disposition by an absolute owner of his property. A trustee may not speculate in respect to trust property for his own benefit, or for the benefit of a friend or in favor of any institution. The fact of a trust compels that all received as the proceeds of trust property, directly or indirectly, must be adjudged forever within the obligations of that trust.

The scrip became the property of the State in trust. The Act of Congress determines the fact, the nature and extent of the trust. It grants land; or, in the absence of public lands within the State, scrip to the corresponding amount. It provides, in section two, that where scrip is taken by a State, it may be sold by it, "and the proceeds thereof applied to the uses and purposes prescribed in this Act, and for no other use or purpose whatsoever." Sec- tion three, while referring to the land which may be taken under the Act, indicates fully the scope and intent of the trust, by enacting "that all the expenses of management, super- intendence and taxes from date of selection of said lands, previous to their sales, and all ex- penses incurred in the management and dis- bursement of the moneys which may be re- ceived therefrom, shall be paid by the States to which they may belong, out of the treasury of said States, so that the entire proceeds of the sale of said lands shall be applied without any diminution whatever to the purposes here- inafter mentioned." Section four provides "that all moneys derived from the sale of lands, and from the sales of land scrip, shall be invested," etc.; and that "the moneys so invested shall constitute a perpetual fund, the capital of which shall remain forever undimin- ished, and the interest of which shall be in- violably appropriated," etc., specifying the pur- poses of the appropriation. Obviously the scope of this is, that all moneys derived from *this property*, whether land or scrip, whether obtained directly or indirectly, are consecrated to the purposes designated, and must be held by the State in trust forever. Among the limi- tations provided is that expressed in the sec- ond clause of the fifth section, that "no portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pre- tense whatever, to the purchase, erection, pres- ervation or repair of any building or build- ings." Nothing can be clearer from this Statute than that a State, accepting its provi- sions, constituted itself a trustee, with the ob- ligation that it should devote to the purposes of the Act all the proceeds of the land or land scrip which it might obtain, directly or indi- rectly.

The State of New York, having no public lands within its limits, received scrip, but the scrip was subjected to the same trust that land would have been subjected to, and was sub- jected to, when taken by any State. All ex- pense in respect to the location and manage- ment of the lands, or the investment of the funds, was to be borne by the State, in order that the net proceeds of this grant, no matter how obtained, should be appropriated to the purposes expressed. Hence, the State of New York, accepting the trust, was powerless to repudiate its obligations, or to provide for an appropriation for any other purposes, or under any other conditions, of the moneys which might be received, directly or indirectly, from the disposition of this trust property. Prior to November 24, 1865, scrip to the ag- gregate amount of 176,000 acres was sold at prices ranging from fifty to eighty-five cents— the average being sixty-five, nearly.

The first selection of the beneficiary of this trust was the People's College of Havana; but that selection was not satisfactory; and on April 27, 1865, Cornell University was estab- lished by Act of the Legislature of New York, and it was designated as the beneficiary; the Act providing, as a condition of this selection, that Cornell University should be endowed to the extent of five hundred thousand dollars by Ezra Cornell. The provision in § 4 in its char- ter, that "the corporation hereby created may hold real and personal property to an amount not exceeding three millions of dollars in the aggregate," evidently means that the property of the corporation shall not exceed three millions, after deducting the amount of all its debts and obligations, and does not include property which the State might retake at any time, and *a fortiori* property which the State, under a duty imposed upon it by law, owned upon a trust which it could not devest itself of. Here, a reference to Mr. Cornell, and his con- nection with this transaction, is appropriate. A man acquiring wealth by his own exertions, the dream of his later years was a university, bearing his name, and so munificently en- dowed as to become, like Yale and Harvard, a centre of learning; and his purchase of the scrip, and his transaction with the State, must be interpreted in the line of this thought. It was the glory of a great university which he hoped to realize—one which would link his name with its glory. The means were subor- dinate—the glory and strength of Cornell Uni- versity was the purpose. Unquestionably in- spired by his thought and wish, on April 10,

1866, the Legislature passed an Act for the future disposal of the scrip, and authorized the comptroller to fix its price. That price was not to be less than thirty cents per acre. The Act also provided that he might contract for the sale thereof to the trustees of Cornell University; and that if they did not purchase, the commissioners of the land office might contract for the sale to any person or persons; but added, expressly, that "said trustees or such person or persons shall at the time make an agreement and give security for the performance thereof to the satisfaction of the comptroller, to the effect that the whole net avails and profits from the sale of scrip or the location and use by the said trustees, person or persons of the said lands or of the lands located under said scrip, shall from time to time, as such net avails or profits are received, be paid over and devoted to the purposes of such institution or institutions as have been or shall be created by the Act, chapter five hundred and eighty-five of the laws of eighteen hundred and sixty-five, of the State of New York, in accordance with the provisions of the Act of Congress hereinbefore mentioned. And the said trustees, person or persons to whom the said lands or scrip shall be sold, shall report to the comptroller annually, under such oath and in such form as the comptroller shall direct, the amount of land or scrip sold, the prices at which the same have been sold, and the amount of money received therefor, and the amount of expenses incurred in the location and sale thereof."

This Act has a twofold aspect: It is the legislation of a sovereign State, prescribing the duties and powers of one of its officials; and it is also a declaration of the duties cast by a trustee upon its agent in respect to trust property. In either aspect, its voice is potential in respect to that which was under the authority thereafter done by official or agent. It must be borne in mind that the State had no land—nothing but scrip. This fact was known, and must be recognized in any interpretation of the powers granted. What were they? First, to sell for cash, at a price not less than that to be fixed by the comptroller. Second, and this was obviously in view of propositions or suggestions made by Mr. Cornell as to what he was willing to do, that if no sale for cash was made, the scrip might be disposed of to anyone who would give to this fund the full benefit of any profits made by the location of the scrip upon public lands. Can it be doubted, under such a statute, that, if no absolute sale for cash was made, and the alternative proposition was finally accepted by the official and agent of the State and trustee, the net profits of such location and sale were to become and be a part of the trust funds? If language means anything, it means this. No stipulation by official or agent could nullify or thwart the express limitations of this power. An illustration or two will make this clear: Suppose under this authority the land commissioners had contracted with Mr. Cornell to take the scrip and locate it upon public lands, and out of the proceeds pay thirty cents an acre to the fund, and give the balance to the commissioners for their private gain; or to the State for the public purpose of a state-house, or other matter of general interest, would any court or any person uphold for a moment the validity of such a contract so far as respects the latter provisions; and would not the universal voice declare that, notwithstanding it, the entire proceeds of the location of scrip and sale of lands belonged to the fund of which the State was the trustee? That is this case. The comptroller fixed the price at fifty cents an acre, about fifteen cents an acre less than had theretofore been realized. Not only that, but while it is in evidence that the amount of scrip authorized by the Act of Congress created a temporary depression in price, so that although no land was purchasable from Congress at less than one dollar and a quarter per acre, the price of scrip was temporarily reduced to less than half that figure; yet, as appears from the report of a commission, appointed in 1874 by the State of New York to inquire into this college land grant, the cash market value of the scrip was always at least fifty cents an acre and the sales by other States of scrip, amounting in all to 5,699,600 acres, ranged from fifty to ninety cents, only 120,000 acres having been sold below fifty cents. It is thus obvious that the depression in price was only temporary. The prior experience of the State of New York, the whole experience of other States, tends to show that fifty cents was the minimum value of this scrip. No sale was made, no contract of sale [201 entered into, at the price fixed by the comptroller. The contract entered into was by virtue of the alternative authority given.

That contract was upon this proposition from Mr. Cornell: "Appreciating, however, as I do most fully, your motives for desiring to give the utmost possible security and permanency to the funds which are, in a great degree, to constitute the endowment of the Cornell University, I shall most cheerfully accept your views so far as to consent to place the entire profits to be derived from the sale of the lands to be located with the college land scrip in the treasury of the State, if the State will receive the money as a separate fund from that which may be derived from the sale of scrip and will keep it permanently invested, and appropriate the proceeds from the income thereof annually to the Cornell University, subject to the direction of the trustees thereof, for the general purposes of said institution, and not to hold it subject to the restrictions which the Act of Congress places upon the fund derivable from the sale of the college land scrip, or as a donation from the government of the United States, but as a donation from Ezra Cornell to the Cornell University. Acting upon the above basis, I propose to purchase said land scrip as fast as I can advantageously locate the same, paying therefor at the rate of thirty cents per acre in good seven per cent bonds and securities, and obligating myself to pay the profits, as specified in chapter 481 of the Laws of 1868, into the treasury of the State, as follows: thirty cents per acre of said profits to be added to the College Land Scrip Fund, and the balance of said profits to be placed in a separate fund, to be known as the 'Cornell University Fund,' and to be preserved and invested for the benefit of said institution, and the income derived

therefrom to be paid over annually to the trustees of said University for the general purposes of said institution."

It is unnecessary to notice the other portions of the correspondence, or to review the contract, for all of significance is expressed in this proposition. It is not an absolute sale of the scrip for so much money. The obligation assumed by Mr. Cornell to the State was thirty [209] cents an acre, and the net profits of the location of the scrip on public lands, and sale of the lands. In briefer words, thirty cents an acre and net profits was his offer. True, he proposed that only part of the profits, to wit, thirty cents an acre, should pass to the fund; but what authority had the commissioners for making such a limitation in the contract? Suppose, after the making of the contract, the commissioners had declined to transfer the scrip to him, could he have compelled the specific performance, by mandamus, of that contract? Would not a clear and satisfactory answer have been that the commissioners had no authority to partition the profits. The limit of their authority was a contract by which the agent and locator should pay to the State the whole net profits of the location. As Mr. Cornell could not have compelled, by mandamus, the performance by the commissioners of the contract, so, on the other hand, having received the scrip and located it, and disposed of the land, and paid the money into the State, that unauthorized stipulation becomes surplusage. It cannot relieve the State of New York from its liability as trustee. It is not potent to turn a portion of the proceeds of this scrip into other channels, or to other uses. The fact that all the proceeds were going to the selected beneficiary doubtless led the commissioners to indifference as to the stipulations of the contract; but such indifference did not enlarge their powers nor make valid the stipulation in excess thereof. It seems strange that a trustee can avail itself of a disregard by its agent of his instructions so as to relieve itself of responsibility for about four fifths of the proceeds of the trust property; yet such is the result of the conclusions reached by this court.

We are sustained in this view by a report of a majority of the commission, appointed in 1874 by the Legislature of the State of New York, to inquire into this fund; for they say: "The question was raised in the comptroller's report of 1869, and earlier, whether this agreement of 4th August, 1866, was a sale of the scrip to Mr. Cornell, whether it was not, 'in substance, an agency with a transfer of title for the purpose of facilitating the object in view.' We are of the opinion that the agreement was an actual sale to Mr. Cornell; but that all his profits, made from these lands, are [210] part of the purchase money, and so subject to the restrictions of the Act of Congress. Everything that forms a part of the consideration for the sale of the trust property by the State belongs to the trust fund created by Congress." And again: "We are are asked, finally, to recommend 'what legislation is necessary to properly secure said funds in compliance with the Act of Congress.' None seems to be necessary in reference to the fund to be derived from what are called the ultimate net profits from the location and sale of the lands by Mr. Cornell, under the agreement of August, 1866. By his contract with the State he is to pay these profits into its treasury, and he has twenty years in which to complete the sale of the lands. This fund is, in our opinion, a part of the proceeds of the scrip within the purview of the Act of Congress, and cannot be legally distinguished from the other fund. Mr. Cornell seems to have taken this view before entering into the contract, for in a public communication, dated October 26, 1869, referring to a letter from himself to Comptroller Hillhouse in June, 1866, he says: 'I volunteered to create a fund three or four times as large as that which the State could produce, for the same object that Congress intended, and at my own risk and expenses, without charging a single dime to anybody for my services.' He could not impose on the state treasury a new and distinct trust as to any part of the consideration he was to pay. Unless these profits are part of the purchase money, the State gave to him, for the college bearing his name, a monopoly of the scrip on long credit for a price much less than its cash value. The second thirty cents per acre, provided for in the agreement, being dependent solely on contingent profits, which might not be realized, if at all, for twenty years, and then without interest, was not at the date of the agreement equivalent to more than from seven to ten cents. These profits, being part of the purchase money, the State is bound to receive them, when, from time to time, realized, and invest them in the manner prescribed by the Act of Congress, and to appropriate the income to educational purposes in the Act defined."

It is true, a minority of that commission dissented; but the reasoning of the minority makes [211] the contract of no validity, except as to the sale of the scrip for thirty cents an acre, and leaves only that amount as the fund for which the State is responsible. The reasoning is that the State was not authorized under the Act to itself locate scrip on lands in another State; and if the profits of the location were to belong to the State, it would follow that the State was the beneficial owner of the lands thus located, and therefore there was a direct evasion of the Act of Congress. Concede the force of that reasoning, and who can take advantage of it? Can the State which has received the proceeds of such location say that it had no authority to receive them; and can it, after receiving them, repudiate its liability as trustee for that which it has received as the proceeds of the trust property?

It scarcely need be said that no subsequent legislation on the part of the State of New York, and no agreement between it and Cornell University as to the possession of these funds, can have the effect to relieve the State from its liability as trustee, or place the title to those funds elsewhere than in the State.

THOMAS RYAN, *Plff. in Err.*,
v.
UNITED STATES.

(See S. C. Reporter's ed. 68-88.)

Purchase of lands by United States—contract under Statute of Frauds—proposal of sale—sufficient description—description in deed—offer and acceptance—approval of title and recording—general warranty—estoppel.

1. The United States may acquire by purchase lands for the purposes of fortification and garrison.
2. A complete contract binding under the Statute of Frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract.
3. In Michigan, it is not essential that the description in the proposal of sale have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless.
4. The description in the proposal of sale in this case of the lands proposed to be sold, giving the number of the sections and the parts thereof and the township and range, is sufficient (although there is no statement of the particular village in which the lands were situated), when taken in connection with the Act of Congress authorizing the purchase at or near the Village of Sault Ste. Marie.
5. The deed, if delivered only for purposes of examination, and if the previous memorandum of sale is fatally defective under the Statute of Frauds, is competent to show the precise locality of the property which the memorandum of sale was intended to embrace.
6. A mere offer to sell real estate, upon specified terms, may be withdrawn at any time before its acceptance. But if the offer be accepted without conditions, and without varying its terms, and the acceptance be communicated to the other party without unreasonable delay, a contract arises, from which neither party can withdraw at pleasure.
7. When the deed is delivered in the execution of the contract with the intention that it shall be operative when the grantee approves of the title, he has the right to put the deed on record, on his approving of it and tendering the consideration money.
8. A party who contracts to sell lands which he does not then own, but the title to which he acquires and then conveys by general warranty, cannot, in an action of ejectment, set up that he had no title when he agreed to sell.
9. Where one assumes by his deed to convey a title and obligates himself to protect the grantee in his enjoyment of it, he is estopped from asserting an after-acquired title and turning his grantee over to a suit on his covenant for redress.

[No. 1307.]

Submitted April 21, 1890. Decided May 19, 1890.

IN ERROR to the Circuit Court of the United States for the Western District of Michigan to review a judgment in favor of the United States, plaintiff, against Thomas Ryan for the recovery of certain lands in Michigan. *Affirmed.*

Statement by *Mr. Justice* **Harlan:** [69

This action of ejectment was brought to recover certain lands in the Village of Sault Ste. Marie, Chippewa County, Michigan, of which the United States claims to be the owner in fee, and the possession of which is alleged to be wrongfully withheld from the government by the defendant, Thomas Ryan. They are described in a deed from Ryan and wife to the United States, of date December 18, 1886, and recorded in the proper local office on the 25th of May, 1887. At the conclusion of the evidence the jury, under the direction of the court, returned a verdict for the government, and a judgment was entered against the defendant. The present writ of error brings that judgment here for review. The principal question to be determined is whether the title to the premises in dispute ever passed from the defendant to the government. It is claimed that the negotiations in reference to the sale of these premises never resulted in a binding contract between the United States and the defendant; that the deed of December 18, 1886, although signed and acknowledged by the defendant and his wife, was delivered to the officers of the government, pending such negotiations, only for examination, and was not placed [70 upon record with the assent, express or implied, of the grantors; that the proposal made in Ryan's name for the sale of the property was withdrawn by him before it was accepted, and before the above deed was filed for record; and that therefore no title passed to the United States. Each of these propositions is controverted by the government.

The facts upon which these several propositions depend are very numerous, and are to be gathered principally from letters and telegrams between the parties and their agents. They are substantially as follows:

By the third section of an Act of Congress, approved July 8, 1886 (24 Stat. 128, chap. 747), the Secretary of War was authorized to sell the military reservation known as Fort Brady, in the Village of Sault Ste. Marie, in the State of Michigan, except certain portions thereof. By the fourth section he was authorized to purchase grounds in or near the same village, suitable and sufficient for fortification and for garrison purposes, and to construct thereon the necessary buildings, with appurtenances, sufficient for a four-company military post, to be known as Fort Brady, in accordance with estimates to be prepared by the War Department; and the sum of one hundred and twenty thousand dollars was appropriated to enable the Secretary to comply with the provisions of the Act. That section contained the proviso "that the title to lands authorized to be purchased under the fourth section of this Act shall be approved by the Attorney-General." It was declared by the sixth section that section

NOTE.—*As to Statute of Frauds; what is sufficient note or memorandum under,*—see *note* to Barry v. Coombe, 7:295.

The delivery and acceptance necessary under Statute of Frauds. See *note* to Mahan v. United States, 21:307.

Oral evidence as applicable to written contracts. See *note* to Bradley v. Washington, A. & G. S. P. Co. 10:72.

three should not take effect until the purchase of the new site provided for in section four should have been effected.

By direction of the Secretary and in execution of the above Act, a board of officers of the army was constituted, to meet at Fort Brady, Michigan, on the 7th of September, 1886, or as soon thereafter as was practicable, for the purpose, among others, of selecting for purchase suitable and sufficient grounds as indicated in the fourth section of the above Act of Congress. The board was directed to report by telegraph to the adjutant-general with its recommendation for the approval of the Secretary of War, as soon as a new site was selected. Shortly before the day fixed for its convening, Ryan and his attorney, Mr. Cady, met in Detroit, and during their interview in that city some conversation was had between them in relation to the meeting of this board, and the purposes for which it was to be convened. It appears that for a number of years prior to that date this property had been mentioned in military circles and among citizens as a possible site for a fort.

On the 7th of September, 1886, Cady telegraphed from Sault Ste. Marie to Ryan at Detroit, Michigan: "Telegraph price to me of southwest quarter of southwest quarter of section 6 and southeast quarter of southeast quarter of section 1, for Fort Brady. Answer immediately." To this telegram Ryan responded on the same day under his own signature: "Twelve thousand dollars." On the next day Ryan, by Cady, telegraphed to the board convened by the Secretary of War: "I am instructed by Mr. Ryan to offer the S. W. ¼ of S. W. ¼ of sec. 6 and the S. E. ¼ of the S. E. ¼ of sec. 1 (both in towns. 47 N. of ranges 1 E. and W.), containing eighty (80) acres, more or less, if sold together, for the sum of twelve thousand dollars ($12,000). Although not authorized yet, I assume that Mr. Ryan would sell any portion of said lands at a price in ratio to the above (*i. e.*, $150 per acre)." To this telegram was appended a postscript: "P. S. The above offer is subject to the opening of Easterday Avenue along the south line." Under date of September 9, 1886, the president of the board of officers telegraphed to the adjutant-general at Washington: "The board recommends for purchase the two adjoining forty-acre tracts on the hill, half mile due south of west end of canal, divided through the center of length by meridian of Sault Ste. Marie, aggregating about seventy-five acres; price, twelve thousand dollars." General Drum, acting Secretary of War, under date of September 11, 1886, made the following indorsement on this telegram: "Under ordinary circumstances action in this case would have been deferred until the return of the Secretary of War or the lieutenant-general. In view, however, of the importance of the selection of this site, and of the fact that inaction here would delay further action by the board, which is now in Michigan awaiting reply, the recommendation of the board as contained in the within telegram is approved. The board will be advised by telegraph of such approval." On the same day General Kelton, acting adjutant-general, telegraphed to Lieutenant-Colonel Abbot, president of the board: "Dispatches nine (9) and eleven (11) instant received. The Secretary of War approves the recommendation of board for purchase of two (2) tracts designated at the price of twelve thousand dollars ($12,000). Acknowledge receipt. No further instructions. This telegram was received; for on the 11th of September, 1886, Lieutenant-Colonel Abbot, the president of the board of officers, wrote from Fort Brady to Ryan at Sault Ste. Marie: "You are hereby notified that the acting Secretary of War has approved the recommendation of the board of officers now in session at this post, that your proposal dated September 8, 1886, be accepted, viz. for the sale of certain tracts of land described in your proposal as follows: 'The S. W. ¼ of the S. W. ¼ of sec. 6 and the S. E. ¼ of the S. E. ¼ of sec. 1, subject to the opening of Easterday Avenue along the south line, for twelve thousand dollars.'" The letter was first delivered to Mr. Cady, and was by him delivered to Ryan within three or four days after it came to his hands. The receipt of it by Ryan is not disputed.

On the 30th of September, 1886, the acting Secretary of War wrote to Colonel Poe, of the board: "The recommendation of the board, approved by the Department, selects a tract of about 75 acres of land at Sault Ste. Marie, owned by Thomas Ryan, as the new site for Fort Brady, at the proposed price of $12,000. Papers on file show Mr. Ryan's address to be Michigan Exchange Hotel, Detroit. Please take the proper steps without delay to collect and forward to this Department the necessary deeds and other title papers for the conveyance of this land to the United States, for examination by the Attorney-General as required by law. General Orders 47, H'dq'rs of Army, A. G. O., 1881, publishes regulations of the Department of Justice concerning such title papers, a copy of which will be forwarded to you by mail." Under date of October 4, 1886, Mr. Cady wrote to the adjutant-general of the army at Washington: "On the 11th ult. Mr. Thomas Ryan, of Sault Ste. Marie, Mich., was notified by Henry L. Abbot, lieutenant-colonel of engineers, president of board, that his offer of certain lands as a site for Fort Brady had been accepted. I have the honor of acting for Mr. Ryan in preparing his title for the Attorney-General. Will you please furnish me with a copy of the printed directions for preparing abstracts for the use of the government? Any communication relative to the matter should be addressed to W. B. Cady, Sault Ste. Marie, Mich." Two days thereafter, October 6, 1886, Colonel Poe wrote to Ryan: "I have received from the War Department the following letter of instructions, viz.: [Letter above of September 30, 1886.] I have therefore to request that you will proceed as rapidly as possible with the preparation of the requisite papers, and to aid you in this I inclose herewith a copy of General Order No. 47, Headquarters of the Army, Adjutant-General's Office, May 13, 1881, above referred

to. Please acknowledge receipt of this communication and inform me as to how soon you can begin the preparation of the papers in question." The general order referred to in this letter was one issued from the headquarters of the army, by direction of the Secretary of War, and embodying certain regulations established by the Department of Justice for the guidance of those drawing conveyances, making abstracts or collecting evidences of title to land in cases in which it is the duty of the Attorney-General to pass upon the validity of such title. Among other requirements was one to the effect that a deed to the United States should be acknowledged according to the laws of the State where the land lies, and one (XX.) directing that before any papers relating to title were sent to the Department of Justice for examination they should be submitted to the proper district attorney of the United States.

Under date of October 13, 1886, Mr. Cady thus acknowledged the receipt of Colonel Poe's letter of the 6th inst. to Thomas Ryan, saying: "I am acting for Mr. Ryan in preparing his title for the inspection of the Attorney-General. I expect to be able to send on the necessary papers in from six to eight weeks." Some time having passed without anything being heard either from Mr. Ryan or from his attorney, Cady, Colonel Poe, under date of December 10, 1886, wrote to the latter urging him to forward "the title papers to the Ryan property purchased by the United States for a new site for Fort Brady." To this letter Mr. Cady replied, under date of December 11, 1886, stating that he had met with unexpected delay in obtaining certain papers, and saying: "If I understand directions I am to first send papers to G. Chase Godwin, U. S. district attorney for this district. Do you wish them first sent to you? Also, should the deed from Ryan to the government be recorded before forwarding? Will you honor me by answering the above questions at once? I expect to start for Detroit on the 20th inst., and if you wish to see the papers I will bring them down for your examination and send to Mr. Godwin from Detroit."

The next letter, in the order of their dates, which appeared in evidence, was one under date of December 22, 1886, from Colonel Poe to Mr. Godwin, United States district attorney at Grand Rapids. In that letter the writer said: "In accordance with paragraph XX. of the circular of the Attorney-General of the United States, dated October 27, 1875, W. B. Cady, Esq., attorney for Mr. Thomas Ryan, of Sault Ste. Marie, Michigan, visits you for the purpose of submitting the title papers to a tract of land which the government desires to purchase for a new site for Fort Brady. The War Department is anxious to complete the transaction as soon as possible, and your early action would greatly facilitate matters." This letter was delivered to Mr. Godwin by Mr. Cady, the latter having with him abstracts, certified copy of deeds, maps, etc., relating to the title to the property. On the same day as the letter last referred to, Cady & Cady wrote to the adjutant-general, at Washington, inclosing the papers, "relating to Thomas Ryan's sale to the government," including a "deed of Thomas Ryan *et ux.* to U. S. to carry out above sale," and "authority of Thomas Ryan and E. K. Roberts, cashier, relating to your draft, etc." Under date of January 8, 1887, Mr. Cady addressed a letter to the district [7
attorney, in which he said: "I inclose deed, etc., in the Ryan sale. This makes papers complete. I would respectfully call your attention to the following: 1st. I inclose two deeds of lands in question, one in exact conformity to Mr. Ryan's bid, the other reserving a strip of land 33 feet wide off east side for street purposes; 2d. That the dower right, if any, of Mrs. Warner is cut off by the state tax deeds held by Mr. Ryan. Most respectfully asking you to consider the paper at as early a date as possible and to communicate to me the results, I submit the papers to your inspection. In conversation with General Poe to-day he seemed quite certain that the papers would be sent to him after your examination of them, and that he should send them to the War Department, you sending your report to the Attorney-General. Would you kindly inform me what course you have decided to follow in the matter?"

Among the papers inclosed within this letter was a deed, duly executed and acknowledged, by Ryan and wife, for the premises in dispute. It contained a covenant that the grantors were seised of the premises in fee simple, and would warrant and defend the same against all lawful claims whatsoever. That deed excepted a strip off the south side of the southeast quarter of the southeast quarter of section one in township 47 N., thirty-three feet in width, reserved for Easterday Avenue, and also a strip off the south side of the southwest quarter of the southwest quarter of section six in same township, of like width, reserved for the same avenue, and a strip of like width, off the east side of the latter forty acres, for street purposes. During the latter part of January or first of February, Cady received a letter from the district attorney asking for further information in regard to what was called the "Warner dower," and in respect to a mortgage held by the Citizens' Bank of Detroit.

Under date of March 18, 1887, all the papers were forwarded by the district attorney to the Attorney-General. In that letter the former expressed the opinion that the title to the lands was sufficient. On the next day, March 19, 1887, the district attorney wrote to Cady: "Yours of the 16th inst. received. The abstract and accompanying pa- [76
pers in the matter of the title to the Fort Brady reservation proposed site have been forwarded to General Poe, together with my opinion regarding the same. I have recommended and advised that the title is good and complete." The papers referred to in this letter were immediately forwarded by General Poe to the Secretary of War. The latter, under date of March 28, 1887, referred them, together with the deed of conveyance by Ryan and wife to the United States, to the Attorney-General, with the request that the War Department be advised as to the

validity of the title to the lands in question, and whether the above deed was sufficient to vest the title in the United States.

While these papers were in the hands of the Attorney-General, Brennan & Donnelly, attorneys for Ryan, wrote to the Secretary of War: "Mr. Thomas Ryan of Sault Ste. Marie, in this State, wtih whom your Department had some negotiations some months ago for the purchase of the S. W. ¼ of the S. W. ¼ of section 6, the S. E. ¼ of the S. E. ¼ of section 1 in said town, as a site for Fort Brady, has instructed us to say that he has arranged for a different disposition of the property, and further negotiations are unnecessary. Will you please return to him all papers submitted to the government concerning said property?" This document was referred by the Secretary to the lieutenant-general of the army, who was informed that the title papers had been forwarded to the Attorney-General, and that a copy of the document had been sent to the latter. Under date of April 9, 1887, the Attorney-General returned the papers to the Secretary of War. They were sent again to the Attorney-General on the 16th of April, 1887, the latter being advised by the Secretary of War that their return was not desired, and that the opinion of the Attorney-General was desired as to the validity of the title to these lands as to the sufficiency of the deed to vest the title in the United States, and as to whether there was a sufficient agreement in writing to bind Ryan, notwithstanding his attempted withdrawal from the agreement. On the 18th of [7] May, 1887, the Attorney-General returned the papers to the Secretary of War with a written opinion to the effect that the deed was sufficient to pass title to the United States, provided nothing had transpired since its execution to affect the title. He advised the Secretary of War that information on that point should be obtained before completing the purchase price, by having search made for liens, incumbrances, etc., down to that date. The Attorney-General, on the next day, transmitted the deed of Ryan and wife to the district attorney, instructing him to continue the search for liens, incumbrances, etc., subsequent to the date of the deed, and saying: "Should the title be found to be unaffected thereby and to remain unchanged, you are instructed to have the deed recorded, after which payment of the purchase money will be made in the usual way through the War Department. Please attend to this promptly and report your doings under these instructions as early as practicable."

On the 28th of May, 1887, the district attorney wrote to the Attorney-General, acknowledging the receipt of the latter's letter of the 19th, and saying: "I found upon investigation that he had got a deed from one Anne E. Warner, who made claim of dower, but which claim had no force, I thought, but I found that on the 4th of April Thomas Ryan and wife deeded to the Village of Sault Ste. Marie a strip of land 40 feet wide off the east side of the southwest quarter of the southwest quarter of section 6, and 40 feet off the west side of the southeast quarter of the southeast quarter of section one, making together a strip 80 feet wide, for street purposes. I hereto attach a slip, with the land marked out, showing you what has been done to affect the title to the land. Notwithstanding all this, I recorded the deed running to the United States. Perhaps I should explain further. Since this land was contracted to the government a very remarkable business boom has struck Sault Ste. Marie, and Mr. Ryan claims that the land deeded to the government is worth fifty sixty thousand dollars. He has made claim that the government was dealing wi the expectation of purchasing it, and assuming that it has not been accepted as yet, b was under consideration by the governmen while I supposed you had accepted his off to sell the land for $12,000. This being t situation, I took the responsibility of recording the deed, notwithstanding that eighty f had been deeded away, thinking that would be the safest way to secure the government, as the property is unquestionat worth more than $12,000, although the c veyance of the street should be valid. Th is no doubt that the village officers knew such contract when made, and no doubt ists in my mind but the village officers fer that the government should own this pr erty. The facts seem to be that Thomas R had other lands adjoining this or in the cinity, which he had sold for fabul prices, and he has no doubt promised to o parties the opening of this street, and in suance of this fact has made this deed. this now stands the title of the land is in government, except only that Ryan has veyed away this 80-foot strip. I shal pleased to take any steps that may be dire in this matter." Under date of June 9, 1 the Attorney-General transmitted to the retary of War the letter of the district a ney, in which he said: "It appears that s the date of that deed, and before the was recorded, namely, on the 4th of Ap 1887, the said Ryan and wife deeded a s part of the premises to the Village of S Ste. Marie for the purpose of a street. withstanding this, the United States atto thought it advisable to put the deed to United States on record. By the law of M igan an unrecorded deed is 'void as aga any subsequent purchaser in good faith for a valuable consideration of the same estate or any portion thereof whose con ance shall be first duly recorded.' If conveyance to the village has been first d recorded, and is otherwise within the pro ion of law just adverted to, its title to much of the premises as is granted there would doubtless be superior to a title deriv under the deed to the United States. Ho ever, should the use of that part of the pre ises for the purpose of a street be unobje tionable, the failure to derive the title there under such deed may be unimportant."

The lieutenant-general of the army recom mended that the ground be not purchase unless the 80-foot right of way referred be given up by the village. This recom mendation was approved and the papers wer referred to the chief of engineers, Colone Poe, to ascertain whether the village woul

relinquish the strip 80 feet wide. The Secretary and the lieutenant-general decided "to await further action of the village council of Sault Ste. Marie, that the rights of the United States should be maintained, and that payment must be withheld until the roadway is relinquished to the government, thus making the title of the United States good to the whole tract conveyed by the deed of Thomas Ryan to the United States." The result desired in this particular was attained; for by deed of May 22, 1888, the village, which had then become a city, relinquished to the United States all the rights that it had obtained from Ryan and wife under their deed to it of April 4, 1887.

It was admitted at the trial that previous to the action of the village council authorizing said deed, namely, May 22, 1888, Major Adams, on behalf of the United States, made a tender to Ryan of the sum of twelve thousand dollars. Before this tender, Adams had an understanding with the local authorities that the village would make the relinquishment which they shortly thereafter did.

It appeared in evidence that Ryan was not the holder of the legal title at the beginning of the negotiations between him and the government. On the 6th of June, 1883, he and his wife conveyed to James R. Ryan, by deed which was recorded, without any reservations therein for streets. By deed of June 16, 1883, recorded June 19, 1883, James R. Ryan and wife, for the consideration of one dollar "and other considerations," conveyed by quit-claim deed ten acres of these lands to Remegius Chartier, S. J., and his successors and assigns, "to be forever the property of the fathers of the Society of Jesus for the purpose of education and other works, in accordance with their constitution, with the power to sell and dispose of the same to accomplish the same ends in case circumstances should require it; together with all and singular the hereditaments and appurtenances thereunto belonging or in any wise appertaining; to have and to hold the said parcel of land hereinbefore described to the said party of the second part, and to his successors, heirs and assigns, to the sole and only proper use, benefit and behoof of the said party of the second part, successors, heirs and assigns forever." Chartier, for the consideration of one dollar, by deed of November 26, 1886, recorded November 29, 1886, reconveyed said parcel to James R. Ryan. The latter, by deed of December 6, 1886, recorded December 13, 1886, conveyed to Thomas Ryan the same premises which the latter and wife had conveyed by their deed of June 6, 1883.

Other facts are set out in the bill of exceptions, but the above are all that are necessary to be stated.

Messrs. **Michael Brennan, John C. Donnelly** and **Isaac Marston,** for plaintiff in error:

The agent must have written authority to enter into a binding contract.

Palmer v. *Williams*, 24 Mich. 334.

The delivery of the deed does not make valid an invalid contract.

Kelsey v. *McDonald*, 76 Mich. 188, and cases cited.

The contract must be complete in itself and leave nothing to rest in parol.

Gault v. *Stormont*, 51 Mich. 638, and cases cited.

There must be an acceptance before a proposal can become a binding contract.

Gilbert v. *United States*, 75 U. S. 8 Wall. 361 (19:304); *Parish* v. *United States*, 75 U. S. 8 Wall. 489 (19:472); *Filor* v. *United States*, 76 U. S. 9 Wall. 45 (19:549); *United States* v. *Burns*, 79 U. S. 12 Wall. 251 (20:389); *United States* v. *Adams*, 74 U. S. 7 Wall. 477 (19:254); *Wilkinson* v. *Heavenrich*, 58 Mich. 574; *Richardson* v. *Hardwick*, 106 U. S. 252 (27:145).

The trust deed to Remegius Chartier was valid.

2 How. Stat. § 5573, subd. 5; *Thatcher* v. *St. Andrew's Church*, 37 Mich. 270, 271; *Palms* v. *Palms*, 68 Mich. 355; *Methodist Episcopal Church* v. *Clark*, 41 Mich. 739.

The trustee had no power to convey this property to James R. Ryan.

2 How. Stat. § 5583; *Pierce* v. *Grimley*, (Mich.) 43 N. W. Rep. 932.

A defendant in ejectment can take advantage of this want of power in Chartier to convey.

Bringhurst v. *G. R. & I. Co.* (Mich.) 44 N. W. Rep. 414; *Doolan* v. *Carr*, 125 U. S. 618 (31:844); *Reynolds* v. *Iron Silver Min. Co.* 116 U. S. 687-698 (29:774-778).

Delivering a deed for examination, to see if satisfactory, it being understood that it might be necessary to alter or correct it, is not a delivery to pass title.

Wadsworth v. *Warren*, 79 U. S. 12 Wall. 314 (20:404); *Graves* v. *Dudley*, 20 N. Y. 79; 3 Washb. Real Prop. 262; *Parker* v. *Parker*, 1 Gray, 411; *Murdock* v. *Gilchrist*, 52 N. Y. 242; *Eggleston* v. *Wagner*, 46 Mich. 620; *Taft* v. *Taft*, 59 Mich. 185.

The material inquiry is, When did the minds of the parties meet in regarding the deed as unconditionally delivered and accepted, so that both parties would be bound?

McCullough v. *Day*, 45 Mich. 554; *Martz* v. *Eggemann*, 44 Mich. 430; *Patrick* v. *Howard*, 47 Mich. 40; *Hyne* v. *Osborn*, 62 Mich. 235.

Record of a deed is not conclusive of its delivery.

Hendricks v. *Rasson*, 53 Mich. 575; *Stevens* v. *Castel*, 63 Mich. 111.

Pennington v. *Pennington*, 75 Mich. 600, holds that until a deed is delivered to the grantee to become presently operative, the grantor retains the right to rescind or recall it.

A deed delivered for examination cannot be used as a contract or a memorandum so as to take the case out of the Statute of Frauds.

Devlin, Deeds, 273, and cases there cited; *Kelsey* v. *McDonald*, 76 Mich. 188.

Mr. **William H. Taft,** *Solicitor-Gen.*, for defendant in error:

The cases which counsel for the plaintiff in error cite (*Gilbert* v. *United States*, 75 U. S. 8 Wall. 361 (19:304); *Parish* v. *United States*, 75 U. S. 8 Wall. 489 (19:472); *Filor* v. *United States*, 76 U. S. 9 Wall. 45 (19:549); *United States* v. *Burns*, 79 U. S. 12 Wall. 251 (20:389);

United States v. *Adams*, 74 U. S. 7 Wall. 477 (19:254), to show that the government was not bound by this contract, are, when examined, strong authorities to show the contrary.

The Michigan Statute may be complied with by a subsequent ratification in writing of the act of the agent.

Holland v. *Hoyt*, 14 Mich. 238.

A contract made by telegram, to which the name of the party to be held is signed, is a sufficient memorandum to satisfy the Statute of Frauds.

Goodwin v. *Francis*, L. R. 5 C. P. 295; *McBlain* v. *Cross*, 25 L. T. N. S. 804; *Whaley* v. *Hinchman*, 22 Mo. App. 488; Reed. Stat. Frauds, § 339, and cases cited; *McElroy* v. *Buck*, 35 Mich. 434.

In the case of a correspondence, the reference made in one letter to another to so connect them as to justify the court's using them both as part of a written contract need not be express.

Wood, Stat. Frauds, § 369; *Western* v. *Russell*, 3 Ves. & B. 187; *James* v. *Muir*, 33 Mich. 223.

It is sufficient to show that a particular unsigned paper is referred to in a signed paper, and parol evidence is admissible for this purpose.

Wood, Stat. Frauds, § 364; *Beckwith* v. *Talbot*, 95 U. S. 289 (24:496); *Salmon Falls Mfg. Co.* v. *Goddard*, 55 U. S. 14 How. 446 (14:493); *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; *Baumann* v. *James*, L. R. 3 Ch. 508; *Buxton* v. *Rust*, L. R. 7 Exch. 279; *Long* v. *Millar*, L. R. 4 C. P. Div. 450; *Cave* v. *Hastings*, L. R. 7 Q. B. Div. 125; *Shardlow* v. *Cotterell*, L. R. 20 Ch. Div. 90; *Lerned* v. *Wannemacher*, 9 Allen, 416; *Work* v. *Cowhick*, 81 Ill. 317; *Jenkins* v. *Harrison*, 66 Ala. 345; *Whaley* v. *Hinchman*, 22 Mo. App. 483; *Patton* v. *Rucker*, 29 Tex. 402.

In determining what a completed written instrument means, whether it be a contract or an authority to an agent, parol evidence of the situation of the parties, and the surrounding circumstances, is admissible.

Wood, Stat. Frauds, § 395; *Newell* v. *Radford*, L. R. 3 C. P. 52; *Monro* v. *Taylor*, 8 Hare, 56; *Lyon* v. *Pollock*, 99 U. S. 668 (25: 265).

It is sufficient to satisfy the Statute that the description of the real estate sold is full enough to enable it to be identified by parol evidence.

Eggleston v. *Wagner*, 46 Mich. 610, 619; Wood, Stat. Frauds, § 396; *Stoops* v. *Smith*, 100 Mass. 63; *Caulkins* v. *Hellman*, 47 N. Y. 449; *Swet* v. *Shumway*, 102 Mass. 367; *Hart* v. *Hammet*, 18 Vt. 127.

Ryan ratified the action of Cady in offering his land to the government by acknowledging and executing a deed for the property to the United States, on the exact terms fixed by Cady in his original communication.

Lyon v. *Pollock*, 99 U. S. 668 (25:265); *Jenkins* v. *Harrison*, 66 Ala. 356; *Bowles* v. *Woodson*, 6 Gratt. 78; *Thayer* v. *Luce*, 22 Ohio St. 74; *Wood* v. *Davis*, 82 Ill. 311; *Hanchett* v. *McQueen*, 32 Mich. 22.

Any signed admission which proves all the terms of an oral contract, or of an oral authority, to be within the Statute, will take the case out of the Statute. And it is immaterial that, in this admission, the party sought to be held denies or repudiates his obligation under the contract.

Reed, Stat. Frauds, § 394; *Shippery* v. *Derrison*, 5 Esp. 191; *Bailey* v. *Sweeting*, 9 C. B. N. S. 857; *Gibson* v. *Holland*, L. R. 1 C. P. 1; *Wilkinson* v. *Evans*, L. R. 1 C. P. 410; *Buxton* v. *Rust*, L. R. 7 Exch. 280; *McFarson's App.* 11 Pa. 509; *Johnson* v. *Trinity Church*, 11 Allen, 123; *Townsend* v. *Hargraves*, 118 Mass. 325; Wood, Stat. Frauds, 360; *Drury* v. *Young*, 58 Md. 546; *Barkworth* v. *Young*, 4 Drew, 13.

The delivery of the deed to the agent of the government on condition is a delivery in escrow, if it be understood between the parties that the delivery is to be effectual upon the happening of a condition.

Devlin, Deeds, 316; *Southern Life Ins. & T. Co.* v. *Cole*, 4 Fla. 359; *Bank of Healdsburg* v. *Bailhache*, 65 Cal. 327; *Cannon* v. *Handley*, 73 Cal. 133.

Ryan, on the plainest principles of law and morals, is estopped from defeating his own covenants.

Shotwell v. *Harrison*, 22 Mich. 410; *Smith* v. *Williams*, 44 Mich. 240; *Case* v. *Green*, 53 Mich. 616; *Van Rensselaer* v. *Kearney*, 52 U. S. 11 How. 297 (13:703).

Mr. Justice **Harlan** delivered the opinion of the court:

No question is made in this case, as in view of the decisions of this court and the statutes of Michigan there could not properly be, in respect to the right of the United States by purchase to acquire the premises in dispute for the purposes of fortification and garrison expressed in the Act of July 8, 1886. *Kohl* v. *United States*, 91 U. S. 367 [23: 449]; *United States* v. *Jones*, 109 U. S. 513 [27: 1015]; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 154 [29: 845, 846]; 2 Howell's Anno. Stat. Mich. §§ 5202, 5203. Nor can it be doubted that what was done by the Secretary of War and by other officers of the government acting under his direction was within the limits of the authority conferred by that Act. It is equally clear that in the absence of the Secretary the authority with which he was invested could be exercised by the officer who, under the law, became for the time acting Secretary of War. Rev. Stat. § 179.

But the defendant insists that the alleged contract between him and the government was not valid or binding under the Statute of Frauds of Michigan, which provides that "every contract for the leasing for a longer period than one year, or for the sale, of any lands, or interest in lands, shall be void, unless the contract, or some note or memorandum thereof, be in writing, and signed by the party by whom the lease or sale is to be made, or by some person by him lawfully authorized by writing." Howell's Stat. § 6181. His contention is, that the writings, including telegrams, which are relied upon to establish a valid, binding contract, do not, in themselves, show that the lands therein referred to are the lands in question, and therefore no written memorandum, such as the Statute requires, was executed. In sup-

port of this view we are referred to *Gault* v. *Stormont*, 51 Mich. 636, 638. In that case, the memorandum was only a receipt, given at Wyandotte, Michigan, by the party selling, showing that he had received from the party proposing to buy "the sum of $75 as part of the principal of $1,050 on sale of my house and two lots on corner of Superior and Second Streets in this City." This receipt was held to be insufficient to answer the requirements of the Statute, for the reason that, "though it specified the purchase price, it failed to express the time or times of payment, and there is no known and recognized custom to fix what is thus left undetermined," the court adding that "a memorandum, to be sufficient under the Statute, must be complete in itself, and leave nothing to rest in parol." It will be observed that the memorandum in that case was not rejected as insufficient because of any want of fullness in the description of the premises, nor is there any intimation that such description (if the case had turned upon that point), might not have been aided by extrinsic parol evidence, identifying the premises intended to be sold. That case did not in any degree modify the decision in *Eggleston* v. *Wagner*, 46 Mich. 610, 618, where the court said: "A further objection is that the proposal did not sufficiently describe the real estate to satisfy the Statute of Frauds. The general principle is not questioned. The degree of certainty with which the premises must be denoted is defined in many books, and the cases are extremely numerous in which the subject has been illustrated. They are not all harmonious. But they agree in this, that it is not essential that the description have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject matter. The terms may be abstract and of a general nature, but they must be sufficient to fit and comprehend the property which is the subject of the transaction; so that with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended, and to the exclusion of all other property. The circumstance that in any case a conflict arises in the outside evidence cannot be allowed the force of proof that the written description is in itself insufficient to satisfy the Statute."

Did the papers which passed between the parties, constituting the memorandum of the transaction, contain such a description of the lands in dispute as was sufficient, in connection with extrinsic evidence not contradictory of nor adding to the written description, to meet the requirements of the Michigan Statute of Frauds? We say "the papers," because the principle is well established that a complete contract binding under the Statute of Frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract. *Beckwith* v. *Talbot*, 95 U. S. 289, 292 [24: 496, 498]); *Ridgway* v. *Wharton*, 6 H. L. Cas. 238; *Coles* v. *Trecothick*, 9 Ves. Jr. 234, 250; *Cave* v. *Hastings*, L. R. 7 Q. B. Div. 125, 128; *Long* v. *Millar*, L. R. 4 C. P. Div. 450, 456.

Turning now to the evidence in the case, there would seem to be no ground for doubt as to the sufficiency of the description of the lands. Cady's telegram of September 7, 1886; Ryan's response thereto on the same day; his written proposal through Cady to the board of army officers on the 8th, and the formal written notification to Ryan on the 11th of September, by the president of the board, of the acceptance by the acting Secretary of War of his proposal of the 8th, show that the lands which the defendant proposed to sell to the United States, and which the government agreed to buy, for the sum of $12,000, was the "S. W. ¼ of the S. W. ¼ of sec. 6, and the S. E. ¼ of the S. E. ¼ of sec. 1, subject to the opening of Easterday Avenue along the south line." And this description of the premises must be taken in connection with the Act of Congress, showing that the authority given to the Secretary of War was to purchase grounds "in or near the Village of Sault Ste. Marie." It is said that neither the telegram of Cady to Ryan nor the latter's response thereto identified the lands by naming any township or range. But Ryan's written proposal through Cady to sell did give the township and range, and the government's written acceptance of the 11th of September referred to that proposal by its date of September 8, 1886. It is well said by the Solicitor-General that, in the absence of any evidence to show it, or to raise doubt upon the subject, the presumption is not to be indulged that Ryan owned, in or near the Village of Sault Ste. Marie, two tracts of land in different townships and ranges which would answer the description of "southwest quarter of southwest quarter of section 6, and southeast quarter or southeast quarter of section 1." The only fact which gives even plausibility to the contention we are considering is the absence from the written proposal of Ryan, as well as from the written acceptance of the government, of any express statement as to the particular village in which the lands were situated. But this defect, if it be one, is supplied by the communication of Colonel Poe, of October 6, 1886, in which he transmits to Ryan the letter of instructions from the War Department of September 30, 1886, in which the lands that the board recommended to be bought—the recommendation alluded to in the government's letter of acceptance of September 11, 1886, addressed to Ryan—are referred to as containing "about 75 acres of land at Sault Ste. Marie." Besides the deed executed by Ryan and wife, and delivered by them to the United States, describes the lands as being in the Village of Sault Ste. Marie." Whatever may be said as to the effect of this deed in passing title, if it was delivered only for purposes of examination, or if the previous memorandum of sale had been for any reason fatally defective under the Statute of Frauds, its recitals, coming as they do from the vendor, are competent for the purpose of showing the precise locality of the property which the memorandum of sale

[84

[85] was intended to embrace. *Jenkins* v. *Harrison*, 66 Ala. 345, 355, and authorities there cited.

For these reasons we are of opinion that the written proposal of the defendant to sell the premises in dispute at the price of twelve thousand dollars, and the written acceptance of that proposal by the government, through its authorized officers, constituted a valid contract, mutually binding upon the parties under the Michigan Statute of Frauds. In this view, the notification given by the defendant on the 1st of April, 1887, to the Secretary of War, that he had arranged for a different disposition of the property, and that further negotiations were unnecessary, did not affect the rights of the government. A mere offer to sell real estate, upon specified terms, may undoubtedly be withdrawn at any time before its acceptance. Such is the general rule. But if the offer be accepted without conditions, and without varying its terms, and the acceptance be communicated to the other party without unreasonable delay, a contract arises, from which neither party can withdraw at pleasure. Was there an unreasonable delay upon the part of the government in accepting the defendant's offer? Clearly not. The acceptance was within a few days after the offer. Nor, after the acceptance, was there any such delay by the government as entitled the defendant to abandon the contract, or to treat it as rescinded. He was informed by the Act of Congress, of which he was bound to take notice, that the approval of the title by the Attorney-General was a condition precedent to the payment by the Secretary of War of the price for the lands. He recognized the right of the government to have the title examined. He was furnished with a copy of the regulations prescribed by the Department of Justice for the examination of the titles to property where such titles were to be passed upon by the Attorney-General. The defendant himself was dilatory in furnishing the necessary abstracts and papers relating to the title. And while the Attorney-General was engaged in the examination of the title, he assumed to withdraw from the contract, and to convey a part of the premises to the Village of Sault Ste. Marie. The delay [86] which occurred after that conveyance came to the knowledge of the government was necessary in order that it might, before paying for the lands, secure a reconveyance of such part thereof as had been conveyed by Ryan to the village. That result being obtained, the government made the tender of the full amount it agreed to pay.

It is said, however, that the deed was delivered to the officers of the government only for the purpose of an examination of the title, and that they had no right to put it on record. This view has been pressed upon the theory that there was no valid contract upon the part of Ryan for the sale of the land, and that he had the right to withdraw his proposal to sell at the time he assumed to do so. If he had not been bound by contract to sell the lands, at the time he withdrew his offer, the placing of the deed upon record would have been unauthorized, and might not have passed the title as between the defendant and the United States. In the case supposed the government, upon being notified of the withdrawal of the offer to sell, would have been under a duty to return the deed. But we have seen that long before such attempted withdrawal there was a valid contract that bound the parties, the one to sell and the other to buy the lands at an agreed price. The attempt to withdraw the offer did not therefore impair the rights of the government. The deed was delivered in execution of that contract, with the intention that it should become presently operative when the Attorney-General approved the title, and the government had the right to put it on record when the title was approved by that officer. The title was approved by him, and thereupon the government became bound to pay the price it agreed to pay for the lands. The delay in making the tender was due to Ryan's efforts to evade or defeat his contract.

There are one or two other matters that require to be examined. It is said that the defendant was not the owner of these lands at the time when, according to the views already expressed, there arose a binding contract between him and the United States. But the title was in him prior to 1883, and was again in him on the 6th of December, 1886, as well as on and after December 18, 1886, when he and his wife executed and acknowledged the deed of the United States. If he chose to bind himself by contract to sell land that he did not at the time own, but the title to which he subsequently acquired and conveyed by general warranty, he will not, in an action of ejectment based upon the title so conveyed, be heard to say that he had no title at the time he agreed to sell.

It is also said that the deed from Remegius Chartier, S. J., to James R. Ryan, for ten acres of these lands, and the deed from James R. Ryan and wife to Thomas Ryan, were void, as to that ten acres, because the previous deed of James R. Ryan and wife to Chartier showed, upon its face, that said ten acres was the property of "the fathers of the Society of Jesus for the purpose of education and other works in accordance with their constitution." In the view we take of this question it is unnecessary to determine the precise nature of the interest, if any, acquired by that society in the ten acres conveyed to Chartier, nor to determine whether the court below correctly interpreted the words "absolutely void" in section 5588 of the Statutes of Michigan, which declares that "when the trust shall be expressed in the instrument creating the estate, any sale, conveyance or other acts of the trustees, in contravention of the trust, shall be absolutely void." The legal title was in Chartier, his successors and assigns, in trust for the purposes of education and other works in accordance with the constitution of his society, "with power to sell and dispose of the same to accomplish the same ends in case circumstances should require it." He thus had the power, under some circumstances, to sell and convey. He did sell and convey by a deed which did not disclose upon its face a vio-

lation of the trust, and his grantee, holding then the legal title to the entire premises in dispute, conveyed to the defendant, who with his wife covenanted in their deed to the United States that they were seised of the premises in fee simple, free from all incumbrances whatever, and that they, and their heirs, executors and administrators, would warrant and defend the title against all lawful claims whatsoever. The title acquired by him, after he contracted to sell to the United States, inured to the benefit of his grantee. He is estopped to dispute his grantee's right of possession, or to dispute, as between him and his grantee, the title he assumed to convey with general warranty. In *Van Rensselaer* v. *Kearney*, 52 U. S. 11 How. 297, 325 [13: 703, 715], it was said that the principle deducible from the authorities was "that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication,—the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies." See also *Bush* v. *Person*, 59 U. S. 18 How. 82, 85 [15: 278, 274]; *Crews* v. *Burcham*, 66 U. S. 1 Black, 352, 357 [17: 91, 93]; *Moore* v. *Crawford*, 130 U. S. 122, 130 [32: 878, 881]; *Jackson* v. *Murray*, 12 Johns. 201. And such is the established doctrine of the Supreme Court of Michigan, which said, in *Smith* v. *Williams*, 44 Mich. 240, 242—an action of ejectment—"that when one assumes by his deed to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title, and turn his grantee over to a suit upon his covenant for redress." See also *Case* v. *Green*, 53 Mich. 615, 620.

The United States has established a good title and right as against the defendant, and that is sufficient to entitle it to judgment in this action of ejectment.

These considerations require an affirmance of the judgment below.

It is so ordered.

THE STATE OF MINNESOTA, *Appt.*, v. HENRY E. BARBER.

(See S. C. Reporter's ed. 313-330.)

Minnesota Statute as to sale of beef, etc., unconstitutional and void—burden upon interstate commerce.

1. The Minnesota Statute of Apr. 16, 1889, so far as its provisions require, as a condition of sales in Minnesota of fresh beef, veal, mutton, lamb or pork for human food, that the animals from which such meats are taken shall have been inspected in Minnesota before being slaughtered, is in violation of the Constitution of the United States and void.

2. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.

[No. 1346.]

Argued Jan. 14, 15, 1890. Decided May 19, 1890.

APPEAL from a judgment of the Circuit Court of the United States for the District of Minnesota discharging, under a writ of habeas corpus, Henry E. Barber from imprisonment under a conviction before a justice of the peace in Minnesota for having sold beef, slaughtered in Illinois, but which had not been inspected in Minnesota under the laws of the latter State. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Gordon E. Cole** and *Jas. O. Broadhead*, for appellant:

It devolves on the party opposing the Law to demonstrate that its provisions needlessly impose restrictions upon a sound article of commerce.

Powell v. *Pennsylvania*, 127 U. S. 678 (32: 253).

The Law can touch no imported meats until after the act of importation has ceased.

Coe v. *Errol*, 116 U. S. 517 (29: 715); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700); *Passenger Cases*, 48 U. S. 7 How. 283 (12: 702); *Butler* v. *Chambers*, 36 Minn. 69.

The Law in question here is not a law directed at interstate commerce, like *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465-498 (31: 700-711); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *Slaughter-House Cases*, 83 U. S. 16 Wall. 36-63 (21: 394-404); *Patterson* v. *Kentucky*, 97 U. S. 501 (24: 1115); *Com.* v. *Alger*, 7 Cush. 53.

The police power of the States was not surrendered when the Constitution conferred upon Congress the general power to regulate commerce.

Powell v. *Pennsylvania*, 127 U. S. 678 (32: 253); *Sherlock* v. *Alling*, 93 U. S. 99-103 (23: 819, 820); *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 203 (6: 71).

Inspection Laws were defined in *Turner* v. *Maryland*, 107 U. S. 55 (27: 377), and *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700).

A State is not bound to abstain from the passage of any law it may deem necessary or advisable to guard the health or morals of its citizens.

Hannibal & St. J. R. Co. v. *Husen*, 95 U. S. 465 (24: 527).

The Law in question does not interfere with transportation in any way whatever.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 419 (6: 678); *Gordon* v. *Appeal Tax Court*, 44

NOTE.—*As to power of Congress to regulate commerce*, see *note* to Gibbons v. Ogden, 6: 23; also *note* to Brown v. Maryland, 6: 678.

As to interstate commerce; regulation of; power of Congress; how far exclusive,—see *note* to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

U. S. 3 How. 138 (11: 531) *Butchers Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746 (28: 585); *Stone* v. *Mississippi*, 101 U. S. 814 (25: 1079); *Welton* v. *Missouri*, 91 U. S. 275 (23: 347); *Ward* v. *Maryland*, 79 U. S. 12 Wall. 418 (20: 449); *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 129 (19: 382); *Mugler* v. *Kansas*, 123 U. S. 623 (31: 205); *Butler* v. *Chambers*, 36 Minn. 78.

This Law has relation to the public health.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 32 (24: 991); *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659 (24: 1036); *Henderson* v. *New York*, 92 U. S. 259 (23: 543); *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana*, 118 U. S. 455 (30: 237); *License Cases*, 46 U. S. 5 How. 504, 577 (12: 256, 289); *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 (21: 929); *People* v. *Albertson*, 55 N. Y. 50.

Any law impairing the obligation of contracts is void except as against the police power, before which the constitutional prohibition yields.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 32 (24: 991).

No legislators can bargain away the public health or the public morals.

Morgan's L. & T. R. & S. S. Co. v. *Louisiana*, 118 U. S. 462 (30: 241); *New Orleans Gas Light Co.* v. *Louisiana L. & H. P. & Mfg. Co.* 115 U. S. 667 (29: 523); *Leloup* v. *Port of Mobile*, 127 U. S. 640 (32: 311); *Munn* v. *Illinois*, 94 U. S. 113 (24: 77); *Brown* v. *Houston*, 114 U. S. 622 (29: 257).

Mr. **Alpheus H. Snow,** by leave of the court, participated in the argument in behalf of appellant, as counsel for State of Indiana.

Messrs. John B. Sanborn, **Walter H. Sanborn, W. C. Goudy,** *Geo. W. McCrary, Wallace Pratt, A. H. Veeder* and *Wm. J. Campbell*, for appellee:

The power to regulate commerce between the States is vested in the Congress exclusively, and no State, under the name of police power or under any other name, can lawfully infringe upon it.

Hannibal & St. J. R. Co. v. *Husen*, 95 U. S. 465, 471-473 (24: 527, 530, 531); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 474 (31: 703); *Henderson* v. *New York*, 92 U. S. 271, 272 (23: 548, 549); *Foster* v. *Blue Earth County*, 7 Minn. 140; *Mugler* v. *Kansas*, 123 U. S. 623, 624 (31: 205); *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 439, 448 (6: 678, 685, 688); *Welton* v. *Missouri*, 91 U. S. 275, 280 (23: 347, 349); *Passenger Cases*, 48 U. S. 7 How. 283, 426, 427, 463, 464 (12: 702, 762, 777, 778); *Chy Lung* v. *Freeman*, 92 U. S. 275 (23: 550); *State Freight Tax Case*, 82 U. S. 15 Wall. 232, 279, 280 (21: 146, 163); *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35, 44, 48, 49 (18: 745, 747, 748, 749); *Mobile County* v. *Kimball*, 102 U. S. 691 (26: 238); *Hall* v. *DeCuir*, 95 U. S. 485 (24: 547); *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 569, 577 (30: 244, 248, 251); *Stockton* v. *Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9; *Western U. Teleg. Co.* v. *Pendleton*, 95 Ind. 12; *Grafty* v. *Rushville*, 107 Ind. 502; *Swift* v. *Sutphin*, 39 Fed. Rep. 630; *Re Barber*, Id. 641; *Re Christian*, Id 636.

Any law of a State which in any way prohibits or interferes with the free commerce in an article of commerce is void.

Mobile County v. *Kimball*, 102 U. S. 691 (26: 238); *Brown* v. *Houston*, 114 U. S. 630 (29: 260); *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 566-577 (30: 247-251); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 480-499 (31: 705-712).

Where Congress has passed no law regulating interstate commerce in any article of commerce, that fact is conclusive evidence that it intends such commerce to be free.

Brown v. *Houston*, 114 U. S. 622, 631 (29: 257, 260); *Walling* v. *Michigan*, 116 U. S. 455, 456 (29: 694); *Welton* v. *Missouri*, 91 U. S. 275, 282 (23: 347, 350); *State Freight Tax Case*, 82 U. S. 15 Wall. 232 (21: 146).

Any prohibition or restriction of the sale of a manufactured product of another State is an unlawful restriction of commerce in the article.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 419-447 (6: 678-688); *Welton* v. *Missouri*, 91 U. S. 275, 282 (23: 347, 350); *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 497 (30: 694).

The Law violates section eight, article four, of the Constitution.

Swift v. *Sutphin*, 39 Fed. Rep. 630; *Re Barber*, Id. 641; *Re Christian*, Id. 636; *Harvey* v. *Huffman*, Id. 646; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527).

The Law violates the provisions of section two, article four, of the Constitution.

Ward v. *Maryland*, 79 U. S. 12 Wall. 418 (20: 449); *Walling* v. *Michigan*, 116 U. S. 446, 459 (29: 691, 695); *Tiernan* v. *Rinker*, 102 U. S. 123 (26: 103); *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489 (30: 694); *Welton* v. *Missouri*, 91 U. S. 275 (23: 347); *Asher* v. *Texas*, 128 U. S. 129 (32: 368); *Re Watson*, 15 Fed. Rep. 511; *Millett* v. *People*, 117 Ill. 294; Cooley, Const. Lim. 391; *Brown* v. *Houston*, 114 U. S. 630 (29: 260); *Swift* v. *Sutphin*, 39 Fed. Rep. 635.

The Law is not valid as an Inspection Law.

Passenger Cases, 48 U. S. 7 How. 426, 427, 463 (12: 762, 777); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *Kimmish* v. *Ball*, 129 U. S. 217 (32: 695).

It is the province and duty of the courts to look at the Law itself, and if it in fact imposes restrictions upon interstate commerce, or restricts the equal privileges of citizens of other States, to declare it void.

Powell v. *Pennsylvania*, 127 U. S. 686 (32: 253); *Mugler* v. *Kansas*, 123 U. S. 623, 661 (31: 205, 210); *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana*, 118 U. S. 455, 462 (30: 237, 240); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700); *Henderson* v. *New York City*, 92 U. S. 268 (23: 547); *Chy Lung* v. *Freeman*, 92 U. S. 275 (23: 550); *State* v. *Fisher*, 52 Mo. 177; *Re Jacobs*, 98 N. Y. 98; *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *State Freight Tax Case*, 82 U. S. 15 Wall. 232 (21: 146); *Watertown* v. *Mayo*, 109 Mass. 315; *Austin* v. *Murray*, 16 Pick. 126; *Ames* v. *Port Huron L. D. & B. Co.* 11 Mich. 139.

[317] *Mr. Justice* **Harlan** delivered the opinion of the court:

Henry E. Barber, the appellee, was convicted before a justice of the peace in Ramsey County, Minnesota, of the offense of having wrongfully and unlawfully offered and exposed for sale, and of having sold, for human food, one hundred pounds of fresh uncured beef, part of an animal slaughtered in the State of Illinois, but which had not been inspected in Minnesota, and "certified" before slaughter by an inspector appointed under the laws of the latter State. Having been committed to the common jail of the county pursuant to a judgment of imprisonment for the term of thirty days, he sued out a writ of habeas corpus from the Circuit Court of the United States for the District of Minnesota, and prayed to be discharged from such imprisonment, upon the ground that the Statute of that State, approved April 16, 1889, and under which he was prosecuted, was repugnant to the provision of the Constitution giving Congress power to regulate commerce among the several States, as well as to the provision declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Art. 1, § 8; art. 4, § 2. The court below, speaking by *Judge* Nelson, held the Statute to be in violation of both of these provisions, and discharged the prisoner from custody. *Re Barber*, 39 Fed. Rep. 641. A similar conclusion in reference to the same Statute had been previously reached by *Judge* Blodgett, holding the Circuit Court of the United States for the Northern District of Illinois. *Swift v. Sutphin*, 39 Fed. Rep. 630.

From the judgment discharging Barber the State has prosecuted the present appeal. Rev. Stat. § 764 (23 Stat. 437, chap. 353).

Attorneys representing persons interested in maintaining the validity of a Statute of Indiana, alleged to be similar to that of Minnesota, were allowed to participate in the argument in this court, and to file briefs.

[1] The Statute of Minnesota upon the validity of which the decision of the case depends is as follows:

"An Act for the Protection of the Public Health by Providing for Inspection before Slaughter of Cattle, Sheep and Swine Designed for Slaughter for Human Food.

Section 1. The sale of any fresh beef, veal, mutton, lamb or pork, for human food in this State, except as hereinafter provided, is hereby prohibited.

"Sec. 2. It shall be the duty of the several local boards of health of the several cities, villages, boroughs and townships within this State, to appoint one or more inspectors of cattle, sheep and swine, for said city, village, borough or township, who shall hold their offices for one year, and until their successors are appointed and qualified, and whose authority and jurisdiction shall be territorially co-extensive with the board so appointing them; and said several boards shall regulate the form of certificate to be issued by such inspectors and the fees to be paid them by the person applying for such inspection, which fees shall be no greater than are actually necessary to defray the costs of the inspection provided for in section three of this Act.

"Sec. 3. It shall be the duty of the inspectors appointed hereunder to inspect all cattle, sheep and swine slaughtered for human food within their respective jurisdictions within twenty-four hours before the slaughter of the same, and, if found healthy and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect. If found unfit for food by reason of infectious disease, such inspectors shall order the immediate removal and destruction of such diseased animals, and no liability for damages shall accrue by reason of such action.

"Sec. 4. Any person who shall sell, expose or offer for sale for human food in this State any fresh beef, veal, mutton, lamb or pork whatsoever, which has not been taken from an animal inspected and certified before slaughter by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof [3] shall be punished by a fine of not more than one hundred dollars, or by imprisonment not exceeding three months, for each offense.

"Sec. 5. Each and every certificate made by inspectors under the provisions of this Act shall contain a statement to the effect that the animal or animals inspected, describing them as to kind and sex, were, at the date of such inspection, free from all indication of disease, apparently in good health, and in fit condition, when inspected, to be slaughtered for human food; a duplicate of which certificate shall be preserved in the office of the inspector.

"Sec. 6. Any inspector making a false certificate shall be liable to a fine of not less than ten dollars nor more than fifty dollars for each animal falsely certified to be fit for human food under the provisions of this Act.

"Sec. 7. This Act shall take effect and be in force from and after its passage." Gen. Laws Minn. 1889, p. 51, chap. 8.

The presumption that this Statute was enacted, in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose upon the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the Statute unconstitutional and void. This principle of constitutional interpretation has been often announced by this court. In *Henderson* v. *New York City*, 92 U. S. 259, 268 [23: 543, 547], where a Statute of New York, imposing burdensome and almost impossible conditions on the landing of passengers from vessels employed in foreign commerce, was held to be unconstitutional and void as a regulation of such commerce, the

court said that "in whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." In *New York* v. *Compagnie Générale Transatlantique*, 107 U. S. 59, 63 [27: 383, 385], [320] where the question was as to the validity of a Statute of the same State, which was attempted to be supported as an Inspection Law authorized by section 10 of article 1 of the Constitution, and was so designated in its title, it was said: "A State cannot make a law designed to raise money to support paupers, to detect or prevent crime, to guard against disease and to cure the sick, an Inspection Law, within the constitutional meaning of that word, by calling it so in the title." So, in *Soon Hing* v. *Crowley*, 113 U. S. 703, 710 [28: 1145, 1147]: "The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the Acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments." In *Mugler* v. *Kansas*, 123 U. S. 623, 661 [31: 205, 210], the court, after observing that every possible presumption is to be indulged in favor of the validity of a statute, said that the judiciary must obey the Constitution rather than the law-making department of the government, and must, upon its own responsibility, determine whether, in any particular case, the limits of the Constitution have been passed. It was added: "If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." Upon the authority of those cases, and others that could be cited, it is our duty to inquire, in respect to the Statute before us, not only whether there is a real or substantial relation between its avowed objects and the means devised for attaining those objects, but whether by its necessary or natural operation it impairs or destroys rights secured by the Constitution of the United States.

Underlying the entire argument in behalf of the State is the proposition that it is im- [321] possible to tell, by an inspection of fresh beef, veal, mutton, lamb or pork, designed for human food, whether or not it came from animals that were diseased when slaughtered; that inspection on the hoof, within a very short time before animals are slaughtered, is the only mode by which their condition can be ascertained with certainty. And it is insisted, with great confidence, that of this fact the court must take judicial notice. If a fact, alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice. *Brown* v. *Piper*, 91 U. S. 37, 42 [23: 200, 201]; *Phillips* v. *Detroit*, 111 U. S. 604, 606 [28: 532, 533]. But we cannot assent to the suggestion that the fact alleged in this case to exist is of that class. It may be the opinion of some that the presence of disease in animals, at the time of their being slaughtered, cannot be determined by inspection of the meat taken from them; but we are not aware that such is the view universally, or even generally, entertained. But if, as alleged, the inspection of fresh beef, veal, mutton, lamb or pork will not necessarily show whether the animal from which it was taken was diseased when slaughtered, it would not follow that a statute like the one before us is within the constitutional power of the State to enact. On the contrary, the enactment of a similar statute by each one of the States composing the Union would result in the destruction of commerce among the several States, so far as such commerce is involved in the transportation from one part of the country to another of animal meats designed for human food, and entirely free from disease. A careful examination of the Minnesota Act will place this construction of it beyond question.

The first section prohibits the sale of any fresh beef, veal, mutton, lamb or pork for human food, except as provided in that Act. The second and third sections provide that all cattle, sheep and swine to be slaughtered for human food within the respective jurisdictions of the inspectors, shall be inspected by the proper local inspector appointed in Minnesota, within twenty-four hours before the animals are slaughtered, and that a certificate shall be made by such inspector, showing (if such be the fact) that the animals, when slaughtered, were found healthy and in suitable condition to be slaughtered for human food. The fourth section makes it a misdemeanor, punishable by fine or imprisonment, for anyone to sell, expose or offer for sale, for human food, in the State, any fresh beef, veal, mutton, lamb or pork, not taken from an animal inspected and "certified before slaughter, by the proper local inspector" appointed under that Act. As the inspection must take place within the twenty-four hours immediately before the slaughtering, the Act, by its necessary operation, excludes from the Minnesota market, practically, all fresh beef, veal, mutton, lamb or pork—in whatever form, and although entirely sound, healthy and fit for human food—taken from animals slaughtered in other States; and directly tends to restrict the slaughtering of animals, whose meat is to be sold in Minnesota for human food, to those engaged in such business in that State. This must be so, because the time, expense and labor of sending animals from points outside of Minnesota to points in that State to be there inspected, and bringing them back, after inspection, to be slaughtered at the place from which they were sent—the slaughtering to take place within twenty-four hours after inspection, else the certificate of inspection becomes of no value—will be so great as to amount to an absolute prohibition upon sales, in Minnesota, of meat from ani-

mals not slaughtered within its limits. When to this is added the fact that the Statute, by its necessary operation, prohibits the sale, in the State, of fresh beef, veal, mutton, lamb or pork, from animals that may have been inspected carefully and thoroughly in the State where they were slaughtered, and before they were slaughtered, no doubt can remain as to its effect upon commerce among the several States. It will not do to say—certainly no judicial tribunal can, with propriety, assume—that the people of Minnesota may not, with due regard to their health, rely upon inspections in other States of animals there slaughtered for purposes of human food. If the object of the Statute had been to deny altogether to the citizens of other States the privilege of selling, within the limits of Minnesota, for human food, any fresh beef, veal, mutton, lamb or pork, from
[23] animals slaughtered outside of that State, and to compel the people of Minnesota, wishing to buy such meats, either to purchase those taken from animals inspected and slaughtered in the State, or to incur the cost of purchasing them, when desired for their own domestic use, at points beyond the State, that object is attained by the Act in question. Our duty to maintain the Constitution will not permit us to shut our eyes to these obvious and necessary results of the Minnesota Statute. If this legislation does not make such discrimination against the products and business of other States in favor of the products and business of Minnesota, as interferes with and burdens commerce among the several States, it would be difficult to enact legislation that would have that result.

The principles we have announced are fully supported by the decisions of this court. In *Woodruff* v. *Parham*, 75 U. S. 8 Wall. 123, 140 [19: 882, 887], which involved the validity of an ordinance of the City of Mobile, Alabama, relating to sales at auction, *Mr. Justice* Miller, speaking for this court, said: "There is no attempt to discriminate injuriously against the products of other States, or the rights of the citizens, and the case is not therefore an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution which relate to those subjects, and therefore void." So, in *Hinson* v. *Lott*, 75 U. S. 8 Wall. 148, 151 [19: 887, 888], decided at the same time, upon a writ of error from the Supreme Court of Alabama, it was said, in reference to the opinion of that court: "And it is also true, as conceded in that opinion, that Congress has the same right to regulate commerce among the States that it has to regulate commerce with foreign nations, and that whenever it exercises that power, all conflicting state laws must give way, and that if Congress had made any regulation covering the matter in question we need inquire no further. That court seems to have relieved itself of the objection by holding that the tax imposed by the State of Alabama was an exercise of the concurrent right of regulating commerce remaining with the States until [3
some regulation on the subject had been made by Congress. But, assuming the tax to be, as we have supposed, a discriminating tax, levied exclusively upon the products of sister States; and looking to the consequences which the exercise of this power may produce if it be once conceded, amounting, as we have seen, to a total abolition of all commercial intercourse between the States, under the cloak of the taxing power, we are not prepared to admit that a State can exercise such a power, though Congress may have failed to act on the subject in any manner whatever."

In *Welton* v. *Missouri*, 91 U. S. 275, 281 [23: 347, 349], the court, speaking by *Mr. Justice* Field, declared to be unconstitutional a Statute of Missouri, imposing a license tax upon the sale by peddlers of certain kinds of personal property "not the growth, produce or manufacture" of that State, but which did not impose a like tax upon similar articles grown, produced or manufactured in Missouri. After observing that if the tax there in question could be imposed at all, the power of the State could not be controlled, however unreasonable and oppressive its action, the court said: "Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating state legislation, favorable to the interests of one State, and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States."

In *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527], the court examined a Statute of Missouri prohibiting, under penalties, any Texas, Mexican or Indian cattle from being driven or otherwise conveyed into, or remaining in, any county of the State, between the first day of March and the first day of November in each year, by any person or persons whatsoever. While admitting, in the broadest terms, the power of a State to pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders, to prevent convicts, or persons and animals suffering under contagious or infectious diseases, from entering the States, and, for purposes of protection, [3
to establish quarantine and inspections, the court, *Mr. Justice* Strong delivering its opinion, said that a State may not, "under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." The general ground upon which it held the Missouri Statute to be unconstitutional was, that its effect was "to obstruct interstate commerce, and to discriminate between the property of citizens of one State and that of citizens of other States."

In *Guy* v. *Baltimore*, 100 U. S. 434, 443 [25: 743, 746], the court adjudged to be void an ordinance of the City of Baltimore, exacting from vessels using the public wharves of that city, and laden with the products of other States, higher rates of wharfage than from vessels using the same wharves and laden with the products of Maryland. "Such exactions," the court said, "in

the name of wharfage, must be regarded as taxation upon interstate commerce. Municipal corporations, owning wharves upon the public navigable waters of the United States, and *quasi* public corporations transporting the products of the country, cannot be permitted by discriminations of that character to impede commercial intercourse and traffic among the several States and with foreign nations."

The latest case in this court upon the subject of interstate commerce, as affected by local enactments discriminating against the products and citizens of other States, is *Walling* v. *Michigan*, 116 U. S. 446, 454 [29: 691, 693]. We there held to be unconstitutional a Statute of Michigan imposing a license tax upon persons not residing or having their principal place of business in that State, but whose business was that of selling or soliciting the sale of intoxicating liquors to be shipped into the State from places without, a similar tax not being imposed in respect to the sale and soliciting for sale of liquors manufactured in Michigan. *Mr. Justice* Bradley, delivering the opinion of the court, said: "A discriminating tax imposed by a State, operating to the disadvantage of the products of other States when introduced into the first-mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States."

It is, however, contended, in behalf of the State, that there is in fact no interference, by this Statute, with the bringing of cattle, sheep and swine into Minnesota from other States, nor any discrimination against the products or business of other States, for the reason—such is the argument—that the Statute requiring an inspection of animals on the hoof, as a condition of the privilege of selling, or offering for sale, in the State, the meats taken from them, is applicable alike to all owners of such animals, whether citizens of Minnesota or citizens of other States. To this we answer that a statute may, upon its face, apply equally to the people of all the States, and yet be a regulation of interstate commerce which a State may not establish. A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute. *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 497 [30: 694, 697]; *State Freight Tax Case*, 82 U. S. 15 Wall. 232 [21: 146]. The people of Minnesota have as much right to protection against the enactments of that State, interfering with the freedom of commerce among the States, as have the people of other States. Although this Statute is not avowedly, or in terms, directed against the bringing into Minnesota of the products of other States, its necessary effect is to burden or obstruct commerce with other States, as involved in the transportation into that State, for purposes of sale there, of all fresh beef, veal, mutton, lamb or pork, however free from disease may have been the *animals from* which it was taken.

The learned counsel for the State relies with confidence upon *Patterson* v. *Kentucky*, 97 U. S. 501 [24: 1115], as supporting the principles for which he contends. In that case we sustained the constitutionality of a Statute of Kentucky, forbidding the sale within that Commonwealth of oils or fluids used for illuminating purposes, and the product of coal, petroleum or other bituminous substances, that would ignite at less than a certain temperature. Having a patent from the United States for an improved burning oil, Patterson claimed the right, by virtue of his patent, to sell anywhere in the United States the oil described in it, without regard to the Inspection Laws of any State, enacted to protect the public safety. It was held that the Statute of Kentucky was a mere police regulation, embodying the deliberate judgment of that Commonwealth that burning fluids, the product of coal, petroleum or other bituminous substances, which would ignite or permanently burn at less than a prescribed temperature, are unsafe for illuminating purposes. We said that the patent was not a regulation of commerce, nor a license to sell the patented article, but a grant that no one else should manufacture or sell that article, and therefore a grant simply of an exclusive right in the discovery, which the national authority could protect against all interference; that it was not to be supposed "that Congress intended to authorize or regulate the sale, within a State, of tangible personal property which that State declares to be unfit and unsafe for use, and by statute has prohibited from being sold or offered for sale within her limits;" also, that "the right which the patentee or his assignee possesses in the property created by the application of a patented discovery must be enjoyed subject to the complete and salutary power with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few." Now, the counsel of the State asks: If the State may, by the exercise of its police power, determine for itself what test shall be made of the safety of illuminating oils, and prohibit the sale of all oils not subjected to and sustaining such test, although such oils are manufactured by a process patented under the Constitution and laws of the United States, why may it not determine for itself what test shall be made of the wholesomeness and safety of food, and prohibit the sale of all such food not submitted to and sustaining the test, although it may chance that articles otherwise subject to the Constitution and laws of the United States cannot sustain the test? The analogy, the learned counsel observes, seems close. But it is only seemingly close. There is no real analogy between that case and the one before us. The Kentucky Statute prescribed no test of inspection which, in view of the nature of the property, was either unusual or unreasonable, or which by its necessary operation discriminated against any particular oil because of the locality of its production. If it had prescribed a mode of inspection to which citizens of other States

having oils designed for illuminating purposes, and which they desired to sell in the Kentucky market, could not have reasonably conformed, it would undoubtedly have been held to be an unauthorized burden upon interstate commerce. Looking at the nature of the proprety to which the Kentucky Statute had reference, there was no difficulty in the way of the patentee of the particular oil there in question submitting to the required local inspection.

But a law providing for the inspection of animals whose meats are designed for human food cannot be regarded as a rightful exertion of the police powers of the State, if the inspection prescribed is of such a character, or is burdened with such conditions, as will prevent altogether the introduction into the State of sound meats, the product of animals slaughtered in other States. It is one thing for a State to exclude from its limits cattle, sheep or swine, actually diseased, or meats that, by reason of their condition, or the condition of the animals from which they are taken, are unfit for human food, and punish all sales of such animals or of such meats within its limits. It is quite a different thing for a State to declare, as does Minnesota by the necessary operation of its Statute, that fresh beef, veal, mutton, lamb or pork—articles that are used in every part of this country to support human life—shall not be sold at all for human food within its limits, unless the animal from which such meats are taken is inspected in that State, or, as is practically said, unless the animal is slaughtered in that State.

One other suggestion by the counsel for the State deserves to be examined. It is that, so far as this Statute is concerned, the people of Minnesota can purchase in other States fresh beef, veal, mutton, lamb and pork, and bring such meats into Minnesota for their own personal use. We do not perceive that this view strengthens the case for the State, for it ignores the right which the people of other States have in commerce between those States and the State of Minnesota. And it ignores the right of the people of Minnesota to bring into that State, for purposes of sale, sound and healthy meat, wherever such meat may have come into existence. But there is a consideration arising out of the suggestion just alluded to which militates somewhat against the theory that the Statute in question is a legitimate exertion of the police powers of the State for the protection of the public health. If every hotel-keeper, railroad or mining corporation, or contractor, in Minnesota, furnishing subsistence to large numbers of persons, and every private family in that State, that is so disposed, can, without violating this Statute, bring into the State from other States and use for their own purposes, fresh beef, veal, mutton, lamb and pork, taken from animals slaughtered outside of Minnesota which may not have been inspected at all, or not within twenty-four hours before being slaughtered, what becomes of the argument, pressed with so much earnestness, that the health of the people of that State requires that they be protected against the use of meats from animals not inspected in Minnesota within the twenty-four hours before being slaughtered? If the Statute, while permitting the sale of meats from animals slaughtered, inspected and "certified" in that State, had expressly forbidden the introduction from other States, and their sale in Minnesota, of all fresh meats, of every kind, without making any distinction between those that were from animals inspected on the hoof and those that were not so inspected, its unconstitutionality could not have been doubted. And yet it is so framed that this precise result is attained as to all sales in Minnesota, for human food, of meats from animals slaughtered in other States.

In the opinion of this court the Statute in question, so far as its provisions require, as a condition of sales in Minnesota, of fresh beef, veal, mutton, lamb or pork for human food, that the animals from which such meats are taken shall have been inspected in Minnesota before being slaughtered, is in violation of the Constitution of the United States and void. [3

The judgment discharging the appellee from custody is affirmed.

WILLIAM J. STEVENS, Petitioner, *Appt.*, [46
v.
WILLIAM G. FULLER.

(See S. C. Reporter's ed. 468-478.)

Habeas corpus, what questions reviewable.

Where the United States commissioner has jurisdiction of the subject matter and of the person, irregularities in the proceedings before him are not reviewable on habeas corpus by the circuit court.

[No. 1617.]

Submitted May 5, 1890. Decided May 19, 1890.

APPEAL from an order of the Circuit Court of the United States for the District of Massachusetts discharging the writ of habeas corpus and remanding Stevens to the custody of the marshal, under his sentence for imprisonment made by the commissioner. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wm. E. Jewell**, for appellant:

All those measures which are intended for the security of the citizen are conditions precedent to a conviction.

Torrey v. *Millbury*, 21 Pick. 67; *Alexander* v. *Pitts*, 7 Cush. 503; *Simpson* v. *Carleton*, 1 Allen, 117; *Abbott* v. *Pearson*, 130 Mass. 193; *Bacon* v. *Rogers*, 8 Allen, 146; *Simpson* v. *Dix*, 131 Mass. 185; *Stone* v. *Carter*, 13 Gray, 575; *Gould* v. *Gould*, 1 Met. 382; *Kelly* v.

NOTE.—*When habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of.* See *note* to United States v. Hamilton, 1: 490.

What questions may be considered on habeas corpus. See *note* to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see *note* to Luther v. Borden, 12: 581.

Laws, 109 Mass. 397; *Morgan* v. *Curley*, 142 Mass. 109; *Willis* v. *Howard*, 7 Allen, 267.

The magistrate's record shows that the examination of a poor debtor was not completed.

Morgan v. *Curley*, 142 Mass. 108; *Lothrop* v. *Bailey*, 14 Allen, 514; *Lane* v. *Holman*, 145 Mass. 221; *Longley* v. *Cleavland*, 133 Mass. 256; *Davis* v. *Putnam*, 5 Gray, 321; *Bruce* v. *Keogh*, 7 Cush. 537; *McCaig's Case*, 137 Mass. 470; *Fletcher* v. *Bartlett*, 10 Gray, 491; *Lockhead* v. *Jones*, 137 Mass. 27.

Appeal does not carry up the whole case, but only the finding upon charge of fraud.

Fletcher v. *Bartlett*, 10 Gray, 491.

The certificates of a magistrate affixed to an execution are no part of the record, and are not evidence of the recitals contained in them.

Young v. *Capen*, 7 Met. 289; *Hobbs* v. *Fogg*, 6 Gray, 254; *Baker* v. *Moffat*, 7 Cush. 260; *Hyde* v. *Malley*, 121 Mass. 388.

The supreme court will, by writ of habeas corpus and certiorari, look into the record so far as to ascertain whether the prisoner is held without authority of law, and, if found to be so, will discharge the prisoner.

Ex parte Lange, 85 U. S. 18 Wall. 163 (21: 872); *Ex parte Yerger*, 75 U. S. 8 Wall. 85 (19: 332); *Blake's Case*, 106 Mass. 501; *Commonwealth* v. *Moore*, 19 Pick. 341; *Stone* v. *Carter*, 13 Gray, 575; *Morgan* v. *Curley*, 142 Mass. 107; *Lane* v. *Holman*, 145 Mass. 221; Pub. Stat. Mass. § 344, chap. 162.

Messrs. **Edward W. Hutchins** and **Henry Wheeler** for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal by William J. Stevens from an order of the Circuit Court of the [469] United States for the District of Massachusetts, refusing to discharge him from custody on a writ of habeas corpus. The following are the material facts: William G. Fuller having recovered a judgment against Stevens, in the Circuit Court of the United States for the District of Massachusetts, for $18,000, an execution was issued thereon to the marshal, which commanded him, if he could find no property belonging to Stevens, to take his body and commit him to jail. Accompanying that execution was an affidavit made by Fuller, that the judgment in question amounted to $20, exclusive of costs, and that $20 remained uncollected, and that he believed, and had good reason to believe, that Stevens had property not exempt from execution, which he did not intend to apply to the payment of the judgment claim, and that he intended to leave the State and District of Massachusetts. Thereupon, a commissioner of the circuit court certified that, after due hearing, he was satisfied that there was reasonable cause to believe that the charge made in the affidavit was true, and that, satisfactory cause having been shown, he thereby authorized the arrest of Stevens, if his arrest was authorized by law, to be made after sunset. Stevens was arrested and brought before Henry L. Hallett, a United States commissioner for the District of Massachusetts, who interrogated him, and he declared that he did not desire to take any oath, or to recognize, or to give bail for his appearance at any time, and he failed to recognize or give bail. Thereafter, the commissioner gave notice to Fuller that Stevens desired to take the oath for the relief of poor debtors, at a time specified and appointed, at the office of the commissioner. Stevens then gave a recognizance for his appearance at such time and place, to be examined. He duly appeared and submitted to be examined, protesting that the commissioner was not authorized by law to order him to be examined touching his property, and stating that he did not waive any informalities in his arrest or in any of the other proceedings. His examination was begun and continued for some time. In the course of it, he offered evidence from the Court of Insolvency for the County of Suffolk, in the district, that proceedings in insolvency had been begun by him and were then pending. Thereupon, Fuller filed with the commissioner charges [4 of fraud against Stevens, alleging that Stevens, since he had contracted the debt for which the judgment was rendered, had fraudulently conveyed, concealed or otherwise disposed of some part of his estate, with a design to secure the same to his own use and to defraud his creditors, and specifying the particulars of seven different conveyances of land, and a mortgage of land, and three payments of money by him with such design. The examination of Stevens as a poor debtor was suspended by the commissioner, and a hearing was had before him on such charges of fraud. Stevens put in a plea of want of jurisdiction as to such charges, on the ground [that all the transfers of property but one were made by him in the State of New Hampshire, and while he was an inhabitant [thereof, and not within the jurisdiction of Massachusetts or of any court or magistrate therein; and that, at the time of the filing of such charges, he had been adjudged an insolvent debtor under the laws of Massachusetts, by the judge of the Court of Insolvency for Suffolk County, and all of his right, title and interest in the property mentioned in the charges of fraud had become vested in said court of insolvency. At the same time, he filed with the commissioner a motion to quash the charges, on the ground that it appeared therefrom that the property alleged was conveyed by him while he was a resident in and a citizen of New Hampshire, and was conveyed by him in New Hampshire, and not within the jurisdiction of the courts of Massachusetts, or of the commissioner, or of the Circuit Court of the United States for the District of Massachusetts, and that he could not be tried by such commissioner, or sentenced by him thereon, if found guilty; and also because all of the charges were vague, and did not, with sufficient certainty, set forth any fraudulent transfer of any property belonging to him. Afterwards, an assignment in insolvency of the estate, real and personal, of Stevens, was made by the judge of the court of insolvency, to duly appointed assignees. After the close of the testimony before the commissioner on the charges of fraud, and before his decision thereon was rendered, Stevens requested that his examin-

ation as a poor debtor be again taken up, and he be allowed to offer evidence of his releases and conveyance to his assignees in insolvency, at their request, of all his title to the estates so charged to have been fraudulently conveyed by him; and requested also that he be allowed to complete his own examination as a poor debtor; which requests were refused by the commissioner.

On the 25th of January, 1890, the commissioner gave his decision on the charges of fraud, sustaining them and finding Stevens guilty thereof, and sentencing him to be imprisoned for six months in the jail at Boston. Stevens appealed from that decision to the Circuit Court of the United States for the District of Massachusetts, and gave a recognizance with sureties. Thereafter, but on the same day, and before any other or further order or act of the commissioner, and before any finding made on the charge in the affidavit which accompanied the execution as to property, Stevens again requested that his examination as a poor debtor, so suspended, be taken up, and he be permitted to offer evidence of the releases and conveyance above mentioned, and also to complete his own examination as a poor debtor. Both of such requests were refused by the commissioner, and the examination of Stevens as a poor debtor was not completed. No other witness than Stevens was offered during his examination as a poor debtor, and no other evidence except such assignment in insolvency was offered thereon, except that partly given by him. His examination was not read to him and corrected, and he did not sign or swear to it. On the same day the commissioner made a certificate that it appeared that Stevens "has property and estate to the amount of twenty dollars, besides the estate, goods and chattels which are by law exempt from being taken on execution;" and that, after due examination of him, the commissioner refused to administer to him the oath for the relief of poor debtors. Thereupon Stevens was taken into custody by the marshal of the district, under the execution, and lodged in the Suffolk County jail, where he was detained.

On the foregoing facts, Stevens, on the 28th of January, 1890, obtained from the Circuit Court of the United States for the District of Massachusetts a writ of habeas corpus, returnable in that court. At the hearing thereon evidence was introduced by both parties as to what took place at the hearing before the commissioner on the 25th of January, 1890, and the commissioner himself was examined as a witness. The circuit court ordered that the writ of habeas corpus be discharged and that Stevens be remanded to the custody of the marshal. To review that order Stevens has taken an appeal to this court.

The circuit court stated its decisions and the grounds thereof in these words: "The court decided that, although no formal request appeared to have been made by either party before the commissioner that the examination of the debtor should be in writing, yet, as it was in fact taken in writing, and this mode of proceeding was adopted with the assent of both parties, this was equivalent to a previous formal request that it should be so taken; that, as the examination was not signed and sworn to by the debtor, as required by the statute, and no opportunity was given him to sign and swear to it, and he never refused to do so, the examination was imperfect and incomplete, and had not reached a stage to justify the commissioner in assuming to pass upon the question whether the debtor was entitled to be admitted to take the oath for the relief of poor debtors; that the commissioner's certificate annexed to the execution was therefore premature and irregular; that this irregularity did not, however, have the effect to render all the proceedings before him absolutely void, so [47 as to authorize the court to direct the discharge of the debtor from custody upon this writ, and thus deprive the creditor of his right to hold the body of the debtor for his debt; but that the debtor's remedy was rather by application to the court to set aside the certificate as irregular, and to direct that he might go at large under his old recognizance, or upon a new recognizance, and that the examination might proceed before the commissioner, and, when completed, a new adjudication be made by him."

We are of opinion that the order of the circuit court must be affirmed. The matters alleged before that court against the action of the commissioner did not go to the question of his jurisdiction, so as to make such action reviewable on habeas corpus by the circuit court. He had jurisdiction of the subject matter and of the person of Stevens, under the proceedings instituted in conformity with the statutes of Massachusetts. The objections taken on the part of Stevens, at the hearing before the commissioner, and also urged here, to the proceedings before the commissioner, all of them went only to alleged errors and irregularities in those proceedings, which could not be reviewed by the circuit court on a writ of habeas corpus, and cannot be taken cognizance of by this court on this appeal.

It was proper for the circuit court to admit in evidence the poor debtor examination before the commissioner, and the evidence offered before him on the charges of fraud.

It is conceded in the brief of the counsel for Stevens that the proper affidavit was made and the proper certificate of the commissioner was annexed to the execution authorizing the arrest. The points urged before the circuit court and urged here, that Stevens was entitled to have his examination as a poor debtor read over to him, and to have it corrected, and to sign and swear to it, and the other points raised by him as to the proceedings before the commissioner, are mere questions of irregularity, not reviewable by the circuit court on habeas corpus, or by this court on this appeal.

This rule is well established in cases of original writs of habeas corpus issued by [47 this court. *Ex parte Parks*, 93 U. S. 18 [23: 787]; *Ex parte Reed*, 100 U. S. 13, 23 [25: 538, 539]; *Ex parte Siebold*, 100 U. S. 371, 375 [25: 717, 718]; *Ex parte Carll*, 106 U. S. 521 [27: 288]; *Ex parte Wilson*, 114 U. S. 417, 421 [29: 89, 90].

The same doctrine applies to the circuit court in the present case in its review on habeas corpus of the proceedings before the commissioner; and it has been applied by this court on appeals to it from inferior courts in habeas corpus proceedings. *Benson* v. *McMahon*, 127 U. S. 457, 461, 462 [32: 234, 236]; *Re Coy*, 127 U. S. 731, 758, 759 [32: 274, 280, 281]; *Re Nielsen*, 131 U. S. 176, 182, 184 [33: 118, 120]; *Re Savin*, 131 U. S. 267, 279 [33: 150, 154]; *Re Cuddy*, 131 U. S. 280, 285 [33: 154, 156]. The case of *Re Savin*, *supra*, was an appeal from an order of a circuit court of the United States dismissing a petition for a writ of habeas corpus, where the party had been imprisoned for contempt of court by a district court of the United States. This court said, speaking by *Mr. Justice* Harlan: "Our conclusion is that the district court had jurisdiction of the subject matter and of the person, and that irregularities, if any, occurring in the mere conduct of the case, do not affect the validity of its final order. Its judgment, so far as it involved mere errors, cannot be reviewed in this collateral proceeding, and must be affirmed."

These views are conclusive to show that *the order of the Circuit Court must be affirmed, and it is so ordered.*

330] LUIS OTEIZA y CORTES, *Appt.*,
v.
JOHN W. JACOBUS ET AL.

(See S. C. *Re Luis Oteiza y Cortes*, Reporter's ed. 330-338.)

Habeas corpus—extent of power of review—Act of August 3, 1882.

1. A writ of habeas corpus in a case of extradition cannot perform the office of a writ of error.

2. If the commissioner has jurisdiction of the subject matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court, on habeas corpus, either originally or by appeal.

3. Section 5 of the Act of August 3, 1882, applies only to papers, or copies thereof, which are offered in evidence by the prosecution to establish the criminality of the person apprehended, and does not apply to documents or depositions offered on the part of the accused.

[No. 1631.]

Argued May 20, 1890. Decided May 23, 1890.

APPEAL from an order of the Circuit Court of the United States for the Southern District of New York refusing to discharge the appellant on habeas corpus from a commitment by the commissioner by which he was held until a warrant for his surrender to the Spanish authorities should issue, on his extradition under the Treaty between the United States and Spain. *Affirmed.*

The facts are stated in the opinion.

Mr. **Louis S. Phillips**, for appellant:

No bonds or coupons can be public funds unless they are executed and issued in accordance with law.

People v. *Loomis*, 4 Denio, 380; *Bork* v. *People*, 91 N. Y. 17.

Embezzlement can only be committed by a person who has been intrusted with the property.

2 Bishop, Crim. Law, §§ 352, 353.

The complaint is jurisdictional, and the commissioner had no power to commit for any offense not specifically charged therein.

Spear, Extradition, 79, 80, 249, 250; *Re Henrich*, 5 Blatchf. 414; *Re Dugau*, 2 Low. 367; *Re*

NOTE.—*When habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of.* See *note* to United States v. Hamilton, 1: 490.

What questions may be considered on habeas corpus. See *note* to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see *note* to Luther v. Borden, 12: 581.

Habeas corpus, when sustainable and what questions reviewable; extradition.

A party convicted by a court having jurisdiction of his person and of the offense cannot be discharged on habeas corpus because of errors of law committed by the trial court. *Ex parte* Lehmkuhl, 73 Cal. 53.

Neither irregularities nor errors, so far as they were within the jurisdiction of the court committing a person to custody, can be inquired into upon habeas corpus. Sennott's Case, 6 New Eng. Rep. 106, 146 Mass. 489.

Habeas corpus cannot be used as a writ of error. Willis v. Bayles, 2 West. Rep. 749, 105 Ind. 363; State v. Neel, 48 Ark. 288; *Ex parte* Boenninghausen, 3 West. Rep. 414, 21 Mo. App. 267.

This court will not issue a writ of habeas corpus, even if it has the power, where it may as well be done in the proper circuit court. *Ex parte* Mirzan, 119 U. S. 584 (30: 513).

That a prisoner has been twice refused his discharge on habeas corpus does not prevent a subsequent application for the same writ. Selz v. Pressburger, 6 Cent. Rep. 340, 49 N. J. L. 396.

It is not the function of a writ of habeas corpus to bring in review any irregularity or mere error of procedure committed by a judicial tribunal having jurisdiction of the cause and the person. Powell v. Dayton, S. & G. R. R. Co. 16 Or. 33, 8 Am. St. Rep. 251; *Re* Savin, 131 U. S. 267 (33: 150).

Although the writ of habeas corpus does not lie for the determination of mere errors where a conviction has been had and the commitment thereunder is in due form, yet if the court had no jurisdiction of the offense charged, or if it appears by the record that the prisoner was tried and sentenced for the commission of an act which under the law constitutes no crime, the judgment is void, and the prisoner should be discharged. *Ex parte* Mirande, 73 Cal. 365; *Ex parte* Coy, 127 U. S. 731 (32: 274); *Re* Kowalsky, 73 Cal. 120; *Re* Nielsen, 131 U. S. 176 (33: 118).

A party is entitled to a habeas corpus, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. *Re* Nielsen, 131 U. S. 176 (33: 118).

Habeas corpus is the proper remedy where the district court has erroneously refused to discharge

Farez, 7 Blatchf. 48; *Re Lane*, 6 Fed. Rep. 34; *Re Van Hoven*, 4 Dill. 412.

Mr. **Emmet R. Olcott**, for appellees:

The complaint and warrant fully apprised the prisoner of the charge, and the evidence fully supports it.

Re Henrich, 5 Blatchf. 414; *Re Macdonnell*, 11 Blatchf. 94, 97, 98; *Re Farez*, 7 Blatchf. 347; *Re Herres*, 33 Fed. Rep. 165; *Re Wadge*, 15 Fed. Rep. 865; *Benson* v. *McMahon*, 127 U. S. 463 (32: 236).

In New York, what was formerly embezzlement has become larceny.

People v. *Dumar*, 106 N. Y. 508; *People* v. *Pollock*, 51 Hun, 615.

The taking and appropriating of the coupons, although unissued, was a criminal malversation of public funds.

People v. *Wiley*, 3 Hill, 194; *Rex* v. *Clarke*, 2 Leach, Cr. Cas. 1036; *Rex* v. *Vyse*, Moody, Cr. Cas. 218; *Reg.* v. *Morris*, 9 Car. & P. 347; *Rex* v. *Chipchase*, 2 Leach, Cr. Cas. 699; *People* v. *Phelps*, 49 How. Pr. 437, 72 N. Y. 334; *State* v. *Walton*, 62 Me. 106; *Bork* v. *People*, 91 N. Y. 5; *Com.* v. *Rand*, 7 Met. 475; *Ayers* v. *Lawrence*, 59 N. Y. 192.

There is a distinction between embezzlement or criminal malversation of public funds or property on the part of a public officer and larceny or embezzlement of a private individual.

State v. *Walton*, 62 Me. 106; *Rex* v. *Borrett*, 6 Car. & P. 124; *Neale* v. *Overseers of the Poor*, 5 Watts, 538; *State* v. *Maberry*, 3 Strob. L. 144; *State* v. *Cansler*, 75 N. C. 442; *State* v. *Long*, 76 N. C. 254; *Kitton* v. *Fag*, 10 Mod. 288-290; *Forlenberry* v. *State*, 56 Miss. 286; *State* v. *Goss*, 69 Me. 23.

Nothing is required to warrant extradition except that there be sufficient evidence of the fact of the crime, and enough to hold accused for trial.

Re Farez, 7 Blatchf. 345; *Benson* v. *McMahon*, 127 U. S. 463 (32: 236); *Re Wadge*, 15 Fed. Rep. 864; *Re Herres*, 33 Fed. Rep. 165.

The judges will not discharge the prisoner if there was legal and competent evidence of facts before the commissioner for him to consider in making up his decision as to criminality, nor because there was an error committed by him in the reception of evidence.

Re Stupp, 11 Blatchf. 124, 12 Blatchf. 501; *Re Farez*, 7 Blatchf. 345; *Re Macdonnell* 11 Blatchf. 170; *Ex parte Geissler*, 4 Fed. Rep. 188; *Re Doig*, Id. 193; *Re Fowler*, Id. 303; *Re Weigand*, 14 Blatchf. 370; *Re Vandervelpen*, Id. 137; *Re Wahl*, 15 Blatchf. 334.

Mr. Justice **Blatchford** delivered the opinion of the court: [33

By section 12 of article II. of the Convention between the United States and the Kingdom of Spain, for the extradition of criminals, concluded January 5, 1877, and proclaimed February 21, 1877 (19 Stat. 650), it was provided that persons should be delivered up according to the provisions of the Convention, who should have been charged with, or convicted of, any of the following crimes: "12. The embezzlement of public funds, committed within the jurisdiction of one or the other party, by public officers or depositaries."

By a supplemental Convention between the United States and the Kingdom of Spain, concerning extradition, concluded August 7, 1882, and proclaimed April 19, 1883 (22 Stat. 991), section 12 of article II. of the Convention of January 5, 1877, was amended to read as follows: "12. The embezzlement or criminal malversation of public funds, committed within the jurisdiction of one or the other party, by public officers or depositaries."

On the 2d of January, 1890, Miguel Suarez Guanes, the consul-general of Spain at the City of New York, duly recognized as such by the President of the United States, filed a complaint, on his own oath, before Samuel H. Lyman, a duly authorized United States commissioner for the Southern District of New York, charging that one Luis Oteiza y Cortes, the secretary or clerk of the Bureau

---

a person in prison under indictment or information, where he has not been brought to trial within the time prescribed by statute. *Re* McMicken, 39 Kan. 406.

Writs of habeas corpus may be used to obtain the discharge of one imprisoned under the order of a court of the United States which does not possess jurisdiction of the person or of the subject matter. *Re* Terry, 128 U. S. 289 (32: 405).

Whether the facts justified punishment as for contempt for acts in the presence of the court cannot be inquired into on a writ of habeas corpus to release a person imprisoned by such court for contempt. *Ex parte* Ah Men, 77 Cal. 198; *Re* Morris, 39 Kan. 28, 7 Am. St. Rep. 512.

A defendant imprisoned under a judgment of a court of sessions which is in excess of that which it is authorized to impose under N. Y. Code Crim. Proc., secs. 717, 718, is detained upon an invalid judgment, and is entitled to a discharge upon habeas corpus. People v. Liscomb, 60 N. Y. 559; People v. Jacobs, 66 N. Y. 10; People v. Riseley, 38 Hun, 280.

Where the sentence was void, but the conviction was valid, the prisoner is not entitled to a discharge on habeas corpus. People v. Gilbert, 96 N. Y. 631; People v. Bork, Id. 188; People v. Kelly, 97 N. Y. 212.

The test of the prisoner's right to relief by habeas corpus is that the tribunal should be competent by reason of its civil or criminal jurisdiction to render the judgment by virtue of which the imprisonment is inflicted. People v. Walters, 15 Abb. N. C. 461; People v. Kelly, 32 Hun, 536; *Re* Donohue, 1 Abb. N. C. 1; Com. v. Lecky, 1 Watts, 66; Peltier v. Pennington, 14 N. J. L. 312.

The court or judge cannot on habeas corpus determine whether a police justice acted upon sufficient evidence in committing a child to the custody of an asylum as being a vagrant or beggar. *Re* Stewart, 1 Abb. N. C. 210; *Re* Prime, 1 Barb. 340; Gray's Case, 11 Abb. Pr. 56; Bennac v. People, 4 Barb. 31; Case of Williamson, 19 Abb. Pr. 413; Case of Twelve Commitments, 19 Abb. Pr. 394; People v. Sisters of St. Dominick, 34 Hun, 463.

Upon the hearing of a habeas corpus, obtained by a person held under a warrant of extradition as a fugitive from justice, the only questions open to inquiry where the warrant of the executive is sufficient on its face, are whether the relator is the person against whom the warrant is issued, and whether he is as a matter of fact a fugitive from justice of the State demanding his return. People v. Byrnes, 33 Hun, 99, 2 N. Y. Crim. Rep. 398; *Re* Reggel, 114 U. S. 643 (29: 250); People v. Warden of City Prison, 3 N. Y. Crim. Rep. 370.

of Public Debt of the Island of Cuba at Havana, and an officer in the employment of the Kingdom of Spain, at Havana, had charge of the public funds and moneys belonging to the Kingdom of Spain, namely, the Bureau of Public Debt of the Island of Cuba, at Havana; that in December, 1889, the said Luis Oteiza y Cortes (who will hereinafter be called Oteiza) at Havana, and within the jurisdiction of the Kingdom of Spain, in the course of his said employment, had in his possession, as such clerk or secretary, a large amount of public bonds or certificates of indebtedness of the Kingdom of Spain, belonging to the public debt of the Island of Cuba, and being a part of the public funds of the Kingdom of Spain; and that Oteiza, at that
332] time, at Havana, wrongfully and feloniously embezzled bonds or certificates of indebtedness belonging to the said public debt of the Island of Cuba, of the value of $190,000, and converted the same to his own use, and also the coupons of other government bonds, of the value of $500,000, and the stub-books thereof. The complainant therefore charged Oteiza with the crime of embezzlement of bonds or certificates of indebtedness of the said public debt of the Island of Cuba, committed at Havana, and further stated that Oteiza had fled to the United States, and that criminal proceedings had been begun in Havana against him for such embezzlement, and asked for a warrant for his apprehension under the above-named two Conventions, that evidence of his criminality might be heard by the commissioner, and that if, on the hearing, the evidence should be deemed sufficient to sustain the charge, a warrant might issue for his surrender. In the course of the proceedings before the commissioner, this complaint was amended by adding the words "or criminal malversation" after the word "embezzlement," wherever it appeared in the complaint. On the 2d of January, 1890, a warrant was issued by the commissioner, reciting the complaint and stating that Oteiza was charged by it "with having committed the crime of embezzlement or criminal malversation of public funds within the jurisdiction of the Kingdom of Spain," and that such crime was enumerated and provided for by the two Conventions before mentioned. The warrant was directed to the marshal or any deputy, and commanded that Oteiza be apprehended and brought before the commissioner, in order that the evidence of his criminality might be heard. Oteiza was arrested, and evidence in the matter on both sides was heard by the commissioner. On the 13th of March, 1890, the commissioner certified that, on the examination and the hearings which had been had, he deemed the evidence sufficient to sustain the charge, and that he committed the accused to the custody of the marshal, to be held until a warrant for his surrender should issue according to the stipulations of the Treaty, or he should be otherwise dealt with according to law.

On the 14th of March, 1890, a writ of
333] habeas corpus, to bring the body of Oteiza before the Circuit Court of the United States for the Southern District of New York, directed to John W. Jacobus, the marshal of the United States for the Southern District of New York, and to the warden of the jail, and a writ of certiorari to the commissioner, to transmit the proceedings to the said circuit court, were allowed by *Judge* Lacombe. These writs were returnable on the 28th of March, 1890. The case was heard by *Judge* Lacombe in the circuit court, and on the 18th of April, 1890, that court made an order discharging the writ of habeas corpus. Oteiza has appealed to this court.

In his opinion in the matter, which forms part of the record, *Judge* Lacombe arrives at the conclusion that either the coupons alleged to have been abstracted by Oteiza were public funds, or that, by discharging the functions of his office falsely and with corrupt intent, he had got possession of certain moneys which where public funds, paid out by the Spanish Bank of the Island of Cuba, which would not have passed from the possession of that bank to his own possession, except as a consequence of his official action; that he therefore obtained charge of such moneys by virtue of his office and thereupon converted them to his own use; that his acts were therefore within the terms of article 401 of the Spanish Penal Code of Cuba, which is a part of title VII., "Of the Crimes of Public Employés in the Discharge of Their Duties," and of chapter 10 therein, entitled "Malversation of Public Funds," and reads as follows: "Art. 401. A public officer who, having charge of public effects or funds by virtue of his office, takes or allows others to take the same, shall be punished as follows," etc.; and that like acts are made punishable by section 5438 of the Revised Statutes of the United States, and by section 165 of the Penal Code of New York. The judge also refers to the warrant of arrest issued against Oteiza in Cuba, as specifically stating the offense which it was claimed he had committed. From that warrant it appears that the complaint against Oteiza in Cuba was for having committed the crime of "embezzlement of public funds" as a public officer.

We are of the opinion that the order of the circuit court, refusing to discharge Oteiza, must be affirmed. A writ of habeas corpus in a case of extradition cannot perform the office of a writ of error. If the commissioner has jurisdiction of the subject matter and of the person of the accused, and the offense charged is within the terms of a treaty of extradition, and the commissioner, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision of the commissioner cannot be reviewed by a circuit court or by this court, on habeas corpus, either originally or by appeal.

In the case of *Benson* v. *McMahon*, 127 U. S. 457, 461, 462, 463 [32: 234, 236], which was an appeal to this court from an order of a circuit court of the United States, denying a discharge to a prisoner on a writ of habeas corpus issued by that court to a United States marshal, in a case of extradition, where a

United States commissioner had held the accused by a final commitment, this court, speaking by *Mr. Justice* Miller, said: "Several questions in regard to the introduction of evidence which were raised before the commissioner, some of them concerning the sufficiency of the authentication of papers and depositions taken in Mexico, and as to the testimony of persons supposed to be expert in the law of that country regarding the subject, are found in the record, which we do not think require notice here. The writ of habeas corpus, directed to the marshal of the Southern District of New York, does not operate as a writ of error. . . . The main question to be considered upon such a writ of habeas corpus must be, Had the commissioner jurisdiction to hear and decide upon the complaint made by the Mexican consul? and also, Was there sufficient legal ground for his action in committing the prisoner to await the requisition of the Mexican authorities? . . . We are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial, by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations, which take place every day in this country, before an examining or committing magistrate, for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding in which he shall be finally tried upon the charge made against him. The language of the Treaty which we have cited, above quoted, explicitly provides that 'the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial, if the crime had been there committed.' This describes the proceedings in these preliminary examinations as accurately as language can well do it. The Act of Congress conferring jurisdiction upon the commissioner, or other examining officer, it may be noted in this connection, says that if he deems the evidence sufficient to sustain the charge under the provisions of the treaty, he shall certify the same, together with a copy of all the testimony, and issue his warrant for the commitment of the person so charged." In the present case, article I. of the Convention of January 6, 1877, provides that the surrender of the accused "shall take place only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had been here committed." In the opinion in *Benson* v. *McMahan*, *supra*, the court proceeds: "We are not sitting in this court on the trial of the prisoner, with power to pronounce him guilty and punish him, or declare him innocent and acquit him. We are now engaged simply in an inquiry as to whether, under the construction of the Act of Congress and the Treaty entered into between this country and Mexico, there was legal evidence before the commissioner to justify him in exercising his power to commit the person accused to custody, to await the requisition of the Mexican government."

Without discussing the questions raised in the present case, it is sufficient to say that we concur in the views of *Judge* Lacombe.

The only point raised on behalf of Oteiza [330
which we deem it important to notice is his offer to introduce in evidence before the commissioner, on his own part, certificates made by public officers in Cuba, as to the existence of certain facts, and also certain copies of papers, and certain *ex parte* depositions in writing taken in Cuba before a notary public; all of which were sought to be made evidence under certificates made by the consul-general of the United States at Havana, certifying that the papers were properly and legally authenticated so as to entitle them to be received "in the tribunals of Cuba as evidence in defense of a charge of embezzlement, and as evidence in defense of said charge upon a preliminary hearing before a commiting magistrate, and as evidence in defense of said charge in an extradition proceeding upon a hearing before a competent magistrate, and especially as evidence in all the cases enumerated, where said charge of embezzlement is made against Don Luis de Oteiza y Cortes."

It is supposed that these documents were admissible in evidence by virtue of the provisions of section 5 of the Act of August 3, 1882, chap. 378 (22 Stat. 216), which reads as follows: "Sec. 5. That in all cases where any depositions, warrants or other papers, or copies thereof, shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped; and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant or other paper, or copies thereof, so offered, are authenticated in the manner required by this Act."

We are of opinion that section 5 of the Act of August 3, 1882, applies only to papers, or copies thereof, which are offered in evidence by the prosecution to establish the criminality of the person apprehended; and that it does not apply to documents or depositions offered [337
on the part of the accused, any more than did the provisions of section 5271 of the Revised Statutes, either as originally enacted or as amended by the Act of June 19, 1876, chap. 133 (19 Stat. 59).

This view was held by *Judge* Brown, in the District Court for the Southern District of New York, in March, 1883, in *Re Wadge*, 15 Fed. Rep. 864. In that case, the commissioner had refused to adjourn the proceedings before him in order to enable the accused to procure depositions from England, to es-

tablish an *alibi*. *Judge* Brown considered the Act of August 3, 1882, and held that while it was the duty of the commissioner, under section 3 of that Act, to take such evidence of oral witnesses as should be offered by the accused, the Statute did not apply to testimony obtained upon commission or by deposition, adding that, so far as he was aware, there was no warrant, according to the law or the practice before committing magistrates in the State of New York, for receiving testimony by commission or by the depositions of foreign witnesses taken abroad, and that all the provisions of the law and the statutes contemplated the production of the defendant's witnesses in person before the magistrate for examination by him. The order dismissing the writ of habeas corpus in that case was affirmed by the circuit court, held by *Judge* Wallace, in *Re Wadge*, 21 Blatchf. 300. He said: "The depositions and proofs presented a sufficient case to the commissioner for the exercise of his judicial discretion, and his judgment cannot be reviewed upon this proceeding. He is made the judge of the weight and effect of the evidence, and this court cannot review his action, when there was sufficient competent evidence before him to authorize him to decide the merits of the case."

In the case of *Re McPhun*, 24 Blatchf. 254, in the Circuit Court for the Southern District of New York, before *Judge* Brown, in March, 1887, on a habeas corpus in an extradition case, it was held that the words "for similar purposes" in the 5th section of the Act of August 3, 1882, must receive the same construction they had received under the Act of June 22, 1860, chap. 184 (12 Stat. 84), [338] which was that they meant "as evidence of criminality;" and that the same construction had been given to similar words in prior statutes,—citing *Re Henrich*, 5 Blatchf. 414, 424, and *Re Farez*, 7 Blatchf. 345, 353. We concur in this view.

Since the close of the oral argument we have been furnished with a printed brief on the part of the appellant, which we have examined, but we do not deem it necessary to make any further observations on the case.

The order of the Circuit Court is affirmed.

---

[338] BERTRAND SALOY, *Plff. in Err.*,
v.
SIMON BLOCH.

(See S. C. Reporter's ed. 338-347.)

Louisiana law—landlord's lien on crops—waiver of lien—selling crops for rent—lien for advances to planter—equitable suit.

1. In Louisiana, the privilege or pledge of the landlord on the crops for his rent is superior to the pledge of one who advances money or necessary supplies to the planter, even where the planter pledges the crops for such advances.
2. A waiver by the landlord of the priority of his privilege or pledge for rent in favor of one making advances of money or supplies to the lessee, makes the landlord a second incumbrancer subject to the superior pledge for such advances.
3. The landlord is not prevented by such waiver from instituting suit and seizing the crop for the rent, although the net proceeds of the crop in his hands are subject to the lien for such advances.
4. The claim for the lien for such advances against the landlord, who has seized and sold the crop for rent, is an equitable one, for an account, and to such a suit the tenant is a necessary party; and a suit against the landlord alone for damages for seizing the crop for rent cannot be maintained.

[No. 92.]

Argued Dec. 18, 19, 1889. Decided May 23, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Louisiana to review a judgment in favor of plaintiff for damages for seizing and selling property for rent on which the plaintiff had a lien. *Reversed.*

The facts are stated in the opinion.

Messrs. E. Howard McCaleb and **Wm. A. Maury**, for plaintiff in error:

Plaintiff's action is not maintainable.

Barton v. *Kavanaugh*, 12 La. Ann. 332; *Murphy* v. *Redler*, 16 La. Ann. 1; *Blanchin* v. *The Fashion*, 10 La. Ann. 49; *Leon* v. *Galecran*, 78 U. S. 11 Wall. 185 (20: 74); *Holdane* v. *Sumner*, 82 U. S. 15 Wall. 600 (21: 254); *Marshall* v. *Knox*, 83 U. S. 16 Wall. 557 (21: 484).

In instituting suit to recover his rent, Saloy was only exercising his legal rights; and when an act authorized by law causes damage, it is *damnum absque injuria*.

Grant v. *Sebastian* (La.) Louque's Dig. 493 *d*, No. 4; *Murphy* v. *Redler*, 16 La. Ann. 1.

The plaintiff cannot collaterally question the validity of the proceedings in the state court by suit in the federal court.

Peck v. *Jenness*, 48 U. S. 7 How. 612 (12: 841); *Taylor* v. *Carryl*, 61 U. S. 20 How. 595 (15: 1032); *Taylor* v. *Taintor*, 83 U. S. 16 Wall. 370 (21: 290); *New Orleans* v. *New York M. S. S. Co.* 87 U. S. 20 Wall. 392 (22: 357); *Memphis* v. *Dean*, 75 U. S. 8 Wall. 64 (19: 326).

There must be mutuality of agreement, otherwise the contract is null.

Campbell v. *Lambert*, 36 La. Ann. 35; Rev. Civ. Code, arts. 2034, 2035.

A privilege is only given on the growing crop of the year for such necessary supplies as are used in producing it.

Wallace v. *Urquhart*, 23 La. Ann. 469.

Where the articles furnished are not necessary supplies, the law allows no privilege.

Stafford v. *Pearson*, 26 La. Ann. 658.

The judgment obtained by Saloy against the Dragons, not being attacked for fraud or collusion, is prima facie evidence of the claim and privilege of the former even against third persons.

Gleason v. *Sheriff*, 19 La. Ann. 143, 20 La. Ann. 266.

The Dragons having failed to pay their rent when the same fell due, Saloy was authorized to sue and seize the movables subject to his lien.

Lalaurie v. *Woods*, 8 La. Ann. 366: *Wallace* v. *Smith*, 8 La. Ann. 374.

The failure of the jury to notice a reconventional demand, on which evidence is offered, is sufficient ground for a new trial.

Johnston v. *Bagley*, 4 La. 334; *Welsh* v. *Barrow*, 9 Rob. (La.) 520: *Morgan* v. *Briggs*, 17 La. 184.

Messrs. **George A. King,** *William S. Benedict* and *Charles W. Hornor,* for defendant in error:

A privilege cannot be created by convention between the parties; it must derive its existence from the nature of the contract and from the law applicable thereto.

Citizens Bank v. *Maureau,* 37 La. Ann. 857, 861.

A portion of the advances being from time to time refunded, they stood as if they had never been, and the contract of pledge remained as a continuing security.

Lawrence v. *Tucker,* 64 U. S 23 How. 14 (16: 474); *Jones* v. *New York G. & I. Co.* 101 U. S. 622 (25: 1030); *National Bank* v. *Whitney,* 103 U. S. 99 (26: 443); *Shores* v. *Doherty,* 65 Wis. 153, 157; *Bank of Utica* v. *Finch,* 3 Barb. Ch. 293, 5 N. Y. Ch. L. ed. 906; *Murray* v. *Barney,* 34 Barb. 336, 348; *Foster* v. *Reynolds,* 38 Mo. 553, 556, 557; *Collins* v. *Carlile,* 13 Ill. 254; *Pickersgill* v. *Brown,* 7 La. Ann. 297, 308-311; *Douglass* v. *Reynolds,* 32 U. S. 7 Pet. 113 (8: 626); *Mason* v. *Pritchard,* 12 East, 227.

[339] *Mr. Justice* **Bradley** delivered the opinion of the court:

This is an action on contract brought in the Circuit Court of the United States for the Eastern District of Louisiana, by Simon Bloch, a subject of the Emperor of Germany, against Bertrand Saloy, a citizen of Louisiana, to recover the sum of $6,266.23, with interest and costs, alleged to be due from Saloy to the plaintiff.

In his petition the plaintiff avers that on the 26th of January, 1883, he entered into contract with P. B. Dragon and A. Dragon, by act before a notary, to furnish funds necessary for the cultivation and furnishing of necessary supplies to a plantation in the Parish of Plaquemines, in said State, known as "Monsecours," for the year 1883, in consideration of the interest and commissions stipulated to be paid in said act; that said plantation was leased by the Dragons from said Saloy, and that Saloy appeared in said act and made himself a party to said agreement, bound himself by said act and said agreement to carry out the terms and conditions thereof, and did waive and remit, in favor of petitioner, any and all superior rights and claims that he had or might have against said plantation, its buildings, etc., and the crop to be raised thereon during the year 1883, as the lessor or landlord thereof, to the end that said land might be cultivated, the advances paid back to petitioner, and after payment of all legal claims, charges and expenses, the balance received should be paid over to said Saloy, the landlord.

The petition then stated that Saloy, in disregard of his contract, did, in December, 1883, proceed, by action in the Twenty-fourth District Court in and for the Parish of Plaquemines, to a suit and seizure of the buildings, the growing crop and the crop in process of manufacture on said plantation, and placed the sheriff in possession of the same, to the damage of petitioner exceeding the sum due him; that he, Saloy, afterwards obtained an order of the court to bond the property seized, and sold the same and converted it to his own use, without paying petitioner the balance due him for his advances under said contract; which balance was shown by a detailed account annexed to the petition, by which it appeared that Bloch had received only $23,336.10 net proceeds of the produce of the plantation, and had advanced in money and supplies (including his interest and commissions) the sum of $29,602.33; leaving a balance in his favor of $6,266.23.

The petition further states that when Saloy so seized and converted the property, the Dragons were not indebted to him; and the said property was subject to the claim of the petitioner for the balance due him on his said advances, which has not been paid by said Dragons (who are without means to pay the same), or by Saloy; and that said acts of Saloy are illegal, unjust and malicious; and that by his taking possession of said crop, stopping the business, demoralizing the hands and removing crop and machinery, he deprived the Dragons of all power to comply with their contract with the petitioner, and has injured and damaged the petitioner in a sum far exceeding the sum due him by them; and so the defendant, Saloy, is responsible for the said amount due petitioner.

To this petition the defendant, Saloy, filed exceptions:

1st. No cause of action.

2d. Plaintiff cannot maintain his action until he has first obtained judgment against the Dragons, who are necessary parties to the suit.

3d. That the judgment rendered for Saloy [340] against the Dragons cannot be questioned collaterally, but only by appeal or action of nullity to set aside the proceedings, over which this court has no jurisdiction.

4th. The release bond given by defendant in said suit to the Dragons (to get possession of the property) cannot be litigated in this suit.

5th. Exceptor specially pleads the judgment rendered in said suit of *B. Saloy* v. *Pierre B. Dragon* and *A. Dragon,* No. 617 of the docket of Twenty-fourth Judicial District Court for Parish of Plaquemines, as *res adjudicata* of the necessity for, and validity of, the writ of provisional seizure therein issued, etc. (the record of that suit being filed with the exceptions).

Upon argument, these exceptions were overruled, and thereupon Saloy filed an answer and plea in reconvention. In the answer he first made a general denial of the allegations of the petition, and then denied specifically that his suit against the Dragons, his tenants (to wit, No. 617 of the docket of Twenty-fourth Judicial District Court, etc.), was in violation of any agreement made by him with the plaintiff, or that his acts therein were injurious to plaintiff, or illegal, unjust or malicious, as charged; but he avers that the plaintiff appeared and ratified defendant's acts by furnishing the sheriff funds for cultivating the plantation and harvesting and manufacturing the crop, after the provisional seizure; and subsequently received from the sheriff the amount of such advances, which were paid by defendant.

In the plea of reconvention the defendant set up his title as landlord, to Monsecours plantation, and the lease by which the Dragons held it from him, being at an annual rent of $4,800, secured by notes of $4,800 each. He then set out the contract made by the Dragons with the plaintiff, Bloch, annexing a copy of it to his plea. He further stated that the Dragons being heavily in debt, and unable to pay, in October, 1883, two of their creditors sued them, and sequestered and seized 100 barrels of rice and a threshing machine, subject to reconvenor's landlord privilege and that of said Bloch, and reconvenor intervened in that suit to protect his
342] interest, and afterwards, in November, 1883, brought the suit complained of by the plaintiff on two of the rent notes held by him and obtained a provisional seizure of the property subject to his lien as lessor, and obtained judgment against the Dragons for the amount of the two notes, less certain payments made on one of them; and that from the sale of the property seized he only realized, after paying claims of laborers, and costs and charges, the sum of $1,258.28, which, being deducted from his judgment, still leaves due to him the sum of $6,017. This amount he claims from the plaintiff, Bloch, by way of reconvention, because, as he avers, Bloch received from the proceeds of the crop of the plantation a surplus of more than $7,000 over and above all his advances, commissions and other lawful claims.

The cause was tried before a jury on these issues, and a verdict was found for the plaintiff of $3,500. Several bills of exceptions were taken during the trial, but, from the view we have taken of the case, it is unnecessary to advert to them. A radical exception taken by the defendant at the beginning, and always insisted upon, is that the action is not maintainable; and that if the defendant is liable at all to the plaintiff, he cannot be made to respond in this form of proceeding, in which the Dragons are not parties, and no judgment is shown to have been recovered against them. We are of opinion that this exception is well taken; and, in order to explain our views, it is necessary to look a little more particularly at the laws relating to the respective rights of lessors in regard to the rents due to them, and of factors advancing moneys on supplies for the cultivation of a plantation, and at the alleged contract on which the suit is founded.

In treating of the subject of privileges, the Civil Code of Louisiana, by article 3217, declares as follows:

"The debts which are privileged on certain movables are the following:

"1. The appointments or salaries of the overseers for the current year, on the crops of the year and the proceeds thereof; debts due for necessary supplies furnished to any farm or plantation, and debts due for money
343] actually advanced and used for the purchase of necessary supplies and the payment of necessary expenses for any farm or plantation, on the crops of the year and the proceeds thereof.

* * * * * *

"3. The rents of immovables and the wages of laborers employed in working the same, on the crops of the year, and on the furniture which is found in the house let, or on the farm, and on everything which serves to the working of the farm.

* * * * * *

"The privileges granted by this article, on the growing crop, in favor of the classes of persons mentioned, shall be concurrent, except the privilege in favor of the laborer, which shall be ranked as the first privilege on the crop."

"Article 3218. The right which the lessor has over the products of the estate, and on the movables which are found on the place leased, for his rent, is of a higher nature than mere privilege. The latter is only enforced on the price arising from the sale of movables to which it applies. It does not enable the creditor to take or keep the effects themselves specially. The lessor, on the contrary, may take the effects themselves and retain them until he is paid."

Under the title "Lease," in the same Code, are the following provisions:

"Article 2705. The lessor has, for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee, which are found on the property leased.

"In the case of predial estates, this right embraces everything that serves for the labors of the farm, the furniture of the lessee's house and the fruits produced during the lease of the land."

"Article 2709. In the exercise of this right, the lessor may seize the objects which are subject to it, before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified."

By an Act of the Legislature of Louisiana, approved March 21, 1874, it was, amongst other things, provided as follows:

"Section 1. *Be it enacted, etc.:* That in addition to the privilege now conferred by law, any planter or farmer may pledge or pawn his growing crop of cotton, sugar or other agricultural products for advances in money, goods and necessary supplies that he may require for the production of the same, by entering into a written agreement to pledge the same and having the agreement recorded in the office of the recorder of mortgages of the parish where said cotton, sugar or other agricultural product is produced, which recorded contract shall give and confer on the merchant or other person advancing money, goods and necessary supplies for the production of the said agricultural product, a right of pledge upon the said crop, the same as if the said crop had been in the possession of the pledgee: *Provided,* That the right of pledge thus conferred shall be subordinate to that of the claim of the laborers for wages and for the rent of the land on which the crop was produced."

From these laws it will be seen that the privilege or pledge of the landlord for his

rent is superior to the privilege given by the Civil Code to the factor who advances money or necessary supplies to the planter; and, by the proviso of the Act of 1874, it is still made superior to the pledge which that law authorizes the planter to make to the factor for his advances. It was in view of this superior right of the lessor that Saloy was asked to join in a contract between the Dragons as planters of Monsecours and Simon Bloch, who agreed to make advances for the cultivation thereof. This contract was made by an act passed before a notary on the 26th of January, 1883, by which the two Dragons declared that, requiring to have goods and necessary supplies furnished and moneys actually advanced to be used for the payment of necessary expenses and laborers to plant, cultivate, sow, gather and manufacture the crops of rice, sugar, molasses and other products to be made or raised during the present year on the Monsecours plantation, situated in the Parish of Plaquemines, etc., they had contracted a loan of the sum of $7,500 of and from Simon Bloch, of this city [New Orleans], and as evidence of such loan the said Pierre B. Dragon had furnished three certain promissory notes for the sum of $2,500 each, . . . which said notes were delivered unto said Simon Bloch. . . . And in order to more fully secure the punctual payment of all such advances and moneys advanced or to be advanced as aforesaid, costs, charges, expenses, commissions and attorney's fees, a special lien and mortgage or privilege was thereby granted and recognized for the full sum of $15,000, on any and all crop or crops of rice, sugar, molasses and other products that might be planted, grown, raised and gathered, or made and manufactured during the year 1883 on the said plantation. The act also contained an obligation to ship and consign the entire crop of rice, sugar, molasses and other products made on the said plantation during the year 1883 to the said mortgagee [Bloch] in the City of New Orleans, whenever required or notified so to do by him or his assigns, in default of which the mortgagee or assigns were authorized to sequester the crops or proceeds thereof, in whosesoever hands the same might be, regardless of any sale or transfer. After various other agreements and stipulations contained in the act between the Dragons and Bloch, a final clause was inserted containing an agreement or concession of Bertrand Saloy, the defendant below, which laid the foundation of the present action. It is here inserted *verbatim:*

"And here appeared and intervened herein Bertrand Saloy, who, after having read and taken cognizance of what is hereinbefore written, declared that he consents and agrees that his claim and demands as lessor of the aforesaid 'Monsecours plantation' shall be subordinate and inferior in rank to the claims and privileges of said Bloch as the furnisher of supplies or for advances furnished under this contract; and that said Bloch shall be reimbursed from the crops of 1883 made on said place the full amount of his advances hereunder without regard and in preference to the demands of said Saloy for the rental of said plantation; provided, however, that three hundred and fifty sacks of seed rice shall remain or be left on said plantation out [34 of the crop of this year for the purposes thereof for the year 1884."

We do not think that this clause contains any such contract as is averred in the petition of the plaintiff. It is there averred that Saloy appeared in said act and made himself a party to said agreement, and bound himself by said act and said agreement to carry out the terms and conditions thereof, etc.

There is nothing, as it seems to us, in the agreement of Saloy, which engages him to any guaranty of the contract of the Dragons with Bloch; nothing to show that he committed himself in any degree to the fulfillment of said agreements on the part of the Dragons. It contains merely a waiver on his part of his priority in rank as lessor of the plantation. He simply consents and agrees that his claim shall be subordinate and inferior in rank to the claims and privileges of Bloch, and that Bloch shall be reimbursed for his advances without regard to any preference to the demands of said Saloy. That is all. This consent and waiver only placed Saloy in the position of a second incumbrancer, having himself a pledge on the crops of the plantation, but subject to a superior pledge or mortgage in favor of Bloch for his advances.

The question then arises whether Saloy was prevented by his said waiver from instituting suit and seizure of the crop for his own claim for rent. We know of no law or rule of practice in Louisiana which prevented him from instituting such suit. It is true that the net proceeds of the crop in his hands, resulting from his seizure and sale thereof, was liable to the claim of Bloch.

The Code of Practice provides for sales by the sheriff subject to the rights of those having prior liens or privileges, and the purchaser at such sales takes the property subject to those liens, and is credited for the amount thereof on the purchase money of the adjudication. Arts. 679, 683. And by article 709: "The hypothecary action lies against the purchaser of property seized, which is subject to privileges or mortgages, in favor of such creditors as have said privileges and mortgages, in the same manner and under the same rules and restrictions as are applicable to a third possessor of a mortgaged property."

The crop and property sold by Saloy was [34 undoubtedly subject to the plaintiff's pledge to the extent of the amount due to him from the Dragons, and he is entitled to an account from Saloy for that amount to the extent of the net proceeds of said sale. But his claim against Saloy is an equitable one, and in the United States court can only be pursued on the equity side on a bill for an account, in which all equitable deductions would be allowed for the claims of laborers and other preferred creditors; and in such suit an inquiry would be had as to the amount of Bloch's claim against the Dragons, and they would be necessary parties. The debt for which the plaintiff sues Saloy is their debt,

and yet they are not cited and no judgment has been obtained against them. It seems to us altogether an irregular proceeding.

The present suit is an action for damages against Saloy for instituting proceedings and seizing the crops for the purpose of collecting his rent. Such an action cannot be maintained, for Saloy was not prevented by any law from instituting such proceedings for the recovery of his rent. He did nothing that he was not entitled to do, though he became liable to account to Bloch for the net proceeds of the crop, as before mentioned, so far as might be necessary for the satisfaction of Bloch's claim, when duly adjudicated. In our judgment, therefore, the exception taken by Saloy to the petition in this case was well founded, and the action was not maintainable. *The judgment of the Circuit Court is reversed, and the cause remanded, with directions to enter judgment for the defendant.*

450] THE DISTRICT OF COLUMBIA, *Plff. in Err.*,

v.

HENRY E. WOODBURY.

(See S. C. Reporter's ed. 450-467.)

District of Columbia—liability for injuries arising from defective streets and sidewalks—Act of 1878—ownership of streets—neglect of commissioners—evidence of damages—objections to testimony — refusal of instructions—stenographic report.

1. This court reaffirms the decision in *Barnes* v. *District of Columbia*, 91 U. S. 540 (23: 440), that the District is liable, as a municipal corporation, for injuries to individuals arising from its negligence in the construction of a work which it is authorized to construct and maintain, and for those arising from a defective condition of its streets and side-walks, without regard to the manner of appointment of its officers.
2. The municipal corporation of that District, as created by the Act of 1878, is liable to the same extent for injuries to individuals from negligence in maintaining in safe condition the streets and sidewalks of Washington, as was the District under the laws in force when the cause of action in the *Barnes Case* arose.
3. That the fee simple of the streets in the City of Washington is in the United States does not affect such liability.
4. The neglect of the commissioners to keep the public ways of the city in safe condition is the neglect of the municipal corporation, although they are subject to the permanent authority of Congress.
5. Where the injury was to a physician, evidence of his contributions to medical journals on medical subjects is admissible on the question of damages.
6. Evidence tending to show how long a hole in a sidewalk was left unguarded, and tending to show the character of the ordinary pursuits of the person injured and the extent to which the injury prevented him from following those pursuits, and his mental and bodily suffering, is admissible.
7. Vague objections to testimony are without weight before an appellate court in such a case; they should point out some specific defect in the character of the evidence.
8. Where the charge to the jury correctly states the whole law applicable to the case and covers all the issues and every possible view of the evidence, the refusal to give other instructions asked is not error.
9. Where it does not appear from the record that the court below declined to pass upon any question which it was its duty to consider, a stenographic report of its oral opinion cannot control the record by showing that it refused to consider one of the grounds for a new trial.

[No. 234.]

Argued Mar. 27, 28, 1890. Decided May 19, 1890.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment against the District of Columbia for damages for personal injuries arising from the defective character of a sidewalk in the City of Washington. *Affirmed.*

The facts are stated in the opinion.

Mr. **Henry E. Davis** for plaintiff in error.

Messrs. **James Coleman** and **J. M. Wilson** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

Early in the evening of December 6, 1881, the defendant in error, while passing on the sidewalk near the north entrance of the Riggs House on G Street in the City of Washington, fell into a hole, whereby he sustained personal injuries of a serious character. Claiming that the sidewalk was not in a safe condition for use by the public, and that the district authorities had been grossly negligent in not keeping it in proper repair, he brought this action to recover damages for such injuries. The plea was not guilty. A verdict for fifteen thousand dollars was returned against the District, and a judgment in conformity therewith was entered. That judgment having been affirmed by the general term the case has been brought here for re-examination.

The question to be first considered is whether the District of Columbia is, under any circumstances, liable in damages for personal injuries resulting from the unsafe condition of the avenues, streets and sidewalks in the City of Washington. The charge of the court below proceeded upon the ground that such liability existed. The District contends here, as it did at the trial, for the opposite view. And it insists that the question is not concluded by the decision in *Barnes* v. *District of Columbia*, 91 U. S. 540 [23:440]. The argument in support of this proposition

NOTE.—*What constitutes a public highway.* See *note* to Manchester v. Ericsson, 26: 1099.

As to the common-law liability to repair highways, see *note* to Providence v. Clapp, 15: 72.

As to liability to repair highways in United States; safety and convenience of, a mixed question of law and fact,—see *note* to Fitch v. Creighton, 16: 596.

As to liability of third persons to city or town for damages recovered against it for injuries from obstructions or defects in streets, see *note* to Chicago v. Robbins, 17: 298.

assumes that the relations between the government of the District and the public have been so materially changed by legislation enacted since the *Barnes Case*, that the principles therein announced have no application to the present case. This suggestion renders it necessary to ascertain precisely what was decided in the former case.

It arose under the Act approved February 21, 1871 (16 Stat. 419, chap. 62), creating the "District of Columbia" a body corporate for municipal purposes, with power to contract and be contracted with, to sue and be sued, to plead and be impleaded, to have a seal and to exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States, or with that Act. Provision was made for the appointment by the President, with the consent of the Senate, of a governor, secretary, board of health, board of public works and a legislative assembly composed of two bodies, whose power of legislation extended to all rightful subjects of legislation within the District, consistent with the Constitution of the United States and that Act. The streets, avenues, alleys and sewers of Washington, together with all other works intrusted to their charge by the legislative assembly or by Congress, were placed under the entire control of the board of public works, with authority to make all regulations they deemed necessary for keeping them in repair. It was also required to disburse "upon their warrant all moneys appropriated by the United States or the District of Columbia, or collected from property-holders in pursuance of law, for the improvements of streets, avenues, alleys and sewers, and roads and bridges," and to "assess, in such manner as shall be prescribed by law upon the property adjoining and to be specially benefited by the improvements authorized by law and made by them, a reasonable proportion of the cost of the improvement, not exceeding one third of such cost, which sum shall be collected as all other taxes are collected."

It was contended in the *Barnes Case* that the board of public works was not a department or subordinate agency of the District of Columbia, but a federal commission, having exclusive power to make such regulations as it deemed necessary for keeping in repair the streets, avenues, alleys, sewers, roads and bridges committed to their control. This view was rejected by the court. Although that board was dependent upon both Congress and the legislative assembly of the District, and was the hand and agent both of the United States and of the District, it was held to be the representative and a part of the municipal corporation created by the Act of 1871, and that its proceedings and acts in repairing and improving public streets were the proceedings and acts of that corporation. The District was held liable for the injury there complained of upon the principle, which the court declared to be sound and supported by numerous and well-considered adjudications in this country and in England, that a municipal corporation, as distinguished from a corporation organized for private gain, is liable for injuries to individuals arising from negligence upon its part in the construction of works which it was authorized to construct and maintain. And it was expressly declared that it was not of the slightest consequence, in principle, by what means the officers of the District were "placed in position, whether they are elected by the people of the municipality, or appointed by the President or a governor. The people are the recognized source of all authority, state and municipal; and to this authority it must come at last, whether immediately or by circuitous process." 91 U. S. 545 [23: 441].

Has there been any such change in the government established for this District as will take the present case out of the rule announced in the *Barnes Case*? In the revision of the Statutes relating to the District, the clause of the Act of 1871, declaring the District of Columbia (Rev. Stat. D. C. p. 2, § 2) to be a body corporate for municipal purposes, with power to contract, etc., was retained. By the Act of June 20, 1874, for the government of the District and for other purposes (18 Stat. 116, chap. 337), previous statutes providing for the District a governor, secretary, legislative assembly, board of public works and a delegate in Congress were repealed, and all the power and authority then vested in the governor and board of public works, except as limited by that Act, were vested in a commission, composed of three persons, to be appointed by the President with the consent of the Senate. But by the Act of June 11, 1878 (20 Stat. 102, chap. 180), a permanent form of government for the District was established. It provided that "the District of Columbia shall remain and continue a municipal corporation, as provided in section two of the Revised Statutes relating to said District," and that the commissioners therein provided for should "be deemed and taken as officers of such corporation." Those commissioners, consisting of two persons, to be appointed by the President, with the consent of the Senate, and an officer of the engineer corps, detailed for that purpose, were vested with all the powers, rights, duties and privileges, and all the property, estate and effects then lawfully exercised by and vested in the commissioners of the District, including the power, among others, to apply the taxes or other revenues of the District to the payment of its current expenses, the support of the public schools, the fire department and the police, but making no contract nor incurring any obligations other than such as were provided in that Act and should be approved by Congress; to collect taxes theretofore lawfully assessed and due, or to become due, but without anticipating taxes by selling or hypothecating them; to abolish offices, consolidate two or more offices, reduce the number of employés, remove from office and make appointments to any office under them authorized by law; and to erect, light and maintain lamp-posts, with lamps, beyond the city limits. §§ 1, 2, 3.

It was made their duty to submit annually to the Secretary of the Treasury, for his examination and approval, a detailed statement "of the work proposed to be undertaken by

them" during the then ensuing fiscal year, and the estimated cost thereof, as well as the cost of constructing, repairing and maintaining all bridges authorized by law across the Potomac and other streams within the District, the cost of maintaining all public institutions of charity, reformatories and prisons, then belonging to or supported in whole or in part by the District, and the expenses of the Washington aqueduct and its appurtenances, together with an itemized statement and estimate of the amount necessary to defray the expenses of the District for the then ensuing fiscal year. These estimates it became the duty of the Secretary of the Treasury to examine and approve or disapprove, or suggest such change in them as the public interest demanded, the result to be certified to the commissioners, who were required to transmit the same, with the original estimates, to Congress. The Act provided that "to the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of fifty per centum thereof; and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia." § 3.

It also provides that when any repairs of streets, avenues, alleys or sewers within the District are to be made, or when new pavements are to be substituted in place of those worn out, new ones laid, new streets opened, sewers built, or any work the total cost of which shall exceed $1,000, the work shall be given out upon advertisement, the lowest responsible bid to be accepted by the commissioners, though they have the right, in their discretion, to reject all proposals made. It further provides that the "United States shall pay one half of the cost of all work done under the provisions of this (5th) section, except that done by railway companies, which payment shall be credited as part of the fifty per centum which the United States shall contribute towards the expenses of the District of Columbia for that year; and all payments shall be made by the Secretary of the Treasury on the warrant or order of the commissioners of the District of Columbia or a majority thereof, in such amounts and at such times as they may deem safe and proper in view of the progress of the work." The Act places the police, schools, board of health and sanitary inspectors of the District all under the charge and control of the commissioners.

455]

We have made this extended analysis of the provisions of the Act of 1878 because of the earnest contention of the counsel for the defendant, that, while the District of Columbia is still a municipal corporation, under its present form of government it has not, "as a municipal corporation, the features involving it in the liability under consideration." The reasons assigned by counsel for this contention have been carefully considered with the result that, in our judgment, the municipal corporation created by the Act of 1878 is subject to precisely the same liability for injuries to individuals, arising from the negligence of the commissioners or of the officers under them in maintaining in safe condition, for the use of the public, the streets, avenues, alleys and sidewalks of the City of Washington, as was the District under the laws in force when the cause of action in the *Barnes Case* arose. It is said that the present corporation, as a corporation, has nothing to do with the streets. That could have been said with equal propriety in reference to the old corporation, when the streets were under the control and supervision of the board of public works. Yet that board was held to be a part of the municipal corporation. Its acts, within the scope of its powers, were deemed the acts of the corporation. Its negligence, in the care of streets, was held to be the negligence of the municipal corporation of which it was a part. So, in this case, the commissioners, having full control of the streets, are under a duty to keep the public ways of the city in such condition that they can be used with reasonable safety. Their neglect in that matter is the neglect of the municipal corporation of which they are the responsible representatives, although subject to the paramount authority of Congress.

It is suggested that the District is without the means to perform the supposed neglected duty; that none of its officers can pay a judgment against it and that no process against it could enforce payment; that even a mandamus against it to levy a tax would be futile, because neither the District nor the commissioners can levy a tax for any purpose; and that no judgment against it can be paid except by warrant upon the treasury, pursuant to an appropriation by Congress. We do not perceive that these considerations materially affect the principle upon which the decision in the *Barnes Case* rests. That streets, avenues, pavements, sidewalks and sewers in Washington are established, repaired and maintained, in part, by appropriations made by Congress, and, in part, by taxation upon private property, does not change the fact that, by an express declaration of Congress, the District is created a body corporate for municipal purpose. Because it was a municipal corporation proper, as distinguished from a corporation established as an agency of the government creating it, this court held in the *Barnes Case* that it was responsible for such negligence of its officers having the care of streets, avenues and sidewalks, as resulted in personal injuries to individuals. The source from which the District obtains the means for maintaining public highways in the city is of no consequence, so long as Congress has made it, and permits it to remain, a mere municipal corporation, with such functions as pertain to municipal corporations proper. This municipal feature was emphasized in *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1, 7 [33: 231, 234], where it was said that the corporate capacity and the corporate liabilities of the District remained as they were before the Act of 1878, and that its character as a mere municipal corporation had not been changed. Having that character, we held, in that case, that the District was subject to the ordinary rules governing the law of procedure between private persons, and was therefore

embraced by the Maryland Statute of Limitations of 1715.

It is further said that the fee simple of the streets in the City of Washington is in the United States, and that that fact is entitled to great weight. This point was made in the *Barnes Case* and distinctly overruled. The court there said: "We do not perceive that the circumstance that the fee of the streets is in the United States, and not in the municipal corporation, is material to the case. In most of the cities of this country the fee of the land belongs to the adjacent owner; and upon the discontinuance of the street, the possession would revert to him. The streets and avenues in Washington have been laid out by competent authority. The power and the duty to repair them are undoubted and would not be different were the streets the absolute property of the corporation. The only questions can be as to the particular person or body by which the power shall be exercised, and how far the liability of the city extends."

Without further discussion, we adjudge, upon the authority of *Barnes* v. *District of Columbia*, that the District is liable for such negligence upon the part of its officers as is charged in the plaintiff's declaration. That case was determined in 1875, and has never been questioned by any subsequent decision in this court. On the contrary, its authority was recognized in *Metropolitan R. Co.* v. *District of Columbia* and in *Brown* v. *District of Columbia*, 127 U. S. 579, 586 [32: 262, 264], and the principles announced in it were applied in *District of Columbia* v. *McElligott*, 117 U. S. 621 [29: 946]. If the rule announced in the *Barnes Case* is not satisfactory to Congress, it can be abrogated by statute.

We proceed to examine the objections urged by the District to the admission of evidence. The first one relates to the plaintiff's testimony in reference to his contributions to medical journals upon various medical subjects. At the trial below he gave evidence tending to show that at the time of the accident he was, and had been since 1864, a resident practicing physician of Washington; that between eight and nine o'clock of the evening of December 6, 1881, while walking with his sister on the south side of G Street, between Fourteenth and Fifteenth Streets Northwest, he stepped on a board covering a hole in the sidewalk adjoining the Riggs House, and, the board breaking or bending, he fell into the hole underneath it, was severely and permanently injured, and his ability to prosecute his studies and to pursue his profession greatly impaired. While under examination-in-chief, his counsel propounded to him this question: "State, Doctor, if you please, whether or not you had at that time or prior to the time of this accident been a contributor to any medical journal of this country or abroad—the old country—of any articles or essays on diseases known to the profession." To this question the plaintiff answered: "I have been for years a regular contributor in the Philadelphia Medical Times; also to the Virginia Journal, a medical monthly published in Richmond, and other journals." The defendant at the time objected to the question and answer, but, the objections being overruled, it excepted to the ruling of the court. At a subsequent stage of the trial the plaintiff, being recalled as a witness in his own behalf, offered to prove that he had in his possession certain written articles for medical journals and medical works on obstetrics and gynecology, and that he had been quoted as an authority upon certain subjects; to which the defendant objected, but the court overruled the defendant's objection and permitted said testimony to be given as follows: "Atkinson's Therapeutics of Gynecology and Obstetrics and Wood's Library Minor Surgical Gynecology, by Paul F. Munde (which books were produced and examined by the witness before the jury), are text-books in the medical profession, and that on pages 73 and 140 of said first-named book were articles written by himself, or reference made to him, and also at page 217 of the last book referred to; also that in the Virginia Medical Monthly for August, 1876, there is an article by the [45
plaintiff on the therapeutic use of certain remedies, and also in the American Journal of Obstetrics there is an article by plaintiff on the 'Application of Nitric Acid in Endocervicitis and Endometritis,' and also a translation of one of plaintiff's articles in a French journal, entitled 'Annales de Gynecologie,' in April, 1875, and also in a French journal, 'The Review of Medical and Surgical Therapeutics,' of May, 1875." To the action of the court in overruling the defendant's objection and permitting this testimony to be given, and to the testimony itself, the defendant excepted.

This evidence was competent upon the issue as to damages. It indicated the nature of the plaintiff's pursuits, and, in connection with other evidence showing the serious and permanent character of the injuries received by him, that his capacity to prosecute his studies, and to follow his ordinary pursuits, was impaired. The defendant insists that the evidence should have been rejected because it did not appear that the plaintiff had derived any income from his contributions to medical journals. This is not a sound view of the question. Even if those contributions were made without compensation, his inability to continue them by reason of the injuries in question was a proper element in the inquiry as to damages. That fact tended to show the extent of both his mental and physical suffering, resulting from the injuries received. All evidence tending to show the character of his ordinary pursuits, and the extent to which the injury complained of prevented him from following those pursuits, was pertinent to the issues. *Wade* v. *Leroy*, 61 U. S. 20 How. 34 [15: 813]; *Nebraska City* v. *Campbell*, 67 U. S. 2 Black, 590 [17: 271]; *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 545, 554 [30: 257, 258]; *Ripon* v. *Bittel*, 30 Wis. 614; *Ballou* v. *Farnum*, 11 Allen, 73; *Caldwell* v. *Murphy*, 1 Duer, 233, 11 N. Y. 416. The authorities all agree that in cases of this character much latitude must be given to juries in estimating the damages sustained by the person injured. Physical suffering, resulting from such injuries, is necessarily

attended by mental suffering in a greater or less degree. And as said in *Kennon* v. *Gilmer*, 131 U. S. 22, 26, 27 [33: 110, 112], "The action is for an injury to the person of
80] an intelligent being; and when the injury, whether caused by willfulness or negligence, produces mental as well as bodily anguish and suffering, it is impossible to exclude the mental suffering in estimating the extent of the personal injury for which compensation is to be awarded." *Illinois Cent. R. Co.* v. *Barron*, 72 U. S. 5 Wall. 90, 105 [18: 591, 594]; *Pennsylvania & O. Canal Co.* v. *Graham*, 63 Pa. 290; *Smith* v. *Holcomb*, 99 Mass. 552; *Holyoke* v. *Grand Trunk R. Co.* 48 N. H. 541; *Stockton* v. *Frey*, 4 Gill, 406; *Smith* v. *Overby*, 30 Ga. 241; *Cox* v. *Vanderkleed*, 21 Ind. 164; *Lynch* v. *Knight*, 9 H. L. Cas. 577.

The next objection to the admission of evidence relates to a certain entry in the books of the Adams Express Company in reference to the dead-light placed at the hole into which plaintiff fell. It should be stated in this connection that there was evidence before the jury, on behalf of the plaintiff, tending to show that the sidewalk, where the accident happened, was torn up for the purpose of putting in a new boiler for the Riggs House; that after the boiler had been set, and the wall around it bricked up, a hole was left for the purpose of putting in a dead-light; that before the dead-light (in the procuring of which there was some delay) was put in place, the hole was covered by a board, that was kept there for fifteen or eighteen days before the dead-light was put in, which was not done until after the accident in question; that on the top of the boiler was a safety valve that required the attention of the engineer; that before the hole was covered, or the boiler set, the engineer, in order to reach the safety valve, would take off the board cover and go down; and that there was no attachment to the boards from below to prevent them from sliding, but they were nailed together by two cleats. There was also evidence tending to show that the boards constituted a reasonably sufficient covering for the hole. C. E. Luckett, a witness for the plaintiff, testified that he was a clerk in the Adams Express Company in Washington, and its agent at Georgetown in November and December, 1881; that he had the company's book of delivery for those months; that the entries in it under date of November 29, 1881, are in his handwriting,
81] were made by him in the regular course of business for which the book was kept, and that on that date there is an entry in the book of a delivery to Beckham & Middleton; that he did not in person deliver the article mentioned to that firm, his duty being to write up the driver's book, check off the way-bills that came in and do all the clerical work of the office; and that the company's driver delivered the article referred to, taking the book with him, the book produced by witness being the one that the driver had. At this point of the witness' testimony-in-chief he was asked "whether the book shows that this thing was received on the 29th of *November.*" The question was objected to, and the objection overruled. The witness answered: "It was." To this ruling of the court as to the question and answer the defendant excepted. It was also in proof, in behalf of the plaintiff, by Middleton, of the firm of Beckham & Middleton, that on the book of the Adams Express Company, referred to by Luckett (and shown to the witness), appeared his signature under this entry, of date November 29, 1881: "1 casting, Beckham & Middleton; amount of charges, $1.60; Beckham & Middleton;" that the casting referred to was ordered from New York for Hutchins, who put in the boiler, and that no other casting was delivered to him by witness or his firm during November or December, 1881. To this evidence when offered the defendant objected, but the objection was overruled, and it excepted.

The principal object of this evidence in reference to the dead-light was to show when it was placed at the hole. We will not stop to consider whether a proper foundation was laid for the use of the above entry as evidence in itself; for it was otherwise in proof, and not questioned, that the dead-light was not placed in position until after the plaintiff had fallen into the hole, and that the hole was unguarded by such a light for some time prior to the accident. The point which concerned the District was the length of time during which the hole was left unguarded by a dead-light, or other sufficient signal, and not whether Beckham & Middleton, as between themselves and Hutchins, were negligent in not procuring the dead-light sooner, or in not delivering it more promptly than was done after it reached their hands. If the entry in the books of the express company was incompetent as evidence, in itself, of the facts stated in it, its use before the jury could not possibly have prejudiced the defendant.

We will add that the objections made by the District to the evidence in relation to the plaintiff's contributions to medical journals, as well as to the entry upon the books of the Express Company, lose much of their force because they did not indicate with distinctness the precise grounds upon which they were intended to rest. Such general objections were well calculated to embarrass the court, and put it at disadvantage in its conduct of the trial. It was entitled to know the grounds of the objection, so that the jury could be put in possession of the real case to be tried. In *Camden* v. *Doremus*, 44 U. S. 3 How. 515, 530 [11: 705], this court declined to consider objections made to the admission of evidence which did not state the grounds upon which they were made, and did not obviously cover the competency of such evidence nor point to some definite and specific defect in its character. "We must," the court said, "consider objections of this character as vague and nugatory, and, if entitled to weight anywhere, certainly as without weight before an appellate court." To the same effect are *Burton* v. *Driggs*, 87 U. S. 20 Wall. 125, 133 [22: 299, 301]; *Patrick* v. *Graham*, 132 U. S. 627, 629 [33: 460]. This rule is especially applicable in actions like the present one, in which no fixed rule can be prescribed for measuring the amount of

damages, and in which the result must, of necessity, depend upon the good sense and sound discretion of the jury, as controlled by the special circumstances of the case.

At the close of the testimony on behalf of the plaintiff the defendant asked the court to instruct the jury that the evidence did not show a case entitling the plaintiff to recover. The court refused to so instruct the jury. The defendant, having closed its evidence, made numerous requests for instructions, each one of which was refused, and it excepted.

The charge of *Mr. Justice* Cox to the jury covered every possible view of the case as made by the evidence. While it is too lengthy to be here inserted, it will be proper to state the general principles of law which the jury were instructed to observe in their determination of the case. Those principles—preserving as far as possible the language of the charge—were as follows:

1. The district government, as a municipal corporation, is charged with the duty of supervising the streets of Washington, and keeping them in a condition fit for convenient use and safe against accident to travelers using them. But it is not under an absolute obligation to respond for every accident a man may suffer in its streets. It is simply bound to practice due care and diligence in the exercise of its powers and in the application of its resources towards the objects named. If due care is once exercised, and, notwithstanding, an accident occurs and somebody is injured, it is the misfortune of the victim and not the fault of the authorities. If its duty has been fully performed in regard to any particular street and that street has been put in good condition, safe against all accidents that could be foreseen and provided for, and afterwards, by some casualty, it falls into dilapidation and becomes dangerous, as, for instance, by the caving in of a sewer, and then an accident happens, the rule is that the district government is not responsible for the injury that results, unless it had timely notice of the dangerous condition of the street, so that it could be put in repair and the danger obviated. This notice is either actual or constructive; the latter meaning that the district authorities, within the scope of their opportunities and money, being under an obligation to exercise a general supervision of the streets, and to keep themselves informed about their condition, if a street remains in a dangerous condition so long that the authorities could not help, in the exercise of ordinary care and diligence, knowing that fact, and did not know it because they failed to exercise proper vigilance, then the law imputes notice to them; in other words, they have notice in contemplation of law, and that is constructive notice.

2. No certain duration of a dangerous condition of a public highway operates of itself as a notice. The law does not require impossibilities of any person, natural or artificial, and it is impossible that all parts of all the streets should be under constant inspection. Consequently, it could not be maintained that at the instant an accident happens to a highway the authorities are charged with notice and held liable therefor if they do not put it instantly in repair. Every such case must be determined by its peculiar circumstances. The District would not be responsible for damages arising from the bad condition of a street unless actual notice was brought to them of the condition of the street, or unless the street remained in an unsafe condition so long that they ought to have known of it if they exercised ordinary care.

3. People must build houses, and, in order to do that, it is necessary to excavate for cellars and areas, if needed, and to dig trenches to connect with the water-mains, gas-pipes and sewers. Nobody has a right to do this without a permit from the authorities, and if any person undertakes to do it without a permit, he would be responsible for any injury resulting; but the District would not be, unless it had the notice already spoken of. If a permit is granted, as is usually the case, the fact is notice to the authorities that the work is in progress, and then they are charged with the duty of seeing that it is properly conducted.

4. These works are necessarily dangerous to life and limb, and it is the duty of a person doing the work to protect it against accident to travelers on the street, and the duty of a private person is very much the same as that of the District itself when it is prosecuting an improvement. If a private individual fails to protect the excavation or hole, or whatever it may be, it is the duty of the district authorities to see that it is protected, and they are held responsible that he shall do it, for they were notified that he was going on with the work when he obtained his permit. If the individual himself supplies the protection against danger, then the duty will have been discharged on his part, and that of the District also will have been discharged just the same as in the case of the works being constructed by itself. If, then, by any unforeseen accident or the act of somebody that could not be anticipated, the protection has been removed and new danger supervenes, of course the law about notice applies.

5. The first question for the jury was a [46 delicate and difficult one, namely, whether in the first instance a sufficient protection was provided to guard the public against accident. A mortar-board was placed over the hole and extended several inches beyond the edges, and was the protection relied upon. If there never was an adequate protection provided in the first instance, then the duty of the builder never was fulfilled, and it would not make the slightest difference whether it became a little more dangerous by the displacement of the cover afterward or not, and the question of the notice about this displacement would not arise at all. If it was an adequate protection in the first instance, then comes the question of notice of subsequent change.

6. It was for the jury to decide whether the boards placed over the hole be sufficient to sustain the weight of an ordinary man traveling over them. It is not only necessary that the protection should be sufficient to sustain the

weight of persons passing along, but another element is the security of the covering in its place over the hole to sustain the weight of a heavy man walking over it. If it would be liable to be kicked out of place by persons passing along it might not be deemed an adequate protection. But that was for the jury to decide. They must decide whether it was sufficient to sustain the weight of a person passing over it, and whether it was sufficiently secured, either by artificial appliances or by its own inherent weight, to hold it in its proper place. It was not necessary that the board placed over the hole should have been made absolutely safe against all interference, for no barrier or other safeguard could be put there which could not be removed by some force, but only that it should be safe against the consequences of the ordinary use of the street—such contingencies as might fairly have been anticipated and foreseen. If it was such a precaution as proper care, diligence and foresight ought to have provided for, and the accident was not occasioned by any defect in the original appliance provided there, but it was subsequently, by some unforeseen occurrence or agency, or the exertion of some individual, moved from its place and thereby made dangerous, then the above rules as to notice will apply. The burden is on the plaintiff to prove either that the thing was originally dangerous or had become so long enough before the accident for the authorities to have known it, so as to impose upon them the obligation to put it in proper condition.

In regard to the amount of damages, the court said: "The rule laid down in the instructions asked on the part of the plaintiff is to the effect that the plaintiff is entitled to recover, if he is entitled to recover at all, for his loss of time, the expenditure of money made necessary by his injury, and compensation for his suffering in body and mind; and his whole condition and prospects are to be considered in case you find a verdict in his favor. It is impossible for me to say what the compensation should be, as there is no mathematical rule by which his losses can be estimated, and it is a matter for sound judgment in this as in all cases."

As to so much of the charge as instructed the jury that it was to be presumed that a permit had been given by the defendant for doing the work in the sidewalk of the street, and to so much as related to the liability of the defendant incident to and consequent upon such permit, the defendant excepted.

In reference to the entire charge to the jury, it is unnecessary to say more than that it correctly stated the rules of law applicable to the case. It omitted nothing that ought to have been said, and contained nothing that was inconsistent with the principles announced in *Barnes* v. *District of Columbia*, or that was not in harmony with the established rules of evidence. We will not extend this opinion by comments upon the instructions asked by the defendant; for the charge to the jury covered all the issues, and gave, in clear language, the whole law applicable to the case.

It is also assigned for error that the court below, in general term, refused to consider that one of the grounds for a new trial which stated that the verdict was against the weight of the evidence, thereby, it is contended, disregarding the rule announced in *Metropolitan R. Co.* v. *Moore*, 121 U. S. 561 [30 1022]. It is attempted to support this assignment by referring to the stenographic [46 report of the oral opinion of *Mr. Justice* Hagner, speaking for the general term. It is to be found in 5 Mackey, 127, 143. This report cannot control the record of the case as certified to us. It does not appear from the record that the general term declined to pass upon any question which it was its duty to consider. This objection is therefore without any basis upon which to rest.

Upon the whole case we are of opinion that no error of law was committed by the court below, and *the judgment must be affirmed.*

It is so ordered.

THE LATE CORPORATION OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS ET AL., *Appts.*, [1]

v.

UNITED STATES.

GEORGE ROMNEY ET AL., *Appts.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 1-68.)

Power of United States over Territory—Congress has power to revoke charter of Mormon Church of Latter-Day Saints—has power to cause its property to be seized and held—Act limiting real estate—effect of dissolution of charitable corporation on its property—polygamy may be prohibited, and property used for promoting it may be devoted to charity—property, when devoted to other charitable objects—power of Legislature over charities—law of charities—Utah law—void conveyances.

1. The United States has supreme sovereignty over a Territory, and Congress has full and complete legislative authority over its people and government.

2. Congress has power to revoke the charter of the Church of Jesus Christ of Latter-Day Saints in the Territory of Utah.

NOTE.—*As to power of Congress over Territories*, see *note* to First Nat. Bank v. Yankton County, 25: 1046.

As to construction of grants to corporations; corporations have only powers granted, or those necessary to carry into effect powers granted; can act only in the mode prescribed by the law creating,—see *note* to Charles River Bridge v. Warren Bridge, 9: 773; also *note* to Beaty v. Knowler, 7: 813.

As to power to alter, amend or repeal charters of corporations, see *notes* to Dartmouth College v. Woodward, 4: 644; Greenwood v. Union Freight R. Co. 26: 961.

As to mode of executing powers conferred on corporations; what powers are not implied,—see *note* to Beaty v. Knowler, 7: 813.

As to forfeiture of franchises of corporations, for misuse, nonuse or abuse, see *note* to Chicago L. Ins. Co. v. Needles, 28: 1064.

3. Congress and the courts have the power to cause the property of the said Corporation to be seized and taken possession of and held for final proper disposition.

4. The Act of July 1, 1862 (sec. 1890, U. S. Rev. Stat.), limiting the amount of real estate which could be held by a religious corporation in a Territory and forfeiting to the United States real estate held contrary thereto, was a valid exercise of congressional power. Its prohibition could not be evaded by putting the property of the Corporation into the hands of trustees.

5. When a public or charitable corporation is dissolved, its personal property is subject to the disposal of the sovereign authority and its real estate reverts to the grantor (in this case the United States), subject to the charitable use.

6. Government may prohibit polygamy, even if the right to indulge in it is a religious belief; and when it is forbidden by law, property used for promoting such unlawful practice, but dedicated to charitable uses and belonging to a defendant corporation, may be protected from such diversion and be taken and devoted to objects of charity.

7. Where property has been devoted to a charitable use which cannot be carried out on account of some illegality in or failure of the object, it may be applied under the direction of the courts, or of the supreme power in the state, to other charitable objects corresponding, as near as may be, to the original intention of the donor.

8. In this country, the Legislature or government of the State, as *parens patriæ*, has the right to enforce all charities of a public nature where no other person is intrusted with it.

9. The law of charities exists in Utah, and Congress has power to carry out that law and put it in force, in its application to the Church of Jesus Christ of Latter-Day Saints.

10. Congress had constitutional power to pass the Act of Feb. 19, 1887, annulling the charter of said Church and directing proceedings to forfeit its property.

11. The attempt made, after the passage of the Act of February 19, 1887, and whilst it was in the President's hands for his approval or rejection, to transfer the property from the trustee then holding it to other persons, and for the benefit of different associations, was an evasion of the Law and void.

[Nos. 1081, 1054.]

Argued Jan. 16, 17, 18, 1889. Decided May 19, 1890.

APPEALS from a decree of the Supreme Court of the Territory of Utah, that the Corporation of the Church of Jesus Christ of Latter-Day Saints was dissolved, and annulling certain deeds of property and (except a certain piece of land set apart for the worshipers of that sect) decreeing that the real estate belonging to said Corporation was not used for the worship of God or for burial grounds, and that its personal property has become escheated to the United States, and that the receiver appointed by this court keep possession of such real and personal property until further order. *Affirmed. But, as the decree may perhaps require modification in some matters of detail, for that purpose only the case is reserved for further consideration.*

The facts are stated in the opinion.

Messrs. **James O. Broadhead, Joseph E. McDonald,** *Franklin S. Richards* and *John M. Butler*, for appellants:

The creation of this Corporation was a contract which could not be altered or repealed by any subsequent Act of the Territorial Legislature or of the Congress of the United States.

Organic Act of Utah of 1850; *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 637, 643, 644-646 (4: 659-661); Angell and Ames, Corp. § 767; *Miller* v. *New York*, 82 U. S. 15 Wall. 488 (21: 98); *Atlantic & G. R. Co.* v. *Georgia*, 98 U. S. 365 (25: 187); *Greenwood* v. *Union Freight R. Co.* 105 U. S. 15 (26: 963); *Pennsylvania College Cases*, 80 U. S. 13 Wall. 212 (20: 552); *St. Peter's Roman Catholic Cong.* v. *Germain*, 104 Ill. 440; *Holyoke W. P. Co.* v. *Lyman*, 82 U. S. 15 Wall. 500 (21: 133); *Terrett* v. *Taylor*, 13 U. S. 9 Cranch, 53 (3: 654); *Wilkinson* v. *Leland*, 27 U. S. 2 Pet. 657 (7: 553); *Osborn* v. *Nicholson*, 80 U. S. 13 Wall. 662 (20: 695); *Scott* v. *Sandford*, 60 U. S. 19 How. 449 (15: 718); *Calder* v. *Bull*, 3 U. S. 3 Dall. 388 (1: 648).

The charter of the Church Corporation received the implied sanction of Congress, and thereafter Congress could not impair the contract nor dissolve the Corporation, either by disapproving the Act of incorporation, or by repealing the charter.

Clinton v. *Englebrecht*, 80 U. S. 13 Wall. 446 (20: 662); *First Nat. Bank* v. *Yankton County*, 101 U. S. 129 (25: 1046); *People* v. *O'Brien*, 2 L. R. A. 255, 111 N. Y. 1; *Greenwood* v. *Union Freight R. Co.* 105 U. S. 19 (26: 964).

The Act of March 3, 1887, was an act of judicial legislation, and for this reason beyond the power of the legislative department of the general government; it is therefore unconstitutional.

Hurtado v. *California*, 110 U. S. 535, 536 (28: 238); *United States* v. *Klein*, 80 U. S. 13 Wall. 146 (20: 525); *Davis* v. *Gray*, 83 U. S. 16 Wall. 223 (21: 454); *Citizens Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 662 (22: 461).

There is no such thing known to the jurisprudence of the United States as escheat. There is no rule of law by which personal property of any kind can escheat to the United States.

Coke, Litt. 13 *a*, 92 *b*; *Cox* v. *Parker*, 22 Beav. 168; Lewin, Trusts, 822; *Burgess* v. *Wheate*, 1 Eden, 177; *Taylor* v. *Haygarth*, 14 Sim. 16; *Beale* v. *Symonds*, 16 Beav. 406; Tudor, Lead. Cas. on Real Prop. 784, and *notes*; *McDowell* v. *Bergin*, 12 Ir. C. L. R. 391; 2 Hawkins, Pleas of the Crown, chap. 49, § 9; *Wheaton* v. *Peters*, 33 U. S. 8 Pet. 591 (8: 1055).

The personal property is not subject to escheat to the United States on account of any failure or illegality of the trusts to which it was dedicated at its acquisition and for which it has been used by the Corporation.

Com. v. *Martin*, 5 Munf. 117; *Jackson* v. *Phillips*, 96 Mass. 555.

Real estate in which the Church has vested rights cannot be disturbed.

Hussey v. *Smith*, 99 U. S. 22 (25: 314); *Stringfellow* v. *Cain*, 99 U. S. 616 (25: 423); *Cofield* v. *McLellan*, 83 U. S. 16 Wall. 332 (21: 340); *Lamb* v. *Davenport*, 85 U. S. 18 Wall. 313 (21: 761); *Tucker* v. *St. Clement's Church*, 3 Sandf. 251; *Bogardus* v. *Trinity Church*, 4 Sandf. Ch. 752, 7 N. Y. Ch. L. ed. 1280; *Harvard College* v. *Boston*, 104 Mass. 488.

Under the averments of the bill and the proofs taken there was no authority to appoint a receiver.

Fosdick v. *Schall*, 99 U. S. 253 (25:342); High, Receivers, chap. 1, § 7, p. 9; 2 Daniell, Ch. Pl. and Pr. chap. 28, § 1; 2 Story, Eq. Jur. chap. 21, §§ 831-835; 3 Pom. Eq. Jur. 357-365, §§ 1330-1336.

Messrs. A. H. Garland, Atty-Gen., and **G. A. Jenks**, *Solicitor-Gen.*, for appellee:

The legislative power of Congress over the Territories is general.

First Nat. Bank v. *Yankton County*, 101 U. S. 133 (25:1047); *American & O. Ins. Cos.* v. *356 Bales of Cotton*, 26 U. S. 1 Pet. 542 (7:255); *Benner* v. *Porter*, 50 U. S. 9 How. 242 (13:122).

The power to repeal was reserved in the Organic Law.

Morawetz, Priv. Corp. §§ 8, 1106; 9 U. S. Stat. 454; Rev. Stat. § 1850; *Miner's Bank* v. *United States*, 1 Greene, 553; *Miner's Bank* v. *Iowa*, 53 U. S. 12 How. 1 (13:867); *Holyoke W. P. Co.* v. *Lyman*, 82 U. S. 15 Wall. 522 (21:140); *Miller* v. *New York*, 82 U. S. 15 Wall. 478 (21:98); *Tomlinson* v. *Jessup*, 82 U. S. 15 Wall. 455 (21:205); *Chesapeake & O. R. Co.* v. *Miller*, 114 U. S. 176 (29:121); *Shields* v. *Ohio*, 95 U. S. 319 (24:357); *Spring Valley Water-Works* v. *Schottler*, 110 U.S. 347 (28:173); *Sinking Fund Cases*, 99 U. S. 700-748 (25:496-512).

The alleged charter is void, because the power exercised in the passage of the Act of incorporation is among the powers forbidden by the Constitution.

Sedgwick, Stat. and Const. Law, 261.

If the charter was a valid one, it was a public corporation, and therefore not within the principle announced by this court in *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 668-680 (4: 667-669).

Even if the Corporation was a legal private one, its charter was rightfully dissolved, for misuse and abuse of its corporate powers.

Act of July 1, 1862; *Terrett* v. *Taylor*, 13 U. S. 9 Cranch, 43 (3: 650); *Erie & N. E. R. Co.* v. *Casey*, 26 Pa. 303; *Miner's Bank* v. *United States*, 1 Greene, 562, 563.

But whether the alleged Corporation was legal or *de facto*, public or private, or had or had not abused its powers, it was rightfully dissolved under the police powers of the government.

Tiedeman, Lim. of Pol. Power, 2, 576, 580; *Mugler* v. *Kansas*, 123 U. S. 623, 657-663 (31: 205, 209-211); *Stone* v. *Mississippi*, 101 U. S. 814 (25: 1079); *Metropolitan Excise Board* v. *Barrie*, 34 N. Y. 657; *Boyd* v. *Alabama*, 94 U. S. 645 (24: 302); *Reynolds* v. *United States*, 98 U. S. 145 (25: 244).

Congress had the power to declare the dissolution of the Corporation directly, without a judicial determination of the facts.

Miner's Bank v. *United States*, 1 Greene, 562.

The right is the same whether the Corporation existed as a corporation *de jure* or *de facto*.

2 Morawetz, Priv. Corp. § 745; *Smith* v. *Sheeley*, 79 U. S. 12 Wall. 361 (20: 431); *Cowell* v. *Colorado Springs Co.* 100 U. S. 61 (25: 550); *Gill* v. *Fauntleroy*, 8 B. Mon. (Ky.) 185; *Miller* v. *Shackleford*, 4 Dana (Ky.) 287, 288; *Fitch* v. *Baldwin*, 17 Johns. 161; *Close* v. *Glenwood Cemetery*, 107 U. S. 466, 467, 469.

If the Corporation was a public one, as we contend it was, on its dissolution its property became vested in the sovereign.

2 Waterman, Corp. 873; *Meriwether* v. *Garrett*, 102 U. S. 501, 511 (26: 200, 204); 2 Kent, Com. § 307; *Vincennes Bank* v. *State*, 1 Blackf. (Ind.) 282, 283; 2 Kyd, Corp. 516; *Fox* v. *Horah*, 1 Ired. Eq. 358, 361; *White* v. *Campbell*, 5 Humph. (Tenn.) 38; *Mumma* v. *Potomac Co.* 33 U. S. 8 Pet. 281 (8: 945); *Curran* v. *Arkansas*, 56 U. S. 15 How. 304 (14: 705); *Bacon* v. *Robertson*, 59 U. S. 18 How. 488 (15: 504); 2 Waterman, Corp. 934, 935.

Mr. Justice **Bradley** delivered the opinion of the court:

This case originated under and in pursuance of the Act of Congress, entitled "An Act to Amend an Act Entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United States, in Reference to Bigamy, and for Other Purposes, Approved March 22, 1882,'" which Act was passed February 19, 1887, and became a law by not being returned by the President. This Act, besides making additional provision with regard to the prosecution of polygamy in the Territories, and other matters concerning the Territory of Utah, provided, in the 13th, 17th and 26th sections, as follows:

"Sec. 13. That it shall be the duty of the Attorney-General of the United States to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of section three of the Act of Congress approved the first day of July, eighteen hundred and sixty-two, entitled 'An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah,' or in violation of section eighteen hundred and ninety of the Revised Statutes of the United States; and all such property so forfeited and escheated to the United States shall be disposed of by the Secretary of the Interior, and the proceeds thereof applied to the use and benefit of the common schools in the Territory in which such property may be: *Provided*, That no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial ground, shall be forfeited."

"Sec. 17. That the Acts of the Legislative Assembly of the Territory of Utah incorporating, continuing or providing for the Corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called "General Assembly of the State of Deseret" incorporating the Church of Jesus Christ of Latter-Day Saints, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said Corporation, in so far as it may now have, or pretend to have, any legal existence, is hereby dissolved; that it sh[illegible] the duty of the Attorney-General of [illegible]ted States to cause such pro[illegible]aken in the Supreme Court of [illegible] Utah as shall be proper to ex[illegible]ing provisions of this section

and to wind up the affairs of said Corporation conformably to law; and in such proceedings the court shall have power, and it shall be its duty, to make such decree or decrees as shall be proper to effectuate the transfer of the title to real property now held and used by said Corporation for places of worship, and parsonages connected therewith, and burial grounds, and of the description mentioned in the proviso to section thirteen of this Act and in section twenty-six of this Act, to the respective trustees mentioned in section twenty-six of this Act; and for the purposes of this section said court shall have all the powers of a court of equity."

"Sec. 26. That all religious societies, sects and congregations shall have the right to have and to hold, through trustees appointed by any court exercising probate powers in a Territory, only on the nomination of the authorities of such society, sect or congregation, so much real property for the erection or use of houses of worship, and for such parsonages and burial grounds as shall be necessary for the convenience and use of the several congregations of such religious society, sect or congregation." (24 U. S. Stat. 637, 638 and 641.)

In pursuance of the 13th section above recited, proceedings were instituted by information on behalf of the United States in the Third District Court of the Territory of Utah, for the purpose of having declared forfeited and escheated to the government the real estate of the Corporation called the Church of Jesus Christ of Latter-Day Saints, except a certain block in Salt Lake City used exclusively for public worship. On the 30th of September, 1887, the bill in the present case was filed in the Supreme Court of the Territory, under the 17th section of the Act, for the appointment of a receiver to collect the debts due to said Corporation and the rents, issues and profits of its real estate; and to take possession of and manage the same for the time being; and for a decree of dissolution and annulment of the charter of said Corporation, and other incidental relief. The bill is in the name of the United States, and was brought by direction of the Attorney-General, against both "the Late Corporation known and claiming to exist as the Church of Jesus Christ of Latter-Day Saints," and John Taylor, "late trustee in trust," and eleven other persons, late assistant trustees of said Corporation.

The bill states the creation of the Corporation by an ordinance of the assembly of the so-called "State of Deseret," which was afterwards organized as the Territory of Utah. The ordinance was approved the 8th day of February, 1851, and was afterwards, in October, 1851, and January 19, 1855, re-enacted by the Legislature of the Territory of Utah. A copy of the original ordinance is appended to the bill, and is as follows:

"AN ORDINANCE INCORPORATING THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS.

(Approved February 8, 1851.)

Be it ordained by the General Assembly of the State of Deseret: That all that portion of the inhabitants of said State which now may become residents therein, and which are known and distinguished as 'The Church of Jesus Christ of Latter-Day Saints,' are hereby incorporated, constituted, made and declared a body corporate, with perpetual succession, under the original name and style of 'The Church of Jesus Christ of Latter-Day Saints,' as now organized, with full power and authority to sue and be sued, defend and be defended, in all courts of law or equity in this State; to establish, order and regulate worship, and hold and occupy real and personal estate, and have and use a seal, which they may alter at pleasure.

"Sec. 2. *And be it further ordained:* That said body or Church, as a religious society, may, at a general or special conference, elect one 'trustee in trust,' and not to exceed twelve assistant trustees, to receive, hold, buy, sell, manage, use and control the real and personal property of said Church, which said property shall be free from taxation, which trustee and assistant trustees, when elected or appointed, shall give bonds, with approved security, in whatever sum the conference may deem sufficient, for the faithful performance of their several duties, which said bonds, when approved, shall be filed in the general church recorder's office, at the seat of general church business, when said bonds are approved by said conference, and said trustee and assistant trustees shall continue in office during the pleasure of said Church; and there shall also be made by the clerk of the conference of said Church a certificate of such election or appointment of said trustee and assistant trustees, which shall be recorded in the general church recorder's office, at the seat of general church business, and when said bonds are filed and said certificates recorded said trustee or assistant trustees may receive property, real or personal, by gift, donation, bequest or in any manner not incompatible with the principles [4
of righteousness or the rules of justice, inasmuch as the same shall be used, managed or disposed of for the benefit, improvement, erection of houses for public worship and instruction, and the well being of said Church.

"Sec. 3. *And be it further ordained:* That, as said Church holds the constitutional and original right, in common with all civil and religious communities, 'to worship God according to the dictates of conscience,' to reverence communion agreeably to the principles of truth and to solemnize marriage compatible with the revelations of Jesus Christ for the security and full enjoyment of all blessings and privileges embodied in the religion of Jesus Christ free to all, it is also declared that such Church does and shall possess and enjoy continually the power and authority, in and of itself, to originate, make, pass and establish rules, regulations, ordinances, laws, customs and criterions for the good order, safety, government, conveniences, comfort and control of said Church and for the punishment or forgiveness of all offenses relative to fellowship according to church covenants; that the pursuit of bliss and the enjoyment of life in every capacity of public association, domestic happiness, temporal expansion or spiritual increase upon the earth may not legally be questioned: *Provided, however*, That each and every act or practice so established or adopted for law or custom shall

relate to solemnities, sacraments, ceremonies, consecrations, endowments, tithing, marriages, fellowship or the religious duties of man to his Maker, inasmuch as the doctrines, principles, practices or performances support virtue and increase morality, and are not inconsistent with or repugnant to the Constitution of the United States or of this State and are founded in the revelations of the Lord.

"Sec. 4. *And be it further ordained:* That said Church shall keep at every full organized branch or stake a registry of marriages, births and deaths free for the inspection of all members and for their benefit.

"Sec. 5. *And be it further ordained:* That the presidency of said Church shall fill all vacancies of the assistant trustees necessary to be filled until superseded by the conference of said Church.

"Sec. 6. *Be it further ordained:* That no assistant trustee or trustees shall transact business in relation to buying, selling or otherwise disposing of church property without the consent or approval of the trustee in trust of said Church."

(Compiled Laws of Utah, 1876, p. 232.)

The bill states, further, that John Taylor (since deceased), on and prior to the 19th of February, 1887, was trustee in trust, and the other individual defendants were the assistant trustees of the Corporation;

That the Corporation acquired and held large amounts of real and personal property in the Territory of Utah after the 1st of July, 1862,—the value of the real estate being about $2,000,000, and the value of the personal property about $1,000,000, as held and owned on the 19th of February, 1887, and which the defendants still claim to hold in violation of the laws of the United States;

That the Corporation was a corporation for religious or charitable purposes;

That by the third section of the Act of July 1st, 1862, re-enacted as section 1890 of the Revised Statutes of the United States, any corporation for religious or charitable purposes was forbidden to acquire or hold real estate in any Territory, during the existence of the territorial government, of greater value than $5,000; and that more than this value of the property of the said Corporation has been acquired since July 1st, 1862, which is not held or occupied as a building or ground appurtenant thereto for the purpose of the worship of God, or a parsonage connected therewith, or burial ground.

That therefore the real estate referred to, owned by the Corporation, is subject to escheat to the United States;

That on the 19th day of February, 1887 (by the said Act of that date), the charter and Act of incorporation of the Corporation aforesaid was disapproved, repealed and annulled by Congress, and the Corporation was dissolved, and all the real estate owned and occupied by it, in excess of $50,000, not held or occupied for the worship of God, etc., was subject to escheat to the United States;

That the said Corporation, and the successor of said John Taylor as trustee in trust (whose name is unknown, and who is asked to be made a party to the bill), and the other defendants, assistant trustees, wrongfully and in violation of the laws of the United States still claim to hold and exercise the powers which were held and exercised by said Corporation, and are unlawfully possessing and using the said real estate, and claim the right to sell, use and dispose of the same;

That since the 19th of February, 1887, there is no person lawfully authorized to take charge of, manage, preserve or control said property, and the same is subject to irreparable and irremediable loss and destruction.

The bill prays that a receiver may be appointed to receive and hold all the property of the Corporation; that a decree be made declaring the dissolution and annullment of the charter of the said Corporation; that the court appoint a commissioner to select and set apart out of the real estate which was held and occupied by the Corporation such real estate as may be lawfully held for religious uses; make necessary orders and take proceedings to wind up the affairs of the said Corporation; and grant such other and further relief as the nature of the case may require.

On the 7th of November, 1887, the court appointed a receiver, and on the 8th William B. Preston, Robert T. Burton and John R. Winder, claiming to have an interest in a portion of the property, were made parties to the suit. Demurrers to the bill having been overruled, the defendants severally answered.

The Corporation of the Church of Jesus Christ of Latter-Day Saints, in its answer, after stating the granting of its charter by an ordinance of the assembly of Deseret, and its confirmation by the Legislature of the Territory of Utah, contended that this charter was a contract between the government and the persons accepting the grant, and those becoming corporators; and that the Corporation had the power to hold real and personal property, without limit as to value and amount, for the purposes of its charter; that it never acquired property in its own name, but under the powers granted by the ordinance it did acquire and hold certain real and personal property, in the name of a trustee, in trust for said Corporation; that the Act of July 1, 1862, expressly provided that existing vested rights in real estate should not be impaired; that the defendant has ever been and still is a corporation or association for religious or charitable purposes; that so much of the Act of Congress which took effect March 3, 1887 (referring to the Act passed February 19, 1887), as attempts to dissolve the defendant Corporation, or to interfere with or limit its right to hold property, or to escheat the same, or to wind up its affairs, is unconstitutional and void; that the United States has not the power to do this by reason of said contract; that when the Act of March 3, 1887, took effect the said Corporation, through its trustees, held and owned only three parcels of real estate, namely: 1st, all of block 87, in plat A, Salt Lake City survey; 2d, part of block 88, plat A, of said survey, containing $2\frac{15}{16}$ acres; 3d, part of lot 6, in block 75, plat A, of same survey; that the defendant Corporation had acquired the first two of these lots before July 1, 1862; that the first piece, namely, all of block 87, in plat A, was, ever since 1850, and still is, used and occupied exclusively for purposes of the worship

of God; that the third of said tracts, which is the only tract of land owned by the Corporation on the 3d of March, 1887, which had been acquired subsequent to July 1, 1862, was always, and still is, used as a parsonage, necessary for the convenience and use of the Corporation; that said Corporation had owned other lands, but had sold and disposed of the same prior to March 3, 1887; that after the said Act took effect, and in pursuance of section 26 of said Act, it applied to the proper Probate Court for Salt Lake County for the appointment of three trustees to take the title to the three tracts above described; and on May 19, 1887, said court appointed William B. Preston, Robert T. Burton and John R. Winder such trustees; and afterwards said three tracts, except a part of lot 6, in block 75 (the third lot), were conveyed to said trustees; that the remaining part of said lot 6 is now held by Theodore McKean, in trust for the defendant Corporation, having been omitted from the conveyance to the said trustees by mistake; that said Corporation does not now hold any real estate whatsoever; that no successor to said John Taylor has ever been appointed trustee in trust by said Corporation.

The answer denies that the charter and Act of incorporation of the defendant was annulled by the Act of 19th February, 1887; and alleges that, even if said Act is valid and binding, it did not go into effect until March 3d, 1887.

The answer further avers that prior to February 28th, 1887, the defendant Corporation from time to time acquired and held personal property for charitable and religious purposes, and, on that day, held certain personal property donated to it by the members of the Church and friends thereof solely for use and distribution for charitable and religious purposes, such property being always held by its trustee in trust; and that on the 28th of February, 1887, John Taylor, who then held all the personal property, moneys, stocks and bonds belonging to said Corporation, as trustee in trust, with its consent and approval, donated, transferred and conveyed the same (after reserving sufficient to pay its then existing indebtedness) to certain ecclesiastical corporations created and existing under and by virtue of the laws of the Territory of Utah, to be devoted by them solely to charitable and religious uses and purposes; and delivered the same to them. Wherefore the defendant avers that when the Act of March 3d, 1887, went into effect, it did not own or hold any personal property, except mere furniture, fixtures and implements pertaining to its houses of worship and parsonage.

The defendants, Wilford, Woodruff and others, charged as assistant trustees in the bill (except Moses Thatcher), deny that they ever were such assistant trustees, though they admit that they acted as counsellors and advisors of John Taylor, the trustee in trust. Thatcher admits that he was once elected assistant trustee, but alleges that his term of office expired 9th of October, 1875, and he has never acted since. They all deny that they have ever owned or held any property belonging to the Corporation. They all, however, adopt its answer.

Preston, Burton and Winder, who were made defendants after the suit was commenced, admit the conveyance to them of the three tracts described in the answer of the Corporation, which they declare that they hold in trust for the Church of Jesus Christ of Latter-Day [13] Saints. They also adopt the answer of the Corporation.

Replications were duly filed.

One Augus M. Cannon intervened as a claimant of certain coal lands supposed to be affected by the proceedings, and was admitted as a defendant, and filed an answer explaining his claim.

Several petitions were filed in the cause, with leave of the court, for the purpose of asking that certain pieces of property therein described might be set apart for the use of the Church. They were:

1. A petition by Francis Armstrong, Jesse W. Fox, Jr., and Theodore McKean, who alleged that they held divers pieces of real estate (described in their petition) in trust for the use and benefit of the Church of Jesus Christ of Latter-Day Saints. To this petition the plaintiff filed a general replication.

2. William B. Preston, Robert T. Burton and John R. Winder filed a petition stating that they were duly appointed by the Probate Court of Salt Lake County trustees to hold title to real estate belonging to the said Church, and as such trustees hold the legal title to certain pieces of land described, to wit: 1st, a piece known as the "Guardo House" and lot, held for the use and benefit of the president of the said Church as a parsonage, where he has made his home and residence since 1878; 2dly, another piece adjoining the above known as the "Historian's Office" and grounds, the building on which contains the church library and records, and the legal title to which is in Theodore McKean. The petitioners pray that the said premises be set apart to said Church as a parsonage, and that the title be confirmed to the trustees.

To this petition the United States filed an answer, denying that said Preston, Burton and Winder hold the title to said "Guardo House" and land, or that they hold the same in trust for the said Church of Jesus Christ of Latter-Day Saints; that the pretended conveyance under which they claim to hold the same is void and of no effect, for want of power in the grantors; that said property has never been a personage; and that the property designated as the "Historian's Office" and grounds has never [14] been part of any parsonage. On the contrary, the plaintiff avers that McKean holds the legal title to said property in trust for the Late Corporation of the Church of Jesus Christ of Latter-Day Saints as a part of its general property, and that the "Historian's Office" and grounds are entirely separate and apart from the "Guardo House" and lot, and in no manner connected therewith.

The said Preston, Burton and Winder filed another petition, stating their appointment as trustees as aforesaid, and that they, as such, hold another property described in the petition (being a portion of block 88, plat A, of Salt Lake City survey) for the use and benefit of the said Church, which was taken possession of by the agents of said Church when Salt Lake City was first laid out in 1848, and ever since used and occupied by said Church; and that prior to July 1, 1862, valuable buildings and im-

provements had been built thereon, still owned and possessed by the said Church; and they pray that said property be set apart to said Church, and the title and possession confirmed to the petitioners as trustees.

The United States filed an answer to this petition, denying the truth of the same.

A similar petition was filed by the same parties, Preston, Burton and Winder, claiming to hold the legal title to block 87, plat A, Salt Lake City survey, known as the "Temple Block," containing three large buildings constructed by said Church exclusively for religious purposes, and been in its possession since 1848. They pray that this property may be set apart to the Church, and the title and possession confirmed to the petitioners as trustees. The plaintiff, by answer, alleges that the conveyance under which the petitioners claim this property is also void for want of power in the grantors to convey.

Another petition was filed by George Romney, Henry Dinwoody, James Watson and John Clark, in behalf of themselves and of other members of the Church of Jesus Christ of Latter-Day Saints, alleging that said members are more than one hundred thousand in number, and so numerous that they cannot, without inconvenience and oppressive delays, be brought before the court; that they all have an interest
15] in common in the subject of the petition and the questions involved in this suit. That on the 7th of November, 1887, this court made an order appointing Frank H. Dyer receiver of the Church aforesaid; that he, as such receiver, has seized, taken possession of and now holds, subject to the order of the court, the following described real and personal property, to wit:

1. All of block 87, plat A, Salt Lake City survey, known as "Temple Block."

2. The east half of lot 6, block 75, plat A aforesaid, known as the "Guardo House" and grounds.

3. Part of lot 6, block 75, plat A aforesaid, known as the "Historian's Office" and grounds.

4. A portion of block 88, plat A aforesaid, known as part of the "Tithing Office" property.

5. The south half of lots 6 and 7, in block 88, plat A aforesaid, known as part of the "Tithing Office" property.

6. Various tracts of land, designated, containing a large number of acres, situated in township 1 south, range 1 west, United States survey of Utah, and known as the "Church Farm;" excepting, however, a tract sold to the Denver and Rio Grande Western Railway Company by deed dated February 7, 1882.

7. The undivided half of the south half of the southeast quarter, the southeast quarter of the southwest quarter, and lot 4, section 18, and the north half of the northeast quarter of section 19, township 3 north, range 6 east, in Summit County, Utah Territory, known as coal lands.

Also a number of items of personal property, including 800 shares of stock in the Salt Lake Gas Company; 4,732 shares in the Deseret Telegraph Company; several promissory notes of different parties and amounts; 30,158 sheep; $237,666.15 of money.

That since said personal property came into possession of the receiver he has collected rents on the real estate, and dividends on the gas stock; and that all the property in the possession of the receiver is of the aggregate value of about $750,000, exclusive of Temple Block.

That all of said property, at the time so taken, and long prior thereto, was the property of the Church of Jesus Christ of Latter-Day Saints, [and that the possession of the receiver is wrongful and without authority or right.

That said Church is a voluntary religious society, organized in the Territory of Utah for religious and charitable purposes.

That said petitioners and others, for whose benefit they file the petition, are members of said Church, residing in said Territory; that the Church became possessed of all of said property in accordance with its established rules and customs, by the voluntary contributions, donations and dedications of its members, to be held, managed and applied to the use and benefit of the Church, for the maintenance of its religion and charities by trustees appointed by said members semi-annually at the general conference.

That John Taylor, the late trustee so appointed, died on the 25th day of July, 1887, and no trustee has been appointed since.

That the property in the hands of the trustees is claimed adversely to the Church, the petitioners, and the members thereof, and wholly without right, by the United States, and is wrongfully withheld by the receiver from the purposes to which it was dedicated and granted; that the petitioners and the members on whose behalf this petition is filed are equitably the owners of said property, and beneficially interested therein, and, to prevent a diversion thereof from the religious and charitable purposes of the said Church to which they donated and granted said property, the petitioners pray that in case said Corporation of the Church of Jesus Christ of Latter-Day Saints should, upon the final hearing, be held and decreed to be dissolved, an order may be made decreeing:

1. That the said property belongs to the individual members of said Church, and that they are authorized to appoint a trustee or trustees to hold, manage and apply such property to the purposes for which it was originally given.

2. That said receiver deliver the possession thereof to such trustee or trustees as may be named and appointed at a general conference of the members of the Church, in accordance with its rules and customs.

To this petition the United States filed an answer, denying the claim of the petitioners; [admitting the appointment of the receiver, and his taking possession of the property referred to; denying that at the time of such taking it was the property of the said Church of Jesus Christ of Latter-Day Saints, whether the petition is intended to apply to the Late Corporation or to the voluntary religious sect which has existed under that name since the dissolution of the said Corporation. It admits that prior to the said dissolution said property belonged to the Corporation of the Church of Jesus Christ of Latter-Day Saints, but alleges that since then it has had no legal owner except the United States; denies that the said Church of Jesus Christ of Latter-Day Saints has been for years past a voluntary religious society or asso-

ciation, but alleges that up to the 19th day of February, 1887, said Church existed as a corporation for religious purposes; and since that time, when it became dissolved, there has existed a voluntary and unincorporated religious society or sect, known by the name of the Church of Jesus Christ of Latter-Day Saints. It denies that the Corporation to which all of said property belonged acquired the same by voluntary contributions, donations and dedications of the members thereof, and alleges that all of said realty was acquired by said Church largely by purchase and other means as afterwards set out. It denies that the receiver is wrongfully withholding and diverting the property from the purposes to which it was donated, and denies that the petitioners or any other persons are equitably or otherwise the owners of said property or any portion thereof, or beneficially interested therein. The answer then sets forth the incorporation of the Church of Jesus Christ of Latter-Day Saints as a body for religious and charitable purposes, by the Act of the Territorial Assembly of Utah in 1855, and avers that it continued to be a Corporation up to the 19th of February, 1887; it then sets forth the Act of Congress of July 1, 1862, before referred to, and the Act of March 3, 1887, disapproving and annulling the Act of incorporation aforesaid, and dissolving the said Corporation, and alleges that it did become dissolved. The answer then states the previous proceedings in the suit, and the appointment of a receiver, and alleges that the United States had filed in the District Court for the Third District of Utah a proceeding in the nature of an information against all the real property set out in the petition, for the purpose of having the same declared forfeited and escheated to the United States, which proceedings are now pending. And the answer alleges that said real property has become forfeited to the United States, as shown in said information. The answer further states that the said Corporation was a religious Corporation for the purpose of promulgating, spreading and upholding the principles, practices, teachings and tenets of said Church, and that it never had any other corporate objects, purposes or authority; never had any capital stock or stockholders, nor persons pecuniarily interested in its property, nor any natural persons authorized to take or hold any personal property or estate for said Corporation, except such trustees as were provided for by its Statute of incorporation, and the power of appointing such trustees ceased and became extinct at the date of its dissolution; that up to that date said personal property had been used for and devoted exclusively to the promulgation, spread and maintenance of the principles, practices, teachings and tenets of said Church of Jesus Christ of Latter-Day Saints, amongst which the doctrine and practice of polygamy, or plurality of wives, was a fundamental and essential doctrine, tenet and principle of said Church, and the same was opposed and contrary to good morals, public policy and the laws of the United States, and that the use made of said personal property was largely for purposes of upholding and maintaining said doctrine and practice of polygamy, and violating the laws of the United States; that since said dissolution there has existed a voluntary and unincorporated sect known as the Church of Jesus Christ of Latter-Day Saints, comprising the great body of individuals named in said intervention, who formerly formed the membership of said Corporation; and the organization and general government of said voluntary religious sect, and its principles, doctrines, teachings and tenets, include the practice of polygamy, and have been substantially the same as those of the said Corporation; and the said voluntary religious sect has upheld and maintained the unlawful and immoral practice and doctrine of polygamy as strongly as the said Corporation did; and any uses, purposes or trusts to which said personal property could be devoted in accordance with the original purposes and trusts to which it was dedicated would be opposed to good morals, public policy, and contrary to the laws of the United States. The answer further states that there are no natural persons or corporations entitled to any portion of the personal property thereof, as successors in interest to said Corporation; that all definite and legal trusts to which said property was dedicated have totally failed and become extinct; and that by operation of law the said property has become escheated to the United States; and the allegation that said property was acquired by voluntary contributions, donations and dedications of the members of the Corporation is not true, but the Late Corporation carried on business to a wide extent; and whilst a large amount of personalty in the shape of tithes was paid to the Church each year by the members thereof, yet the personalty now in the hands of the said receiver is in no part made up of voluntary contributions or tithes paid in as aforesaid, but is all of it property which was acquired by said Corporation in the course of trade, by purchase, and for a valuable consideration; and it held the same in its corporate capacity, absolutely and entirely independent of any individual members of said Corporation, and upon the trust and for the uses and purposes set out, which, as has been alleged, were in whole or in part immoral and illegal.

[19]

A replication was filed to this answer.

The last-mentioned petition of intervention and the answer thereto are in the nature of an original bill and answer, but serve to present the whole controversy in all its aspects, and for that purpose may properly be retained, as no objection is made thereto.

The Act of Congress of July 1, 1862, referred to in the pleadings, is entitled "An Act to Punish and Prevent the Practice of Polygamy in the Territories of the United States, and Other Places, and Disapproving and Annulling Certain Acts of the Legislative Assembly of the Territory of Utah," and provides as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:* That every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall, except in the cases specified in the proviso to this section, be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceed-

ing five hundred dollars, and by imprisonment for a term not exceeding five years: *Provided, nevertheless*, That this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years without being known to such person within that time to be living; nor to any person by reason of any former marriage which shall have been dissolved by the decree of a competent court; nor to any person by reason of any former marriage which shall have been annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract.

"Sec. 2. *And be it further enacted:* That the following ordinance of the provisional government of the 'State of Deseret,' so-called, namely, 'An Ordinance Incorporating the Church of Jesus Christ of Latter-Day Saints,' passed February eight, in the year eighteen hundred and fifty-one, and adopted, reenacted and made valid by the governor and Legislative Assembly of the Territory of Utah by an Act passed January nineteen, in the year eighteen hundred and fifty-five, entitled 'An Act in Relation to the Compilation and Revision of the Laws and Resolutions in Force in Utah Territory, Their Publication and Distribution,' and all other Acts and parts of Acts heretofore passed by the said Legislative Assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be, and the same hereby are, disapproved and annulled: *Provided*, That this Act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but only to annul all Acts and laws which establish, maintain, protect or countenance the practice of polygamy, evasively called spiritual marriage, however disguised by legal or ecclesiastical solemnities, sacraments, ceremonies, consecrations or other contrivances.

"Sec. 3. *And be it further enacted:* That it shall not be lawful for any corporation or association for religious or charitable purposes to acquire or hold real estate in any Territory of the United States during the existence of the territorial government, of a greater value than fifty thousand dollars; and all real estate acquired or held by any such corporation or association contrary to the provisions of this Act shall be forfeited and escheat to the United States: *Provided*, That existing vested rights in real estate shall not be impaired by the provisions of this section." (12 U. S. Stat. 501.)

Another Act, known as the Edmunds Act, was approved March 22, 1882, entitled "An Act to Amend Section 5352 of the Revised Statutes of the United States in Reference to Bigamy, and for Other Purposes." This Act contained stringent provisions against the crime of polygamy, and has frequently come under the consideration of this court, and need not be recited in detail.

The cause came on to be heard upon the pleadings, proofs and an agreed statement of the facts. The court made a finding of facts, upon which a final decree was rendered. The facts found are as follows:

"1st. That the Church of Jesus Christ of Latter-Day Saints was, from the 19th day of January, 1855, to the 3d day of March, A. D. 1887, a corporation for religious and charitable purposes, duly organized and existing under and in pursuance of an ordinance enacted by the Legislature of the Territory of Utah, and approved by the governor thereof on the said 19th day of January, A. D. 1855, a copy of which ordinance is made a part of the complaint herein.

"2. That on the 19th day of February, A. D. 1887, the Congress of the United States passed an Act entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United States in Reference to Bigamy, and for Other Purposes,' approved March 22d, 1882, which purported to disapprove, repeal and annul the said charter and Act of incorporation of the Corporation of the Church of Jesus Christ of Latter-Day Saints aforesaid and passed as aforesaid.

"3. That immediately before the passage of said Act of Congress of February 19, 1887, the said John Taylor was, and for a long time prior thereto had been, the qualified and acting trustee in trust of said Corporation of the Church of Jesus Christ of Latter-Day Saints; that after the passage of said Act of Congress of February 19th, 1887, the said John Taylor claimed to hold and continued to exercise the powers conferred upon said Church of Jesus Christ of Latter-Day Saints by said Act of incorporation until his death, which occurred on the 25th day of July, A. D. 1887.

"4. That at the date of the passage of said Act of Congress of February 19th, A. D. 1887, and for a long time prior thereto, there were no assistant trustees of said Corporation, none having been elected, appointed or qualified since the year 1887; that said Wilford Woodruff, Lorenzo Snow, Erastus Snow, Franklin D. Richards, Brigham Young, Moses Thatcher, Francis M. Lyman, John Henry Smith, George Teasdale, Heber J. Grant and John W. Taylor were, at the commencement of this suit, counsellors and advisers of the said John Taylor, and continued to his death counselling and advising him respecting the management, use and control of the property hereinafter described.

"5. That since the passage of said Act of Congress of Feb. 19, 1887, the Church of Jesus Christ of Latter-Day Saints has existed as a voluntary religious sect, of which the said Wilford Woodruff is the acting president, and it has had duly designated and appointed by the Probate Court of Salt Lake County, in said Territory, in pursuance of the Act of Congress aforesaid, the following-named trustees, William B. Preston, Robert T. Burton and John R. Winder, to take the title to and hold such real estate as shall be allowed said religious sect by law for the erection and use of houses of worship, parsonages and burial grounds.

"6. That at the time of the passage of said Act of Congress of February 19, 1887, there were no outstanding debts of or claims against

said Corporation, so far as appears to the court from the evidence herein.

"7. That at the time of the passage of the Act of Congress of February 19, 1887, the said Corporation owned, held and possessed the following real estate in said Territory, to wit."

The items of real estate were then enumerated, being substantially the same as those specified in the petition of George Romney and others, before referred to, with the addition of the valuation of each item or piece of property,—the Temple Block being valued at $500,000; the Guardo House and grounds at $50,000; the Historian's Office and grounds at $20,000; the Tithing Office and grounds, one portion at $50,000, and the other at $25,000; the Church Farm at $110,000; and the seventh item, known as "coal lands in Summit County," valued at $30,000.

The court further found as follows:

"The legal title to the real estate, first above described, known as the Temple Block, at the time said Act of Feb. 19, 1887, went into effect, was in John Taylor, as trustee in trust for the said Corporation, which said trustee in trust subsequently and on the 30th day of June, 1887, attempted to convey the same to William B. Preston, Robert T. Burton and John R. Winder, as trustees, by a certain instrument in writing in the words and figures following, to wit:

"'This indenture, made on this thirtieth day of June, in the year of our Lord one thousand eight hundred and eighty-seven, by and between John Taylor, trustee in trust of that certain body of religious worshipers called and known as the "Church of Jesus Christ of Latter-Day Saints," party of the first part, and William B. Preston, presiding bishop of said Church, and his two counsellors, Robert T. Burton and John R. Winder, parties of the second part.'"

The indenture then recites the appointment of the parties of the second part, by Probate Court of Salt Lake County, as trustees to hold certain real property of the said Church located in Salt Lake City, under and in pursuance of the 26th section of the Act of March 3, 1887, and purports on the part of Taylor, the party of the first part, in consideration of one dollar, to convey to the parties of the second part and their successors duly appointed, upon trust, the property referred to, being all of block 87 in plat A, Salt Lake City survey, for the use, benefit and behoof of that body of religious worshipers known and called the "Church of Jesus Christ of Latter-Day Saints," and for such use as said Church or its authorities should dictate and appoint, with provision for the devolution of the property in case of failure of the trustees.

The court further found as follows:

"The said Temple Block was taken possession of by the agents of the said Church of Jesus Christ of Latter-Day Saints, then existing as a voluntary unincorporated religious sect, when Salt Lake City was first laid out and surveyed, in 1848, and since said date has been in possession of said Church as a voluntary religious sect until it became incorporated as aforesaid, and then as a corporation; that at the time the same was taken possession of as aforesaid it was a part of the public domain and continued to be such until said land was entered by the mayor of said city, along with other lands, on the 21st day of November, 1871, under the Town-Site Act of Congress entitled 'An Act for the Relief of Cities and Towns upon the Public Lands,' approved March 2, 1867; that on the 1st day of June, 1872, the same was conveyed by the mayor of said Salt Lake City to the trustee in trust of said Corporation, in whom the title remained until the Act of Congress of February 19, 1887, took effect.

"The facts in regard to the possession and [23
acquisition of the balance of said real estate above described are as follows: The second property, above described and known as the 'Guardo House' and grounds, was owned by Brigham Young individually at the time of his death, in 1877, and was thereafter transferred and conveyed by his executors to John Taylor, as trustee in trust for the Corporation of the Church of Jesus Christ of Latter-Day Saints, for a valuable consideration, pursuant to the powers in them vested by the will of the said Brigham Young; that subsequently, on the 24th day of April, 1878, the said John Taylor, as trustee in trust, transferred and conveyed the same to Theodore McKean on a secret trust for said Corporation, who held the same upon said trust until the 2d day of July, 1887, when he attempted to convey the same to William B. Preston and Robert T. Burton and John R. Winder, trustees, by a certain instrument in writing, of which the following is a copy."

The deed is then set out in the findings, and is altogether similar to that executed by John Taylor to Preston, Burton and Winder, before recited.

The court further found as follows:

"That said Guardo House and grounds were used and occupied by said John Taylor, president of said Church, from 1878 up to the time of his death, as a residence.

"The third property above described, known as the 'Historian's Office' and grounds, was taken possession of by Albert T. Rockwood in 1848, and was a part of the public domain, and continued to be such up to the 21st day of November, 1871, when the town site of Salt Lake City was entered as aforesaid; that on the 3d day of October, 1855, the Church of Jesus Christ of Latter-Day Saints, through its trustee in trust, Brigham Young, purchased the said Rockwood's claim to said premises and at its own cost and expense erected thereon the building which has ever since been known as the 'Historian's Office and Residence;' that said building was large enough to accommodate the historian's family and furnish an office for the church historian; that from the year 1848 until the time of his death in 1875, George A. Smith
was the historian of said Church and lived in [24
said building with his family and had the custody of the books, papers and records of said Church relating to its history or public acts of its officers or members; that the same have always been kept in said building from the time of its construction until the present time, at the cost of said Church, and that such office is and has been necessary for the use of said historian

in the discharge of his duties; that in 1872 the said George A. Smith obtained the title to said premises from the mayor of Salt Lake City under the Town-Site Act, and that after his death the same was conveyed to his wife and one of his granddaughters, who afterwards transferred and conveyed the same to Theodore McKean for a valuable consideration; that the said Theodore McKean has ever since that date held and now holds the same on a secret trust for the use and benefit of said Corporation; that said grounds are immediately west of and adjoining the Guardo House grounds.

"The fourth property above described, known as part of the 'Tithing Office' and grounds, was taken possession of by the agents of the Church of Jesus Christ of Latter-Day Saints when Salt Lake City was first laid out and surveyed, in 1848, and ever since that time has been used and occupied by said Church as a voluntary sect until it became incorporated as aforesaid, and then as a corporation, receiving and disbursing tithing and voluntary contributions of property, and that prior to July 1, 1862, buildings and other improvements of considerable value had been built thereon by said Church; that at the time said property was taken possession of as aforesaid it was a part of the public domain and continued to be such until the 21st day of November, 1871, when said land was entered as aforesaid along with other lands under said Town-Site Act by the mayor of Salt Lake City; that Brigham Young, who was then president and trustee in trust of said Corporation, claimed said land under said Town-Site Law and it was conveyed to him by Daniel H. Wells, mayor of Salt Lake City; that in November, 1878, Brigham Young transferred and conveyed said property to George A. Smith, as the trustee in trust of the Corporation of the Church of Jesus Christ of Latter-Day Saints, and his successor in office; that on [25] the death of said George A. Smith the legal title in said premises vested in Brigham Young as such successor, and the executors of said Brigham Young transferred and conveyed said property to John Taylor, as the trustee in trust of said Corporation, who, in April, 1878, transferred and conveyed the same to Edward Hunter upon a secret trust for the use and benefit of said Corporation; that said Edward Hunter afterwards, to wit, on the 24th day of April, 1878, transferred and conveyed the same to Robert T. Burton on a secret trust for said Corporation, and on the 2d day of July, 1887, the said Robert T. Burton attempted to convey the same to William B. Preston, John R. Winder and himself, as trustees, by a certain instrument in writing in the words and figures following, to wit."

The deed here copied is similar to the previous deeds before recited.

The court further found as follows:

"The fifth piece of property above described, known as a part of the 'Tithing Office' and grounds, was possessed, acquired and owned as follows:

"In the year 1848, Newell K. Whitney, then presiding bishop of said Church of Jesus Christ of Latter-Day Saints, took possession of lot five, block eighty-eight, plat A, Salt Lake City survey, and in the same year Horace K. Whitney took possession of lot six, in said block; that some time in the year 1856 the Church of Jesus Christ of Latter-Day Saints, by its agents, took possession of the south half of said lots and placed thereon yards and corrals, and have continued to occupy the same with said yards and corrals down to this period; that in the year 1870 the mayor of Salt Lake City entered the town site of Salt Lake City, in trust for the inhabitants and occupants thereof, under the Law of 1867; that the foregoing lots are a portion of said entry.

"The said Church of Jesus Christ of Latter-Day Saints, by its trustee, Brigham Young, filed an application in the proper court for a title to the south half of said lots, and the heirs of Newell K. Whitney also filed an application in the proper court for the south half of lot five, and Horace K. Whitney filed an application in the same court for the south half of lot six. The court awarded the title to the said premises to Brigham Young, as trustee as aforesaid.

"That afterwards, in the year 1872, Brigham Young, trustee, obtained a deed from the heirs of Newell K. Whitney to said south half of lot five, and in consideration thereof paid them seven thousand dollars, and at the same time the said Brigham Young, trustee, obtained a deed from Horace K. Whitney of lot six and paid him therefor the sum of two thousand dollars.

"At the time the Act of Congress of February 19, 1887, took effect the legal title thereto was held by Robert T. Burton on a secret trust for the use and benefit of said Corporation; that on the 2d day of July, 1887, the said Robert T. Burton attempted to convey the same to William B. Preston, John R. Winder and himself, as trustees, by that certain instrument of writing hereinbefore last set out.

"The remainder of said real estate held, owned and possessed by said Corporation as aforesaid was acquired by it after the first day of July, 1862, by purchase, but the legal title thereof was at all times held by persons in trust for said Corporation upon secret trusts, and not by the Corporation itself.

"That at the time the said Act of Congress of February 19, 1887, took effect said Corporation owned, held and possessed the following-described personal property, to wit."

The items of personal property are then set out, being the same as in the petition of Romney and others before referred to.

The court further found as follows:

"That the said Corporation of the Church of Jesus Christ of Latter-Day Saints was in its nature and by its Statute of incorporation a religious and charitable corporation for the purpose of promulgating, spreading and upholding the principles, practices, teachings and tenets of said Church, and for the purpose of dispensing charity, subject and according to said principles, practices, teachings and tenets, and that from the time of the organization of said Corporation up to the time of the passage of said Act of February the 19th, 1887, it never had any other corporate objects, purposes and authority, never had any capital stock or stockholders, nor have there ever been any natural persons who were authorized under its Act and charter of incorporation to take or hold any

personal property or estate of said Corporation, except the trustees provided for by said Statute of incorporation.

"That the said personal property herein before set out had been accumulated by said Late Corporation prior to the passage of said Act of February the 19th, 1887, and that such accumulation extended over a period of twenty years or more; that prior to and at the time of the passage of said Act the said personal property had been used for and devoted to the promulgation, spread and maintenance of the doctrines, teachings, tenets and practices of the said Church of Jesus Christ of Latter-Day Saints, and the doctrine of polygamy or plurality of wives was one of the said doctrines, teachings, tenets and practices of the said Late Church Corporation, but only a portion of the members of said Corporation, not exceeding twenty per cent of the marriageable members, male and female, were engaged in the actual practice of polygamy; that since the passage of the said Act of Congress of February 19, 1887, the said voluntary religious sect known as the Church of Jesus Christ of Latter-Day Saints has comprised the great body of individuals who formerly composed the membership of said Corporation, and the organization, general government, doctrines and tenets of said voluntary religious sect have been and now are substantially the same as those of the Late Corporation of the Church of Jesus Christ of Latter-Day Saints.

That certain of the officers of said religious sect, regularly ordained, and certain public preachers and teachers of said religious sect, who are in good standing, and who are preachers and teachers concerning the doctrines and tenets of said sect, have, since the passage of said Act of Congress of February the 19th, 1887, promulgated, taught, spread and upheld the same doctrines, tenets and practices, including the doctrine of polygamy, as were formerly promulgated, taught and upheld by the said Late Corporation, and the said teachings of the said officers, preachers and teachers have not been repudiated or dissented from by said voluntary religious sect, nor have their teachings and preachings or their actions created any division or schism in said voluntary religious sect.

"That any dedication or setting aside of any of the personal property hereinbefore set out as having belonged to the Late Corporation, to the uses and purposes of or in trust for the members of the Late Corporation of the Church of Jesus Christ of Latter-Day Saints, or any of them, would practically and in effect be a dedication and setting aside of said personal property to the uses and for the purposes of and in trust for the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints.

"That at the commencement of this suit all of said personal property was in the possession of the said William B. Preston, who held it in trust and for the benefit of said Corporation.

"That all of the above-described property, real and personal, is now in the possession of Frank H. Dyer, receiver of this court.

"That of the above-described real estate the following tract, including the buildings thereon, situated in said County of Salt Lake, Territory of Utah, and being all of block eighty-seven (87), in plat A, Salt Lake City survey, at the time of the passage of the Act of Congress of February 19, 1887, was used exclusively for the worship of God according to the doctrines and tenets of the Church of Jesus Christ of Latter-Day Saints.

"That several proceedings have been instituted by and with the consent and advice of this court, by information, on behalf of the United States of America, in the Third District Court of said Territory of Utah, for the purpose of having declared and adjudged forfeited and escheated to the government of the United States all of the above-described real estate, excepting the said block eighty-seven of plat A, Salt Lake City survey, last above mentioned, by virtue of the said Act of Congress entitled 'An Act to Amend Section 5352 of the Revised Statutes of the United States in Reference to Bigamy, and for Other Purposes,' which proceedings are now pending in said court and undetermined."

Upon this finding of facts the court adjudged and decreed as follows, to wit:

"That on the 3d day of March, 1887, the [29] Corporation of the Church of Jesus Christ of Latter-Day Saints became and the same was dissolved, and that since said date it has had no legal corporate existence.

"2d. It is furthermore adjudged and decreed that the following alleged deeds, hereinbefore set out, were executed without authority, and that no estate in the property set out in said deeds passed by the same or any of them, to wit:

"The deed, dated June 30th, 1887, from John Taylor, trustee in trust, to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for the property described as the 'Temple Block.' The deed, dated July 2d, 1887, from Theodore McKean and his wife to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for property known as the 'Guardo House' and grounds. The deed, dated July 2d, 1887, from Robert T. Burton and wife to William B. Preston, Robert T. Burton and John R. Winder, as trustees, for the property described as the 'Tithing House' and grounds.

"And it is therefore ordered and decreed that said alleged deeds and each of them be, and the same are hereby, annulled, canceled and set aside.

"3d. It is further adjudged and decreed that the following described real estate, to wit, all of block eighty-seven, in plat A, Salt Lake City survey, in the City and County of Salt Lake, Territory of Utah, be, and the same is hereby, set apart to the voluntary religious worshipers and unincorporated sect and body known as the Church of Jesus Christ of Latter-Day Saints, and that the said William B. Preston, Robert T. Burton and John R. Winder, trustees appointed by the Probate Court of Salt Lake County, as hereinbefore set out, do hold, manage and control said property so set aside for the benefit of said voluntary religious worshipers and unincorporated sect and body, and for the erection and use by them of houses of worship, and for their use and convenience in the lawful exercise of worship according to

the tenets of said sect and body; and it is ordered that Frank H. Dyer, receiver of this court, heretofore appointed, do surrender and deliver possession and control of all of the [30] property so set aside to the trustees, William B. Preston, Robert T. Burton and John R. Winder, aforesaid.

"4th. It is furthermore adjudged and decreed that, except as to the Temple Block aforesaid, the petitions of William B. Preston, Robert T. Burton and John R. Winder, trustees, filed the 6th day of October, 1888, in this court for the setting aside of certain real estate for the uses and purposes of the religious sect known as the Church of Jesus Christ of Latter-Day Saints be, and the same are hereby, denied; and it is adjudged and decreed that the balance of the real estate over and above said Temple Block, which has been hereinbefore found as belonging to said Late Corporation, has not nor has any of it ever been used as buildings or grounds appurtenant thereunto for the purposes of the worship of God or of parsonages connected therewith, or for burial grounds, by the said Late Corporation of the Church of Jesus Christ of Latter-Day Saints, nor is the said real estate, except as set aside, or any part thereof, necessary for such purposes for the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints.

"5th. It is furthermore adjudged and decreed that all of the real estate set out in the findings of fact hereinbefore was the property of and belonged to the Late Corporation of the Church of Jesus Christ of Latter-Day Saints, and the same was held in trust for said Corporation; and, furthermore, that the legal titles of and estates in said real estate and every part and parcel thereof were acquired by said Late Corporation and its trustees subsequently to July 1, 1862, and that prior to said date neither the said Corporation nor its trustees had any legal title or estate in and to said real estate or any part thereof.

"6th. And it is further adjudged and decreed that the petition of intervention by George Romney, Henry Dinwoodey, James Watson and John Clark, on behalf of themselves and other members of the Late Corporation of the Church of Jesus Christ of Latter-Day Saints, filed this day in this court, which said petition alleges the claim on behalf of the petitioners and those for whom it is filed in and to the real and personal property formerly belonging [31] to said Late Corporation and now in the hands of the receiver of this court, be, and the same is hereby, denied; and it is adjudged and decreed that neither said intervenors nor those in whose behalf they filed said petition have any legal claim or title in and to said property or any part thereof.

"7th. And the court does further adjudge and decree that the Late Corporation of the Church of Jesus Christ of Latter-Day Saints having become by law dissolved as aforesaid, there did not exist at its dissolution and do not now exist any trusts or purposes within the objects and purposes for which said personal property was originally acquired, as hereinbefore set out, whether said acquisition was by purchase or donation, to or for which said personalty or any part thereof could be used or to which it could be dedicated, that were and are not in whole or in part opposed to public policy, good morals, and contrary to the laws of the United States; and, furthermore, that there do not exist any natural persons or any body, association or corporation who are legally entitled to any portion of said personalty as successors in interest to said Church of Jesus Christ of Latter-Day Saints, nor have there been nor are there now any trusts of a definite and legal character upon which this court, sitting as a court of chancery, can administer the personal property hereinbefore set out; and it is furthermore adjudged that all and entire the personal property set out in this decree as having belonged to said Late Corporation of the Church of Jesus Christ of Latter-Day Saints has by reason of the dissolution of said Corporation as aforesaid, on account of the failure or illegality of the trusts to which it was dedicated at its acquisition and for which it had been used by said Late Corporation and by operation of law, become escheated to and the property of the United States of America, subject to the costs and expenses of this proceeding and of the receivership by this court instituted and ordered.

"8th. It is furthermore ordered and adjudged that there is not now and has not been since the 3d day of March, 1887, any person legally authorized to take charge of, manage, preserve and control the personal and real property hereinbefore set out, except the receiver heretofore appointed by this court; and it is therefore ordered that the receivership hereinbefore established by this court is continued in full force and effect, and that the said receiver shall continue to exercise all and entire the powers and authority conferred upon him by the decree appointing him; and it is further ordered that he do continue in his possession and keeping all of the property, real and personal, hereinbefore set out, except such realty as has been set apart by the provision of this decree for the benefit of the unincorporated religious sect known as the Church of Jesus Christ of Latter-Day Saints, and that he do safely keep, manage and control the same in accordance with the provisions of the order of this court appointing him receiver, pending the determination of the proceeding upon information hereinbefore referred to and until the further order of this court; and final action upon and determination concerning the accounts, proceedings and transactions of said receiver, and all matters connected with or incidental thereto, are ordered to be reserved for the future consideration and decision of this court."

From this decree the defendants appealed, and the intervenors, Romney and others, also took a separate appeal, and the case is now here for adjudication.

The principal questions raised are, first, as to the power of Congress to repeal the charter of the Church of Jesus Christ of Latter-Day Saints; and, secondly, as to the power of Congress and the courts to seize the property of said Corporation and to hold the same for the purposes mentioned in the decree.

The power of Congress over the Territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power

given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The Territory of Louisiana, when acquired from France, and the Territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those Territories. Having rightfully acquired said Territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident. *Chief Justice* Marshall, in the case of the *American & O. Ins. Cos.* v. *356 Bales of Cotton*, 26 U. S. 1 Pet. 511, 542 [7: 242, 255], well said: "Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned." And *Mr. Justice* Nelson, delivering the opinion of the court in *Benner* v. *Porter*, 50 U. S. 9 How. 235, 242 [13: 119, 122], speaking of the territorial governments established by Congress, says: "They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the Territories, combining the powers of both the federal and state authorities." *Chief Justice* Waite, in the case of *First Nat. Bank* v. *Yankton County*, 101 U. S. 129, 133 [25: 1046, 1047], said: "In the Organic Act of Dakota there was not an express reservation of power in Congress to amend the Acts of the Territorial Legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the Territorial Legislatures, but it may itself legislate directly for the local government. It may make a void Act of the Territorial Legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments. It may do for the Territories what the people, under the Constitution of the United States, may do for the States." In a still more recent case, and one relating to the legislation of Congress over the Territory of Utah itself, *Murphy* v. *Ramsey*, 114 U. S. 15, 44 [29: 47, 57], *Mr. Justice* Mat- [4
thews said: "The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the Act of March 22, 1882, so far as it abridges the rights of electors in the Territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms." Doubtless Congress, in legislating for the Territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its Amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.

The supreme power of Congress over the Territories, and over the Acts of the Territorial Legislatures established therein, is generally expressly reserved in the Organic Acts establishing governments in said Territories. This is true of the Territory of Utah. In the 6th section of the Act establishing a territorial government in Utah, approved September 9, 1850, it is declared "that the legislative powers of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act. . . . All the laws passed by the Legislative Assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect." (9 Stat. 454.)

This brings us directly to the question of the power of Congress to revoke the charter of the Church of Jesus Christ of Latter-Day Saints. That Corporation, when the Territory of Utah was organized, was a corporation *de facto*, existing under an ordinance of the so-called "State of Deseret," approved February 8, 1851. This [4
ordinance had no validity except in the voluntary acquiescence of the people of Utah then residing there. Deseret, or Utah, had ceased to belong to the Mexican government by the Treaty of Guadalupe Hidalgo, and in 1851 it belonged to the United States, and no government without authority from the United States, express or implied, had any legal right to exist there. The assembly of Deseret had no power to make any valid law. Congress had already passed the law for organizing the Territory of Utah into a government, and no other government was lawful within the bounds of that Territory. But after the organization of

the territorial government of Utah under the Act of Congress, the Legislative Assembly of the Territory passed the following resolution: "*Resolved by the Legislative Assembly of the Territory of Utah*, That the laws heretofore passed by the provisional government of the State of Deseret, and which do not conflict with the Organic Act of said Territory, be and the same are hereby declared to be legal and in full force and virtue, and shall so remain until superseded by the action of the Legislative Assembly of the Territory of Utah." This resolution was approved October 4, 1851. The confirmation was repeated on the 19th of January, 1855, by the Act of the Legislative Assembly entitled "An Act in Relation to the Compilation and Revision of the Laws and Resolutions in Force in Utah Territory, Their Publication and Distribution." From the time of these confirmatory Acts, therefore, the said Corporation had a legal existence under its charter. But it is too plain for argument that this charter, or enactment, was subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose. Like any other Act of the Territorial Legislature, it was subject to this condition. Not only so, but the power of Congress could be exercised in modifying or limiting the powers and privileges granted by such charter; for if it could repeal, it could modify; the greater includes the less. Hence there can be no question that the Act of July 1, 1862, already recited, was a valid exercise of congressional power. Whatever may be the effect or true construction of this Act, we have no doubt of its validity. As far as it went it was effective. If it did not [46] absolutely repeal the charter of the Corporation, it certainly took away all right or power which may have been claimed under it to establish, protect or foster the practice of polygamy, under whatever disguise it might be carried on; and it also limited the amount of property which might be acquired by the Church of Jesus Christ of Latter-Day Saints; not interfering, however, with vested rights in real estate existing at that time. If the Act of July 1, 1862, had but a partial effect, Congress had still the power to make the abrogation of its charter absolute and complete. This was done by the Act of 1887. By the 17th section of that Act it is expressly declared that "the Acts of the Legislative Assembly of the Territory of Utah, incorporating, continuing or providing for the Corporation known as the Church of Jesus Christ of Latter-Day Saints, and the ordinance of the so-called 'General Assembly of the State of Deseret,' incorporating the said Church, so far as the same may now have legal force and validity, are hereby disapproved and annulled, and the said Corporation, so far as it may now have or pretend to have any legal existence, is hereby dissolved." This absolute annulment of the laws which gave the said Corporation a legal existence has dissipated all doubt on the subject, and the said Corporation has ceased to have any existence as a civil body, whether for the purpose of holding property or of doing any other corporate act. It was not necessary to resort to the condition imposed by the Act of 1862, limiting the amount of real estate which any corporation or association for religious or charitable purposes was authorized to acquire or hold; although it is apparent from the findings of the court that this condition was violated by the Corporation before the passage of the Act of 1887. Congress, for good and sufficient reasons of its own, independent of that limitation, and of any violation of it, had a full and perfect right to repeal its charter and abrogate its corporate existence, which of course depended upon its charter.

The next question is, whether Congress or the court had the power to cause the property of the said Corporation to be seized and taken possession of, as was done in this case.

When a business corporation, instituted for the purpose of gain or private interest, is dissolved, the modern doctrine is, that its property, after payment of its debts, quitably belongs to its stockholders. But this doctrine has never been extended to public or charitable corporations. As to these, the ancient and established rule prevails, namely: that when a corporation is dissolved, its personal property, like that of a man dying without heirs, ceases to be the subject of private ownership, and becomes subject to the disposal of the sovereign authority; whilst its real estate reverts or escheats to the grantor or donor, unless some other course of devolution has been directed by positive law, though still subject, as we shall hereafter see, to the charitable use. To this rule the Corporation in question was undoubtedly subject. But the grantor of all, or the principal part, of the real estate of the Church of Jesus Christ of Latter-Day Saints was really the United States, from whom the property was derived by the Church, or its trustees, through the operation of the Town-Site Act. Besides, as we have seen, the Act of 1862 expressly declared that all real estate acquired or held by any of the corporations or associations therein mentioned (of which the Church of Jesus Christ of Latter-Day Saints was one), contrary to the provisions of that Act, should be forfeited and escheat to the United States, with a saving of existing vested rights. The Act prohibited the acquiring or holding of real estate of greater value than $50,000 in a Territory, and no legal title had vested in any of the lands in Salt Lake City at that time, as the Town-Site Act was not passed until March 2, 1867. There can be no doubt, therefore, that the real estate of the Corporation in question could not, on its dissolution, revert or pass to any other person or persons than the United States.

If it be urged that the real estate did not stand in the name of the Corporation, but in the name of a trustee or trustees, and therefore was not subject to the rules relating to corporate property, the substance of the difficulty still remains. It cannot be contended that the prohibition of the Act of 1862 could have been so easily evaded as by putting the property of the Corporation into the hands of trustees. The equitable or trust estate was vested in the Corporation. The trustee held it for no other purpose; and the Corporation being dissolved, that purpose was at an end. The trust estate devolved to the United States in the same manner as the legal estate would have done had it been in the hands of the Corporation. The trustee became trustee for the United States in-

stead of trustee for the Corporation. We do not now speak of the religious and charitable uses for which the Corporation, through its trustee, held and managed the property. That aspect of the subject is one which places the power of the government and of the court over the property on a distinct ground.

Where a charitable corporation is dissolved, and no private donor or founder appears to be entitled to its real estate (its personal property not being subject to such reclamation), the government, or sovereign authority, as the chief and common guardian of the state, either through its judicial tribunals or otherwise, necessarily has the disposition of the funds of such corporation, to be exercised, however, with due regard to the objects and purposes of the charitable uses to which the property was originally devoted, so far as they are lawful and not repugnant to public policy. This is the general principle, which will be more fully discussed further on. In this direction, it will be pertinent, in the mean time, to examine into the character of the Corporation of the Church of Jesus Christ of Latter-Day Saints, and the objects which, by its constitution and principles, it promoted and had in view.

It is distinctly stated in the pleadings and findings of fact that the property of the said Corporation was held for the purpose of religious and charitable uses. But it is also stated in the findings of fact, and is a matter of public notoriety, that the religious and charitable uses intended to be subserved and promoted are the inculcation and spread of the doctrines and usages of the Mormon Church, or Church of Latter-Day Saints, one of the distinguishing features of which is the practice of polygamy —a crime against the laws, and abhorrent to the sentiments and feelings of the civilized world. Notwithstanding the stringent laws which have been passed by Congress—notwithstanding all the efforts made to suppress this barbarous practice—the sect or community composing the Church of Jesus Christ of Latter-Day Saints perseveres, in defiance of law, in preaching, upholding, promoting and defending it. It is a matter of public notoriety that its emissaries are engaged in many countries in propagating this nefarious doctrine, and urging its converts to join the community in Utah. The existence of such a propaganda is a blot on our civilization. The organization of a community for the spread and practice of polygamy is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World. The question therefore is whether the promotion of such a nefarious system and practice, so repugnant to our laws and to the principles of our civilization, is to be allowed to continue by the sanction of the government itself; and whether the funds accumulated for that purpose shall be restored to the same unlawful uses as heretofore to the detriment of the true interests of civil society.

It is unnecessary here to refer to the past history of the sect, to their defiance of the government authorities, to their attempt to establish an independent community, to their efforts to drive from the Territory all who were not connected with them in communion and sympathy. The tale is one of patience on the part of the American government and people, and of contempt of authority and resistance to law on the part of the Mormons. Whatever persecutions they may have suffered in the early part of their history, in Missouri and Illinois, they have no excuse for their persistent defiance of law under the government of the United States.

One pretense for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and therefore under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our [50
own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority.

The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practised. *Davis* v. *Beason*, 133 U. S. 333 [33: 637]. And since polygamy has been forbidden by the laws of the United States, under severe penalties, and since the Church of Jesus Christ of Latter-Day Saints has persistently used, and claimed the right to use, and the unincorporated community still claims the same right to use, the funds with which the Late Corporation was endowed for the purpose of promoting and propagating the unlawful practice as an integral part of their religious usages, the question arises, whether the government, finding these funds without legal ownership, has or has not the right, through its courts, and in due course of administration, to cause them to be seized and devoted to objects of undoubted charity and usefulness—such for example as the maintenance of schools—for the benefit of the community whose leaders are now misusing them in the unlawful manner above described; setting apart, however, for the exclusive possession and use of the Church, sufficient and suitable portions of the property for the purposes of public worship, parsonage buildings and burying grounds, as provided in the Law.

The property in question has been dedicated to public and charitable uses. It matters not whether it is the product of private contributions, made during the course of half a century, or of taxes imposed upon the people, or of gains arising from fortunate operations in business, or appreciation in values, the charitable uses for which it is held are stamped upon it by charter, by ordinance, by regulation and by usage, in such an indelible manner that there can be no mistake as to their character, purpose or object.

The law respecting property held for charitable uses of course depends upon the legisla- [5
tion and jurisprudence of the country in which the property is situated and the uses are car-

ried out; and when the positive law affords no specific provision for actual cases that arise, the subject must necessarily be governed by those principles of reason and public policy which prevail in all civilized and enlightened communities.

The principles of the law of charities are not confined to a particular people or nation, but prevail in all civilized countries pervaded by the spirit of Christianity. They are found embedded in the civil law of Rome, in the laws of European nations, and especially in the laws of that nation from which our institutions are derived. A leading and prominent principle prevailing in them all is, that property devoted to a charitable and worthy object, promotive of the public good, shall be applied to the purposes of its dedication, and protected from spoliation and from diversion to other objects. Though devoted to a particular use, it is considered as given to the public, and is therefore taken under the guardianship of the laws. If it cannot be applied to the particular use for which it was intended, either because the objects to be subserved have failed, or because they have become unlawful and repugnant to the public policy of the State, it will be applied to some object of kindred character so as to fulfill in substance, if not in manner and form, the purpose of its consecration.

The manner in which the due administration and application of charitable estates is secured, depends upon the judicial institutions and machinery of the particular government to which they are subject. In England, the court of chancery is the ordinary tribunal to which this class of cases is delegated, and there are comparatively few which it is not competent to administer. Where there is a failure of trustees, it can appoint new ones; and where a modification of uses is necessary in order to avoid a violation of the laws, it has power to make the change. There are some cases, however, which are beyond its jurisdiction; as where, by statute, a gift to certain uses is declared void and the property goes to the King; and in some other cases of failure of the charity. In such cases the King, as *parens patriæ*, under
52] his sign manual, disposes of the fund to such uses, analogous to those intended, as seems to him expedient and wise.

These general principles are laid down in all the principal treatises on the subject, and are the result of numerous cases and authorities. See Duke on Char. Uses, chap. X., secs. 4, 5, 6; Boyle on Charities, chap. III., IV.; 2 Story's Eq. Jur. §§ 1167 *et seq.*; *Atty-Gen.* v. *Guise*, 2 Vern. 266; *Moggridge* v. *Thackwell*, 7 Ves. Jr. 36, 77; *De Themmines* v. *De Bonneval*, 5 Russ. 289; *Pawlet* v. *Clark*, 18 U. S. 9 Cranch, 292, 335, 336 [3: 735, 750, 751]; *Beatty* v. *Kurtz*, 27 U. S. 2 Pet. 566 [7: 521]; *Vidal* v. *Girard*, 43 U. S. 2 How. 127 [11: 205]; *Jackson* v. *Phillips*, 14 Allen, 539; *Ould* v. *Washington Hospital*, 95 U. S. 303 [24: 450]; *Jones* v. *Habersham*, 107 U. S. 174 [27: 301].

The individual cases cited are but *indicia* of the general principle underlying them. As such they are authoritative, though often in themselves of minor importance. Bearing this in mind, it is interesting to see how far back the principle is recognized. In the Pandects of Justinian we find cases to the same effect as those referred to, antedating the adoption of Christianity as the religion of the Empire. Amongst others, in the Digest, lib. 33, tit. 2, law 16, a case is reported which occurred in the early part of the third century, in which a legacy was left to a city in order that from the yearly revenues games might be celebrated for the purpose of preserving the memory of the deceased. It was not lawful at that time to celebrate these games. The question was, what was to be done with this legacy. Modestinus, a celebrated jurist of authority, replied: "Since the testator wished games to be celebrated which were not permitted, it would be unjust that the amount which he had destined to that end should go back to the heirs. Therefore let the heirs and magnates of the city be cited, and let an examination be made to ascertain how the trust may be employed so that the memory of the deceased may be preserved in some other and lawful manner." Here is the doctrine of charitable uses in a nutshell.

Domat, the French jurist, writing on the civil law, after explaining the nature of pious and charitable uses, and the favor with which they are treated in the law, says: "If a pious legacy were destined to some use which could not have its effect, as if a testator had left a legacy for building a church for a parish, or an apartment in an hospital, and it happened, either that before his death the said church or the said apartment had been built out of some other fund, or that it was noways necessary or useful, the legacy would not for all that remain without any use; but it would be laid out on other works of piety for that parish, or for that hospital, according to the directions that should be given in this matter by the persons to whom this function should belong." And for this principle he cites a passage from the Pandects. Domat's Civil Law, book 4, title 2, section 6, par. 6.

By the Spanish law, whatever was given to the service of God became incapable of private ownership, being held by the clergy as guardians or trustees; and any part not required for their own support, and the repairs, books and furniture of the church, was devoted to works of piety, such as feeding and clothing the poor, supporting orphans, marrying poor virgins, redeeming captives and the like. Partida III. tit. 28, ll. 12-15. When property was given for a particular object, as a church, a hospital, a convent or a community, etc., and the object failed, the property did not revert to the donor or his heirs, but devolved to the crown, the church or other convent or community, unless the donation contained an express condition in writing to the contrary. Tapia, Febrero Novisimo, lib. 2, tit. 4, chap. 22, §§ 24-26.

A case came before *Lord* Bacon in 1619 (*Bloomfield* v. *Stowe Market*, Duke, Char. Uses, 624), in which lands had been given before the Reformation to be sold, and the proceeds applied, one half to the making of a highway from the town in which the lands were, one fourth to the repair of a church in that town, and the other fourth to the priest of the church to say prayers for the souls of the donor and others. The lord keeper decreed the establishment of the uses for making the highway and repairing the church, and directed the remain-

ing fourth (which could not, by reason of the change in religion, be applied as directed by the donor) to be divided between the poor of the same town and the poor of the town where the donor inhabited.

In the case of *Baliol College*, which came before the court of chancery from time to time for over a century and a half, the same principle was asserted, of directing a charity fund to a different, though analogous, use, where the use originally declared had become contrary to the policy of the law. There, a testator in 1679, when episcopacy was established by law in Scotland, gave lands in trust to apply the income to the education of Scotchmen at Oxford, with a view to their taking Episcopal orders and settling in Scotland. Presbyterianism being re-established in Scotland after the Revolution of 1688, the object of the bequest could not be carried into effect; and the court of chancery, by successive decrees of *Lord* Somers and *Lord* Hardwicke, directed the income of the estate to be applied to the education of a certain number of Scotch students at Baliol College, without the condition of taking orders; and, in consideration of this privilege, directed the surplus of the income to be applied to the college library. See the cases of *Atty-Gen.* v. *Guise*, 2 Vern. 166; *Atty-Gen.* v. *Baliol College*, 9 Mod. 407; *Atty-Gen.* v. *Glasgow College*, 2 Coll. Ch. 665, 1 H. L. Cas. 800. And see abridgment of the above cases in 14 Allen, 581, 582.

Lord Chief Justice Wilmot, in his opinion in *Atty-Gen.* v. *Lady Downing*, Wilmot, Notes, 1, 82, looking at the case on the supposition that the trusts of the will (which were for instituting a college) were illegal and void, or of such a nature as not fit to be carried into execution, said: "This court has long made a distinction between superstitious uses and mistaken charitable uses. By mistaken, I mean such as are repugnant to that sound constitutional policy, which controls the interests, wills and wishes of individuals, when they clash with the interest and safety of the whole community. Property destined to superstitious uses is given by law of Parliament to the King, to dispose of as he pleases; and it falls properly under the cognizance of a court of revenue. But where property is given to mistaken charitable uses, this court distinguishes between the charity and the use; and seeing the charitable bequest in the intention of the testator, they execute the intention, varying the use, as the King, who is the curator of all charities, and the constitutional trustee for the performance of them, pleases to direct and appoint." "This doctrine is now so fully settled that it cannot be departed from." *Ibid.*

In *Moggridge* v. *Thackwell*, 7 Ves. Jr. 36, 69, *Lord* Eldon said: "I have no doubt that cases much older than I shall cite may be found; all of which appear to prove that if the testator has manifested a general intention to give to charity, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity, but, if the substantial intention is charity, the law will substitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished." In Hill on Trustees, page 450, after citing this observation of *Lord* Eldon, it is added: "In accordance with these principles, it has frequently been decided that where a testator has sufficiently expressed his intention to dispose of his estate in trust for charitable purposes *generally*, the general purpose will be enforced by the court to the exclusion of any claim of the next of kin to take under a resulting trust, although the *particular* purpose or mode of application is not declared at all by the testator. And the same rule prevails although the testator refers to some past or intended declaration of the particular charity, which declaration is not made or cannot be discovered; and although the selection of the objects of the charity and the mode of application are left to the discretion of the trustees. And it is immaterial that the trustees refuse the gift, or die, or that their appointment is revoked in the lifetime of the [56
testator, causing a lapse of the bequest at law. The same construction will also be adopted where a *particular* charitable purpose is declared by the testator which does not exhaust the whole value of the estate; or where the particular trust cannot be carried into effect, either for its uncertainty or its illegality, or for want of proper objects. And in all these cases the general intention of the testator in favor of charity will be effectuated by the court through a *cy-près* application of the fund." The same propositions are laid down by *Mr. Justice* Story in his Equity Jurisprudence, sections 1167 *et seq.* But it is unnecessary to make further quotations.

These authorities are cited (and many more might be adduced) for the purpose of showing that where property has been devoted to a public or charitable use which cannot be carried out on account of some illegality in, or failure of, the object, it does not, according to the general law of charities, revert to the donor or his heirs, or other representatives, but is applied under the direction of the courts, or of the supreme power in the state, to other charitable objects, lawful in their character, but corresponding, as near as may be, to the original intention of the donor.

They also show that the authority thus exercised arises, in part, from the ordinary power of the court of chancery over trusts, and, in part, from the right of the government, or sovereign, as *parens patriæ*, to supervise the acts of public and charitable institutions in the interest of those to be benefited by their establishment; and, if their funds become *bona vacantia*, or left without lawful charge, or appropriated to illegal purposes, to cause them to be applied in such lawful manner as justice and equity may require.

If it should be conceded that a case like the present transcends the ordinary jurisdiction of the court of chancery, and requires for its determination the interposition of the *parens patriæ* of the state, it may then be contended that, in this country, there is no royal person to act as *parens patriæ*, and to give direction for the application of charities which cannot be administered by the court. It is true we have no such chief magistrate. But here the Legislature is the *parens patriæ*, and, unless [57
restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England. *Chief Justice*

Marshall, in the *Dartmouth College Case*, said: "By the Revolution, the duties, as well as the powers, of government devolved on the people. . . . It is admitted that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department." (17 U. S. 4 Wheat. 651 [4: 662].) And *Mr. Justice* Baldwin, in *Magill* v. *Brown*, Bright. 347, 373, a case arising on Sarah Zane's will, referring to this declaration of *Chief Justice* Marshall, said: "The Revolution devolved on the State all the transcendent power of Parliament, and the prerogative of the crown, and gave their Acts the same force and effect."

Chancellor Kent says: "In this country, the Legislature or government of the State, as *parens patriæ*, has the right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is intrusted with it." 4 Kent, Com. 508, *note*.

In *Fontain* v. *Ravenel*, 58 U. S. 17 How. 369, 384 [15: 80, 86], *Mr. Justice* McLean, delivering the opinion of this court in a charity case, said: "When this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the *parens patriæ*."

This prerogative of *parens patriæ* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the Legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and the destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves. *Lord Chancellor* Somers, in *Cary* v. *Bertie*, 2 Vern. 333, 342, said: "It is true infants are always favored. In this court there are several things which belong to the King as [58] *pater patriæ*, and fall under the care and direction of this court, as charities, infants, idiots, lunatics, etc."

The Supreme Judicial Court of Massachusetts well said, in *Sohier* v. *Massachusetts Gen. Hospital*, 3 Cush. 483, 497: "It is deemed indispensable that there should be a power in the Legislature to authorize a sale of the estates of infants, idiots, insane persons and persons not known, or not in being, who cannot act for themselves. The best interest of these persons, and justice to other persons, often require that such sales should be made. It would be attended with incalculable mischiefs, injuries and losses, if estates, in which persons are interested who have not capacity to act for themselves, or who cannot be certainly ascertained, or are not in being, could, under no circumstances, be sold, and perfect titles effected. But, in such cases, the Legislature, as *parens patriæ*, can disentangle and unfetter the estates, by authorizing a sale, taking precaution that the substantial rights of all parties are protected and secured."

These remarks in reference to infants, insane persons and persons not known, or not in being, apply to the beneficiaries of charities, who are often incapable of vindicating their rights, and justly look for protection to the sovereign authority, acting as *parens patriæ*. They show that this beneficent function has not ceased to exist under the change of government from a monarchy to a republic: but that it now resides in the legislative department, ready to be called into exercise whenever required for the purposes of justice and right, and is as clearly capable of being exercised in cases of charities as in any other cases whatever.

It is true that in some of the States of the Union in which charities are not favored, gifts to unlawful or impracticable objects, and even gifts affected by merely technical difficulties, are held to be void, and the property is allowed to revert to the donor or his heirs or other representatives. But this is in cases where such heirs or representatives are at hand to claim the property and are ascertainable. It is difficult to see how this could be done in a case where it would be impossible for any such claim to be made,—as where the property has been the resulting accumulation of ten thousand petty contributions, extending through a [5 long period of time, as is the case with all ecclesiastical and community funds. In such a case the only course that could be satisfactorily pursued would be that pointed out by the general law of charities, namely, for the government, or the court of chancery, to assume the control of the fund, and devote it to lawful objects of charity most nearly corresponding to those to which it was originally destined. It could not be returned to the donors, nor distributed among the beneficiaries.

The impracticability of pursuing a different course, however, is not the true ground of this rule of charity law. The true ground is that the property given to a charity becomes in a measure public property, only applicable as far as may be, it is true, to the specific purposes to which it is devoted, but within those limits consecrated to the public use, and become part of the public resources for promoting the happiness and well-being of the people of the State. Hence, when such property ceases to have any other owner, by the failure of the trustees, by forfeiture for illegal application or for any other cause, the ownership naturally and necessarily falls upon the sovereign power of the State; and thereupon the court of chancery, in the exercise of its ordinary jurisdiction, will appoint a new trustee to take the place of the trustees that have failed or that have been set aside, and will give directions for the further management and administration of the property; or if the case is beyond the ordinary jurisdiction of the court, the Legislature may interpose and make such disposition of the matter as will accord with the purposes of justice and right. The funds are not lost to the public as charity funds; they are not lost to the general objects or class of objects which they were intended to subserve or effect. The State, by its Legislature, or its judiciary, interposes to preserve them from dissipation and destruction, and to set them up on a new basis of usefulness, directed to lawful ends, coincident, as far as may be, with the objects originally proposed.

The interposition of the Legislature in such cases is exemplified by the case of *Pawlet* v. *Clark*, 13 U. S. 9 Cranch, 292 [3:735], which arose in Vermont. In the town charter, granted in the name of the King in 1761, one entire share of the town lands was granted "as a glebe for the Church of England as by law established." There was no Episcopal church in the town until 1802. In that year one was organized, and its parson laid claim to the glebe lands, and leased them to Clark and others. Of course, this church had never been connected with the "Church of England as by law established;" and the institution of such a church in 1802 was impossible, and would have been contrary to the public policy of the State. Meantime, in 1794, the Legislature had granted the glebe lands to the several towns to be rented by the selectmen for the sole use and support of public worship, without restriction as to sect or denomination. This law was subsequently repealed, and in 1805 the Legislature passed another Act, granting the glebe lands to the respective towns, to apply the rents to the use of schools therein. This was held to be a valid disposition. *Mr. Justice* Story, in the course of an elaborate opinion, amongst other things showed that a mere voluntary society of Episcopalians within a town could no more entitle themselves, on account of their religious tenets, to the glebe than any other society worshiping therein. "The glebe," he said, "remained as an *hæreditas jacens*, and the State, which succeeded to the rights of the crown, might, with the assent of the town, alien or incumber it, or might erect an Episcopal church therein," etc. "By the Revolution the State of Vermont succeeded to all the rights of the crown as to the unappropriated as well as the appropriated glebes." pp. 334, 335. Again: "Without the authority of the State, however, they [the towns] could not apply the lands to other uses than public worship; and in this respect the Statute of 1805 conferred a new right which the towns might or might not exercise at their own pleasure."* p. 336.

Coming to the case before us, we have no [61] doubt that the general law of charities which we have described is applicable thereto. It is [62] true, no formal declaration has been made by Congress or the Territorial Legislature as to what system of laws shall prevail there. But it is apparent from the language of the Organic Act, which was passed September 9, 1850 (9 Stat. 453), that it was the intention of Congress that the system of common law and equity which generally prevails in this country should be operative in the Territory of Utah, except as it might be altered by legislation. In the 9th section of the Act it is declared that the Supreme and District Courts of the Territory "shall possess *chancery* as well as *common-law* jurisdiction;" and the whole phraseology of the Act implies the same thing. The Territorial Legislature, in like manner, in the first section of the Act regulating procedure, approved December 30, 1852, declared that all the courts of the Territory should have "*law* and *equity* jurisdiction in civil cases." In view of these significant provisions, we infer that the general system of common law and equity, as it prevails in this country, is the basis of the laws of the Territory of Utah. We may therefore assume that the doctrine of charities is applicable to the Territory, and that Congress, in the exercise of its plenary legislative power over it, was entitled to carry out that law and put it in force, in its application to the Church of Jesus Christ of Latter-Day Saints.

Indeed, it is impliedly admitted by the Corporation itself, in its answer to the bill in this case, that the law of charities exists in Utah, for it expressly says: "That it was, at the time of its creation, ever since has been and still is a corporation or association for religious or charitable uses." And again it says:

"That prior to February 28, 1887, it had, as

---

*The frequency with which this power of the Legislature is exerted is shown by a recurrence to the private laws of any of the States. Taking New Jersey for example; the Index of Private Laws, under the head of *Academies* alone, refers to the following Acts:

1. By an ancient charter the trustees of the Township of Bergen held certain lands for the common benefit of the freeholders, a portion of which was set apart for the free school of the township. An academy being organized and incorporated in the town, its trustees claimed this portion and sold certain parcels of it. The Legislature, on the representation of the trustees of the township, confirmed the sales that had been made, but directed that the proceeds and the land unsold should be vested in the trustees of the township, for the use and benefit of the free school alone. This, of course, the court of chancery could not have done. Laws of 1814, p. 202.

2. By an Act of March 2, 1848, it was enacted that the title of a lot in the Village of Hackensack, formerly vested in the trustees of the Washington Academy, should be vested in the Washington Institute of Hackensack, to be held by them for the purposes and trusts, and subject to the conditions, of the articles of their association. Laws of 1848, p. 118. It is probable that the first institution had ceased to exist.

3. A certain school-house and lot in the City of Newark was held by trustees for the benefit of "The Female Union School Society," for the education of indigent female children. Not being longer needed for that purpose, in consequence of the establishment of public free schools in the city, the Legislature authorized the trustees, with the assent of the association, to sell the property and pay over the proceeds to a new corporation created for the support and education of destitute orphan children of the city, called "The Protestant Foster Home Society." Laws of 1849, p. 143.

4. In 1854 an Act was passed, authorizing the trustees of the Camden Academy to convey their property to the Board of Education of the City of Camden. The reason appears from the following recital of the Act: "Whereas a certain lot of land [describing it] has heretofore been given or bequeathed for the purpose of erecting a school-house thereon; and whereas the building known as the Camden Academy has been erected thereon by voluntary subscription; and whereas the donors of said land and the subscribers to the funds for the erection of said building have, with few exceptions, departed this life, and the objects which they had in view have in a great degree been frustrated; and whereas it is considered that the same may be best promoted by securing said lot of land, and the building thereon, for the occupancy of public schools of the City of Camden: *Be it enacted*," etc. Laws of 1854, p. 358.

5. By an Act passed in 1871, the trustees of Chatham Academy, in the County of Morris, were authorized to convey any part of the real estate held by them, or to sell the same and pay over the proceeds, to the trustees of Chatham School District No. 1, to be used by them for educational purposes only. Laws of 1871, p. 670. Here was evidently another case of an academy having run down, and its operations discontinued.

Instances of this kind of legislation, in which the Legislature clearly acts as *parens patriæ*, may be found almost without number.

such corporation, as it lawfully might by the powers granted to it by its Act of incorporation, acquired and held from time to time certain personal property, goods and chattels, all of which it had acquired, held and used solely and only for charitable and religious purposes; that on the 28th day of February, A. D. 1887, it still held and owned certain personal property, goods and chattels donated to it by the members of said Church and friends thereof solely
[3] and only for use and distribution for charitable and religious purposes;" and "that on February 28, 1887, John Taylor, who then held all the personal property, moneys, stocks and bonds belonging to said defendant Corporation as trustee in trust for said defendant, by and with the consent and approval of defendant, donated, transferred and conveyed all of said personal property, moneys, stocks and bonds held by him belonging to said defendant Corporation, after setting apart and reserving certain moneys and stocks then held by him, sufficient in amount and necessary for the payment of the then existing indebtedness of said defendant Corporation, to certain ecclesiastical corporations created and existing under and by virtue of the laws of the Territory of Utah, to be devoted by said ecclesiastical corporations solely and only to charitable and religious uses and purposes."

And the intervenors, Romney and others, who claim to represent the hundred thousand and more individuals of the Mormon Church, in their petition say:

"That the said Church of Jesus Christ of Latter-Day Saints is and for many years last past has been a voluntary religious society or association, organized and existing in the Territory of Utah for religious and charitable purposes.

"That said petitioners, and others for whose benefit they file this petition, are members of said Church, residing in said Territory; that said Church became possessed of all the above-described property, in accordance with its established rules and customs, by the voluntary contributions, donations and dedications of its said members, to be held, managed and applied to the use and benefit of said Church and for the maintenance of its religion and charities by trustees appointed by said members semi-annually at the general conference or meeting of said members."

The foregoing considerations place it beyond doubt that the general law of charities, as understood and administered in our Anglo-American system of laws, was and is applicable to the case now under consideration.

Then looking at the case as the finding of facts presents it, we have before us—Congress
[4] had before it—a contumacious organization, wielding by its resources an immense power in the Territory of Utah, and employing those resources and that power in constantly attempting to oppose, thwart and subvert the legislation of Congress and the will of the government of the United States. Under these circumstances we have no doubt of the power of Congress to do as it did.

It is not our province to pass judgment upon the necessity or expediency of the Act of February 19, 1887, under which this proceeding was taken. The only question we have to consider in this regard is as to the constitutional power of Congress to pass it. Nor are we now called upon to declare what disposition ought to be made of the property of the Church of Jesus Christ of Latter-Day Saints. This suit is, in some respects, an ancillary one, instituted for the purpose of taking possession of and holding for final disposition the property of the defunct Corporation in the hands of a receiver, and winding up its affairs. To that extent, and to that only, the decree of the circuit court has gone. In the proceedings which have been instituted in the district court of the Territory, it will be determined whether the real estate of the Corporation which has been seized (excepting the portions exempted by the Act) has, or has not, escheated or become forfeited to the United States. If it should be decided in the affirmative, then, pursuant to the terms of the Act, the property so forfeited and escheated will be disposed of by the Secretary of the Interior, and the proceeds applied to the use and benefit of common schools in the Territory.

It is obvious that any property of the Corporation which may be adjudged to be forfeited and escheated will be subject to a more absolute control and disposition by the government than that which is not so forfeited. The non-forfeited property will be subject to such disposition only as may be required by the law of charitable uses; whilst the forfeited and escheated property, being subject to a more absolute control of the government, will admit of a greater latitude of discretion in regard to its disposition. As we have seen, however, Congress has signified its will in this regard, having declared that the proceeds shall be applied to the use and benefit of common schools in the Territory. Whether that will be a proper destination for the non-forfeited property will be a matter for future consideration in view of all the circumstances of the case.

As to the constitutional question, we see nothing in the Act which, in our judgment, transcends the power of Congress over the subject. We have already considered the question of its power to repeal the charter of the Corporation. It certainly also had power to direct proceedings to be instituted for the forfeiture and escheat of the real estate of the Corporation; and, if a judgment should be rendered in favor of the government in these proceedings, the power to dispose of the proceeds of the lands thus forfeited and escheated, for the use and benefit of common schools in the Territory, is beyond dispute. It would probably have power to make such a disposition of the proceeds if the question were merely one of charitable uses, and not of forfeiture. Schools and education were regarded by the Congress of the Confederation as the most natural and obvious appliances for the promotion of religion and morality. In the ordinance of 1787, passed for the government of the territory northwest of the Ohio, it is declared (art. 8): "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Mr. Dane, who is reputed to have drafted the said ordinance, speaking of some of the statutory

provisions of the English law regarding charities as inapplicable to America, says: "But in construing these laws, rules have been laid down which are valuable in every State; as that the erection of schools and the relief of the poor are always right, and the law will deny the application of private property only as to uses the nation deems superstitious." 4 Dane's Abridg. 239.

The only remaining constitutional question arises upon that part of the 17th section of the Act, under which the present proceedings were instituted. We do not well see how the constitutionality of this provision can be seriously disputed, if it be conceded or established that the Corporation ceased to exist, and that its property thereupon ceased to have a lawful owner, and reverted to the care and protection of the government as *parens patriæ*. This point has already been fully discussed. We have no doubt that the state of things referred to existed, and that the right of the government to take possession of the property followed thereupon.

The application of Romney and others, representing the unincorporated members of the Church of Jesus Christ of Latter-Day Saints, is fully disposed of by the considerations already adduced. The principal question discussed has been, whether the property of the Church was in such a condition as to authorize the government and the court to take possession of it and hold it until it shall be seen what final disposition of it should be made; and we think it was in such a condition, and that it is properly held in the custody of the receiver. The rights of the church members will necessarily be taken into consideration in the final disposition of the case. There is no ground for granting their present application.

The property is in the custody of the law, awaiting the judgment of the court as to its final disposition in view of the illegal uses to which it is subject in the hands of the Church of Latter-Day Saints, whether incorporated or unincorporated. The conditions for claiming possession of it by the members of the sect or community under the Act do not at present exist.

The attempt made, after the passage of the Act of February 19, 1887, and whilst it was in the President's hands for his approval or rejection, to transfer the property from the trustee then holding it to other persons, and for the benefit of different associations, was so evidently intended as an evasion of the Law that the court below justly regarded it as void and without force or effect.

We have carefully examined the decree, and do not find anything in it that calls for a reversal. It may perhaps require modification in some matters of detail, and for that purpose only *the case is reserved for further consideration.*

Mr. Chief Justice **Fuller,** with whom concurred *Mr. Justice* **Field** and *Mr. Justice* **Lamar,** dissenting:

I am constrained to dissent from the opinion and judgment just announced. Congress possesses such authority over the Territories as the Constitution expressly or by clear implication delegates. Doubtless territory may be acquired by the direct action of Congress, as in the annexation of Texas; by treaty, as in the case of Louisiana; or, as in the case of California, by conquest and afterwards by treaty; but the power of Congress to legislate over the Territories is granted in so many words by the Constitution. Art. 4, sec. 3, clause 2.

And it is further therein provided that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

In my opinion, Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, express or implied, in that instrument. And no such power as that involved in the Act of Congress under consideration is conferred by the Constitution, nor is any clause pointed out as its legitimate source. I regard it of vital consequence that absolute power should never be conceded as belonging under our system of government to any one of its departments. The legislative power of Congress is delegated and not inherent, and is therefore limited. I agree that the power to make needful rules and regulations for the Territories necessarily comprehends the power to suppress crime; and it is immaterial even though that crime assumes the form of a religious belief or creed. Congress has the power to extirpate polygamy in any of the Territories, by the enactment of a criminal code directed to that end; but it is not authorized under the cover of that power to seize and confiscate the property of persons, individuals or corporations, without office found, because they may have been guilty of criminal practices.

The doctrine of *cy près* is one of construction, and not of administration. By it a fund devoted to a particular charity is applied to a cognate purpose, and if the purpose for which this property was accumulated was such as has been depicted, it cannot be brought within the rule of application to a purpose as nearly as possible resembling that denounced. Nor is there here any counterpart in congressional power to the exercise of the royal prerogative in the disposition of a charity. If this property was accumulated for purposes declared illegal, that does not justify its arbitrary disposition by judicial legislation. In my judgment, its diversion under this Act of Congress is in contravention of specific limitations in the Constitution; unauthorized, expressly or by implication, by any of its provisions; and in disregard of the fundamental principle that the legislative power of the United States, as exercised by the agents of the people of this Republic, is delegated and not inherent.

586] *Ex parte:*

In the Matter of THOMAS F. BURRUS, Petitioner.

(See S. C. Reporter's ed. 586 627.)

Jurisdiction of district court—habeas corpus to deliver child to parent—citizenship—state laws—void proceeding—imprisonment for contempt—habeas corpus from this court.

1. The United States district court, or a judge thereof, has no jurisdiction to issue a writ of habeas corpus to recover the custody of a child withheld from its parent; nor to order the delivery of the child to its parent; nor to imprison for contempt for the disobedience of that order.
2. The district courts of the United States cannot take jurisdiction of such a case on the ground of the citizenship of the parties.
3. The whole subject of the domestic relations of husband and wife, parent and child, belongs to and depends upon the laws of the States alone.
4. A proceeding by habeas corpus before a district judge in the district court, to restore the custody of a child to its parent, is void; and an attempt to enforce its order, in such a case, by imprisonment for contempt, is illegal and void.
5. A person so imprisoned for contempt in disobeying the order of such court for the delivery of the child to its parent, in such case, may be discharged on habeas corpus issued by this court.

[No. 10, Original.]

Submitted Mar. 10, 1890. Decided May 19, 1890.

ON PETITION for a writ of habeas corpus by Thomas F. Burrus to relieve him from imprisonment under an order of the District Court of the United States for the District of Nebraska for contempt in disobeying the order of that court requiring the petitioner to deliver a child to its parent. *Order that the writ of habeas corpus issue.*

The facts are stated in the opinion.

Mr. **G. M. Lambertson,** for petitioner:

Where the jurisdiction of a court of the United States depends upon the citizenship of the parties, such citizenship, not simply their residence, must be shown by the record.

Robertson v. *Cease*, 97 U. S. 646 (24: 1057); *Parker* v. *Overman*, 59 U. S. 18 How. 137 (15: 818); *Godfrey* v. *Terry*, 97 U. S. 171 (24: 944); *Jackson* v. *Ashton*, 33 U. S. 8 Pet. 148 (8: 898); Spear, Fed. Jud. 145.

A procedure by habeas corpus is not a suit or controversy between private parties.

Hurd, Habeas Corpus, 152; *Ex parte Everts*, 1 Bond, 205; *Ex parte Tom Tong*, 108 U. S. 559 (27: 827); Church, Habeas Corpus, § 439; *Re Barry*, 7 Law Rep. 374.

A writ of habeas corpus is not the proper mode of instituting a proceeding to try the legal right of the party to the guardianship of an infant.

People v. *Mercein*, 8 Paige, 55, 4 N. Y. Ch. L. ed. 343.

Jurisdiction of controversies between citizens of different States is not bestowed on district courts.

Kurtz v. *Moffitt*, 115 U. S. 487 (29: 458); *Barry* v. *Mercein*, 46 U. S. 5 How. 103 (12: 70); *Rosenbaum* v. *Bauer*, 120 U. S. 450 (30: 743).

The federal courts have jurisdiction in habeas corpus only in those cases when a person is restrained of his liberty by authority or under color of authority of the United States, or held in custody in violation of the Constitution and laws of the United States.

Cooley, Const. Lim. 421; *Ex parte Dorr*, 44 U. S. 3 How. 103 (11: 514); *Ex parte Yerger*, 75 U. S. 8 Wall. 101 (19: 337); *Ex parte McCardle*, 73 U. S. 6 Wall. 325 (18: 817), 74 U. S. 7 Wall. 514 (19: 265).

Mr. **Jno. Schomp,** for respondent:

This court can deal only with such defects in the proceedings under which commitment was ordered as render them absolutely void.

Ex parte Terry, 128 U. S. 306 (32: 409); *Ex parte Robinson*, 86 U. S. 19 Wall. 505-511 (22: 205-208); *Ex parte Kearney*, 20 U. S. 7 Wheat. 38-43 (5: 391, 392).

The federal justices and judges within their respective jurisdictions have power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of restraint of liberty.

Ex parte Royall, 117 U. S. 254 (29: 872); *Ex parte Yarbrough*, 110 U. S. 651, 654 (28: 274); *Robb* v. *Connolly*, 111 U. S. 624, 637 (28: 542, 546); *Ex parte Barry*, 43 U. S. 2 How. 65 (11: 181); *United States* v. *Green*, 3 Mason, 482; *Bennett* v. *Bennett*, 1 Deady, 299; *Ex parte Bollman*, 8 U. S. 4 Cranch, 75 (2: 554).

The case, being properly one that could be brought and heard within the jurisdiction of the judge and court, and it having been so brought, and so heard by the judge, cannot be reviewed by these proceedings.

Ex parte Barry, 43 U. S. 2 How. 65 (11: 181); *Bennett* v. *Bennett*, 1 Deady, 299; *United States* v. *Green*, 3 Mason, 485; Hurd, Habeas Corpus (2d ed.) 204, 454; *Mercein* v. *People*, 25 Wend. 64.

The writ may not only issue without privity of the child, but against its express wish.

People v. *Mercein*, 3 Hill, 399; *Com.* v. *Hamilton*, 6 Mass. 273; *State* v. *Baird*, 18 N. J. Eq. 195.

He who voluntarily submits himself to the power of the court must obey its decrees.

Skillern v. *May*, 10 U. S. 6 Cranch, 268 (3: 220); *Ex parte Story*, 37 U. S. 12 Pet. 343 (9: 1110); *Fowler* v. *Rathbone*, 79 U. S. 12 Wall. 120 (20: 285).

Mr. Justice **Miller** delivered the opinion of the court:

This is an application by Thomas F. Burrus to this court, in the exercise of its original jurisdiction, for a writ of habeas corpus to relieve him from the custody and unlawful imprisonment, as he declares, in which he is held by Brad D. Slaughter, United States marshal of the State of Nebraska, in the jail at Omaha in said State, by virtue of an order of the District Court of the United States for that District. Upon the filing of the petition in this court, a rule was entered and served upon Slaughter to show cause why said writ of habeas corpus should not issue. To this rule Slaughter made return. In this return he says that "the said petitioner is in his custody under and by virtue of an

[587] order and judgment of the Honorable Elmer S. Dundy, judge of the United States Court for the District of Nebraska, a copy of which order is hereto attached, and forms a part of this my return to aforesaid writ." He further attaches to this return a "true and correct copy of the whole proceedings in the controversy that brought about the judgment and order aforesaid, and he holds the said Thomas F. Burrus in his custody subject to and in pursuance of the aforesaid order and said judgment of the court, and submits whether he is entitled to his discharge as prayed for." This return is signed "Brad D. Slaughter, Marshal of the United States for the District of Nebraska."

The substance of this record shows that Louis B. Miller, of the Town of Oxford, County of Butler, and State of Ohio, and a citizen of that State, was the father of a child named Evelyn Estelle Miller, who was born on the 7th day of October, 1881; that his wife died on the 18th of May, 1882, while he and his wife were residing in Nemaha County, in the State of Nebraska; and that while his wife was lying sick of measles, from which she ultimately died, the child was taken, under the directions of a physician, to the residence of the grandfather, Thomas F. Burrus, and Catherine Burrus, his wife, who were, and now are, residents of said Nemaha County and citizens of the State of Nebraska. Since that time, Miller has married again, and, having a house and home, and being well prepared to take care of his child, he has desired its care and custody, and made frequent demands of the said Thomas and Catherine Burrus that they deliver it up to him, which they have uniformly refused to do.

Under these circumstances, Miller made application, on the 4th day of April, 1889, to Hon. Elmer S. Dundy, district judge of the United States for the District of Nebraska, for a writ of habeas corpus to recover the care and custody of the child, reciting the circumstances hereinbefore stated, and also some other matters tending to show that the home of Burrus was not a fit place for the child to be brought up. Upon this petition the writ was issued, and the defendant Burrus and his wife appeared before *Judge* Dundy at a regular term of the district court. They stated the fact that they had had the care and custody of the infant from a very short time after its birth and still had it; and that they had taken good care of it, were capable of taking good care of it, and were very much attached to it, and it was attached to them; and they claimed the right to continue in the custody and control of the child, who was then between eight and nine years old.

Afterwards, on the 25th day of June, 1889, *Judge* Dundy made an order that said Evelyn E. Miller, the child, was improperly detained and kept by Thomas Burrus and Catherine Burrus, and that she, the said Evelyn E. Miller, should be awarded to the care and custody of her father, Louis E. Miller, the petitioner, and that said Burrus and wife produce the child before the court within five days from the date of said order. From this order an appeal was taken to the Circuit Court for that District, before *Judge* Brewer, who decided that neither he nor the circuit court had any jurisdiction to hear the case on appeal, and remitted the case to the district court. On the 16th of December, 1889, an order was made reciting that the court had heard the argument of counsel on a motion to stay proceedings and dismiss the cause for want of jurisdiction of the court, and, the court being of opinion that the cause was properly before it, and that the judge had jurisdiction of the same, ordering that the stay of proceedings theretofore granted be terminated, and that the judgment of the court made on the 25th day of June, 1889, be carried into effect. It appears that the order for the delivery of the child to the father was obeyed in the presence of the court, but that, Miller having started from Omaha for his home in Ohio with the child, the petitioner Burrus and his wife got into the same train, and crossed the Missouri River on that train, and that when they reached Council Bluffs, in the State of Iowa, on the opposite side of the river, they again made efforts to secure possession of the child. The result of these efforts was, that the father proceeded somewhat further into the State of Iowa, whilst the defendants, taking possession of the child with violence and against the will of the father, returned with it to the State of Nebraska. Thereupon Burrus and his wife were called before the district court by a writ of attachment for contempt [588] in disobeying the orders of the court, and for this contempt Burrus was committed to imprisonment for three months in a county jail, in the custody of the marshal of Nebraska. It is from this imprisonment that he now seeks to be relieved by the present proceedings in this court; and the foundation of his claim of right to be so relieved is that neither the District Court of Nebraska nor *Judge* Dundy, the judge of that court, had any jurisdiction whatever in the original case of habeas corpus before him. That is the only question in the present case, for we have no power under this writ to inquire into mere errors committed by the district court in the progress of that case, and if we had, we are not satisfied that any such errors exist save as to the alleged error of the assumption of jurisdiction in the case. Whether such jurisdiction existed is therefore the sole question before us.

The question of the extent of the authority of the courts of the United States to use the writ of habeas corpus as a means of releasing persons held in unlawful custody has always been clouded with more or less doubt and uncertainty. The Constitution, by declaring that "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," added to the exalted estimate in which that writ has always been held in this country and in England. By the fourteenth section of the Act establishing the judicial courts of the United States, it is declared "that all the beforementioned courts of the United States shall have power to issue writs of *scire facias*,

habeas corpus and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law; and that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment: *Provided*, That writs of habeas corpus shall in no case extend to prisoners in jail unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

590] It will be seen in this section that, while there may be many writs not specifically provided for in the Statute which shall be within the powers of the courts of the United States, the framers of that Statute were careful to mention specifically the writs of *scire facias* and of habeas corpus, and to make some special provisions in regard to the latter. As to the power of the courts to issue any of these writs, it was said that they must be necessary to the exercise of the jurisdiction of the respective courts and agreeable to the principles and usages of law. In reference to the writ of habeas corpus, it is expressly enacted that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant the writ for the purpose of an inquiry into the cause of commitment. This latter clause has been interpreted occasionally as authorizing the issuing of the writ in any case where a person is imprisoned or confined by an order of a court, for the purposes of an inquiry into the cause of commitment. But the proviso, proceeding upon the idea of the first clause, that in order to the issuing of this writ it must be necessary for the exercise of the jurisdiction of the court which issues it, declares that the writ "shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This Statute, of course, left cases of prisoners in confinement by order of state authorities without the benefit of this writ from the courts or justices or judges of the United States, and the law remained in this condition until the events connected with the nullification proceedings in South Carolina, by which officers of the United States engaged in collecting the revenue and performing other duties in that State were for that reason subjected by the laws of South Carolina to imprisonment. In the recent case of *Cunningham* v. *Neagle*, 135 U. S. 1 [34: 55], we have had occasion to review the course of legislation by Congress on the subject of the writ of habeas corpus, which has mainly, as now found in the Revised Statutes of the United States, reference to provisions for
591] protecting the individual liberty of persons, citizens of the United States and subjects or citizens of foreign governments, from illegal imprisonment under state authority. It is not necessary to go over that field on this occasion. It is sufficient to say that the net result of the discussion is, that all the courts of the United States, and the justices and judges of all its courts, are authorized to issue the writ of habeas corpus in any case where a party is imprisoned or held in custody for an act done by or under the authority of the laws of the United States, or where his imprisonment is in violation of the Constitution of the United States, or where it is supposed to be in violation of the Law of Nations or of the United States, in all which cases the federal courts and judges have jurisdiction to make inquiry into the matter, and, in the language of the Statute, when the prisoner is brought before them and the matter is inquired into, the court or justice or judge shall "dispose of the party as law and justice require." It is not now the law, therefore, and never was, that every person held in unlawful imprisonment has a right to invoke the aid of the courts of the United States for his release by the writ of habeas corpus. In order to obtain the benefit of this writ and to procure its being issued by the court or justice or judge who has a right to order its issue, it should be made to appear, upon the application for the writ, that it is founded upon some matter which justifies the exercise of federal authority, and which is necessary to the enforcement of rights under the Constitution, laws or treaties of the United States.

It is true that perhaps the court or judge who is asked to issue such a writ need not be very critical in looking into the petition or application for very clear grounds of the exercise of this jurisdiction, because, when the prisoner is brought before the court, or justice, or judge, his power to make full inquiry into the cause of commitment or detention will enable him to correct any errors or defects in the petition under which the writ issued; and it is upon such hearing to be finally determined by the tribunal before whom the prisoner is brought whether his imprisonment or custody is in violation of the Constitution or laws or treaties of the United States. The cases on this subject, as they have been decided in the courts of the country, are not altogether in accord, but we think this is a fair statement of the law as it stands at the present time, under the statutes of the United States and the decisions of this court.

This subject was considered with much ability in *Ex parte McCardle*, 73 U. S. 6 Wall. 318 [18: 816]. In that case, although the court was speaking mainly of the jurisdiction of this court by way of appeal, yet it made the following observation with reference to the Act of February 5, 1867 (14 U. S. Stat. 385), then recently passed. The language of that Statute was, that in addition to the authority already conferred on the several courts of the United States and the justices and judges of said courts, they shall have power "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States; and it shall be lawful for such person so restrained of his or her liberty

to apply to either of said justices or judges for a writ of habeas corpus, which application shall be in writing and verified by affidavit, and shall set forth the facts concerning the detention of the party applying, in whose custody he or she is detained, and by virtue of what claim or authority, if known; and the said justice or judge to whom such application shall be made shall forthwith award a writ of habeas corpus, unless it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the Constitution or laws of the United States." In reference to this Statute, *Chief Justice* Chase, speaking for the court, in that case, said: "This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction. It is to this jurisdiction that the system of appeals is applied." The provision of this Statute is reproduced, with others on the same subject, in section 753 of the Revised Statutes.

In *Ex parte Dorr*, 44 U. S. 8 How. 103 [11: 514], an application was made to this court for a writ of habeas corpus to bring up the body of Thomas W. Dorr, of Rhode Island, on whose behalf it was alleged that he was held under sentence of death in violation of the Constitution and laws of the United States. The law then existing on the subject of the powers of the court in awarding writs of habeas corpus was the fourteenth section of the Judiciary Act of 1789, which we have already recited. This court, construing that section, said: "The power given to the courts, in this section, to issue writs of *scire facias*, habeas corpus, etc., as regards the writ of habeas corpus, is restricted by the proviso to cases where a prisoner is 'in custody under or by color of the authority of the United States, or has been committed for trial before some court of the same, or is necessary to be brought into court to testify.' This is so clear, from the language of the section, that any illustration of it would seem to be unnecessary. The words of the proviso are unambiguous. They admit of but one construction; and that they qualify and restrict the preceding provisions of the section is indisputable. Neither this nor any other court of the United States, or judge thereof, can issue a habeas corpus to bring up a prisoner, who is in custody under a sentence or execution of a state court, for any other purpose than to be used as a witness; and it is immaterial whether the imprisonment be under civil or criminal process." The motion for the habeas corpus was overruled. It was on account of this limited power of the federal courts to issue writs of habeas corpus that the various statutes referred to in *Ex parte Neagle* have since been passed; among the rest, the one construed by this court in *Ex parte McCardle*, in which it is clear, from the language of *Chief Justice* Chase, that the original limitation upon the power remains, except as it is extended by the Statute of 1867 and others on the same subject.

In the case before us there was no pretense that the child was restrained of its liberty, or that the grandfather withheld it from the possession and control of the father, under or by virtue of any authority of the United States, or that his possession of the child was in violation of the Constitution or any law or treaty of the United States. The whole subject of the domestic relations of [59 husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any Act of Congress, or any treaty of the United States or its Constitution.

The case of *Barry* v. *Mercein* is very instructive on this subject. Mr. Barry, who was a subject of the Queen of Great Britain, married an American lady, and after the birth of two children they separated, Mr. Barry residing in Nova Scotia and the wife in the State of New York. Mr. Barry made application first to the Court of Chancery of New York, by a writ of habeas corpus, to recover possession of his daughter. In the case of *People* v. *Mercein*, 8 Paige, 47, 55, 4 N. Y. Ch. L. ed. 337, 343, *Chancellor* Walworth refused the relief he asked, saying that "a writ of habeas corpus *ad subjiciendum* is not, either by the common law or under the provisions of the Revised Statutes [of New York], the proper mode of instituting a proceeding to try the legal right of a party to the guardianship of an infant."

Mr. Barry then made application to the Circuit Court of the United States for the Southern District of New York, where his case was heard by *Judge* Betts, who delivered a very careful and a very able opinion, which had been furnished to us, in which he held that his court could not exercise the common-law function of *parens patriæ*, and therefore had no jurisdiction over the matter, nor had it by virtue of any statute of the United States. The petitioner in that case alleged that he was a native-born subject of the Queen of Great Britain, residing in Nova Scotia, and that his wife was the daughter of Mary Mercein, then a citizen of the State of New York, and that the mother and daughter held the custody of his child in violation of law. *Judge* Betts then, in a very able opinion, discusses the jurisdiction of the courts of the United States generally, and especially of the circuit court, in regard to a case like this, with the result which we have stated.*

*Following is a copy of this opinion, delivered [597] May 25, 1844. (See 42 Fed. Rep. 113.)

BETTS, *J.*: On the first day of term the petitioner presented in open court, and filed, his petition praying that "the people's writ of habeas corpus *ad subjiciendum* may issue in his behalf directed to

[595] Prior to this the petitioner had made application to this court, in the exercise of its original jurisdiction, for the writ of habeas corpus, but the court declared that the case was not of that class of which it could assume original jurisdiction, and that no

Mary Mercein, relict of the late Thomas R. Mercein, deceased, of the City of New York, and to [598] Eliza Anna Barry, wife of the petitioner, commanding them forthwith, immediately on the receipt of said writ, to have the body of Mary Mercein Barry, daughter of the petitioner, by them imprisoned or detained, with the time and cause of such imprisonment or detention, before this court, to do and receive what shall then and there be considered of the said Mary Mercein Barry."

The petitioner alleges that he is a native-born subject of the Queen of Great Britain, resident in Nova Scotia, and that he has never been naturalized or claimed naturalization under the laws of the United States.

That in April, 1835, in the City of New York, he intermarried with Eliza Anna, daughter of the late Thomas R. Mercein, a citizen of said city.

That, in the month of May thereafter, he returned to Nova Scotia accompanied by his wife, and there resided about a year, when he removed his family to the City of New York, where he resided until April, 1838, when he returned to Nova Scotia with a portion of his family, and has continued to reside there from that time.

That a son and daughter were born of said marriage during his residence in the City of New York, and on his removal to Nova Scotia he left his wife and two children temporarily with her father in the City of New York. That in the month of May thereafter he returned to New York, when difficulties arose between him and his wife respecting her removal to Nova Scotia, and she declared her determination to part with him rather than think of going to Nova Scotia.

That he remained in New York until the 28th of June, 1838, and, with a view to arrange amicably the differences between himself and wife, he finally agreed to allow her to continue in New York at her father's house until the first day of May, 1839, and to retain in her care their said daughter, Mary Mercein, during that period, and also their son until such time as the petitioner might think proper to require him.

That in September following he returned to New York and made every possible effort to conciliate his wife and induce her to consent to go at some future time to her own proper home in Nova Scotia, but she utterly refusing and declaring that she had no expectation of so doing, the petitioner returned himself, taking his son along with him.

That these attempts to conciliate her were fre- [599] quently repeated without avail, and the petitioner awaited the expiration of the time he had agreed she should remain with her father, and on the 2d day of May, 1839, formally demanded of the said Thomas R. Mercein the surrender of his said wife and child, which demand was not complied with.

That his wife, from that time to the present period, has refused to return to his home and has absented herself therefrom, contrary to his desires, and has detained and does still keep from him, unlawfully, his daughter, who is now in the seventh year of her age. That Thomas R. Mercein has lately deceased, and that thereby the wife of the petitioner is left without any present property, and little or no prospect of any in reversion, and that she has no property whatever of any kind in her own right, and has no means known to the petitioner for the present or future support of herself and their daughter, and that she resides with and is harbored in her present vicious and illegal condition by her mother, Mary, relict of the late Thomas R. Mercein.

The petitioner alleges his own ability to provide comfortably for the support and education of his daughter, and especially claims that she is a British subject, allegiant to the crown of Great Britain, at least during her minority.

The petitioner sets forth many other matters of aggravation in the separation from him, persisted in by his wife, and the countenance and support of her by her family in her conduct and refusal to return to her home.

These particulars it is unnecessary to rehearse, and the right to the remedy or relief claimed by the petitioner is not, in this stage of the case, to be determined by a consideration of the relative conduct of these parents toward each other or the child, or of the advantages to the infant, to be placed with the one rather than the other.

These matters would be most material if the case had proceeded so far as to require from the court a decision upon the question as to the fit or proper disposal of the infant.

The point now to be considered is, whether the petitioner has presented a case coming within the jurisdiction of this court; or, if this court has cognizance of the matter, whether the facts stated by the petitioner entitle him to the interference of the court in the manner prayed for.

The same petition in substance was presented to the Supreme Court of the United States at the last [600] term, and was supported by an elaborate argument on the part of the petitioner.

The court observes (*Ex parte* Barry, 2 How. 65): "It is the case of a private individual, who is an alien, seeking redress for a supposed wrong done him by another private individual, who is a citizen of New York. It is plain, therefore, that this court has no original jurisdiction to entertain the present petition. . . . Without, therefore, entering into the merits of the present application, we are compelled by our duty to dismiss the petition, leaving the petitioner to seek redress in such other tribunal of the United States as may be entitled to grant it. If the petitioner has any title to redress in those tribunals, the vacancy in the office of judge of this court assigned to that circuit and district creates no legal obstruction to the pursuit thereof."

This instruction of the supreme court seems to be regarded by the petitioner as a declaration of that high tribunal that the United States Circuit Court for this District has the power to grant the relief demanded by the petition.

The expression of such opinion by that court, even in an incidental manner and not on a point under adjudication, would have the highest influence with this court, and would undoubtedly be adopted here as the rule of decision.

But the cautious and reserved phraseology employed by the supreme court in respect to the competency of any other United States tribunal to take cognizance of the subject is, in my opinion, to be regarded rather as an admonition to the inferior courts that grave difficulties rested over the matter, than an assurance to them that their original jurisdiction contained the authority to award the common-law writ of habeas corpus *ad subjiciendum*, prayed for. That court says of itself: "We cannot issue any writ of habeas corpus, except when it is necessary for the exercise of the jurisdiction, original or appellate, given to it by the Constitution or laws of the United States," language plainly not employed to import that a circuit court has in this behalf a capacity transcending that of the supreme court, and can create a jurisdiction to itself by awarding writs of habeas corpus.

This opinion of the supreme court, I think, sup-

ground for the exercise of appellate jurisdiction was presented; and it therefore refused the application. *Ex parte Barry*, 43 U. S. 2 How. 65 [11: 181]. From the judgment of the circuit court by *Judge* Betts, Mr. Barry brought the case to this court by

---

plies no authority or suggestion in aid of the jurisdiction now invoked, and, taken most favorably for the petitioner, merely leaves the question as to its power to award the writ to be settled by the [601] circuit court in consonance with the Constitution and laws of the United States.

The application to the supreme court was supported by an exposition of this case, intended to show that this petitioner's claim had been unjustly adjudged against in the courts of this State, and that the interposition of that tribunal was necessary to correct these erroneous judgments and secure the legal rights of the petitioner.

That argument, with the decision of the supreme court on this motion, was also submitted to me with the petition, when filed.

On the perusal of these papers, I at first hesitated as to the course most proper to be pursued, preliminarily; whether to grant a rule against Mrs. Barry and Mrs. Mercein to show cause why the writ should not issue, or even to award the writ, with a view to have the entire case spread before the court, or such points presented as would lead to a definite decision of the case.

But as the adoption of either alternative must involve great delay and expense, both in the disposition of the case in the first instance, and in removing it by either party to the supreme court for revision, and as the right of the petitioner to relief in this court, under any aspect of the case, was doubtful, I conceived it the least expensive and more convenient course to inquire and decide whether the petitioner presented a case of which this court should take cognizance.

When the cause of imprisonment or detention shown by the petition satisfies the court that the prisoner would be remanded, if brought up, the writ will not be awarded. Watkins' Case, 3 Pet. 193, 201, per Marshall, *Ch. J.*: Milburn's Case, 9 Pet. 704, 706; 2 Story, Const. Law, 207, § 1341; *Ex parte* Bollman, 4 Cranch, 75.

The practice in the English courts is the same. Bac. Abr. *Habeas Corpus*, B. No. 44, case cited; 4 Comyn, Dig. (Day's ed.) 550, and *note* 3; Hallam's Const. Law, 20; Penrice & Wynn's Case, 2 Mod. 306; Slater v. Slater, 1 Lev. 1; The King v. Marsh, 3 Bulst. 27; Sir William Fish's Case, cited in White v. Wiltsheire, 2 Rolle, 137, 138.

If upon the facts stated by the petitioner it shall be determined that the court cannot grant the relief prayed for, either for want of jurisdiction, or because the law is against his demand, it would be inexpedient and oppressive to cause the parties implicated to be arraigned before this court and held [602] under its control, pending the discussion and consideration of the subject, and, accordingly, upon the doubts arising from a perusal of the papers, I deemed it proper to invite the petitioner in the first instance to support his petition by arguing these two points:

(1) Whether the United States circuit court has jurisdiction over the subject matter of his petition.

(2) If such jurisdiction exists, do the facts stated upon the petition give the petitioner, under the law of the land, a title to the remedy prayed for?

The petitioner has read an argument prepared with great research and ability in support of the affirmative of both inquiries, bringing into review numerous English and American decisions upon the same question, and has submitted the manuscript to the examination of the court. With the aid of this most ample discussion of this subject, I proceed to pronounce the result of my reflections upon this interesting and important case.

The incongruity of awarding proofs, at the instance of husband or wife, to take away an infant child from the parent having it in nurture and keeping, upon the allegation that such keeping is wrongful imprisonment, is most palpable and striking. It is a bold figure of speech, or rather fiction, to which the law ought not to resort, unless indispensably necessary to be employed in preservation of parental rights, or the personal fondness of the child. The courts, however, assume such suppositious imprisonment to exist as the foundation for jurisdiction, to a limited extent, over the detention of infants, even by their parents, on the ground that the writ is rather to be considered a proceeding in the name and behalf of the sovereign than by one named person against the other. Com. v. Briggs, 16 Pick. 203.

There is no reason to doubt that originally the common-law writ was granted solely in cases of arrest and forcible imprisonment under color of claim of warrant of law.

As late as 2 James II. the court expressly denied its allowance in a case of detention or restraint by a private person (Rex v. Drake, Comb. 35, 14 Vin. Abr. 214); and the Habeas Corpus Act of Charles II., which is claimed as the Magna Charta of British liberty, has relation only to imprisonment on criminal charges. 3 Bac. Abr. 438, *note*.

It is not important to inquire at what period the writ was first employed to place infant children under the disposal of courts of law and equity. [60 This was clearly so in England anterior to our Revolution (Rex v. Smith, 2 Str. 982; Rex v. Delaval, 3 Burr. 1434; Blisset's Case, Lofft, 748); and the practice has been fully confirmed in the continued assertion of the authority by those courts unto the present day (King v. DeManneville, 5 East, 221; De Manneville v. DeManneville, 10 Ves. Jr. 52; Ball v. Ball, 2 Sim. 35; *Ex parte* Skinner, 9 J. B. Moore, 278; King v. Greenhill, 4 Ad. & El. 624); and this indifferently, whether the interposition of the court is demanded by the father or mother. 4 Ad. & El. 624, *ubi sup.*; 9 Moore, 278, *ubi sup.*

The late Act of 2 and 3 Vict., chap. 54 (1839), sanctions the principle, and would seem to reinstate the old dictum that the judgment and discretion of the court is not to be controlled by any supposed legal right of the father in exclusion of that of the mother, if the infant be within the age of seven years. An Act of the State of New York, passed in 1830, had established the same doctrine within this State by positive law; and, independently of this statute, the course of the American courts in this respect had been substantially in consonance with the decisions in England, antecedent to the Revolution. *Re* McDowle, 8 Johns. 332; *Re* Waldron, 13 Johns. 418; *Re* Wollstonecraft, 4 Johns. Ch. 80; People v. Mercein, 8 Paige, 47; Com. v. Addicks, 5 Binn. 520; Com. v. Briggs, 16 Pick. 203; State v. Smith, 6 Greenl. 462.

The later cases in New York are founded upon a principle common to all the decisions cited (People v. ——, 19 Wend. 16; Mercein v. People, 25 Wend. 64, 80; People v. Mercein, 3 Hill, 399); but in so far as they may seem to favor the latest adjudications in England, in respect to the fixed and controlling right of the father as the true exposition of the common-law rule, they are modified and overruled by the decisions of the court of errors. Mercein v. People, 25 Wend. 106; and Sittings, 1844, MSS.

The petitioner in this case asks of the court the award of the common-law writ of habeas corpus *ad subjiciendum*, with all of its common-law attributes and efficacy.

That is a high mandate, by means of which courts or judges, in protection of the liberty of in-

a writ of error, and a motion was made to dismiss the case for want of jurisdiction in this court. In this case, which was very elaborately argued, the opinion of the court was delivered by *Chief Justice* Taney, in which he said that "in the argument upon

dividuals, exercise functions appertaining to the sovereign power, and which in intendment of law rest only in the sovereign and are co-extensive with his dominion. Kendall v. United States, 12 Pet. 524, 627, 629.

[604] The writ is purely one of prerogative. Whether emanating from a King or a State, whether returnable before the King in person (as it undoubtedly was in its origin), or awarded and acted upon by magistrates as surrogates of the sovereign authority, it has always been made to bring the party imprisoned directly before the supreme power, that if there be no due cause of law for his detention, the sovereign may set him free of his restraint. 3 Bl. Com. 131; Bac. Abr. *Habeas Corpus*, 421; 3 Story, Const. Law, 207; *Ex parte* Watkins, 3 Pet. 193, 202; 2 Kent, Com. 26, 29.

In respect to married women or other adults, held in detention by private individuals, the sovereign, through this writ, acts as *conservator pacis* and *custos morum*, and, in regard to infant children, as *parens patriæ*, making, in these high capacities, summary order that the party be forthwith set at liberty, if improperly and wrongfully detained. Lofft, 748, and 13 Johns. 418, above cited; People v. Chegaray, 18 Wend. 637; 8 Paige, 47, above cited; United States v. Green, 3 Mason, 482. The state, thus acting upon the assumption that its parentage supersedes all authority conferred by birth on the natural parents, takes upon itself the power and right to dispose of the custody of children, as it shall judge best for their welfare. People v. Chegaray, 18 Wend. 642, 643; Blisset's Case, Lofft, 748.

The cases before cited show that the English and American courts act in this behalf solely upon the assertion of the right of the sovereign whose power they administer, to continue or change the custody of the child at his discretion, as *parens patriæ*, allowing the infant, if of competent age, to elect for himself; if not, making the election for him.

Even in the extraordinary conclusions drawn from the facts brought to light in Com. v. Addicks, 5 Binn. 520, and The King v. Greenhill, 4 Ad. & El. 624, both courts, in denying that these facts called for any change of the custody of the children, readjudged the principle, that it was their province, at common law, authoritatively to decide that question according to their legal discretion.

Does this common-law prerogative, in relation to infants, rest in the government of the United States, and has the circuit court competent authority to exercise it?

The argument bearing upon the first branch of this inquiry assumes two propositions as its basis: (1), that the government of the United States is [605] supreme over all subjects within its cognizance; and (2), that the common law of England is embodied with, and has become a measure and source of authority to, the national government, and is to be enforced in the circuit court, whenever persons competent to sue in those courts prosecute their rights therein. It is believed that neither of these propositions can be maintained, and certainly not in respect to the subject matter of this proceeding.

Many of the powers of the general government are unquestionably supreme and exclusive, while others, especially those in relation to remedies afforded by its courts to private suitors, are only concurrent with similar powers possessed by the state governments. If the power in respect to parties competent to sue in the national federal courts could be supposed to exist in its absolute sense in the United States government, its exercise has been modified and restricted by Congress in the 11th section of the Act of September 24, 1789, which gives the circuit courts no more than a concurrent jurisdiction with the state courts, of suits of a civil nature, at common law. 2 Stat. 60.

Nor again do all attributes of sovereignty devolve upon the national government. Whether considered as emanating directly from the people in their aggregate capacity, or as proceeding from the States, in their independent organization and character, the government of the Union is one of special powers, defined or necessarily implied in the terms of the grant. McCulloch v. Maryland, 4 Wheat. 407; 2 Story, Const. § 1907; Rhode Island v. Massachusetts, 12 Pet. 657.

Though the point has been labored with ability by a late jurist of eminence in this department of legal learning, to deduce from the circumstances attendant upon the establishment of this government, that the common law became embodied in it, as an efficient principle of its authority and action, (Du Ponceau on Jurisd. 85-90), yet the doctrine has never been declared or sanctioned by our courts.

So far as the decisions have gone, they tend to repudiate the principle *in toto*. United States v. Hudson, 7 Cranch, 32; United States v. Coolidge, 1 Wheat. 415.

There is, accordingly, no sure foundation for the assumption that the federal government possesses common-law prerogatives inherent in the sovereign, which can be exercised without authority of positive law. Martin v. Hunter, 1 Wheat. 304, 329.

If any common-law prerogative in relation to the [604] administration of justice can be proved to exist in the sovereignty of the United States, it must, upon the same principle, be endowed with all such prerogatives, and can, on the like authority, unless inhibited by positive law, award writs of mandamus, *quo warranto*, *ne exeat*, or mandates to citizens abroad to return home on pain of confiscation of their estates (Comyn's Dig. *Prerogatives*, D. 34, 35), or this writ of habeas corpus, they being all common-law writs *ejusdem generis*.

That such attributes or functions of sovereignty cannot be inherent in the United States government necessarily results from the character of the government and the objects of its constitution.

It is not designed, in its organization or aim, to regulate the individual or municipal relations of the citizen. These are left under the dominion of the state government; and there accordingly exists no relation between the nation and the individuals which affords foundation for these prerogatives.

The social or personal duties or liabilities of the citizens come within the control of the general government only when remitted to its charge by a special cession of authority, and then solely to the end that such regulations as are of a federal character may be enforced,—as in relation to land and naval forces, and persons in the employ of the United States, the punishment of offenses, etc., etc.,—but in other respects the national government does not supply the law governing the citizen in his domestic or individual capacity. These particulars appertain to the institutions and policy of the respective States.

This reasoning, however, may not be supposed to meet fully the case presented by the petitioner; for although, in the abstract, there may be no prerogative authority in the head of the United States government, yet the argument would maintain that its courts of justice, as organized, may possess all the powers exercised by superior courts at

this motion, the power of the circuit court to award the writ of habeas corpus in a case like this has been very fully discussed at the bar. But this question is not before us, unless we have power by writ of error to re-examine the judgment given by the circuit

common law, and the issuing and acting upon writs of habeas corpus *ad subjiciendum* become thereby a branch of jurisdiction necessarily incident to the constitution of such courts.

This hypothesis overlooks the peculiar foundation of the United States judiciary, and the allotment of its functions in respect to the powers of the States.

[607] The federal government came into force coördinately with, or as the concomitant of, state governments at the time existing, and in the full exercise of legislative, executive and judicial sovereignty.

These sovereignties are left entirely under the action of the general government, except in so far only as the powers are transferred to the federal head, by the Constitution, or are by that prohibited to the States, or, in some few instances, are alloted to be exercised concurrently by the two governments.

The United States judiciary is constituted and put in action in the several States, in subordination to this fundamental principle of the Union, and empowered to exercise only such peculiar and special supremacy, and not one in its absolute sense.

To render this connection of the United States judiciary with that of the States more intimate and entire, and to take away all implication that it was a paramount power acting irrespective of state laws, or that it possessed or could exercise any inherent jurisdiction countervailing those laws, the Act of Congress organizing the courts establishes it as an element in their procedure that the laws of the State where the court sits shall be its rule of decision in common-law cases.

It necessarily results, as a consequence of this special character of the United States judiciary, that it can possess no powers other than those specifically conferred by the Constitution or laws of the Union, and such incidents thereto as are necessary to the proper execution of its jurisdiction. All other judicial powers necessary to the complement of supreme authority remain with and are exercised by the States.

This doctrine is sufficiently indicated in the decision of the supreme court made in this case at the last term, and it has been invariably recognized from the earliest adjudications of the court. Chisholm v. Georgia, 2 Dall. 419, 432, 435; *Ex parte* Bollman, 4 Cranch, 75; *Ex parte* Watkins, 3 Pet. 201; Kendall v. United States, 12 Pet. 524.

The jurisdiction of the United States courts depends exclusively on the Constitution and laws of the United States, and they can, neither in criminal nor civil cases, resort to the common law as a source of jurisdiction. United States v. Hudson, 7 Cranch, 32; United States v. Coolidge, 1 Wheat. [608] 415; Chisholm v. Georgia, 2 Dall. 432; *Ex parte* Bollman, 4 Cranch, 75; Pawlet v. Clark, 9 Cranch, 333; *Ex parte* Randolph, 2 Brock. 477; Wheaton v. Peters, 8 Pet. 591, 658; The Steamboat Orleans, 11 Pet. 175; Kendall v. United States, 12 Pet. 524.

It is now argued that this principle is limited to the supreme court; but that in respect to the circuit courts, they have a common-law jurisdiction incident to their constitution, inasmuch as judicial sovereignty resides in them, rendering the range of their original jurisdiction co-extensive with the subjects of litigation arising under the Constitution and laws of the United States, and because all remedies not otherwise provided are, in the exercise of that judicial sovereignty, to be in conformity to the common law.

Although the speculations of our most eminent jurists may countenance this argument (Du Ponceau, 85; 1 Kent, Com. 341), yet it has not received the sanction of the United States courts. Chisholm v. Georgia, 2 Dall. 435; Kendall v. United States, 12 Pet. 616, *per cur.*, and 626, Taney, *Ch. J.*; *Ex parte* Bollman, 4 Cranch, 87; *Ex parte* Randolph, 2 Brock. 477, Marshall, *Ch. J.*; Lorman v. Clarke, 2 McLean, 568.

The distinction established by the cases is clear and practical, and embraces all United States courts alike, and is, in effect, that those courts derive no jurisdiction from the common law, but that in those cases in which jurisdiction is appointed by statute, and attaches, the remedies in these courts are to be according to the principles of the common law. Baines v. Schooner James, 1 Baldw. 544, 558; Robinson v. Campbell, 3 Wheat. 212, 223; United States v. Hudson, 7 Cranch, 32; *Ex parte* Kearney, 7 Wheat. 38; Anderson v. Dunn, 6 Wheat. 204; *Ex parte* Randolph, 2 Brock. 477.

It is not, accordingly, conclusive of their right to take cognizance of the subject matter, to show that the parties connected therewith are competent to sue or be sued in the United States courts, and that there is a perfect right of action or defense thereupon supplied such parties at common law. The evidence must go further, and prove that the particular subject matter is one over which the courts are by Act of Congress appointed to act, or that the question has relation to the remedy alone, and not to the jurisdiction of the court. United States v. Bevans, 3 Wheat. 336, 389; McCulloch v. Maryland, *ubi sup.* at p. 407; Rhode Island v. Massachusetts, *ubi sup.* at p. 721.

The authority to take cognizance of the detention of infants by private persons, not held under claim, or color, or warrant of law, rests solely in England on the common law. It is one of the eminent prerogatives of the crown, which implies in the monarch the guardianship of infants paramount to that of their natural parents. The royal prerogative, at first exercised personally *ad libitum* by the King (12 Pet. 630), and afterwards, for his relief, by special officers, as the Lord High Constable, the Lord High Admiral and the Lord Chancellor, in process of time devolved upon the high courts of equity and law, and in them this exalted one, of allowing and enforcing the writ of habeas corpus *ad subjiciendum*, became vested as an elementary branch of their jurisdiction. In the performance, however, of this high function in respect to the detention of infants by parents, etc., the court or judge still acts with submission to the original principle, out of which it sprang, that infants ought to be left where found, or to be taken from that custody and transferred to some other, at the discretion of the prerogative guardian, and according to its opinion of their best interest and safety. [609]

The reference already made to the origin and object of our federal union demonstrates that no prerogative of this character could be exercised as an incident to its qualified and peculiar sovereignty; and I think it equally clear that the inherent authority of no branch of the judiciary can transcend that of the government in this behalf, and that it has no capacity to issue this writ, or act upon it, except under appointment by positive law. *Ex parte* Bollman, 4 Cranch, 75, 93.

It remains then only to consider whether such jurisdiction is conferred upon the circuit courts by statute; for, even if the language of the Constitution might import such authority to be within the competency of the judiciary, it is authoritatively established that the circuit courts, at least, cannot exercise jurisdiction as to individual rights, because

court, and to affirm or reverse it, as we may find it to be correct or otherwise." He then proceeds to say that the appellate jurisdiction of the supreme court is governed by the amount or value in controversy, and adds: "In the case before us, the controversy is

authorized by the Constitution, unless Congress has specifically assigned it to them. They possess no jurisdiction other than that which both the Constitution and Acts of Congress concur in conferring upon them. Turner v. Bank of North America, 4 Dall. 8, 10; United States Bank v. Devaux, 5 Cranch, 61; Livingston v. Van Ingen, 1 Paine, 45; Hodgson v. Bowerbank, 5 Cranch, 303; Kendall v. United States, *ubi sup.*; *Ex parte* Bollman, *ubi sup.* at p. 98; McClung v. Silliman, 6 Wheat. 598.

The 9th section of the first article of the Constitution, paragraph 2, declaring that "the privilege [610] of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it," does not purport to convey power or jurisdiction to the judiciary. It is in restraint of executive and legislative powers, and no further affects the judiciary than to impose on them the necessity, if the privilege of habeas corpus is suspended by any authority, to decide whether the exigency demanded by the Constitution exists to sanction the act.

So, although the 2d section of the 3d article gives the United States judiciary jurisdiction over all cases in law and equity between our own citizens and the citizens or subjects of foreign states, yet, as already shown, the circuit court cannot, under that provision, act on one of the subjects without an express authorization by statute. McClung v. Silliman, *ubi sup.*

In our government the judiciary power acts only to give effect to the voice of the Legislature. Osborn v. United States Bank, 9 Wheat. 738, 866.

The material question in the case must, accordingly, be, whether Congress has given to the circuit courts the special jurisdiction appealed to by the petitioner.

Judge Story holds that the courts of the United States are vested with full authority to issue the great writ of habeas corpus in cases properly within the jurisdiction of the national government. 2 Story, Const. § 1341.

The general doctrine the commentator is discussing, and the authorities supporting it, have relation to the law as it exists in England and in the respective States of the Union. The only case referred to as giving application of the general doctrine to the United States courts is that of *Ex parte* Bollman and *Ex parte* Swartwout, 4 Cranch, 75.

That was a case of imprisonment on a criminal charge, under and by color of the authority of the United States, the prisoners having been committed by the Circuit Court of the District of Columbia, on a charge of treason against the United States; and the supreme court held that, though it could not take cognizance of the matter under any common-law jurisdiction, yet the Act of Congress of September 24, 1789, had conferred the jurisdiction, and they proceeded, by virtue of the Statute, to exercise it in the case.

The court nowhere advert to an implied power in the circuit courts broader than that vested in [611] the supreme court, which would empower a circuit court to grant the writ upon the fo ing of a general jurisdiction in respect to the parties to be affected by it.

The positions adopted as the basis of the decision would seem to look to an entirely opposite conclusion. *Chief Justice* Marshall says: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. . . . It extends" (in the case of United States courts) "only to the power of taking cognizance of any question between individuals, or between the government and individuals. To enable the court to decide on such question, the power to determine it must be given by written law."

This language of the chief justice is explicit against the theory that the United States courts have necessarily cognizance of all subjects of litigation arising between parties over whom they have jurisdiction.

So in respect to another prerogative writ, that of mandamus, the supreme court, in disavowing in itself the power to issue it in the common-law sense, holds, in terms not less definite and decisive, that the circuit courts cannot award it but by virtue of express authority from statute (Kendall v. United States, 12 Pet. 524): and this conclusion has no exclusive connection with the particular writ of mandamus, but flows from the doctrine definitely announced by the court, that the United States judiciary has no authority to award prerogative writs of any character further than the power is specifically given by statute.

The relator refers to the argument of counsel, in the Case of Bollman and Swartwout, as demonstrating that the 14th section of the Act of Congress of September 24, 1789, imparts to the United States courts authority as ample as exists in the supreme courts of judicature at common law, in the application and enforcement of the writ of habeas corpus.

No judicial decision (unless it be that of United States v. Green, 3 Mason, 482) is found which sanctions that exposition of the Statute; and it accordingly becomes necessary to examine with attention the foundation of the construction contended for.

The terms of the Statute are "that all the before-mentioned courts of the United States shall have [612] power to issue writs of *scire facias*, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment: *Provided*, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless when they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The scope and purport of this enactment were very carefully considered by the supreme court. *Ex parte* Bollman, 4 Cranch, 75; *Ex parte* Watkins, 3 Pet. 201. The courts being authorized to issue the writ "for the purpose of an inquiry into the cause of commitment," the supreme court regarded the provisions of the Act as incorporating in a considerable degree the English law on the subject, and that the Statute of 31 Charles II. had defined the cases in England in which relief could be had, under the writ, by persons detained in custody, and was an enforcement of the common law in that respect.

The argument of the court tends clearly to the conclusion that our Act was to be construed as applicable to the cases embraced within the English Habeas Corpus Act, and as framed in reference to the law established by that Statute.

If the term "commitment" in our Act is used in its common acceptation, it would have reference

between the father and mother of an infant daughter. They are living separate from each other, and each claiming the right to the custody, care and society of their child. This is the matter in dispute; and it is evidently utterly incapable of being reduced to

to the forcible confinement of a person under color of legal protest or authority. In its common-law sense, it imports an imprisonment under a warrant or order on a criminal charge and no other (4 Bl. Com. 296; 2 Hawk. chap. 16, §§ 1, 2, 3, 13, 14, 15), and under the Statute, all the judges of England decided that the Act of Charles did not extend to any cases of imprisonment, detainer or restraint whatsoever, except cases of commitment for criminal or supposed criminal matters. 3 Bac. Abr. 438, *note*.

As our Statute uses the term "commitment," and drops the limitation of it in the English Act "for any criminal or supposed criminal matter," it may be reasonable, in favor of liberty, to understand it in its broadest signification. A court of deservedly high character decided that, under our Statute, a writ of habeas corpus lies to inquire into the cause of commitment, though made on civil process. *Ex parte* Randolph, 2 Brock. 447, 476; see also Bank of United States v. Jenkins, 18 Johns. 303, 309. But it is to be borne in mind that the supreme court hesitated as to the soundness of this interpretation of the Statute; for, in *Ex parte* Wilson, *Chief Justice* Marshall, after consultation with the judges on a motion for a habeas corpus, stated that the court was not satisfied that a habeas corpus is the proper remedy in a case of arrest under civil process (6 Cranch, 52), and the writ was denied; and to the same effect was the decision of the Supreme Court of New York. Cable v. Cooper, 15 Johns. 152.

If the more extended interpretation of the term be adopted, and cases of commitment for civil or criminal matters may be brought under review by habeas corpus, yet in view of the qualified character of the federal government, and the special jurisdiction of its judiciary, the more reasonable inference would be that Congress intended the protection of this writ should be interposed by its courts only in cases of imprisonment under color or claim of the authority of the United States.

Rawle, an eminent commentator on the Constitution, says that the writ of habeas corpus is restrained to imprisonment under the authority of the United States. Rawle on Const. 115, 2d ed. 117.

Every adjudicated case in the United States courts, with one exception, has been under writs sued out for relief against an actual arrest of a party under process, or his confinement by claim of authority of the United States. United States v. Hamilton, 3 Dall. 17; United States v. Johns, 4 Dall. 412; *Ex parte* Burford, 3 Cranch, 448; *Ex parte* Bollman, 4 Cranch, 75; *Ex parte* Kearney, 7 Wheat. 38; *Ex parte* Watkins, 3 Pet. 193, 201; *Ex parte* Milburn, 9 Pet. 704; United States v. Bainbridge, 1 Mason, 71; *Ex parte* Carbrera, 1 Wash. C. C. 232; *Ex parte* Randolph, 2 Brock. 471, in which a doubt is made whether the writ may not apply in case of imprisonment on civil process.

Judge Washington, on habeas corpus, adjudged the matter not within the cognizance of the circuit court, because the prisoner was not in custody by authority of the United States, and was not committed for trial before any of its courts. *Ex parte* Cabrera, 1 Wash. C. C. 237.

The proviso to the 14th section, above recited, looks to such limitations of the writ. It is palpable that Congress did not intend that an inquiry into the cause of commitment of a person detained should authorize the United States courts to interfere with his custody, unless the subject matter upon which he was confined was to be acted on and decided by the United States tribunals.

This policy of the Statute is emphatically indicated by the Act of March 2, 1833, chap. 57, § 7, in which special powers are conferred on the United States courts to liberate by habeas corpus even persons confined under authority of state law, for any act done or omitted to be done in pursuance of a law of the United States, or in pursuance of any order, process or decree of any judge or court thereof. Both clauses denote that it was the violation of a law of the United States or its just authority, in the imprisonment of the citizen, that was intended by Congress to be inquired into and remedied by habeas corpus before the courts of the United States.

My opinion upon this review of this subject is, that there is no foundation for the claim that there is vested in the United States government a common-law prerogative, or that the circuit court can, upon the footing of common-law prerogative, by writ of habeas corpus, assume and exercise this function of *parens patriæ* in relation to infant children held in detention by private individuals, not acting under color of authority from the laws of the United States.

And it also seems equally clear to me that the authority given by the 14th section of the Judiciary Act, to issue writs of habeas corpus "for the purpose of an inquiry into the cause of commitment," necessarily restricts the jurisdiction of the courts to commitments under process of authority of the United States.

I should, upon the conclusions against the competency of the court to take cognizance of the matter, feel constrained to deny the petition, but for the decision of the Circuit Court in the First Circuit, in an analogous case, where the relief now prayed for was granted. United States v. Green, 3 Mason, 482.

The jurisdiction of the court was not brought in question, and was undoubtedly conceded by the parties, but the acquiescence in a legal proposition so important, by a judge of the exact and varied learning of *Judge* Story, and one whose judicial habit is so cautious and investigating, is an imposing authority in its support.

A citizen of New York sued out a habeas corpus against a citizen of Rhode Island, the grandfather of his infant child, to recover possession of the child, which was retained and defended against the demand of the father. The court took cognizance of the subject matter, and, after full hearing, decided the question of rightful custody upon its merits in favor of the father. It was supposed that the circuit court possessed such authority under the provisions of the 11th and 14th sections of the Judiciary Act.

The 11th section gives circuit courts original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, etc., etc., when one party is a citizen of the State where the suit is brought and the other an alien, etc., etc. 2 Bioren's Laws U. S. 60, 61; 1 Stat. 78.

It is well settled that Congress has not, in this section, exhausted the powers vested in them by the 2d section of the 3d article of the Constitution, and imparted to the circuit courts cognizance of all cases at common law which might be within the control of the legislative power. Turner v. Bank of North America, 4 Dall. 11; Bank of United States v. Devaux, 5 Cranch, 61.

The supreme court say there is manifestly some limitation to the authority of the circuit courts in respect to the cases therein brought within the purview of their jurisdiction, and that those courts have not jurisdiction, under the 11th section, of all suits or cases of a civil nature at common law. Kendall v. United States, 12 Pet. 616.

any standard of pecuniary value, as it rises superior to money considerations." *Barry* v. *Mercein*, 46 U. S. 5 How. 103, 119, 120 [12: 70, 77].

So far as the question whether the custody of a child can be brought into litigation in a circuit court of the United States, even where the citizenship of the opposing parties

---

Two particulars must concur as the foundation of a suit in a circuit court—that the litigant parties be competent to sue and be sued, and that the subject matter be one over which the court has cognizance. Voorhees v. United States Bank, 10 Pet. 449, 474.

A procedure by habeas corpus can in no legal sense be regarded as a suit or controversy between private parties. It is an inquisition by the government, at the suggestion and instance of an individual, most probably, but still in the name and capacity of the sovereign, to ascertain whether the infant in this case is wrongfully detained, and in a way conducive to its prejudice.

Neither in England nor the States in this country does the court regard this as a suit in which the right of guardianship is to be discussed or decided. Rex v. Smith, 2 Str. 982; People v. Mercein, 8 Paige, 47; *Re* Wollstonecraft, 4 Johns. Ch. 80; *Re* McDowle, 8 Johns. 328, 332.

616] *Judge* Story, in the case cited, manifestly took the same view of the subject. 3 Mason, 482, *ubi sup.*

There would, moreover, be a technical objection to this proceeding, if a suit, which the court might not be permitted to overlook.

Neither in this country nor in England can an action be prosecuted by an individual in the name of the government, without express authority of the court, or the officer appointed by law to represent the public. And no distinction is made between actions popular in their nature and those in which the private suitor is solely the party in interest.

The authority of the circuit court to take cognizance of the case must probably, then, be deduced from the provisions of the 14th section, in conjunction with those of the 11th; and the first clause or branch of the 14th section must be accepted as giving the courts of the United States power to issue the writ of habeas corpus, without the restriction of the subsequent clause, to "the purpose of an inquiry into the cause of commitment." And the 11th section must be regarded as supplying the parties in whose behalf such general power may be exercised.

The argument was pressed with great earnestness before the supreme court in Bollman and Swartwout's Case, that the first clause of this section was to be interpreted as a positive and absolute grant of power (4 Cranch, 82); but the court does not seem to have yielded to that construction, for in reference to that point they say that "the true sense of the words is to be determined by the nature of the provision and by the context." 4 Cranch, 94. And they evidently regard the whole section as having relation to one and the same matter.

The principles established by the supreme court and brought in review in that case would seem to militate so strongly against the doctrine involved in the case of United States v. Green as to prevent this court adopting the latter as its guide in determining this point; but without asserting that such diversity exists in the judgments of the supreme and circuit courts, and admitting that the decision in 3 Mason stands unimpaired as an authority, I proceed to consider the remaining general inquiry, whether by the law of the land the petitioner is entitled to the relief asked for.

What, then, is the law which this court administers? For that will be the law of the land in respect to these parties and the subject matter of this

617] petition.

The argument assumes it to be the common law of England as declared and enforced by her courts, and that the most recent adjudications in those tribunals is the highest and most important evidence of what the law is, and must supply the rule of decision to the United States courts. This view of the subject disregards the special organization of the United States circuit courts and the limited purposes they were designed to subserve.

They are distributed amongst the States to exercise that special jurisdiction bestowed upon the federal government, or shared with it by the state sovereignties, and not to carry with them an inherent power to resort to or employ any other law, than that given them by express and written grant. Chisholm v. Georgia, 2 Dall. 432, 435; *Ex parte* Barry, 2 How. 65. Although the people brought with them, on their emigration to this country, the essential principles of the common law, and embodied them in their institutions, yet this was not done by them in a national capacity (at the time no such character or capacity was contemplated), but as distinct communities independent of each other. Chisholm v. Georgia, 2 Dall. 419, 435; Bains v. Schooner James, 1 Baldw. 544, 557.

Nor has the common law been adopted by the United States as a system applicable to the States generally and to be administered as such in the national courts. Kendall v. United States, 12 Pet. 621.

This has been done specifically by Act of Congress in relation to the District of Columbia (Kendall v. United States, 12 Pet. 621); but in respect to the States the common law is regarded in force only as adopted or modified by the Constitution, statutes or usages of the States respectively It came to them and was appropriated by them, and became an integral portion of the laws of the particular States, before the United States government had existence. 1 Story, Com. Const. chap. 16, 17; 1 Kent, Com. 471, and *notes;* Pawlet v. Clark, 9 Cranch, 292, 332, Southwick v. Postmaster-General, 2 Pet. 446.

In bringing this new government into action amidst sovereignties already organized and established, it would be a cardinal object to have the limited share of judicial authority possessed by the national judiciary administered, as far as practicable, in consonance with the laws and usages of the State where the court was placed.

Political considerations of the highest moment would exact this. The disquietude and jealousy in relation to this new power would be aggravated [618
tenfold if, in addition to its authority under appointment of positive law, it could, by its inherent jurisdiction, supplant local customs and usages, and substitute in their place the common law of England in its primitive plentitude and vigor.

There was a deep-rooted attachment in the States to their own laws and customs, whilst every influence acting on the public mind at that day would tend to induce alarm and distrust of English law, except only in so far as it had already been modified and adopted by express authority of the States.

All the early legislation of Congress manifests the purpose to affiliate the new system with that of the State, and especially, in the jurisprudence as between individuals, to have the writs of the one government or the other organs of the same law, and controlled by a common rule of decision.

This principle was varied only when the Constitution of the United States, treaties or Acts of Congress provided a specific law for the case.

Accordingly, when Congress assigned to the circuit courts sitting within the States "original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common

is such as ordinarily confers jurisdiction on that court, the matter was left undecided in the case of *Barry* v. *Mercein*. Obviously, although the statutes of the United States have since enlarged the jurisdiction of the circuit courts by declaring that they shall have original cognizance, concurrent with the courts of the several States, of all civil

law," it was careful to direct "that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Act September 24, 1789, §§ 11 and 34, 1 Stat. 78, 92.

The supreme court has recently decided that the decisions of the state courts are not laws of the State, within the purview of this section of the Act of Congress, in questions of a commercial character, and that such questions are to be determined according to general principles of mercantile law, recognized by American and English authorities. Swift v. Tyson, 16 Pet. 1. The argument upon which the decision is founded insists that only the statutes of the State, or long established local customs having the force of laws, are embraced within the language of the clause, and that the court has always understood the section to apply solely to state laws, strictly local—positive statutes—and their construction by the state tribunals, and to rights and titles to things having a permanent locality, immovable and intraterritorial in their nature or character.

This exposition by the supreme court, so far as it covers this question, is the law of the land, to the same extent and with equal force with the Statute itself; and although a state statute, which should declare the laws of the United States a rule of decision in commercial questions, would scarcely be understood to exclude this decision as appertaining to that character, yet, under the authority of that adjudication, this court is bound to regard only certain classes of decisions made by the state tribunals as laws of the State within contemplation of the Judiciary Act, whatever may be their authority within the State itself.

But it would seem, from the opinion of the supreme court, that long-established local customs, having the form of laws, come within the terms of the section and must be followed by the United States courts as rules of decision, and that the decisions of the state courts are evidence of what the laws of the State are.

The court in the same opinion declares that the decisions of the state courts upon even commercial questions are entitled to and will receive the most deliberate attention and respect of the supreme court, though they do not supply positive rules or conclusive authority. Swift v. Tyson, 16 Pet. 19.

This decision confirms the general doctrine, before stated, that the circuit court is bound to administer the laws of the State. It perhaps renders indefinite and ambiguous to some degree the methods by which the United States court is to ascertain and determine what that law is; whether if it is not found on the statute book, it is to be authenticated by the dicta and decisions of English jurists, or by the adjudications of the local judicatories.

The proposition on which the petition rests is, that a subject of the Queen of Great Britain, resident in Nova Scotia, is entitled, as father of a female child under the age of seven years, born within this State, to have that child taken, by writ of habeas corpus, from the keeping of its mother, and transferred by the judgment of this court to his custody, the mother being a native and resident of this State, but residing in the family of her parents, separate from her husband, and without his consent, and refusing to cohabit with him.

Do the laws of the State of New York give him that right, and, if they do, can they be enforced in this court?

The United States courts cannot take cognisance of matters of right created or conferred by local statutes. It is to be presupposed that a case at common law exists, of which the United States court acquires jurisdiction under an Act of Congress, and the determination of that right is then to be made in conformity with the state law.

It is accordingly unnecessary to consider the question which has been raised in the state courts, whether, under the Revised Statutes (2 Rev. Stat. N. Y. (1st ed.) 477, § 88), there exists in this State any common-law right or remedy by habeas corpus, because if the 11th and 14th sections of the Judiciary Act bring the case within the jurisdiction of this court, it must proceed to adjudicate on it conformably to the general principles of the common law of England (*Ex parte* Watkins, 3 Pet. 201), unless that rule is varied by the local laws.

Nor need the point be discussed, whether, if an infant is brought before this court on habeas corpus, on the application of its father or guardian, the court can act on the matter as if the writ were presented at the instance of the mother, and accordingly regard the provisions in the Revised Statutes as the rule of decision for governing the case. 2 Rev. Stat. N. Y. (1st ed.) 82, §§ 1, 2.

The question now is, whether the petitioner can demand as his legal right the writ prayed for, on the facts stated in his petition.

The present posture of the case does not raise the point whether the individual cause of action has been adjudicated and settled by the state courts, so as to bar the party from again prosecuting it; but the proposition to be determined is one general in its nature, whether the facts stated in this petition entitle any party, as matter of right, to relief by a habeas corpus.

This subject has undergone a most searching discussion before various tribunals of the State. Two of the local judges and the chancellor, on these facts, allowed a writ, but refused to award the custody of the child to the father. People v. Mercein, 8 Paige, 47.

The supreme court, on full discussion, adopted a different conclusion, and, by two solemn decisions, adjudged that the father, under such a state of facts, was by law entitled to the custody of the infant child. 25 Wend. 82, *ubi sup.*; 3 Hill, 405, *ubi sup.* These judgments of the supreme court were reviewed on error in the court of errors, and both reversed by that tribunal. Mercein v. People, 25 Wend. 106; MSS. Ops. Session 1844, *ubi sup.*

The supreme court based their decisions upon the doctrines of the common law, and not upon the terms of the Revised Statutes (2 Rev. Stat. N. Y. 466, § 23), the language of which certainly comprehends the broadest range ever given the writ by the English courts, and might very plausibly be urged as extending it to matters not before embraced within that remedy. Reviser's *notes*, 3 Rev. Stat. N. Y. 784.

The substance of the enactment is, that a habeas corpus shall issue on the application of any person (by petitions signed by himself, or another in his behalf) "committed, detained, confined or restrained of his liberty, for any criminal or supposed criminal matter, *or under any pretense whatsoever*" (2 Rev. Stat. N. Y. (1st ed.) 466, §§ 23, 25), with some exceptions that need not now be noticed.

It must therefore be regarded as the settled law of this State, so far forth as the decision of the court of errors, twice rendered on this point, can

suits arising under the Constitution or laws of the United States, or treaties made, or [596] which shall be made, under their authority, the difficulty is not removed by this provision, for, as we have already said, the custody and guardianship by the parent of his

furnish the law, that the keeping of an infant female child, under seven years of age, from its father, by the mother, living separate from him, and who has it in her nurture, is not, in judgment of law, a detention or restraint of the liberty of the child; and that the father is not entitled by writ of habeas corpus to have such possession of the mother adjudged illegal, nor to have the custody of the child awarded him.

These decisions have been stigmatized on the argument as outrages upon the common-law doctrine on this subject, and as devoid of all claims to professional consideration and respect.

Most earnest efforts were made to place them in disparaging contrast with the opinions of the individual judges of the supreme court, whose judgments upon the point are overruled by the court of errors; and this, not by weighing the arguments of one tribunal against those of the other on the subject, but by sharp invectives against the constitution of that high court, and the competency of its individual members.

This court was solicitous to allow the petitioner the opportunity to discuss his case in all its bearings, and, as his language was decorous in terms, did not feel called upon to check the course of remarks conducing and palpably intended to impute ignorance or disregard of the law, in this respect, to that high tribunal; but I should do injustice to my own convictions if I omitted to observe that on a careful perusal of the opinions leading to the [622] decisions of the respective courts on this subject, I discover nothing in the ultimate judgments of the court of errors which places that judicatory in disadvantageous contrast with the one whose opinion it reviews and reverses.

Every lawyer, however, is well aware that a decision is not to be estimated merely by the ability or learning displayed in its composition, but essentially by the sanction it obtains.

Of what value toward establishing a principle or fixing a rule of law is the most erudite opinion of a high judge, when the full bench to whom it is submitted adopts a different conclusion, although *sub silentio*?

What court or lawyer, in searching for and applying a rule of law, rests upon the dissenting arguments of judges, in the courts of this country or England, whatever be their grade or reputation?

The judgment sanctioned by the court can alone answer the exigencies and meet the inquiry.

The more elevated the rank of the court may be, the higher becomes the sanction of its judgments.

Every system of jurisprudence imports in its organization that, upon questions mooted from tribunal to tribunal, the judgment of the one of last resort is conclusive proof of what the law is upon the points in dispute; and this entirely irrespective of the qualifications of the members of such *dernier* court.

A barrister would not be permitted to argue in Westminster Hall that a decision of the House of Lords, on a writ of error, weighed nothing in settling the law of the case, in comparison with the reasonings of the individual judges on the case, in the courts below.

A decision by the House of Lords ends all question before every tribunal of the Kingdom as to the point adjudicated, and this is certainly not founded upon the fact that any extraordinary judicial learning or experience exists in that body, or is brought to act on the subject matter.

That court is lauded by *Sir* William Blackstone and English writers generally as one of the eminently excellent features of the British Constitution, and as the most august tribunal in the world.

Its judgments of reversal annihilate the decisions of the courts of Ireland and Scotland, rendered unanimously by all the judges, and also of the Lord Chancellor and all the judges, barons and lords of English courts of law and equity, and no party, [62 subject or foreigner, can be permitted to gainsay the efficiency and wisdom of such final determination.

And yet, in that court, on the decision of appeals from Ireland and Scotland, in admiralty and in equity, the Lord Chancellor almost invariably sits and acts as sole judge.

Lord Brougham asserts that he rarely or ever, when Lord Chancellor, could obtain the assistance of any other member of the court to sit with him on review of his own decisions, and that he, solely, had to decide questions brought from the Irish and Scotch courts where all the members of those tribunals had concurred in judgment upon points resting on local and peculiar laws.

When the House of Lords sits on writs of error only three lords need be in attendance. No more in fact do attend, and these three may change daily; and it results in practice that the three noble lords who ultimately decide that the twelve judges of England have erred in their opinion of the law were neither of them present at the argument on the writ of error. These facts are asserted by *Lord* Brougham, in the face of the House of Lords, and stand uncontradicted. 2 Chitty's Practice, 567, *note k*.

Whatever obloquy may be aimed at the construction of the court of errors in this State, there are features in its constitution which elevate it most honorably in comparison with that of the House of Lords.

At least twenty-one members must be present at the hearing and decision of every case in the court of errors, and those members alone who hear the argument take part in the decision; and it is doubted whether any period can be referred to in the history of the two exalted tribunals, since they have had co-existence, in which the professional learning and experience in the New York Court of Errors was not at least equal in amount to that contained in the English House of Lords.

The decisions of the court of errors are, within the State of New York, obligatory to the same extent as enactments by positive law. It no more diminishes their efficiency that the judgment of one court may be modified or varied by that of its successor, than the vitality of a statute is impaired because it is liable to repeal at the will of the Legislature. Such judgments are absolute rules of decision in all cases to which they apply in the state tribunals (Hanford v. Artcher, 4 Hill, 271; Butler v. Van Wyck, 1 Hill, 488); and although, within the doctrines declared by the supreme court in Swift [62 v. Tyson, 16 Pet. 19, they are not laws in a technical sense, and as such obligatory upon this court, still, on the inquiry as to what the law of the State is, such decisions must supply evidence of great weight and cogency.

Indeed, what particulars can be regarded as in principle more local or intraterritorial than those which pertain to the domestic institutions of a State—the social and domestic relations of its citizens; or what could probably be less within the meaning of Congress, than that in regard to these interesting matters, the courts of the United States should be empowered to introduce rules and principles because found in the ancient common law,

child does not arise under the Constitution, laws or treaties of the United States and is not dependent on them.

But whether the diverse citizenship of parties contesting this right to the custody of the child could, in the courts of the

which should extinguish or supersede the policy and cherished usages of a State, authenticated and sanctified as part of her laws by the judgments of her highest tribunals?

In my opinion, the rule indicated by the supreme court in Swift v. Tyson, if not limited strictly to questions of commercial law, does not embrace the present case, and that the adjudications of the court of errors, prescribing the laws of its citizens in respect to the custody of infant children resident in the State, and the relative rights of parents in respect to such children, are rules of decision in this court in all common-law cases touching these questions.

But if not so, and the United States court is to act independently of all control by the decisions of the local courts, and is to determine for itself what the common-law rule is in relation to such matters, the judgment of the local tribunal cannot but be of most imposing weight and significancy as a matter of evidence.

I do not discover that that judgment stands opposed to any authentic evidence of the common-law rule as it existed in England anterior to our Revolution, or which has ever existed in this State; and if even a doubt might be raised on that point, the inclination of this court most assuredly must be to yield to the domestic and not to the foreign interpretation of the rule.

If it be conceded that the more recent decisions in England establish the law of that country now to be as claimed by the petitioner, they supply no authority here, further than they correspond with the law as clearly existing antecedent to 1775. I am not aware the doctrine has ever been countenanced in the Supreme Court of the United States that modern decisions in the English courts, unsanctioned by ancient tradition, are entitled to outweigh those of state courts in fixing the final laws of the State.

625] The value of the latest decision, the most relied on, that of King v. Greenhill, 4 Ad. & El. 624, when brought in competition with those of the American courts, upon an inquiry into the *reason* of the law, is essentially impaired by the declaration of *Lord* Denham in the House of Lords (the judge who pronounced the decision below), that he was ashamed of the necessity which exacted a decision of that character from a British court; and of a late Lord Chancellor, on the same occasion, that the rule of law announced by that decision was a disgrace to the English character.

But I do not feel that it is imposed on this court to revise the subject at large, and determine what is the true rule of the common law in this respect.

The United States court in no way acts in supervision of the state courts. The decisions of these tribunals are independent of the United States judiciary, and absolute in themselves, in all cases not subject to review in the method pointed out by the Judiciary Acts. 4 Cranch, 96, 97. This case is not in that predicament. The extent of the authority of this court, on the principle of its organization, is no more than to act concurrently with the state court upon the subject matter of this petition.

If that concurrence does not import and exact an entire coincidence, if each tribunal acting within its sphere may examine and declare for itself, independently of the other, what rule of law shall govern the decisions, that comity at least due between coördinate courts, if not that intimate and special relation of both to a common source and standard of law, would demand that neither should rigorously insist upon a principle which would bring it in collision with the other; the more especially that the United States courts should avoid, upon a balanced question, adopting conclusions which, carried into execution, must violate the domestic policy of the State, settled by the most solemn adjudications of its own judiciary.

The alienage of the petitioner would not vary this principle, even if it be conceded that by the laws of his domicil he is entitled as absolutely to the custody of his infant children as to that of his estate.

No interest, not even one resting in contract, is enforced by a court when it is repugnant to the laws or policy of the place where the action is prosecuted. Pearsall v. Dwight, 2 Mass. 84, 89; Vermont State Bank v. Porter, 5 Day, 316, 320; Bank of Augusta v. Earle, 13 Pet. 519, 589.

It by no means is an indisputable doctrine of [62
public law, or of the law of this country, that the father of this infant can have here the same legal rights and dominion over it as if born within the country of his allegiance, for, if so, it might impart to him a power abhorrent to the civilization and Christianity of our age, giving him a dominion no less absolute than one over his chattels, animate or inanimate.

I do not, however, go into this topic, nor regard it as having any important bearing upon the decision now made. I apprehend it has been sufficiently shown that neither in England, before our Revolution, nor in this State since, has judgment been rendered under a habeas corpus in regard to infants, on the acceptation that the right of the father to their custody was anything in the nature of property, or so fixed in law as to afford a controlling rule of decision to the court. In the use of the remedy afforded by means of this writ, the courts have regarded the father as that guardian first to be looked to, in case a change of custody should be deemed proper, and the infant was not of competent age to make its own choice of guardian; but it has been purely in the application of the remedy and for the protection and interest of the infant, and not in subordination to the legal right of the father, that such award is ever made.

Nothing is clearer in international law than that a party prosecuting upon the clearest right under the laws of his country must still take his remedy in accordance with the law of the court he invokes, without regard to the law of his allegiance, and that his demand of this particular relief is no way aided by the consideration that it would be awarded him in England or Nova Scotia.

I close this protracted discussion by saying that I deny the writ of habeas corpus prayed for, because,

(1) If granted, and a return was made admitting the facts stated in the petition, I should discharge the infant, on the ground that this court cannot exercise the common-law function of *parens patriæ*, and has no common-law jurisdiction over the matter;

(2) Because the court has not judicial cognisance in the matter by virtue of any statute of the United States; or

(3) If such jurisdiction is to be implied, that then the decision of the Court of Errors of New York supplies the rule of law, or furnishes the highest evidence of the common-law rule, which is to be the rule of decision in the case; and

(4) Because, by that rule, the father is not entit- [62
led, on the case made by this petitioner, to take this child out of the custody of its mother.

Petition denied.

United States, give jurisdiction to those courts to determine that question, has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case, for the order for a violation of which the petitioner is imprisoned for contempt is not a judgment of the circuit court of the United States, but a judgment of the district court of the same district. There is apparently a studied effort in the record before us to treat the proceeding as one in the District Court of the United States for the District of Nebraska, and also as one before the judge of that court, but we apprehend that it must be considered for what it is worth, as the judgment of the district court, both the order for the delivery of the child to its father and the order for the imprisonment of the present petitioner for contempt being made in that court. The jurisdiction of that court is not founded upon citizenship of the parties; and though the original petition of Miller, the father of the child, was amended after the judgment was rendered, so as to show that he was a citizen of the State of Ohio, and the defendants, Burrus and wife, were citizens of Nebraska, it is not perceived how that averment aids the parties in the present case, for the district courts of the United States have not jurisdiction by reason of the citizenship of the parties. If, therefore, there was no other ground of jurisdiction of that court in the habeas corpus case, by which the child was delivered to its father, it was entirely without jurisdiction.

We have already said that the relations of the father and child are not matters governed by the laws of the United States, and that the writ of habeas corpus is not to be used by the judges or justices or courts of the United States except in cases where it is appropriate to their jurisdiction. Of course [597] this does not mean that they have jurisdiction in all cases to issue the writ of habeas corpus, but that they have such jurisdiction when, by reason of some other matter or thing in the case, the court has jurisdiction which it can enforce by means of this writ. Whatever, therefore, may be held to be the powers of the circuit courts in cases of this kind, where necessary citizenship exists between the contestants, which gives the court jurisdiction of all matters between such parties, both in law and equity, where the matter exceeds two thousand dollars in value, we know of no statute, no provision of law, no authority intended to be conferred upon the district court of the United States, to take cognizance of a case of this kind, either on the ground of citizenship, or on any other ground found in this case. According to this view of the subject, the whole proceeding before the district judge in the district court was *coram non judice* and void, and the attempt to enforce the judgment by attachment and imprisonment of Burrus for contempt of that order is equally void. *Ex parte Rowland*, 104 U. S. 604 [26: 861].

The petitioner is therefore entitled to his discharge, and the rule against Slaughter, the marshal, is made absolute, and the writ of habeas corpus will issue, if that be necessary to his release.

Mr. Justice **Brewer** dissents.

CHARLES PALLISER, *Appt.*,
v.
UNITED STATES ET AL.

(See S. C. *Re Palliser*, Reporter's ed. 257-268.)

Habeas corpus—appealable order—Act as to selling postage stamps—sale by postmaster on credit—sec. 5451, Rev. Stat.—offer to contract for sale—offense by sending letter, where triable—where letter was received.

1. A final order of the circuit court at a stated term, dismissing a writ of habeas corpus and remanding the prisoner to the custody of the marshal for trial, is appealable to this court.
2. Where the return shows that the prisoner was charged with a crime against the laws of the United States and within the jurisdiction of that court, the order remanding him was proper.
3. The word "cash" in the Act of June 17, 1878, chap. 259, sec. 1, forbidding a postmaster to sell or dispose of postage stamps except for cash, means ready money, or money in hand. A sale on credit is not a sale for cash.
4. A letter written and sent from New York to a postmaster in Connecticut, asking him to put postage stamps on circulars and send them out, at the rate of fifty to one hundred daily; and promising him that, if he would do so, the writer of the letter would remit to him the price of the stamps,—was a tender of a contract for the payment of money to induce him to sell postage stamps for credit, in violation of his lawful duty, contrary to sec. 5451 of the Revised Statutes.
5. An offer of a contract to pay money to a postmaster for an unlawful sale by him of postage stamps on credit is not the less within the Statute, because his commission on the sale would be no greater than upon a lawful sale for cash.
6. Where an offense is committed by means of a communication through the postoffice, the sender may be tried and punished at the place where the letter is received by the person to whom it is addressed.
7. The District Court of the United States for the District of Connecticut in which the letter was received had jurisdiction of the charge against the petitioner in this case.

[No. 1538.]

Argued May 1, 1890. Decided May 19, 1890.

APPEAL from an order of the Circuit Court of the United States for the Southern District of New York, dismissing a writ of habeas corpus and remanding to custody the the prisoner, Charles Palliser, for trial. *Affirmed.*

NOTE.—*When habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of.* See *note* to United States v. Hamilton, 1: 490.

What questions may be considered on habeas corpus. See *note* to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see *note* to Luther v. Borden, 12: 581.

Statement by *Mr. Justice* **Gray:**

Charles Palliser, being detained by the United States marshal for the Southern District of New York, under a warrant from a commissioner of the Circuit Court of the United States for that District, obtained from that court a writ of habeas corpus, as well as a writ of certiorari, to the marshal and commissioner, both returnable at a stated term of the court, in obedience to which the commissioner returned a record of proceedings had before him under § 1014 of the Revised Statutes, which enacts that "for any crime or offense against the United States the offender may," by any commissioner of the circuit court, "be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense;" and that where any offender "is committed in any district other than that where the offense is to be tried," a warrant may be issued by the district judge and executed by the marshal of that district, "for his removal to the district where the trial is to be had." The proceedings stated in the return were as follows:

First. The complaint, of which the following is a copy:

8] "United States of America, } ss.
Southern District of New York. }

"John H. Bario, being duly sworn, deposes and says that he is an inspector of the Post-office Department; that on October 23d, 1888, Charles Palliser of the City and State of New York, then and there doing business under the name and style of Palliser, Palliser & Co., at Old Lyme, in the County of New London, in the State and District of Connecticut, with force and arms unlawfully and willfully did tender to one W. R. De-Wolf, who then and there was and thereafter continued to be until the 4th day of March, 1889, a postmaster of the United States at a certain postoffice known as Black Hall, in said County of New London, a certain contract in the words and figures following:

"'New York, October 23, 1888.

"'Postmaster, Black Hall, Conn.

"'Dear Sir: We desire in each county a place through which to send out mail matter, as we want to reach every business man, mechanic and real estate owner in every State by circular. If we ship to you from our printing department, located in the country in your State, say 5,000 or 10,000 circulars in envelopes, and each addressed, will you give the same your careful attention, sending out daily 50 to 100 during the coming months until they are all out, and then render us statement of same, with account for stamps used, and we will remit. We are doing this at other general-store postoffices in adjoining counties to yours, and it is perfectly legitimate, and we await your reply in addressed and stamped envelope inclosed herewith, as, if you cannot attend to same, we must at once send elsewhere.

"'Yours very truly,
Palliser, Palliser & Co.

—with the intent of him, the said Palliser, to induce him, the said De Wolf, as such postmaster, to do certain acts in violation of his lawful duty as such postmaster—that is to say, to sell him, the said Palliser, postage stamps of the United States otherwise than for cash, to wit, upon the credit of said Palliser, against the peace of the United States and contrary to the statutes thereof in such [259
case made and provided. Deponent further says that said Charles Palliser is now within the Southern District of New York.

"John H. Bario.

"Subscribed and sworn to before me this 27th day of September, 1889.

"John A. Shields, U. S. Commissioner."

Second. The warrant of arrest, dated September 27, 1889, reciting the substance of the complaint, and that it had been satisfactorily proved to the commissioner "that the said Charles Palliser is now within the Southern District of New York."

Third. The bringing of the prisoner before the commissioner, and his discharge on bail pending his examination.

Fourth. The evidence taken before the commissioner, tending to prove the following facts: Palliser was a member of the firm of Palliser, Palliser & Co., architects and publishers of works on building, having their principal place of business in the City of New York, and a printing office at Bridgeport in the State of Connecticut. The letter set forth in the complaint was signed and mailed by Palliser at New York in a sealed envelope; and was received at Black Hall in the County of New London and State of Connecticut by De Wolf, postmaster at that place, who was a postmaster of the fourth class, receiving no salary, and compensated upon the basis of, among other things, the amount of stamps canceled at his office. Act of March, 3, 1883, chap. 142, § 2 (22 Stat. 602). At the same time, Palliser sent similar letters from New York or Bridgeport to many other postmasters of the same class in Connecticut. About a fortnight afterwards, De Wolf received by freight a box of circulars; and on November 26, 1888, he sent by mail to Palliser, Palliser & Co., at the City of New York, a reply to their letter in these words:

"Gentlemen: Have received a case of circulars from you, which I did not order, and cannot handle them. They are here subject to your order. Take notice of sec. 515 of Postal Laws and Regulations 1887.

"Yours, etc., W. R. De Wolf, P. M."

Fifth. An order of the commissioner, dated [260
November 26, 1889, committing the prisoner, upon his surrender by his bail, to the custody of the marshal.

Sixth. The final order of the commissioner, dated December 3, 1889, by which, after reciting the arrest and examination, and "it appearing to me from the testimony offered that there is probable cause to believe the said Charles Palliser guilty of the offense charged in said warrant, the said Charles Palliser is hereby committed for trial at the District of Connecticut, the district in which the offense is alleged to have been committed, and he is hereby remanded to the custody of the United States marshal for the Southern

District of New York until the warrant for his removal shall issue by the United States District Judge for the Southern District of New York, or he be otherwise dealt with according to law."

The record transmitted to this court, after setting forth the proceedings above stated, further set forth: 1st. An opinion of the circuit judge, filed December 3, 1889, treating the case as before him, and not before the circuit court, and directing the writ of habeas corpus to be dismissed; 2d. An order of the circuit court, at a stated term held on the same day, ordering the writ of habeas corpus to be dismissed and the prisoner remanded to the custody of the marshal; 3d. An appeal from that order to this court.

Mr. **Roger Foster,** for appellant:

The court has jurisdiction of the appeal.

U. S. Rev. Stat. §§ 763, 764, as amended March 3, 1885 (23 Stat. at L. p. 437); *Wales* v. *Whitney*, 114 U. S. 564, 565 (29: 277); *Carper* v. *Fitzgerald*, 121 U. S. 87 (30: 882).

The circuit court to which the writ in this case was returned had jurisdiction to hear and determine the same.

U. S. Rev. Stat. § 658; *Roberts* v. *Reilly*, 116 U. S. 80, 92-93 (29: 544, 548).

An application for a writ of habeas corpus and the proceedings thereupon are civil, not criminal, proceedings.

Ex parte Tom Tong, 108 U.S. 556, 559, 560 (27: 826, 828); *Ex parte Cota*, 110 U. S. 385 (28: 172); *Kurtz* v. *Moffitt*, 115 U. S. 487, 494 (29: 458, 460).

The order from which the appeal is taken was the order of the court, not the order of the judge.

Heishon v. *Knickerbocker L. Ins. Co.* 77 N. Y. 278; *Elwood* v. *Roof*, 82 N. Y. 428.

A prisoner held under a warrant issued upon a complaint which does not allege facts constituting a crime can be discharged by a writ of habeas corpus before judgment of conviction.

Ex parte Bollman and *Ex parte Swartwout*, 8 U. S. 4 Cranch, 75, 136 (2: 554, 574); *United States* v. *Hamilton*, 3 U. S. 3 Dall. 17 (1: 490); *Ex parte Burford*, 7 U. S. 3 Cranch, 448 (2: 495); *Ex parte Watkins*, 32 U. S. 7 Pet. 568 (8: 786); *Ex parte Jenkins*, 2 Wall. Jr. 521, 528; *Re Martin*, 5 Blatchf. 303; *United States* v. *Rogers*, 23 Fed. Rep. 658; *Re Cross*, 20 Fed. Rep. 824.

The sending of the letter described in the complaint did not constitute a crime, even if it were unlawful for the postmaster to sell postage stamps upon credit.

U. S. Rev. Stat. § 5451; *Simpson* v. *Yeend*, L. R. 4 Q. B. 626; *Rex* v. *Beale*, cited in *Rex* v. *Gibbs*, 1 East, 173, 183; *Harding* v. *Stokes*, 1 Mees. & W. 354; *Com.* v. *Willard*, 22 Pick. 476; *Com.* v. *Downing*, 4 Gray, 29; *Campbell* v. *Com.* 84 Pa. 187; *State* v. *McKean*, 36 Iowa, 343; *St. Charles* v. *O'Mailey*, 18 Ill. 407; *Smith* v. *State*, 37 Ala. 472; *People* v. *Farrell*, 30 Cal. 316; *People* v. *Emerson*, 6 N. Y. Crim. Rep. 157; *People* v. *Powell*, 4 N. Y. Crim. Rep. 585; *Dunn* v. *People*, 29 N. Y. 523; Bishop, Crim. Law, § 657; *State* v. *Lopkins*, 4 Jones, L. (N. C.) 305; *Rawles* v. *State*, 15 Tex. 581; *Reg.* v. *Williams*, 1 Car. & K. 589; *Stabler* v. *Com.* 95 Pa. 318; *Stamper* v. *Com.* 7 Bush (Ky.) 612.

The sale of postage stamps upon credit is not a violation of a postmaster's official duty.

Act of June 17, 1878 (20 Stat. at L. 141); *The Enterprise*, 1 Paine, 32; *Com.* v. *Standard Oil Co.* 101 Pa. 119, 150; *Com.* v. *Martin*, 17 Mass. 359, 362; *United States* v. *Sheldon*, 15 U. S. 2 Wheat. 119 (4: 199); *United States* v. *Reese*, 92 U. S. 214 (23: 563); *Henderson* v. *Bise*, 3 Stark. 158; *Wells* v. *Porter*, 2 Bing. N. C. 722; *Hewitt* v. *Price*, 4 Man. & G. 355; *Underhill* v. *Longridge*, 29 L. J. N. S. M. C. 65; *Thomas* v. *Stephenson*, 2 El. & Bl. 108; *Coe* v. *Lawrence*, 1 El. & Bl. 516; *Broadhead* v. *Holdsworth*, L. R. 2 Exch. Div. 321; *Southwestern R. Co.* v. *Cohen*, 49 Ga. 627; *Lycoming F. Ins. Co.* v. *Ward*, 90 Ill. 545; *St. Louis Type Foundry* v. *Union Printing & Pub. Co.* 3 Mo. App. 142, 149; *Hoffman* v. *John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 164 (23: 539, 541); *United States* v. *Williamson*, 26 Fed. Rep. 690; *United States* v. *Douglass*, 33 Fed. Rep. 381.

The District Court of Connecticut has no jurisdiction of the offense charged.

Boyd v. *United States*, 116 U. S. 616 (29: 746); 4 Elliot's Debates, 211; 1 Elliot's Debates, 44; *United States* v. *Guiteau*, 1 Mackey, 498, 544, 545; *Riley* v. *State*, 9 Humph. (Tenn.) 646, 656, 659; *State* v. *Moore*, 26 N. H. 448; *State* v. *Knight* 1 Taylor (N. C.) 65; U. S. Const. § 2, art 3, 6th Amend. to Const.

These constitutional provisions cannot be nullified by any statute of the United States.

Ex parte Slater, 72 Mo. 102; *State* v. *McGrath*, 87 Mo. 161; *State* v. *Hatch*, 91 Mo. 568.

Mr. Palliser's alleged crime was complete when the letter was mailed.

United States v. *Worrall*, 2 U. S. 2 Dall. 384, 387, 388 (1: 426, 427); *United States* v. *Comerford*, 25 Fed. Rep. 902; *United States* v. *Bickford*, 4 Blatchf. 337, 339; *United States* v. *Plympton*, 4 Cranch, C. C. 309; *State* v. *Bunkre*, 38 Kan. 737; *United States* v. *Britton*, 2 Mason, 464, 469; *Rex* v. *Williams*, 2 Campb. 506, 507; *Perkin's Case*, 2 Lew. C. C. 150, 151; *Reg.* v. *Holmes*, L. R. 12 Q. B. Div. 23, 15 Cox, Crim. Cas. 343; *Reg.* v. *Cooke*, 1 F. & F. 64; *State* v. *Wyckoff*, 3 N. J. L. 65.

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, for appellees:

The sale of stamps upon credit was a violation of the postmaster's official duty as defined by the Act of June 17, 1878 (20 Stat. at L. 141).

United States v. *Wiltberger*, 18 U. S. 5 Wheat. 76, 94 (5: 37, 42); *Bliss* v. *Arnold*, 8 Vt. 252; *Stewart* v. *Scudder*, 24 N. J. L. 96; *Meng* v. *Houser*, 13 Rich. Eq. 210; *Farr* v. *Sims*, Rich. Eq. Cas. 131; *Foley* v. *Mason*, 6 Md. 37; *Blair* v. *Wilson*, 28 Gratt. 165; *Hoffman* v. *John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 164 (23: 539, 541); *Taylor* v. *Galloway*, 1 Ohio, 232; *American Fur Co.* v. *United States*, 27 U. S. 2 Pet. 367 (7: 453).

The offense of which the appellant was guilty was triable in Connecticut.

United States v. *Davis*, 2 Sumn. 482; *Evans* v. *Nicholson*, 32 L. T. N. S. 778; *Reg.* v. *Rogers*, L. R. 3 Q. B. Div. 28; *Com.* v. *Blanding*, 3 Pick. 304; *Rex* v. *Burdett*, 4 Barn. & Ald. 95; *Re Buell*, 3 Dill. 122; *People* v. *Griffin*, 2 Barb. 427; *Esser's Case*, 2 East, Pl. Cr. 1125; *Reg.* v. *Jones*, 1 Den. Cr. Cas. 551, Temp. & M. 270, 1 Eng. L. & Eq. 533; *People* v. *Rathbun*, 21

Wend. 509; *Norris* v. *State*, 25 Ohio St. 217; *Adams* v. *People*, 1 N. Y. 173; *People* v. *Adams*, 3 Denio, 190; *Reg.* v. *Leech*, 7 Cox, Crim. Cas. 100; *United States* v. *Worrall*, 2 U. S. 2 Dall. 384 (1: 426); *United States* v. *Comerford*, 25 Fed. Rep. 902; *United States* v. *Bickford*, 4 Blatchf. 337; *United States* v. *Plympton*, 4 Cranch, C. C. 309; *Rex* v. *Williams*, 2 Campb. 506.

Mr. Justice **Gray** delivered the opinion of the court:

Upon the record before us, the final order dismissing the writ of habeas corpus, and remanding the prisoner to the custody of the marshal, appears to have been a decision of the circuit court at a stated term, and therefore clearly subject to an appeal to this court, under the Act of March 3, 1885, chap. 353 (23 Stat. 437). *Carper* v. *Fitzgerald*, 121 U. S. 87 [30: 882].

But he was rightly remanded to custody, because the return shows that he was charged with a crime against the laws of the United States and within the jurisdiction of the courts of the United States for the District of Connecticut.

By section 5451 of the Revised Statutes, "every person who promises, offers or gives, or causes or procures to be promised, offered or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity or security for the payment of money, or for the delivery or conveyance of anything of value to any officer of the United States," "with intent to influence him to commit or aid in committing, or to collude in or allow any fraud, or make opportunity for the commission of any fraud on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be punished" by fine and imprisonment.

By the Act of June 17, 1878, chap. 259, § 1, "no postmaster of any class, or other person connected with the postal service, intrusted with the sale or custody of postage stamps, stamped envelopes or postal cards, shall use or dispose of them in the payment of debts or in the purchase of merchandise or other salable articles, or pledge or hypothecate the same, or sell or dispose of them except for cash," on pain of being deemed guilty of a misdemeanor and punished accordingly. 20 Stat. 141.

By this Statute, postmasters are peremptorily forbidden, not only to dispose of postage stamps in the payment of debts or in the purchase of commodities, or to pledge them, but "to sell or dispose of them except for cash." The word "cash" in this Statute, as in common speech, means ready money, or money in hand, either in current coin or other legal tender, or in bank bills or checks paid and received as money, and does not include promises to pay money in the future. A sale on credit is not, ordinarily speaking, and in the absence of any evidence of usage, a sale for cash, within the meaning of that word as used in statutes or contracts. *Muller* v. *Norton*, 132 U. S. 501 [33: 397]; *Bliss* v. *Arnold*, 8 Vt. 252; *Steward* v. *Scudder*, 24 N. J. L. 96; *Foley* v. *Mason*, 6 Md. 37; *Blair* v. *Wilson*, 28 Gratt. 165, 175; *Furr* v. *Sims*, Rich. Eq. Cas. 122, 131; *Meng* v. *Houser*, 13 Rich. Eq. 210, 213.

The petitoner relies on the following passage in an opinion delivered by *Mr. Justice* Swayne: "Life insurance is a cash business. Its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and rule of all such companies." *Hoffman* v. *John Hancock Mut. L. Ins. Co.* 92 U. S. 161, 164 [23: 539, 541]. But the only point decided in that case was that an agent of an insurance company could not, unless authorized by the company, accept personal property as money in payment of a premium. No [264] question arose or was considered as to the premium note; and it cannot reasonably be inferred that the learned justice meant to intimate that a premium note was cash or money, before the amount thereof was paid by the insured and received by the insurance company, according to the terms of their contracts.

The substance and effect of the letter written and sent by the petitioner, in behalf of himself and his partners, to De Wolf as postmaster, was to ask him whether, if they should send him from five to ten thousand circulars in addressed envelopes, he would put postage stamps on them and send them out, at the rate of fifty to one hundred daily; and to promise him that, if he would do so, and would render them a statement of his doings and an account of the stamps used, they would remit to him the price of the stamps. If we take five thousand, the smallest number of circulars proposed to be sent by the petitioner to the postmaster, and one hundred, the largest number suggested to be sent out by the postmaster daily, it would require fifty days for the postmaster to send out the circulars; and the petitioner would thus be allowed an average credit of at least twenty-five days on his payments to the postmaster for five thousand postage stamps; and the postmaster would receive and retain a commission on the sale of as many stamps, which neither he nor any other postmaster would retain if the circulars were mailed by the petitioner at the postoffice in New York or any other postoffice where the postmaster was paid by a salary.

If this letter was not an offer of money to the postmaster, it was clearly a tender of a contract for the payment of money to him, with intent to induce him to sell postage stamps for credit, in violation of his lawful duty; and therefore came within § 5451 of the Revised Statutes, above quoted. A promise to a public officer, that if he will do a certain unlawful act he shall be paid a certain compensation, is an offer to bribe him to do the unlawful act; and an offer of a contract to pay money to a postmaster for an unlawful sale by him of postage stamps on credit is not the less within the Statute, because the portion of that money which he would ultimately have the right to retain, [265] by way of commission, from the United States, would be no greater than he would have upon a lawful sale for cash of an equal amount of postage stamps.

The remaining and more interesting ques-

tion is whether the petitioner can be tried for this offense in the District of Connecticut.

The petitioner relies on those provisions of the Constitution of the United States which declare that in all criminal prosecutions the accused shall have the right to be tried by an impartial jury of the State and district wherein the crime shall have been committed. Art. 3, sec. 2; Amendments, art. 6.

But the right thereby secured is not a right to be tried in the district where the accused resides, or even in the district in which he is personally at the time of committing the crime, but in the district "wherein the crime shall have been committed."

Reference was made in argument to the question, often disputed, where an indictment for murder shall be tried, when a person mortally wounded in one jurisdiction afterwards dies in another jurisdiction. See *Com.* v. *Macloon*, 101 Mass. 1, and authorities there cited; *Reg.* v. *Keyn*, L. R. 2 Exch. Div. 63; *The Franconia*, 11 Am. L. Rev. 625; *State* v. *Bowen*, 16 Kan. 475; *United States* v. *Guiteau*, 1 Mackey, 498. But there the original unlawful act is not only done by the offender, but reaches the person at whom it is aimed, in one jurisdiction; and it is the subsequent effect only which takes place in another jurisdiction. We have no occasion now to consider such a case, beyond observing that before the Declaration of Independence provision had been made by statute, both in England and in Ireland, for trying such cases in either jurisdiction, and was never supposed to be inconsistent in principle with the provision of Magna Charta, chap. 14, for trial by a jury of the vicinage. 1 East, P. C. 366; 1 Gabbett's Crim. Law, 501. It is universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction, the offender may be tried where the shot takes effect, and the only doubt is whether he can [266] be tried where the shot is fired. *Rex* v. *Coombes*, 1 Leach (4th ed.) 888; *United States* v. *Davis*, 2 Sumn. 482; *People* v. *Adams*, 3 Denio, 190, 207, and 1 N. Y. 173, 176, 179; Cockburn, *Ch. J.*, in *Reg.* v. *Keyn*, L. R. 2 Exch. Div. 233, 234.

When a crime is committed partly in one district and partly in another, it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the Legislature may designate; and Congress has accordingly provided that "when any offense against the United States is begun in one judicial district and completed in any other, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined and punished in either district, in the same manner and as if it had been actually and wholly committed therein." Rev. Stat. § 731.

When an offense is committed by means of a communication through the postoffice, the sender has sometimes, as appears by the cases cited for the petitioner, been held to be punishable at the place where he mails the letter. *United States* v. *Worrall*, 2 U. S. 2 Dall. 384 [1: 486]; *United States* v. *Bickford*, 4 Blatchf. 337; *Rex* v. *Williams*, 2 Campb. 506; *Rex* v. *Burdett*, 3 Barn. & Ald. 717, and 4 Barn. & Ald. 95; *Perkin's Case*, 2 Lew. C. C. 150; *Reg.* v. *Cooke*, 1 F. & F. 64; *Reg.* v. *Holmes*, L. R. 12 Q. B. Div. 23, 15 Cox, Crim. Cas. 343. But it does not follow that he is not punishable at the place where the letter is received by the person to whom it is addressed; and it is settled by an overwhelming weight of authority that he may be tried and punished at that place, whether the unlawfulness of the communication through the postoffice consists in its being a threatening letter (*Rex* v. *Girdwood*, 1 Leach, 142; *S. C.* 2 East, P. C. 1120; *Esser's Case*, 2 East, P. C. 1125); or a libel (*Rex* v. *Johnson*, 7 East, 65; *S. C.* 3 J. P. Smith, 94; *Rex* v. *Burdett*, 4 Barn. & Ald. 95, 136, 150, 170, 184; *Com.* v. *Blanding*, 3 Pick. 304; *Re Buell*, 3 Dill. 116, 122); or a false pretense or fraudulent representation. *Reg.* v. *Lech*, Dearsly, 642; *S. C.* 7 Cox, Crim. Cas. 100; *Reg.* v. *Rogers*, L. R. 3 Q. B. Div. 28; *S. C.* 14 Cox, Crim. Cas. 22; *People* v. *Rathbun*, 21 Wend. 509; *People* v. *Adams*, 3 Denio, 190, and 1 N. Y. 173; *Foute* v. *State*, 15 Lea, 712.

The only decision to the contrary, cited for the petitioner, is one in which the Circuit Court of the District of Columbia, upon the authority of a former case in the same court in which no opinion is reported, held that where a letter containing a forged check was put in the postoffice at Baltimore, addressed to a person in Washington, there was no uttering of the forged paper in Washington. *United States* v. *Plympton*, 4 Cranch, C. C. 309, citing *United States* v. *Wright*, 2 Cranch, C. C. 296. In *Dana's Case*, 7 Benedict, 1, a warrant to remove to the District of Columbia a person alleged to have printed a libel in a newspaper published in New York, and circulated by his authority in the District of Columbia, was refused by *Mr. Justice* Blatchford, then district judge, not because the offense could not be punished in the District of Columbia, but because the law of that District provided for its prosecution by information only, and was therefore unconstitutional. In *United States* v. *Comerford*, 25 Fed. Rep. 902, an indictment on § 3893 of the Revised Statutes, for "knowingly depositing or causing to be deposited" in the postoffice at New York a letter containing obscene matter in a sealed envelope addressed to a person in Texas, was quashed, not merely for want of jurisdiction in Texas, but because the court held that the act did not constitute an offense under that Statute, in accord with the decision of this court at the present term in *United States* v. *Chase*, 135 U. S. 255 [34: 117].

In the case before us, the offense charged being an offer of money, or a tender of a contract for the payment of money, contained in a letter mailed in New York and addressed to a postmaster in Connecticut, to induce him to violate his official duty, it might admit of doubt whether any offense against the laws of the United States was committed until the offer or tender was known to the postmaster and might have influenced his mind. But there can be no doubt at all that if any offense was committed in New York, the offense continued to be committed when

the letter reached the postmaster in Connecticut; and that if no offense was committed [438] in New York, an offense was committed in Connecticut; and that, in either aspect, the District Court of the United States for the District of Connecticut had jurisdiction of the charge against the petitioner. Whether he might have been indicted in New York is a question not presented by this appeal.

Order affirmed.

---

[436] *Ex parte:*

In the Matter of WILLIAM KEMMLER, Petitioner.

(See S. C. Reporter's ed. 436-449.)

Writ of error to state court, when issued—cruel and unusual punishment, what is—construction of Constitution—state decision, when reviewable—14th Amendment—power of State—New York Law inflicting punishment of death by electricity, constitutional.

1. A writ of error to the highest court of a State is not allowed as of right, and ought not to be sent out when this court, after hearing, is of opinion that the issue of the writ could only result in the affirmance of the judgment.

2. Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution.

3. The decision of the New York state courts sustaining the validity under the State Constitution of the New York Act, prescribing that the punishment of death shall be by electricity (chap. 489, Laws of 1888), is not re-examinable here; that decision was not against any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution of the United States.

4. The privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States, are those protected by the XIVth Amendment to the Federal Constitution.

5. That Amendment was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order.

6. Said Statute inflicting the punishment of death by electricity is within the legitimate sphere of the legislative power of the State.

7. Said Statute does not amount in law to a denial by the State of due process of law to one accused of crime, or of any right secured to him by the Constitution of the United States.

[No. 13, Original.]

Argued May 20, 1890. Decided May 23, 1890.

NOTE.—*As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution,* see *notes* to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws,—see *notes* to Jackson v. Lamphire, 7: 679, and Commercial Bank v. Buckingham, 12: 109.

PETITION for a writ of error to review a judgment of the Supreme Court of the State of New York affirming an order of the County Judge of Cayuga County remanding the relator to the custody of the warden of the state prison at Auburn upon a hearing upon habeas corpus. Said judgment of the Supreme Court was entered upon a judgment of the Court of Appeals of said State, affirming a previous order of the Supreme Court.

Application for writ of error denied.

The facts are stated in the opinion.

Mr. **Roger M. Sherman,** for petitioner:

We assume that the determination of questions which the decisions of this court have left open will not be reached in this case upon the present motion, but upon the return to the writ and in due course of law.

Spies v. *Illinois,* 123 U. S. 164 (31: 85).

The decision below, sustaining the Statute, necessarily involved an adjudication that it was not a violation of the Federal Constitution.

Spencer v. *Merchant,* 125 U. S. 352 (31: 766).

Due process of law to deprive a person of his life excludes "cruel and unusual punishment."

Immunity from such cruel and unusual punishment is a privilege of citizens of the United States which no state law can abridge.

In the mode of execution, or in the imposition of solitary confinement, or in the delegation of the judicial functions of fixing the day of death, this Statute does not prescribe due process of law.

Wynehamer v. *People,* 13 N. Y. 378; *Davidson* v. *New Orleans,* 96 U. S. 101, 102, 104 (24: 618, 619); *Den* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 276, 277 (15: 374); *Slaughter House Cases,* 83 U. S. 16 Wall. 118 (21: 422).

The constitutional provision in this respect has been held not to apply to state courts. Its principle, however, must be considered as part of the common law of each State.

3 Whart. Crim. Law, § 3405.

Due process of law excludes cruel and unusual punishment.

Done v. *People,* 5 Park. Crim. Rep. 382-388; *Lowenberg* v. *People,* 27 N. Y. 342.

It is open to contention in this court, that the provision of the Fourteenth Amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition to the State to impose cruel and unusual punishment.

Spies v. *Illinois,* 123 U. S. 131, 166 (31: 80, 86); *Strauder* v. *West Virginia,* 100 U. S. 307 (25: 665); *Brown* v. *Levee Comrs.* 50 Miss. 487; 2 Kent, Com. 6, 8

This Statute of New York imposes cruel and unusual punishment.

Shepherd v. *People,* 25 N. Y. 406, 414.

This court does not necessarily follow the decision of a State Legislature upon the question whether its enactments conflict with the Federal Constitution. The inquiry is here original and independent, without regard to legislative forms.

Ohio L. Ins. & T. Co. v. *Debolt,* 57 U S. 16 How. 432, 433 (14: 1003, 1004); *Pease* v. *Peck,* 59 U. S. 18 How. 595 (15: 518); *Jeffer-*

son Branch Bank v. *Skelly*, 66 U. S. 1 Black, 436 (17: 173); *United States* v. *Muscatine*, 75 U. S. 8 Wall. 582 (19: 493); *Douglass* v. *Pike County*, 101 U. S. 687 (25: 971); *Burgess* v. *Seligman*, 107 U. S. 33 (27: 365); *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 256 (27: 926); *Grenada County* v. *Brogden*, 112 U. S. 269 (28: 707); *Pease* v. *Peck*, 59 U. S. 18 How. 595 (15: 519).

What in the State of New York is a cruel and unusual punishment for the crime of murder is a question of federal cognizance under the 14th Amendment, although it involve the construction of the State Constitution, and this court is at liberty to differ from the court of appeals thereupon.

When the 14th Amendment was adopted, the law required that the warrant for execution should specify the time thereof.

N. Y. Rev. Stat. part IV., chap. 1, title 1, § 24.

This requirement is something more than mere remedial or administrative process; and the change which delegates this power and duty of the court to the warden of the state prison has been considered by this court in *Ex parte Medley*, 134 U. S. 160 (33: 835).

The court will take judicial notice of the effect of this Statute, for it involves a law of nature. When a court will take judicial notice, it will inform itself at its discretion. It was proper to give proof addressed to this discretion.

Stephens, Dig. of the Law of Ev. art. 58, subd. 11; *United States* v. *Teschmaker*, 63 U. S. 22 How. 392, 403 (16: 353, 356); *State* v. *Wagner*, 61 Me. 178; *McKinnon* v. *Bliss*, 21 N. Y. 206, 213, 217.

The Statute is so repugnant that it cannot be enforced.

United States v. *Cantril*, 8 U. S. 4 Cranch, 167 (2: 584).

It has been proved in this case, and the court will upon this proof take judicial notice, that the State of New York is so enforcing its Statute as in all human probability to torture the plaintiff. This plaintiff is entitled to the protection of the Federal Constitution.

Ex parte Virginia, 100 U. S. 347 (25: 680).

A penal statute which is in general language broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, cannot be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish.

United States v. *Reese*, 92 U. S. 214, 221 (23: 563, 565); *United States* v. *Harris*, 106 U. S. 629, 642 (27: 290, 295); *Baldwin* v. *Franks*, 120 U. S. 686 (30: 768); *Trade-Mark Cases*, 100 U. S. 82, 98, 99 (25: 550, 553); *Hartung* v. *People*, 22 N. Y. 106.

Mr. **Charles F. Tabor**, *Atty-Gen.* of New York, for respondent:

An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

Ex parte Watkins, 28 U. S. 3 Pet. 202 (7: 653).

The only ground on which this court will give relief on habeas corpus to a prisoner under sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

Ex parte Siebold, 100 U. S. 375 (25: 718); *Re Coy*, 127 U. S. 758 (32: 280).

If the judgment is merely erroneous, the party aggrieved can only have relief by writ of error or other process of review. He cannot be relieved summarily by habeas corpus.

People v. *Liscomb*, 60 N. Y. 570; *People* v. *Jacobs*, 66 N. Y. 8; *People* v. *Brady*, 56 N. Y. 192; *Ex parte Kaine*, 3 Blatchf. 1.

The sentence imposed by the court cannot be corrected by a writ of habeas corpus, but only by appeal.

Wilkerson v. *Utah*, 99 U. S. 137 (25: 348); *Lowenberg* v. *People*, 27 N. Y. 341, 342.

The writ of error is not allowed as a matter of right.

Twitchell v. *Com.* 74 U. S. 7 Wall. 321 (19: 223); *Spies* v. *Illinois*, 123 U. S. 143 (31: 80); *Brooks* v. *Missouri*, 124 U. S. 394 (31: 454); *Bridge Proprietors* v. *Hoboken Land & Imp. Co.* 68 U. S. 1 Wall. 143 (17: 576); *Chouteau* v. *Gibson*, 111 U. S. 200 (28: 400); *Detroit City R. Co.* v. *Guthard*, 114 U. S. 136 (29: 118).

This court will not take jurisdiction to review the action of a state court if the federal question raised here was not raised below.

Santa Cruz County v. *Santa Cruz R. Co.* 111 U. S. 361 (28: 456).

The Fourteenth Amendment to the Federal Constitution has not been violated by the Statute in question.

Slaughter House Cases, 83 U. S. 16 Wall. 36, 77 (21: 394, 409); *New York City* v. *Miln*, 36 U. S. 11 Pet. 102, 139 (9: 648, 662); *Presser* v. *Illinois*, 116 U. S. 265 (29: 619); *Kennard* v. *Louisiana*, 92 U. S. 483 (23: 479); *Davidson* v. *New Orleans*, 96 U. S. 104 (24: 619); *Missouri Pac. R. Co.* v. *Humes*, 115 U. S. 520 (29: 465).

The police power extends to the protection of the lives, health and property of the citizens, and to the perservation of good order and the public morals.

The Legislature cannot, by any contract, devest itself of its police power.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 33 (24: 989); *Mugler* v. *Kansas*, 123 U. S. 665 (31: 211); *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26 (32: 585); *Kidd* v. *Pearson*, 128 U. S. 1 (32: 346); *Hurtado* v. *California*, 110 U. S. 516 (28: 232); *Powell* v. *Pennsylvania*, 127 U. S. 683 (32: 256).

The only question decided by the court of appeals was "that chapter 489 of the Laws of 1888 was not in violation of section 5 of article 1 of the State Constitution." That being so, the decision of the court of appeals, on the construction of the Constitution and Statute of New York, will be followed by this court.

Elmwood v. *Marcy*, 92 U. S. 289 (23: 710); *Fairfield* v. *Gallitin Co.* 100 U. S. 47 (25: 544); *Howe Machine Co.* v. *Gage*, 100 U. S. 677 (25: 755); *Hall* v. *De Cuir*, 95 U. S. 500 (24: 552); *National Bank* v. *Boston*, 125 U. S. 68 (31: 693).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an application for a writ of error to bring up for review a judgment of the supreme court of the State of New York, affirming an order of the county judge of Cayuga County, remanding the relator to the custody of the warden of the state prison at Auburn, upon a hearing upon habeas corpus. The judgment of the supreme court was entered upon a judgment of the Court of Appeals of the State of New York, affirming a previous order of the supreme court. The application was originally presented to *Mr. Justice* Blatchford, and, upon his suggestion, was permitted to be made in open court, and has been heard upon full argument.

A writ of error to the highest court of a State is not allowed as of right, and ought not to be sent out when the court in session, after hearing, is of opinion that it is apparent upon the face of the record that the issue of the writ could only result in the affirmance of the judgment. *Spies* v. *Illinois*, 123 U. S. 131 [31: 80].

The writ of habeas corpus was allowed on the 11th day of June, 1889, and made returnable before the county judge of Cayuga County. The petition was filed by one Hatch, and stated "that William Kemmler, otherwise called John Hort, is imprisoned or restrained in his liberty at Auburn state prison, in the City of Auburn, County of Cayuga, State of New York, by Charles F. Durston, agent and warden of Auburn state prison, having charge thereof. That he has not been committed and is not detained by virtue of any judgment, decree, final order or process issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; nor is he committed or detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal made in the special proceedings instituted for any cause except to punish him for contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order. That the cause or pretense of the imprisonment or restraint of said William Kemmler, otherwise called John Hort, according to the best knowledge and belief of your petitioner, is that he was indicted by a grand jury of Erie County, for murder in the first degree; that he was tried therefor at a Court of Oyer and Terminer of Erie County, and found guilty thereof by the verdict of a jury on the 10th day of May, 1889; that thereafter and on the 14th day of May, 1889, he was arraigned in said court of oyer and terminer for sentence; that, contrary to the Constitution of the State of New York and of the United States, and contrary to his objection and exception, duly and timely taken in due form of law, he was sentenced to undergo a cruel and unusual punishment, as appears by a copy of the pretended judgment, warrant or mandate hereto annexed and made a part of this petition and marked 'Exhibit A,' by virtue of which such imprisonment or restraint is claimed to be made: that he is deprived of liberty and threatened with deprivation of life without due process of law, contrary to the Constitution of the State of New York and of the United States, and contrary to his objection and exception thereto, duly and timely taken. The imprisonment is stated to be illegal because it is contrary to the provisions of each of said Constitutions."

The warden of the Auburn state prison made the following return:

"*First.* That I am the duly appointed and acting warden and agent of the Auburn state prison, and on the said 11th day of June, 1889, and before the said writ of habeas corpus was served upon and came to me, the said William Kemmler, otherwise called John Hort, was, and now is, in my custody and detained by me in the state prison at Auburn, in the State of New York, under and by virtue of a judgment of the Court of Oyer and Terminer of the State of New York, held in and for the County of Erie, on the 14th day of May, 1889, duly convicting the said William Kemmler, otherwise called John Hort, of murder in the first degree. A true copy of the judgment roll of the aforesaid conviction is hereto attached as a part hereof, and marked 'Exhibit A.' |440

"And said William Kemmler, otherwise called John Hort, is also detained in my custody as such warden and agent under and by virtue of a warrant signed by the Hon. Henry A. Childs, the justice of the supreme court before whom the said William Kemmler, otherwise called John Hort, was, as aforesaid, duly tried and convicted, and which said warrant was duly issued in pursuance of the aforesaid conviction, and in compliance with the provisions of the Code of Criminal Procedure, relating thereto, a copy of which said warrant is hereto annexed as a part hereof, and marked 'Exhibit B.'

"*Second.* And I, the said Charles F. Durston, agent and warden of Auburn state prison, do make a further return and allege as I am advised and verily believe to be true, that the said William Kemmler, otherwise called John Hort, was not sentenced as hereinbefore set forth, to undergo a cruel and unusual punishment, contrary to the provisions of the Constitution of the State of New York and the Constitution of the United States.

"And I do further allege that the said imprisonment and restraint of the said William Kemmler, otherwise called John Hort, and the deprivation of his liberty and the threatened deprivation of life, are not without due process of law and are not contrary to the provisions of the Constitution of the State of New York or the Constitution of the United States, as alleged in the petition upon which said writ of habeas corpus was granted.

"I do further allege, as I am advised, that the said judgment of conviction hereinbefore set forth, and the aforesaid warrant and the punishment and deprivation of liberty and the threatened deprivation of life of the said William Kemmler, otherwise called John Hort, thereunder, are fully warranted by the provisions of chapter 489 of the Laws of 1888, |441

which is a valid enactment of the Legislature of the State of New York, and it is not in conflict with or in violation of the provisions of the Constitution of the State of New York or the Constitution of the United States.

"And I hold the said William Kemmler, otherwise called John Hort, under and by virtue of no other authority than as hereinbefore set forth."

Copies of the indictment of Kemmler, otherwise called Hort, for the murder of Matilda Zeigler, otherwise called Matilda Hort, the judgment and sentence of the court, and the warrant to the warden to execute the sentence, were attached to the petition and return. The conclusion of the warrant, pursuing the sentence, was in these words: "Now, therefore, you are hereby ordered, commanded and required to execute the said sentence upon him, the said William Kemmler, otherwise called John Hort, upon some day within the week commencing on Monday, the 24th day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and within the walls of Auburn state prison, or within the yard or inclosure adjoining thereto, by then and there causing to pass through the body of him, the said William Kemmler, otherwise called John Hort, a current of electricity of sufficient intensity to cause death, and that the application of such current of electricity be continued until he, the said William Kemmler, otherwise called John Hort, be dead."

Upon the return of the writ before the county judge, counsel for the petitioner offered to prove that the infliction of death by the application of electricity as directed "is a cruel and unusual punishment, within the meaning of the Constitution, and that it cannot therefore be lawfully inflicted, and to establish the facts upon which the court can pass, as to the character of the penalty. The attorney-general objected to the taking of testimony as to the constitutionality of this law, on the ground that the court has no authority
442] to take such proof. The objection was thereupon overruled, and the attorney-general excepted." A voluminous mass of evidence was then taken as to the effect of electricity as an agent of death. And upon that evidence it was argued that the punishment in that form was cruel and unusual within the inhibition of the Constitutions of the United States and of the State of New York, and that therefore the Act in question was unconstitutional.

The county judge observed that the "Constitution of the United States and that of the State of New York, in language almost identical, provide against cruel and inhuman punishment, but it may be remarked, in passing, that with the former we have no present concern, as the prohibition therein contained has no reference to punishments inflicted in state courts for crimes against the State, but is addressed solely to the national government and operates as a restriction on its power." He held that the presumption of constitutionality had not been overcome by the prisoner, because he had not "made it appear by proofs or otherwise, beyond doubt, that the Statute of 1888 in regard to the infliction of the death penalty provides a cruel and unusual, and therefore unconstitutional, punishment, and that a force of electricity to kill any human subject with celerity and certainty, when scientifically applied, cannot be generated." He therefore made an order dismissing the writ of habeas corpus, and remanding the relator to the custody of the respondent. From this order an appeal was taken to the supreme court, which affirmed the judgment of the county judge. The supreme court was of opinion (*People* v. *Durston*, 55 Hun, 64) that it was not competent to support the contention of the relator by proofs *aliunde* the Statute; that there was nothing in the constitution of the government or in the nature of things giving any color to the proposition that, upon a mere question of fact involved in legislation, the judgment of a court is superior to that of the Legislature itself, nor was there any authority for the proposition that in respect to such questions, relating either to the manner or the matter of legislation, the decision of the Legislature could be reviewed by the court; and that the presumption that the Legislature had ascertained the facts necessary to determine that death by the mode prescribed was not a cruel punishment, was conclusive upon the court. And Dwight, *J.*, delivering the opinion, also said: "We have read with much interest the evidence returned to the county judge, and we agree with him that the burden of the proof is not successfully borne by the relator. On the contrary, we think that the evidence is clearly in favor of the conclusion that it is within easy reach of electrical science at this day to so generate and apply to the person of the convict a current of electricity of such known and sufficient force as certainly to produce instantaneous, and therefore painless, death."

From this judgment of the supreme court an appeal was prosecuted to the court of appeals, and the order appealed from was affirmed. It is said in the opinion by O'Brien, *J.*: "The only question involved in this appeal is whether this enactment is in conflict with the provision of the State Constitution which forbids the infliction of cruel and unusual punishment. . . . If it cannot be made to appear that a law is in conflict with the Constitution, by argument deduced from the language of the law itself or from matters of which a court can take judicial notice, then the Act must stand. The testimony of expert or other witnesses is not admissible to show that in carrying out a law enacted by the Legislature some provision of the Constitution may possibly be violated." The determination of the Legislature that the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases, was held conclusive. The opinion concludes as follows: "We have examined this testimony and can find but little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the Constitution, though it is certainly unusual. On the

contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the Statute, must result in instantaneous, and consequently in painless, death." At the same term of the court of appeals the appeal of the relator from the judgment on the indictment against him was heard, and that judgment affirmed. Among other points made upon that appeal was this, that the sentence imposed was illegal and unconstitutional, as being a cruel and unusual punishment, but the court decided, as in the case of the appeal from the order under consideration here, that the position was untenable, and that the Act was not unconstitutional because of the new mode adopted to bring about death.

We find, then, the Law held constitutional by the court of oyer and terminer in rendering the original judgment; by the supreme court and the court of appeals in affirming it; by the county judge in the proceedings upon the writ of habeas corpus; by the supreme court in affirming the order of the county judge, and by the court of appeals in affirming that judgment of the supreme court.

It appears that the first step which led to the enactment of the Law was a statement contained in the annual message of the governor of the State of New York, transmitted to the Legislature January 6, 1885, as follows: "The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the Legislature." The Legislature accordingly appointed a commission to investigate and report "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases." This commission reported in favor of execution by electricity, and accompanied their report by a bill which was enacted and became chapter 489 of the Laws of 1888. Laws of New York 1888, p. 778. Among other changes, section 505 of the Code of Criminal Procedure of New York was amended so as to read as follows: "§ 505. The punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead." Various other amendments were made, not necessary to be considered here.

Sections 10, 11 and 12 of the Act are as follows:

"§ 10. Nothing contained in any provision of this Act applies to a crime committed at any time before the day when this Act takes effect. Such crime must be punished according to the provisions of law existing when it is committed, in the same manner as if this Act had not been passed; and the provisions of law for the infliction of the penalty of death upon convicted criminals, in existence on the day prior to the passage of this Act, are continued in existence and applicable to all crimes punishable by death, which have been or may be committed before the time when this Act takes effect. A crime punishable by death committed after the beginning of the day when this Act takes effect, must be punished according to the provisions of this Act, and not otherwise.

"§ 11. All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed.

"§ 12. This Act shall take effect on the first day of January, one thousand eight hundred and eighty-nine, and shall apply to all convictions for crimes punishable by death, committed on or after that date."

Kemmler was indicted for and convicted of a murder committed on the 29th day of March, 1889, and therefore came within the Statute. The inhibition of the Federal Constitution upon the passage of *ex post facto* laws has no application.

Section 5 of article I. of the Constitution of the State of New York provides that "excessive bail shall not be required, nor excessive fines imposed, nor shall cruel and unusual punishments be inflicted, nor shall witnesses be unreasonably detained." The Eighth Amendment to the Federal Constitution reads thus: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." By the Fourteenth Amendment it is provided that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws." It is not contended, as it could not be, that the Eighth Amendment was intended to apply to the States, but it is urged that the provision of the Fourteenth Amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition on the State from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term "due process of law."

The provision in reference to cruel and unusual punishments was taken from the well-known Act of Parliament of 1688, entitled "An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown," in which, after rehearsing various grounds of grievance, and among others, that "excessive bail hath been

NOTE.—In the body of the "Liberties of the Massachusetts Colony," in New England, of 1641, this language is used: "For bodilie punishments we allow amongst us none that are inhumane, barbarous or cruel." Colonial Laws of Mass. (1889) p. 43.

required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishment inflicted,"—it is declared that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Stat. 1 W. & M. chap. 2. This Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the Constitution of the State of New York was intended particularly to operate upon the Legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the Eighth Amendment, in its application to Congress.

In *Wilkerson* v. *Utah*, 99 U. S. 130, 135 [25: 345, 347], *Mr. Justice* Clifford, in delivering the opinion of the court, referring to Blackstone, said: "Difficulty would attend the effort to define with exactness the extent of the constitutional provision, which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that Amendment to the Constitution." Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.

The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the Legislature to say in what manner sentence of death should be executed; that this Act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the Legislature was possessed of the facts upon which it took action; and that by evidence taken *aliunde* the Statute that presumption could not be overthrown. They went further, and expressed the opinion that upon the evidence the Legislature had attained by the Act the object had in view in its passage.

The decision of the state courts sustaining the validity of the Act under the State Constitution is not re-examinable here, nor was that decision against any title, right, privilege or immunity specially set up or claimed by the petitioner under the Constitution of the United States.

Treating it as involving an adjudication that the Statute was not repugnant to the Federal Constitution, that conclusion was so plainly right that we should not be justified [448] in allowing the writ upon the ground that error might have supervened therein.

The Fourteenth Amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a State. Protection to life, liberty and property rests, primarily, with the States, and the Amendment furnishes an additional guaranty against any encroachment by the States upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the States, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. *United States* v. *Cruikshank*, 92 U. S. 542 [23: 588]; *Slaughter House Cases*, 83 U. S. 16 Wall. 36 [21: 394].

In *Hurtado* v. *California*, 110 U. S. 516, 534 [28: 232, 238], it is pointed out by *Mr. Justice* Matthews, speaking for the court, that the words "due process of law," as used in the Fifth Amendment, cannot be regarded as superfluous, and held to include the matters specially enumerated in that article, and that when the same phrase was employed in the Fourteenth Amendment it was used in the same sense and with no greater extent.

As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the Amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. *Barbier* v. *Connolly*, 113 U. S. 27, 31 [28: 923, 925].

The enactment of this Statute was in itself within the legitimate sphere of the legislative power of the State, and in the observance of those general rules prescribed by our systems of jurisprudence; and the Legislature of the State of New York determined

that it did not inflict cruel and unusual punishment, and its courts have sustained that determination. We cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.

In order to reverse the judgment of the highest court of the State of New York, we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States. We have no hesitation in saying that this we cannot do upon the record before us.

The application for a writ of error is denied.

MARY ANN GIBBONS, *Appt.*
v.
JANE OWEN MAHON.

(See S. C. Reporter's ed. 549-569.)

Will, construction of—stock dividends on stock—to whom they belong—shareholder's interest in accumulated earnings of a corporation.

1. Where a will gives the dividends of certain stocks to a daughter of the testatrix for life, a stock dividend thereon is capital and does not go to the daughter, but to the legatee in remainder.
2. A stock dividend does not increase the interests of the shareholders in the property of a corporation; it is only a new evidence of their interests.
3. The interest in reserved or accumulated earnings of a corporation represented by each share is capital, and not income, of that share, as between the tenant for life and the remainderman thereof.

[No. 16.]

Argued Dec. 19, 20, 1888. Decided May 19, 1890.

APPEAL from a decree of the Supreme Court of the District of Columbia dismissing a suit in equity, brought to compel the transfer to plaintiff of certain shares of stock held by defendant as trustee under a will. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was a bill in equity by Mary Ann Gibbons against Jane Owen Mahon to compel the transfer to the plaintiff of shares in the Washington Gaslight Company held by the defendant as trustee under the will of Ann W. Smith. The case was heard upon bill and answer, by which, and by the Acts of Congress concerning that company, the facts appeared to be as follows:

Mrs. Smith, a widow, and the mother of both parties to this suit, died March 26, 1865, owning two hundred and eighty shares in that company, and leaving a last will, dated February 11, 1865, and admitted to probate April 8, 1865, containing the following bequest:

"I hereby give, devise and bequeath to my daughter, Jane Owen Mahon, wife of David W. Mahon, of the City of Washington aforesaid, and to her heirs and assigns, two hundred and eighty shares of stock of the Washington Gaslight Company, also forty-five shares of stock of the Franklin Insurance Company, both in the City of Washington aforesaid; also eight thousand five hundred dollars in government bonds of the government of the United States of America, said stock and bonds or any portion of them remaining at my death a part of my said estate; [550
to have and to hold the same in and upon the trusts and provisions following: that is to say, in trust for the advantage and behoof of my said daughter, Mary Ann Gibbons; and that after my decease the said Jane Owen Mahon, her heirs and assigns, shall cause the dividends of said stock and the interest of said bonds as they accrue to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without percentage of commission or diminution of principal; and in case of the death of the said Mary Ann Gibbons, then the said stocks, bonds and income shall revert to the estate of my said daughter, Jane Owen Mahon, without incumbrance or impeachment of waste."

The Washington Gaslight Company was incorporated by the Act of Congress of July 8, 1848, chap. 96, with a capital of $50,000, divided into shares of $20 each. 9 Stat. 722. It was authorized to increase its capital stock to $350,000 by the Act of August 2, 1852, chap. 79, and to $500,000 by the Act of January 3, 1855, chap. 22. 10 Stat. 734, 885. At the death of the testatrix, the capital stock amounted to $500,000, consisting of 25,000 shares of $20 each. By the Act of May 24, 1866, chap. 97, the capital stock was increased to $1,000,000. 14 Stat. 53.

The company from time to time declared and paid dividends in money upon its stock, and such dividends were paid by the defendant to the plaintiff.

Before and after the death of Mrs. Smith, and before and after the passage of the Act of 1866, and before November 1, 1868, the company from time to time invested portions of its net earnings, income and profits in the enlargement and extension of its permanent works and plant employed in its legitimate business under its charter; and the actual cost of its works and plant, as shown by its construction account, amounted on January 1, 1865, to $842,623.02; on January 1, 1866, to $892,224.08; on January 1, 1867, to $935,039.55; on January 1, 1868, to $963,803.37; on July 1, 1868, to $988,914.84, and on January 1, 1869, to $1,039,287.17; and amounted, in fact, at the time of the passage of the Act of 1866, to not less than $900,000, and on October 1, 1868, to more than $1,000,000.

On November 1, 1868, the board of directors of the company adopted the following [55
resolution: "Whereas the construction account of this company exceeds one million of dollars, and as the capital of the company has been increased by an Act of Congress to one million of dollars, therefore be it resolved, that the increased stock be awarded among the stockholders, share for share, as they stood on the first of October, 1868."

On September 29, 1868, the defendant surrendered to the company the certificate for the two hundred and eighty shares mentioned

in Mrs. Smith's will, and those shares were transferred on the books of the company to the name of the defendant, as trustee; and on November 17, 1868, the company made out and delivered to the defendant, as trustee, a certificate for the five hundred and sixty shares.

The defendant paid to the plaintiff from time to time the dividends afterwards declared on the five hundred and sixty shares, but never transferred to her the two hundred and eighty new shares.

The court dismissed the bill, and delivered an opinion reported in 4 Mackey, 130; and the plaintiff appealed to this court.

Mr. **Henry E. Davis,** for appellant:

The new shares are in effect and in substance a stock dividend.

Hooper v. *Rossiter*, 13 Price, 774, 1 McClel. 527, 536; *Clarkson* v. *Clarkson*, 18 Barb. 646, 657; *Deland* v. *Williams*, 101 Mass. 571, 574; *Rand* v. *Hubbell*, 115 Mass. 461; *Com.* v. *Pittsburgh, Fort W. & C. R. Co.* 74 Pa. 83; *Bailey* v. *New York Cent. & H. R. R. Co.* 89 U. S. 22 Wall. 604, 635, 636 (22: 840, 848).

The tenant for life of stock is entitled to all dividends declared thereon during his life, irrespective of the time when they were earned, provided only that they do not impair the capital of the trust fund.

Bates v. *MacKinley*, 31 Beav. 280; *Richardson* v. *Richardson*, 75 Me. 570; *Goodwin* v. *Hardy*, 57 Me. 143; *Jermain* v. *Lake Shore & M. S. R. Co.* 91 N. Y. 483; *Paris* v. *Paris*, 10 Ves. Jr. 185; *Brander* v. *Brander*, 4 Ves. Jr. 800; *Irving* v. *Houstoun*, 4 Paton, Sc. App. Cas. 521; *Clayton* v. *Gresham*, 10 Ves. Jr. 288; *Witts* v. *Steere*, 13 Ves. Jr. 363; *Barclay* v. *Wainewright*, 14 Ves. Jr. 66; *Price* v. *Anderson*, 15 Sim. 473; *Johnson* v. *Johnson*, 15 Jur. 714; *Murray* v. *Glasse*, 17 Jur. 816; *Cuming* v. *Boswell*, 2 Jur. N. S. 1005; *Norris* v. *Harrison*, 2 Madd. 268; *Hooper* v. *Rossiter*, 13 Price, 774, 1 McClel. 536; *Re Barton's Trust*, L. R. 5 Eq. 238; Hill, Trustees, 386; *Minot* v. *Paine*, 99 Mass. 101; *Clarkson* v. *Clarkson*, 18 Barb. 646; *Simpson* v. *Moore*, 30 Barb. 638; *Re Woodruff*, Tuck. 58; *Re Pollock*, 3 Redf. 100; *Whitney* v. *Phœnix*, 4 Redf. 180; *Earp's App.* 28 Pa. 368; *Wilbank's App.* 64 Pa. 256; *Moss's App.* 83 Pa. 264; *Biddle's App.* 99 Pa. 278; *Vinton's App.* Id. 434; *Van Doren* v. *Olden*, 19 N. J. Eq. 176; *Ashhurst* v. *Field*, 26 N. J. Eq. 1; *Wheeler* v. *Perry*, 18 N. H. 307; *Lord* v. *Brooks*, 52 N. H. 72; *Pierce* v. *Burroughs*, 58 N. H. 302; *Miller* v. *Guerrard*, 67 Ga. 284.

Mr. **J. Hubley Ashton,** for appellee:

The term "dividends" was evidently used in the will in its ordinary acceptation of moneys paid out of profits by a corporation to its shareholders.

Hicks v. *Sallitt*, 3 DeG. M. & G. 793.

The term "dividend," when applied to corporate stock, imports only a division of money.

Taft v. *Hartford, P. & F. R. Co.* 8 R. I. 333.

A dividend is money paid cut of the profits by a corporation to its shareholders.

Lockhart v. *Van Alstyne*, 31 Mich. 79; *Hyatt* v. *Allen*, 56 N. Y. 553; *King* v. *Paterson & H. R. R. Co.* 29 N. J. L. 87.

The term "dividends" is obviously used as meaning the same thing as the word "income."

The profits of a corporation remain, while undivided, part of the capital of the corporation, and the interest therein, represented by each certificate of a share of stock, is part of the capital, and not of the income, of that share, as between those entitled to successive rights in the share.

Minot v. *Paine*, 99 Mass. 101; *Rand* v. *Hubbell*, 115 Mass. 474; *Gifford* v. *Thompson*, Id. 480; *Williams* v. *Western U. Teleg. Co.* 93 N. Y. 162; Taylor, Priv. Corp. § 801.

The term "dividends" as used in this will does not include any newly created shares awarded to the appellee upon an increase of the capital stock of the corporation.

Reed v. *Head*, 6 Allen, 177; *Barrus* v. *Kirkland*, 8 Gray, 512; *Atkins* v. *Albree*, 12 Allen, 361; *Kinmonth* v. *Brigham*, 5 Allen, 270; *Rand* v. *Hubbell*, 115 Mass. 461; *Gifford* v. *Thompson*, Id. 478; *New Haven* v. *City Bank*, 31 Conn. 106; *Gray* v. *Portland Bank*, 3 Mass. 364; *Eidman* v. *Bowman*, 58 Ill. 444; *State* v. *Smith*, 48 Vt. 266; *Dousman* v. *Wisconsin & L. S. Min. & S. Co.* 40 Wis. 418; *Atkins* v. *Albree*, 12 Allen, 361.

The shares here in controversy were awarded to the appellee as representing an interest in the permanent and capitalized property of the company; and therefore they cannot be deemed income of the original shares in the meaning of the will, but an accretion to the capital held in trust, and which is to go to appellee absolutely on the death of the appellant.

State v. *Morristown F. Asso.* 23 N. J. L. 195; *Burrall* v. *Bushwick R. Co.* 75 N. Y. 211; *Williams* v. *Western U. Teleg. Co.* 93 N. Y. 182; *Pratt* v. *Pratt*, 33 Conn. 446; *Minot* v. *Paine*, 99 Mass. 107; *Rand* v. *Hubbell*, 115 Mass. 474; *Moss's App.* 83 Pa. 269.

The shares in controversy do not constitute income of the original shares for appellant's benefit under the will of the testatrix.

Hooper v. *Rossiter*, 13 Price, 774, 1 McClel. 527; *Re Barton's Trust*, L. R. 5 Eq. 238; *Atkins* v. *Albree*, 12 Allen, 359; *Deland* v. *Williams*, 101 Mass. 571; *Leland* v. *Hayden*, 102 Mass. 542; *Heard* v. *Eldredge*, 109 Mass. 258; *Rand* v. *Hubbell*, 115 Mass. 461; *Gifford* v. *Thompson*, Id. 478; *Biddle's App.* 99 Pa. 282; *Millen* v. *Guerrard*, 67 Ga. 284.

Mr. Justice **Gray** delivered the opinion of the court:

The question presented by the claims made in the bill and answer, and by the arguments of counsel, is whether the two hundred and eighty new shares of stock in the Washington Gaslight Company are to be treated as dividends, to the whole or part of the principal of which the plaintiff is entitled under the will, or are to be treated as an increase of the capital of the trust fund, and the plaintiff therefore entitled to receive only the income thereof.

The court below held that the new shares must be treated as capital, the income only of which was payable to the plaintiff. She contends that the new shares are in the nature of a dividend, to the whole of which she is

entitled, or, if that position should not be maintained, that so much of the new shares as represents earnings made by the corporation since the death of the testatrix should be held to be income payable to her. Upon full consideration of the case, on reason and authority, this court is of opinion that the decision below is correct.

The distinction between the title of a corporation, and the interest of its members or stockholders, in the property of the corporation, is familiar and well settled. The ownership of that property is in the corporation, and not in the holders of shares of its stock. The interest of each stockholder consists in the right to a proportionate part of the profits whenever dividends are declared by the corporation, during its existence under its charter, and to a like proportion of the property remaining, upon the termination or dissolution of the corporation, after payment of its debts. *Van Allen* v. *Nolan*, 70 U. S. 3 Wall. 573, 584 [18: 229, 234]; *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206, 230 [21: 888, 896]; *Tennessee* v. *Whitworth*, 117 U. S. 129, 136 [29: 830, 832]; *New Orleans* v. *Houston*, 119 U. S. 265, 277 [30: 411, 415].

Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business, or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its earnings and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property.

Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts, even at the suit of owners of preferred stock, entitled by express agreement with the corporation to dividends at a certain yearly rate, "in preference to the payment of any dividend on the common stock, but dependent on the profits of each particular year, as declared by the board of directors." *New York, L. E. & W. R. Co.* v. *Nickals*, 119 U. S. 296, 304, 307 [30: 363, 367, 368].

Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and the remainderman, legal or equitable, thereof.

Whether the gains and profits of a corporation should be so invested and apportioned as to increase the value of each share of stock, for the benefit of all persons interested in it, either for a term of life or of years, or by way of remainder in fee; or should be distributed and paid out as income, to the tenant for life or for years, excluding the remainderman from any participation therein,—is a [559 question to be determined by the action of the corporation itself, at such times and in such manner as the fair and honest administration of its whole property and business may require or permit, and by a rule applicable to all holders of like shares of its stock; and cannot, without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts, as often as it may be litigated between persons claiming successive interests under a trust created by the will of a single shareholder, and by a distinct and separate investigation, through a master in chancery or otherwise, of the affairs and accounts of the corporation, as of the dates when the provisions of the will of that shareholder take effect, and with regard to his shares only.

In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares.

Therefore, when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock representing capital, or a division of profits and income, depends upon the substance and intent of the action of the corporation, as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share.

A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares, and the proportional interest of each share- [560 holder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones.

In *Bailey* v. *New York Cent. & H. R. R. Co.*, 89 U. S. 22 Wall. 604 [22: 840], cited for the plaintiff, the point decided was that certificates, issued by a railroad corporation to its stockholders as representing earnings which had been used in the construction and equipment of its road, and payable, at the option of the company, with dividends like those paid on the stock, were within that provision of the Internal Revenue Laws, which enacted that any railroad company

"that may have declared any dividend in scrip or money due or payable to its stockholders," "as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, shall be subject to and pay a tax of five per centum on the amount of all such" "dividends or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable." Acts of June 30, 1864, chap. 173, § 122 (13 Stat. 284); July 13, 1866, chap. 184, § 9 (14 Stat. 138, 139). The question at issue was not between the owners of successive interests in particular shares, but between the corporation and the government, and depended upon the terms of a statute carefully framed to prevent corporations from evading payment of the tax upon their earnings. The opinion delivered by *Mr. Justice* Clifford, though containing some general expressions which, taken by themselves, might seem to ignore the settled distinction (affirmed by this court in earlier and later cases above cited) between the property of the corporation and the interests of the shareholders, yet explicitly recognized that "net earnings of such a company may be expended in constructing or equipping the railroad, or in the purchase of real estate or other properties," and "may be distributed in dividends of stock or of scrip or of money;" that "purchasers of stock have a right to claim and receive all dividends subsequently declared, no matter when the fund appropriated for the purpose was earned;" that, "as a general [61] rule, stock dividends, even when they represent net earnings, become at once a part of the capital of the company," and that "such a dividend, if earned and declared, necessarily increases the value of the old stock, if new stock is not issued, and in that mode reaches substantially the same result." 89 U. S. 22 Wall. 635-637 [22: 848, 849].

In Great Britain, it is well settled that where a corporation, whether authorized or unauthorized by law to increase its capital stock, accumulates and invests part of its earnings, and afterwards apportions them among its shareholders as capital, the amount so apportioned must be deemed an accretion to the capital of each share, the income of which only is payable to a tenant for life.

From the beginning of this century, it has been established, by decisions of the Court of Chancery in England, and of the House of Lords on appeal from Scotland, that where a bank, having no power by law to increase its capital stock, has used its accumulated profits as floating capital, and invested them in securities which can be turned into cash at pleasure, an extraordinary dividend or bonus declared out of such profits is capital, and not income, of each share, as between owners of the life interest and of the interest in remainder therein, without inquiring into the time when the profits were actually earned. *Brander* v. *Brander*, 4 Ves. Jr. 800; *Irving* v. *Houstoun*, 4 Paton, Sc. App. Cas. 521; *Cuming* v. *Boswell*, 2 Jur. N. S. 1005, 1008; *S. C.* 28 L. T. 344, 1 Paterson, 652. *In Irving v. Houstoun, Lord* Eldon (*Lord* Rosslyn and *Lord* Alvanley concurring) said that if an owner of bank stock "gives the life interest of his estate to anyone, it can scarcely be his meaning that the liferenter should run away with a bonus that may have been accumulating on the floating capital for half a century;" and that to take an account of the precise amount of profits which had accumulated before and after the commencement of the life interest in particular shares would lead to inconveniences which would be intolerable. 4 Paton, 530, 531. In *Cuming* v. *Boswell*, above cited, and relied on by the present plaintiff, the person held entitled to bonuses declared on bank stock was, as stated in the judgment delivered by *Lord* Cranworth, "not a liferenter but an ab- [5 solute fiar," in other words, not a mere tenant for life, but an owner in fee, although his estate was determinable by his death without issue.

It is unnecessary, for the purposes of this case, to consider how far the English decisions upon the question whether a dividend in money, not declared to be made out of accumulated earnings, should be considered as capital or as income, can be reconciled with each other, or with sound principle. But there are two recent cases of great authority, concerning stock dividends, which directly bear upon the question before us.

In one of those cases, shares in a steam navigating company were settled by their owner upon trust to pay "the interest, dividends, shares of profits or annual proceeds" to a woman during her life, and after her death in trust for her children. The directors, acting within the scope of their authority, retained part of a half-year's profits, and applied it to pay for new boats, and the company passed a resolution to issue to existing shareholders new shares representing the money so applied. It was argued that "the company had no power to compel the tenant for life to risk any more in the venture than the shares originally held, and could not be allowed for themselves, by declaring or withholding a dividend out of the profits, to alter the rights as between tenant for life and remainderman." But *Vice-Chancellor* Wood (afterwards *Lord Chancellor* Hatherley) held otherwise, and said: "As long as the company have the profit of the half-year in their hands, it is for them to say what they will do with it, subject, of course, to the rules and regulations of the company." "The dividend to which a tenant for life is entitled is the dividend which the company chooses to declare. And when the company meet and say that they will not declare a dividend, but will carry over some portion of the half-year's earnings to the capital account, and turn it into capital, it is competent for them, I apprehend, to do so; and when this is done, everybody is bound by it, and the tenant for life of those shares cannot complain. The only mode in which a tenant for life could act would be to use his influence with his trustees as to their votes [56 with reference to the proposed arrangement." "If a man has his shares placed in settlement, he gives his trustees, in whose names they stand, a power of voting, and he must

use his influence to get them to vote as he wishes. But where the company, by a majority of their votes, have said that they will not divide this money, but turn it all into capital, capital it must be from that time. I think that is the true principle, and I must hold that these additional shares formed part of the capital fund under the settlement, and went to the children, and not to the tenant for life (their mother)." *Re Barton's Trust*, L. R. 5 Eq. 238, 243-245.

In the most recent English case on the subject, William Bouch bequeathed to his executor, in trust for his widow for life, and after her death to the executor, his personal estate, including shares in an iron company, whose directors had power, before recommending a dividend, to set apart out of the profits such sums as they thought proper as a reserved fund, for meeting contingencies, equalizing dividends or repairing or maintaining the works. Four years after the testator's death, the company, upon the recommendation of the directors, and out of a fund so reserved in the testator's life time, and of undivided profits, about half of which accrued before his death, made a bonus dividend, and an allotment of new shares, with liberty to each shareholder to apply the bonus dividend in payment for the new shares. Bouch's executor took the new shares and applied the bonus dividend in payment therefor. The House of Lords, reversing the judgment of the Court of Appeal, and restoring an order of *Mr. Justice* Kay, held that the corporation did not pay or intend to pay any sum as a dividend, but intended to and did appropriate the undivided profits as an increase of the capital stock; that the bonus dividend was therefore capital of the testator's estate, and the widow was not entitled either to the bonus or to the new shares. The difference of opinion was not as to the general principle which should govern, but only as to its application to the action of the corporation in the particular case. The House of Lords fully approved the statements of the general principle by *Vice-Chancellor* Wood in *Re Barton's Trust*, above cited, and by *Lord Justice* Fry, in delivering the judgment of the Court of Appeal, as follows: "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares; and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital. In a word, what the company says is income shall be income, and what it says is capital shall be capital." "In most, if not in all, cases, the inquiry as to the time when the profits were earned by the company is an immaterial one as between the tenant for life and remainderman. Their rights have been made dependent on the legitimate action of the company, and" (subject to any rights arising from the law of apportionment, which was not in question) "are determined by the time, not at which the profits are earned by the company, but at [by] the time at which they are by the action of the company made divisible among its members." *Sproule* v. *Bouch*, L. R. 29 Ch. Div. 635, 653, 658, 659; *Bouch* v. *Sproule*, L. R. 12 App. Cas. 385, 397, 402, 407, 408.

The same principle was established in Massachusetts before the case of *Sproule* v. *Bouch* had come before the courts of England. *Atkins* v. *Albree*, 12 Allen, 359; *Minot* v. *Paine*, 99 Mass. 101; *Deland* v. *Williams*, 101 Mass. 571; *Leland* v. *Hayden*, 102 Mass. 542; *Rand* v. *Hubbell*, 115 Mass. 461; *Gifford* v. *Thompson*, Id. 478. And in Connecticut, Rhode Island and Maine a dividend of new shares, representing accumulated earnings, is held to be capital and not income. *Brinley* v. *Grou*, 50 Conn. 66; *Brown's Petition*, 14 R. I. 371; *Richardson* v. *Richardson*, 75 Me. 570, 574.

In New York the recent judgments of the court of appeals appear to have practically overruled the decisions of the lower courts in *Clarkson* v. *Clarkson*, 18 Barb. 646; *Simpson* v. *Moore*, 30 Barb. 637; *Re Woodruff*, Tuck. 58, and *Re Pollock*, 3 Redf. 100, cited in behalf of the plaintiff; and to have settled the law of that State in accordance with that of England and of Massachusetts. [565]

In *Hyatt* v. *Allen*, 56 N. Y. 553, the defendant, by a contract made August 11, 1871, under which he transferred to the plaintiffs certain stock in a manufacturing corporation, agreed to pay them "all profits and dividends of and upon the stock up to the first day of January, 1872." In April, 1872, the corporation declared a dividend of fifteen dollars a share, five sixteenths of which were found by a referee to have been derived from the increase in value of its property between August 11, 1871, and January 1, 1872; and the court below gave judgment for the plaintiff for that proportion of the dividend. But the court of appeals reversed the judgment, and said: "A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made." "When, therefore, a contract is made in relation to dividends or profits, it must be deemed to have reference to dividends or profits to be ascertained and declared by the particular company, and not to growing profits from day to day, or month to month, to be ascertained upon an investigation by third persons, or courts of justice, into the accounts and transactions of the company." 56 N. Y. 557, 558.

In *Williams* v. *Western U. Teleg. Co.*, 93 N. Y. 162, the court of appeals, in the course of an elaborate discussion of the right of a corporation, when unrestrained by statute, to make a stock dividend, said: "When a corporation has a surplus, whether a dividend shall be made, and if made, how much it shall be, and when and where it shall be payable, rest in the fair and honest discretion of the directors uncontrollable by the courts." "Whether they shall be made in cash or

property must also rest in the discretion of the directors." "Desiring to use the surplus and add it to the permanent capital of the company, and having lawfully created shares of stock, they could issue to the stockholders such shares to represent their respective interests in such surplus." "After a stock [66] dividend a corporation has just as much property as it had before. It is just as solvent and just as capable of meeting all demands upon it. After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before. 93 N. Y. 189, 192.

Finally, in *Re Kernochan*, 104 N. Y. 618, the court of appeals applied the same rules as between the remainderman and the person entitled for life to the income of shares bequeathed in trust; rejected the test of determining what part of a cash dividend should be deemed principal and what part income by ascertaining how much was earned before and how much after the death of the testator; approved the general principle laid down in the cases of *Barton's Trust*, L. R. 5 Eq. 238, 245, and *Sproule* v. *Bouch*, L. R. 29 Ch. Div. 635, 653, above cited; and said: "From the shares in question no income could accrue, no profits arise to the holder, until ascertained and declared by the company and allotted to the shareholder; and that act should be deemed to have been in the mind of the testator, and not the earnings or profits as ascertained by a third person, or a court, upon an investigation of the business and affairs of the company, either upon an inspection of their books or otherwise." "The rule is a reasonable and proper one, which limits the rights of a stockholder to profits by the action of the managers of a corporation or company. It is their sole and exclusive duty to divide profits and declare dividends whenever, in their judgment, the condition of the affairs of the corporation renders it expedient; and it would lead to great embarrassment and confusion if a court should undertake to interfere with their discretion so long as they do not go beyond the scope of their powers and authority." 104 N. Y. 628, 629.

In *Earp's App.*, 28 Pa. 368, on the other hand, the Supreme Court of Pennsylvania declined to follow the early English cases, and adopted the rule, that where a corpora- [67] tion, after having accumulated large surplus profits for many years before and since the death of the testator, increased its capital stock, and issued additional shares to the stockholders, so much of the surplus profits as had accumulated in the lifetime of the testator should be deemed capital, and so much as had accumulated since his death should be deemed income; and in *Wiltbank's App.*, 64 Pa. 256, where a corporation voted to increase its capital stock by an issue of new shares to be subscribed and paid for by the stockholders, and a trustee holding shares sold the right to take some new shares, and took others and sold them at an advance, that rule was carried so far as to hold that the sums so received by the trustee were income of the old shares, for the reason that the right to subscribe to new shares, the court thought, "was not a part of the capital of the old stock, but a mere product of an advantage belonging to it," "a right incidental to the stock, and therefore income." The rule upon which those two cases proceeded has since been treated as settled in Pennsylvania, although there has been some difficulty, if not inconsistency, in applying it; and in one case *Mr. Justice* Paxson, now chief justice of Pennsylvania, spoke of both those cases as exceptional and depending on peculiar circumstances. *Moss's App.* 83 Pa. 264, 269, 270; *Biddle's App.* 99 Pa. 278; *Vinton's App.* Id. 434. The only other States, so far as we are informed, in which the Pennsylvania rule prevails, are New Jersey and New Hampshire. *Van Doren* v. *Olden*, 19 N. J. Eq. 176; *Ashhurst* v. *Field*, 26 N. J. Eq. 1; *Van Blarcom* v. *Dager*, 31 N. J. Eq. 783, 798; *Lord* v. *Brooks*, 52 N. H. 72; *Pierce* v. *Burroughs*, 58 N. H. 302, 303. Upon the grounds already stated, that rule appears to us to be open to grave objections, both in principle and in application, as well as opposed to the weight of authority.

In the case at bar, the testatrix bequeathed to her daughter, Jane Owen Mahon, two hundred and eighty shares of stock in the Washington Gaslight Company, as well as some shares in an insurance company and bonds of the United States, "in trust for the advantage and behoof of" her daughter, Mary Ann Gibbons; and directed that after the decease of the testatrix the trustee should "cause the [5 dividends of said stock and the interest of said bonds, as they accrue, to be paid to my said daughter, Mary Ann Gibbons, during her lifetime, without precentage of commission or diminution of principal. And in case of the death of the said Mary Ann Gibbons, then the said stock, bonds and income shall revert to the estate of my said daughter Jane Owen Mahon, without incumbrance or impeachment of waste."

Upon the face of the will, it is manifest that the testatrix used the word "dividends" as having the same scope and meaning as "income" and "interest," and nothing more; and intended that the plaintiff, as equitable legatee for life, should take the income, and the income only, of the shares owned by the testatrix at the time of her death; and that the whole capital of those shares, unimpaired, should go to the defendant, as legatee in remainder.

The admitted facts present the following state of things: The accumulated earnings of the company were kept undivided, and actually added to the capital of the corporation, by investing them from time to time in its permanent works and plant, until the value of the works and plant amounted to a million dollars; no owner of particular shares, or of any interest therein, had the right to compel the company to divide or apportion those earnings; and while they remained so undivided and invested, the capi-

tal stock of the company was increased to the same amount by the Act of Congress of May 24, 1866. The greater part of the earnings in question had been so invested before the making of the will and the death of the testatrix in 1865, a still larger proportion before the passage of the Act of Congress of 1866, and the whole before the resolution of the directors of November 1, 1868, under which the new shares were issued to the defendant, and in which it was recited, in accordance with the truth, that the construction account of the company exceeded $1,000,000, and that its capital had been increased by Act of Congress to that amount, and it was therefore "resolved, that the increased stock be awarded among the stockholders, share for share, as they stood on the 1st of October, 1868."

To hold the plaintiff to be entitled to the whole of the new shares issued to the defendant would be to allow the plaintiff the exclusive benefit of earnings, the greater part of which had accrued and had been invested by the company as capital before her interest began, and would be contrary to all the authorities. To award to her a proportion of those shares, based upon an account of how much of those earnings actually accrued after the death of the testatrix, would be to substitute the estimate of the court for the discretion of the corporation, lawfully exercised through its directors, and would be open to the practical inconveniences already stated.

The resolution is clearly an apportionment of the new shares as representing capital, and not a distribution or division of income. As well observed by *Mr. Justice* James, delivering the opinion of the court below: "Certificates of stock are simply the representative of the interest which the stockholder has in the capital of the corporation. Before the issue of these two hundred and eighty new shares, this trustee held precisely the same interest in this increased plant in the capital of the corporation that she held afterwards. She merely had a new representative of an interest that she already owned, and which was not increased by the issue of the new shares. A dividend is something with which the corporation parts, but it parted with nothing in issuing this new stock. It simply gave a new evidence of ownership which already existed. They were not in any sense, therefore, dividends for which this trustee had to account to the *cestui que trust*. She stood after the issue of the new shares just as she had stood before; and the trustee was obliged to treat them just as she did, namely, as a part of the original, and to pay the dividends to the *cestui que trust*." 4 Mackey, 136.

Decree affirmed.

Mr. Justice **Brewer**, not having been a member of the court when this case was argued, took no part in the decision.

COLUMBUS THAW, *Plff. in Err.*, [519
v.
MOORE S. FALLS ET AL.

(See S. C. *Thaw* v. *Ritchie*, Reporter's ed. 519-548.)

Circuit Court of District of Columbia, equity powers—orphans' court—power to sell infant's real estate—orders of those courts.

1. Equity jurisdiction was vested in the Circuit Court of the United States of the District of Columbia by the Act of Congress of February 27, 1801, chap. 15, secs. 1, 5 (2 Stat. 105, 106).
2. The Orphans' Court of the District of Columbia, with the approval of the Circuit Court of the United States of that District sitting in chancery, has power to order a sale of the real estate of infant wards for their maintenance and education.
3. The orders of those courts within their jurisdiction cannot be collaterally impeached.

[No. 264.]

Argued Apr. 15, 16, 1890. Decided May 23, 1890.

IN ERROR to the Supreme Court of the District of Columbia to review a judgment of that court, affirming a judgment at a trial term of that court, for the defendant, in an action of ejectment to recover land in the City of Washington. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an action of ejectment, brought [520
December 12, 1882, by Columbus Thaw against Maria Ritchie, to recover possession of an undivided half of lots 1 and 4 in square 160 in the City of Washington.

At the trial, on the general issue, before *Chief Justice* Cartter, the plaintiff introduced evidence that his father, Joseph Thaw, died in 1840, seised and possessed of these lots under a title derived from the United States, and leaving a will, dated February 26, 1840, and duly admitted to probate in the same year, which (omitting the formal commencement and conclusion) was as follows:

"Imprimis. I hereby appoint and constitute my beloved wife, Eliza Van Tyler Thaw, to be the guardian of my two youngest children, to wit, my daughter, Columbia Thaw, and my son, Columbus Thaw, and to act in trust for them in all things as fully as I would do if living.

"Item. I give and bequeath to my said beloved wife Eliza all my property of every description, real and personal, to hold and enjoy during her natural life, in trust for the equal benefit and maintenance of herself and of my daughter Columbia and of my son Columbus, the two children above named; and if either of them shall die before arriving at the age of majority, then she is to hold the whole property as above for the [52
equal benefit of herself and the survivor of the two above-named children; or if both of the said children shall die before their mother, my said wife, then she, my said wife Eliza, shall hold the said property during her natural life for her sole own use and benefit; and in no case shall she, my beloved wife Eliza, be deprived of the use of any part thereof during her natural life for the maintenance of herself and of the two chil-

dren aforesaid, while they, or of either, while either of them, shall live, or of herself, while she shall survive them both.

"Item. I give and bequeath to my two children above named, Columbia and Columbus, in equal parts, to their heirs and assigns forever, all my estate, real and personal, that shall remain at and after the death of their mother, my said wife Eliza; or if either of them shall not survive their mother, then I will that the surviving one shall have the whole.

"Item. If both of my said children shall die before their mother, then, on the demise of the last survivor of them, I give and bequeath to my beloved wife Eliza, to her heirs and assigns forever, for her own proper benefit, all my estate of every description.

"I do moreover hereby constitute and appoint my beloved wife, Eliza Van Tyler Thaw, above named, the sole executrix of this my last will and testament, and authorize her to administer and execute the same without giving security in any way whatever."

The plaintiff also introduced evidence tending to show that his mother, Eliza V. Thaw, died in February, 1866; and, for the purpose of showing a severance of the joint tenancy claimed to have existed between himself and his sister Columbia Thaw in these lots, put in evidence a deed, dated May 16, 1848, from his sister and one Henry Walker of their interest in these lots to Agricol Favier; a deed, dated October 22, 1874, from a trustee appointed in a suit in equity for the partition of Favier's real estate after his death, purporting to convey the whole of these lots to one Ingersoll; a deed of the lots, dated May 24, 1878, from Ingersoll to Mary J. France; and the will of Mrs. France, admitted to probate in January, 1881, devising all her real estate to the defendant.

522] It was admitted that the real estate sought to be recovered was worth more than $12,000, and that the defendant was in possession thereof, claiming title adversely to the plaintiff.

The defendant claimed title under a deed of the two lots to Favier from Eliza V. Thaw, dated March 17, 1848, purporting to be executed pursuant to an order of sale made upon her petition by the Orphans' Court for the County of Washington in the District of Columbia, and approved by the Circuit Court of the United States of the District of Columbia, sitting as a court of chancery. In support of this defense, the defendant offered in evidence, and the court admitted, against the objection and exception of the plaintiff, the following matters:

(1.) From the office of the Supreme Court of the District of Columbia, a book, entitled "Chancery Rules No. 4," of its predecessor, the Circuit Court of the United States of the District of Columbia, containing this entry:

"No. 344. Eliza V. Thaw, guardian, to Columbus and Columbia Thaw, infant children of Jos. Thaw, dec'd. Petition, exhibit, decree of orphans' court. 1844, Oct. 12.—*Decree* affirming decree of orphans' court."

(2.) From the same office, the only paper on file there in said case No. 344, certified by E. N. Roach, register of wills, under date of April 29, 1844, to be "a true copy from an original filed and recorded in the office of the register of wills for Washington County aforesaid;" and consisting of a petition addressed to the judge of the orphans' court for that county, dated March 29, 1844, signed by Eliza V. Thaw, and having annexed to it a certificate of a justice of the peace to her oath that "the facts contained in the within petition are true to the best of her knowledge and belief;" together with the order of the orphans' court thereon; which petition and order were as follows:

"To the Hon. N. P. Causin, Judge of the Orphans' Court of Washington County:

"The petition of the subscriber respectfully represents that she has paid all the debts due by her deceased husband, Joseph Thaw, and that the property left by the deceased is insufficient to support her and the children provided for in the will of the deceased; and [5 a portion of the estate belonging to the deceased consists of two vacant and unimproved lots of ground situate, lying and being in the City of Washington, in the District of Columbia, to wit, lots numbers one and four in square number one hundred and sixty. Your petitioner respectfully prays that the court will deem it expedient and cause the said lots to be sold for the purpose of relieving the immediate wants of the petitioner and for the support and education of the children named in the will of the said Joseph Thaw, deceased, and that an order may be granted for the sale thereof at an early a day as practicable; and, as in duty bound, will ever pray, etc.

"29th March, 1844. Eliza V. Thaw."

"Orphans' Court of Washington, D. C.

"In the Case of the Petition of Eliza V. Thaw, Executrix and Guardian to Columbia and Columbus Thaw, Minor Children of Joseph Thaw, Deceased.

"This case coming on to be heard in the orphans' court on the petition, exhibits, accompanying proofs and representation of said Eliza V. Thaw in her capacity as guardian and executrix aforesaid, the same were by the court read and duly considered; and thereupon it is by the said court, this 29th day of March, 1884, ordered, adjudged and decreed, provided that the Circuit Court of the District of Columbia for the County of Washington, sitting as a court of chancery, shall by its proper order in the premises approve thereof, that the said guardian, for the petitioner's minor children of said Joseph Thaw and herself, be and she is hereby authorized and empowered to sell the said real estate mentioned in said petition at public or private sale, after such notice by advertisement as she shall deem reasonable and sufficient, on the following terms, viz., either for cash or on credit, at the option of the said guardian; and on the full payment of the purchase money and interest, and on the ratification of the sale by this court, to execute to the purchaser, his heirs or assigns, at his or their cost and request, a valid and suffi-

cient deed of conveyance in fee simple of the said premises, with all the right and estate therein of the said Columbia and Columbus Thaw, minor children aforesaid; provided that the said guardian, before proceeding to act hereunder, shall file with the register of wills her bond, with security, to be approved by the judge of this court, in the penalty of seven hundred and fifty dollars, with the usual condition for the due and faithful performance of the trust reposed in her as guardian of said children, and immediately after making said sale to report the same under oath to this court.

"Nath'l Pope Causin."

(3.) Certified copies of two bonds, each executed by Eliza V. Thaw as principal, and Henry Walker and John Walker, as sureties, to the United States.

One of these bonds, dated March 22, 1844, was in the penal sum of $725, and upon the condition that if "the above-bounden Eliza Van Tyler Thaw, as guardian to Columbia and Columbus Thaw, orphans of Joseph Thaw, of Washington County, deceased, shall faithfully account with the Orphans' Court of Washington County, as directed by law, for the management of the property and estate of the orphans under her care, and shall also deliver up the said property agreeably to the order of the said court or the directions of law, and shall in all respects perform the duty of guardian to the said Columbia and Columbus Thaw, according to law, then the above obligation will cease; it shall otherwise remain in full force and virtue in law."

The other bond, dated May 17, 1845, was in the penal sum of $750, and upon this condition: "Whereas Eliza V. Thaw, by a decree of the Orphans' Court of Washington County aforesaid, and confirmed by an order of the Circuit Court of the District of Columbia for the County of Washington aforesaid, has been appointed trustee to sell the real estate of the late Joseph Thaw, mentioned in said order, for the support and maintenance of Columbia and Columbus Thaw, minors, as will more fully appear by the said decree, reference being thereto had: Now the condition of the above obligation is such that if the above-bounden Eliza V. Thaw do and shall well and faithfully perform the trust reposed in her as trustee aforesaid by the said decree, or that may be reposed in her by any further decree or order in the premises, then the above obligation to be void; otherwise in full force and virtue in law."

(4.) A book of records from the office of the register of wills for the District of Columbia, entitled "Guardians' Docket No. 2," containing numerous entries relating to proceedings of guardians in the orphans' court from 1818 to 1860, but no proceedings of the court relating to the sale of real estate, and the only entry in which relating to Eliza V. Thaw's guardianship was as follows:

"Eliza V. Thaw, guardian to Columbia Thaw and Columbus Thaw, orphans of Jos. Thaw. Bond. March 22, 1844, $725; H'y Walker, Jno Walker, sureties. Trustee bond, 17 May, 1845, $750; H'y Walker, E. Walker, sureties."

(5.) Another book of records from that office, entitled "Liber E. N. R. No. 2. Proceedings 1846 to 1861," the entries in which appeared to be consecutive, and which was the only record in that office of proceedings between those dates relating to sales of real estate, and was made by binding up loose scraps of paper in the handwriting of E. N. Roach, register of wills during those years, previously kept in portfolios; and contained the only record to be found in the office relating to the real estate of Joseph Thaw, namely, among the proceedings of the orphans' court on Friday, January 21, 1848, the following: "Sale of real estate of Jos. Thaw, dec'd, filed. Order of approval filed," or "for," the last word being indistinct and uncertain.

(6.) Testimony of the assistant clerk of the Supreme Court of the District of Columbia, and of persons who had served or had made searches in the registry of wills, that there was great confusion in the records, both of the Circuit Court of the United States of the District of Columbia, and of the orphans' court, before the organization of the Supreme Court of the District of Columbia in 1863, under the Act of March 3, 1863, chap. 91 (12 Stat. 762).

(7.) Docket entries in a great number of other cases on the chancery side of the Circuit Court of the United States of the District of Columbia before and after October 12, 1844, and between 1823 and 1863, and on the equity side of the Supreme Court of the District of Columbia between 1863 and July 8, 1865, showing that the practice and forms of proceedings in such cases during those periods were similar to the practice in said case No. 344; and also many later cases in the orphans' court before 1881, in which the practice and forms of proceeding were similar. [526

(8.) The deed executed by Eliza V. Thaw to Agricol Favier, dated and acknowledged March 17, 1848, and recorded March 7, 1867, containing this recital:

"Whereas a decree was passed on the twenty-ninth day of March in the year one thousand eight hundred and forty-four, by the Orphans' Court for the County of Washington in the District of Columbia, upon the petition of Eliza V. Thaw, guardian of her infant children, Columbus and Columbia Thaw; and whereas the said Eliza V. Thaw was thereby appointed a trustee to sell lots numbered one and four in square one hundred and sixty in the City of Washington, which decree was on the twelfth day of October in the year one thousand eight hundred and forty-four confirmed by the Circuit Court for the County of Washington, sitting as a court of chancery; and the said Eliza Thaw having, in conformity with said decree, filed a bond with sureties, which was approved by the said orphans' court; and having, in like conformity with said decree, sold said lots above mentioned, and reported the same to said court, which report was by said court, on the twenty-first day of January in the year

one thousand eight hundred and forty-eight, duly approved, ratified and confirmed; and whereas the said Agricol Favier was the purchaser of said lots from her, the said Eliza V. Thaw, the trustee as aforesaid, under the power vested in her by the said decree."

By the terms of this deed, "the said Eliza V. Thaw, for and in consideration of the sum of ————, lawful money of the United States, to her in hand paid by the said Agricol Favier at or before the sealing and delivery of these presents, the receipt [527] whereof is hereby acknowledged," conveyed to Agricol Favier, in fee, these two lots, "and all the estate, right, title, interest, claim and demand whatsoever, legal and equitable, of her, the said Eliza V. Thaw, as guardian and trustee as aforesaid, and as well in her own right as of the said infant children, Columbus and Columbia Thaw, to the same."

(9.) A deed of partition of other lands between the plaintiff and his sister Columbia, dated March 1, 1871, which recited that "their said mother, after disposing of the real estate acquired by said will and investing the proceeds thereof in other real estate," died intestate.

The plaintiff requested the court to instruct the jury as follows:

"1st. Under Joseph Thaw's will, during the life of Mrs. Thaw, his widow, she held the legal title to the real estate devised thereby for her life, in trust for herself and the two children, Columbia and Columbus, according to the terms prescribed in the will. The interest which Columbus Thaw took in the real estate under his father's will during the life of his mother was a remainder in fee after the termination of her life, and was not an estate in possession until after the death of his mother. The orphans' court had no power during Mrs. Thaw's life to decree the sale of the estate in remainder of Columbus Thaw. Her deed, therefore, purporting to convey said estate is void.

"2d. The Maryland Act of 1789, chapter 101, sub-chapter 12, § 10, did not apply to remainders; and such estates of infants were not subject to sale on petition of the guardian to the orphans' court, with the approval of the court of chancery, as provided in said Act.

"3d. The alleged entry in the records of the orphans' court, purporting to be of the date of January 21, 1848, in these words: 'Sale of real estate of Jos. Thaw, dec'd, filed. Order of approval for,'—is indefinite, uncertain and insufficient to authorize Mrs. Thaw's deed, inasmuch as it does not state what sale, or what real estate was sold, nor by whom, to whom or for what consideration the sale was made; and inasmuch as no report of sale is shown, and no guardian's account, [528] and no record evidence of any payment whatever, and the deed itself does not recite any consideration.

"4th. The Act of Congress of March 3, 1843, entitled 'An Act to Provide in Certain Cases for the Sale of the Real Estate of Infants within the District of Columbia,' repealed the Maryland Act of 1798, so far as concerned the sale of the real estate of infants; and since that Act of Congress was passed, the real estate of infants could only be sold upon a bill filed therefor as prescribed by said Act of Congress; and, as no such bill was filed in reference to the real estate in question, the deed of Eliza V. Thaw to Agricol Favier did not convey the interest of Columbus Thaw therein.

"5th. The Orphans' Court of the District of Columbia, at the date of the proceedings therein relating to the sale of the real estate by Eliza V. Thaw, guardian, was one of limited jurisdiction; and a party claiming title to real estate under its proceedings must show affirmatively that it had jurisdiction; and that not having been shown in this case, the deed from Mrs. Thaw to Agricol Favier did not convey the interest of the plaintiff in the real estate in question."

But the court refused so to instruct the jury, and directed a verdict for the defendant; a verdict and judgment were rendered accordingly; and the plaintiff excepted to the refusal and direction.

The court in general term, *Justices* Hagner and James sitting, reversed the judgment, for the reasons stated in an opinion delivered by *Mr. Justice* Hagner, and reported in 4 Mackey, 347, 358–390. Upon the defendant's petition, a re-argument was ordered before the whole court, and the original judgment was affirmed, for the reasons stated in the opinion delivered by *Mr. Justice* Cox, and reported in 5 Mackey, 200–228, *Mr. Justice* Hagner dissenting. The plaintiff sued out this writ of error.

Messrs. **F. P. Stanton** and **S. R. Bond** for plaintiff in error.

Mr. **George F. Appleby** for defendants in error.

Mr. Justice **Gray** delivered the opinion of [529] the court:

In the consideration and decision of this case, we have been greatly aided by the able and exhaustive opinions delivered in the court below.

The principal question is whether the orphans' court, with the approval of the Circuit Court of the United States of the District of Columbia sitting in chancery, had jurisdiction to order the sale of real estate of infants for their maintenance and education.

It may be assumed that in Maryland before 1798 the orphans' court had no authority to order a sale of a ward's real estate for any purpose; although the court of chancery was empowered by statute to direct a sale of an infant's land for the purpose of making partition, and perhaps had inherent authority to order a sale of an infant's real estate for his support and education. Maryland Stat. 1715, chap. 39, §§ 9, 33, and 1758, chap. 4, Bacon's Laws of Maryland; February 1777, chap. 8, 1 Kilty's Laws; 1785, chap. 72, § 12, and chap. 80, § 9, and 1798, chap. 101, 2 Kilty's Laws; 4 Mackey, 361, 368; 5 Mackey, 202–206.

The earliest statute of Maryland, which authorized a sale by a guardian of the principal of the personal property of his ward, was the Statute of 1785, chap. 80, § 9, by which, after providing that a guardian should not profit by any increase or lose by any decrease "of the estate of the minor under the care of such guardian," and should annually settle an account "of such estate" with the orphans' court, in which "the increase and profits of the estate" should be accounted for, or the loss or decrease thereof allowed, and he should be allowed by the court a commission "upon the whole annual produce of such estate" for managing "such estate," it was further enacted as follows: "And in case the produce of the estate is not sufficient to maintain and educate the minor in a proper manner, and it shall appear to the orphans' court aforesaid that it will be for the benefit and advantage of the orphan to apply some part of the principal of the personal estate to which he shall be entitled towards his education, it shall and may be lawful for the said court to allow the guardian to apply a part of the principal of such personal estate, not exceeding one tenth part thereof annually, to the purpose aforesaid."

The Maryland Statute of 1798, chap. 101, which is understood to have been drawn up by *Chancellor* Hanson at the request of the Legislature of Maryland, is entitled "An Act for Amending, and Reducing into System, the Laws and Regulations Concerning Last Wills and Testaments, the Duties of Executors, Administrators and Guardians, and the Rights of Orphans and Other Representatives of Deceased Persons," and is divided into several sub-chapters, the twelfth of which relates to guardians and wards, and contains the following provisions:

By § 1, whenever a male under the age of twenty-one years, or a female under the age of sixteen, entitled to land by descent or devise, or to personal property of a deceased person by way of distributive share, or of legacy or bequest, shall not have a natural guardian, or a guardian appointed by last will, "the orphans' court of the county where the land lies, or in which administration of the personal estate is granted, shall have power to appoint a guardian to such infant."

By § 5, on the guardian's executing his bond, the orphans' court shall have power to order "the land, distributive share or other property" of the ward to be delivered to the guardian.

By § 6, "every guardian appointed by the court, having the care of a real estate," shall, within three months, procure an appointment by the orphans' court of appraisers "to examine the estate and estimate the annual value thereof."

By § 7, "no guardian shall commit waste on the land; but the court may, on his application, allow him to cut down and sell wood, and account for the same, in case it shall deem the same advantageous or necessary for the ward's education and maintenance."

By § 8, "each guardian having a real estate under his care, shall either cultivate the same," "or he shall lease the same from year to year, or for any term not exceeding three years, and within the non-age of the ward; or he may, with the court's approbation, undertake the estate on his own account, and be answerable for the annual value."

By § 9, "every guardian shall account for all profit and increase of the estate, or annual value as aforesaid, and shall not be answerable for any loss or decrease sustained without his fault, to be allowed by the orphans' court."

Section 10 (upon the construction and effect of which this case turns) is as follows: "And once in each year, or oftener if required, a guardian shall settle an account of his trust with the orphans' court; and the said court shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate, and to make use of his principal, and to sell part of the same, under its order: provided, nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery, or general court, as well as of the orphans' court." [54

By § 11, "on the first account to be rendered by a guardian, he shall state the property by him received from an executor or administrator, or otherwise belonging to his ward, and every increase, and the profits thence arising, if any."

By § 12, "in case the personal property of a ward shall consist of specific articles," "the court, if it shall deem it advantageous for the ward, may at any time pass an order for the sale thereof for ready money, or on credit, the purchaser, with security, giving bond to the said ward, bearing interest."

By § 13, "every account of a guardian shall state his expenditures in maintaining and educating the ward, not exceeding the income of the estate, unless allowed by the court."

By § 15, on the ward's arrival at age, the guardian shall exhibit a final account to the orphans' court, and shall deliver up, agreeably to the court's order, to the ward, "all the property of such ward in his hands."

By § 16, "nothing in this Act contained shall be construed to affect the general superintending power exercised by the court of chancery with respect to trusts."

By § 20 of sub-chapter 15, it is declared that "the said orphans' court shall not, under pretext of incidental power or constructive authority, exercise any jurisdiction whatever not expressly given by this Act, or some other law."

The Statute of Maryland of 1798, by the terms of its final section, took effect on June 1, 1799, and was to continue in force until the end of the year 1801; and it was continued in force in the District of Columbia, and equity jurisdiction was vested in the Circuit Court of the United States of the

District, by the Act of Congress of February 27, 1801, chap. 15, §§ 1, 5 (2 Stat. 105, 106).

On consideration of § 10 of sub-chapter 12 of the Statute of 1798, in connection with the other sections of that sub-chapter, and in the light of the previous law of Maryland upon the subject, we concur in the final conclusion of the court below, that the orphans' court, with the approval of the Circuit Court of the United States of the District of Columbia sitting in chancery, had power [541] to order a sale of the real estate of infant wards for their maintenance and education.

By the terms of that section, the orphans' court, upon settling the guardian's account annually or oftener, "shall ascertain, at discretion, the amount of the sum to be annually expended in the maintenance and education of the orphan, regard being had to the future situation, prospects and destination of the ward; and the said court, if it shall deem it advantageous to the ward, may allow the guardian to exceed the income of the estate and to make use of his principal, and to sell part of the same, under its order: provided, nevertheless, that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery or general court, as well as of the orphans' court."

The orphans' court is thus empowered to allow the guardian, for the suitable maintenance and education of the ward, to exceed "the income of the estate," and to use and sell part of the principal thereof. The words "the estate," in their natural and legal meaning, include the whole property of the ward in the guardian's hands; and the words "the property," "the estate" and "the income of the estate" are habitually and repeatedly used in that sense, both in other sections (§§ 6, 8, 9, 11, 13, 15) of the same sub-chapter, and in the earlier Statute of 1785, chap. 80, § 9, as appears in the passages already quoted from each of those Statutes. Wherever an authority to sell is intended to be limited to personal property, it is so expressed, as in § 9 of the Statute of 1785, and in § 12 of the Statute of 1798. Compared with the express restriction of the authority to sell any part of the principal to "personal estate" in the Act of 1785, the omission of any such restriction in the Act of 1798 strongly tends to show that it was purposely omitted in the latter Act.

This conclusion is confirmed by the proviso "that no part of the real estate shall, on account of such maintenance or education, be diminished without the approbation of the court of chancery or general court, as well as of the orphans' court." As observed by *Mr. Justice* Story, speaking for this court, [542] "the office of a proviso, generally, is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the Legislature to be brought within its purview." *Minis* v. *United States*, 40 U. S. 15 Pet. 423, 445 [13: 791, 799]. The insertion of this proviso therefore manifests the understanding and intention of the Legislature that real estate was and should be included in the preceding general authority to order a sale of part "of the estate," except so far as qualified by the proviso. Indeed, if that authority did not include real estate, the proviso would be superfluous.

The necessary construction of the whole section, including the proviso, appears to us to be that express authority is thereby granted to the orphans' court to order a sale of any part of the ward's estate, real or personal, for his maintenance and education; but that, before any sale of real estate can be made for this purpose, the order of the orphans' court shall be approved by the court of chancery or the general court. Whether the property to be sold for this purpose is personal or real, the application is to be made to the orphans' court, and the order granted by that court in the first instance. In the case of personal property, no action of any other court is required. In the case of real estate, the order of sale, after being passed by the orphans' court, must be presented to and approved by the court of chancery or the general court; but no separate suit need be instituted in either of those courts.

This construction has prevailed in the courts of the State of Maryland, as well as in those of the District of Columbia.

In *Goltier's Case*, which is reported in 8 Bland, 200, *note*, and an authenticated copy of the proceedings in which has been filed in this case and sent up with the record, a petition in December, 1810, to the Orphans' Court of Cecil County in the State of Maryland, by a father and guardian, alleged that his infant children and wards had become entitled, in right of their mother, to one ninth part of a grist mill and about one hundred and forty acres of land in that county, the other owners of which, after consulting with the petitioner, had "concluded that a sale of the said mill and lands would be highly advantageous to all the persons interested," and had contracted to sell them to one Alexander Scott for the sum of $6,424.25, provided the petitioner should be able to convey his children's part; and that the petitioner believed that such a sale would "much promote the interest and welfare of his said children, and enable him to educate and support them more to their advantage than if no such sale were to be made;" and therefore prayed the orphans' court to "order that he may be able to make the necessary conveyance." On December 12, 1810, the orphans' court, "on due consideration of the allegations contained in the within petition," was "of opinion that the sale prayed for was to the advantage of" the wards, "and should be confirmed, and that the petitioner be authorized to make conveyance of that part of his wards' real estate." In the court of chancery, six days afterwards, *Chancellor* Kilty signed a decree, which in the authenticated copy, quoted in 4 Mackey, 370, is stated as follows: "Under power vested in this court by the Act of 1798, chap. 101, sub-chap, 12, § 7, the above order of the orphans' court is approved." This decree, as printed in 8 Bland, 200, *note*, differs only in substituting § 10 for § 7.

That it was not made under the Act of 1785, chap 72, § 12, is quite clear, because no partition was sought, as well as because the petition was addressed to the orphans' court, and not to the court of chancery, in the first instance. *Tilly* v. *Tilly*, 2 Bland, 436, 438, and *note*. Both versions of the decree agree in stating that it was made under the power vested in the court of chancery by the Act of 1798, chap. 101, sub-chapter 12; and § 7 of that sub-chapter concerns only the cutting and sale of standing wood by authority of the orphans' court, without requiring the approval of any other court. The inference is irresistible, that the insertion of § 7 in the record of the decree was a clerical error, and that the decree was really made, as *Chancellor* Bland understood it to have been, under § 10, for the better support and education of the wards.

The Court of Appeals of Maryland, in [4] 1828, decided that the value of buildings constructed on the land of a ward by direction of his guardian, and under order of the orphans' court, at an expense exceeding the income of his estate, real and personal, could not be recovered from the ward, because section 10 of the Act of 1798 did not empower the orphans' court to order any part of the principal of the ward's estate to be applied to any other purpose than his support and maintenance. But the court added: "Should an application of the personal estate not suffice to maintain and educate suitably to the future destination of the ward, then such maintenance and education may also induce an application of a part of the real estate, with the approbation of the court of chancery or general court, as well as the orphans' court." *Brodess* v. *Thompson*, 2 Harr. & G. 120, 126, 127.

Chancellor Bland, in a case decided in the same year, cited those two cases and expressed a similar opinion. *Williams' Case*, 3 Bland, 186, 199, 200, 207. In 1841 the court of appeals said: "According to our laws a guardian cannot encroach on the capital of his ward's estate without the order of the orphans' court, nor can the real estate be diminished but by the approbation of the court of chancery." *Hatton* v. *Weems*, 12 Gill & J. 83, 108. And it is admitted on all hands, that the Circuit Court of the United States of the District of Columbia, and its successor, the Supreme Court of the District of Columbia, have always interpreted the section in question according to what we now hold to be its true construction and effect. 5 Mackey, 213; 4 Mackey, 383, 386.

It is argued for the plaintiff, that so much of the Maryland Act of 1798 as concerned the sale of the real estate of infants has been repealed by the Act of Congress of March 3, 1843, chap. 87, entitled "An Act to Provide in Certain Cases for the Sale of the Real Estate of Infants within the District of Columbia," by which it is enacted that when "the guardian of any infant shall think that the interest of his or her ward will be promoted by the sale of his or her real estate, or any part thereof, it shall be lawful for such guardian" to bring a suit in equity in the Circuit Court of the District of Columbia, in which the infant shall be made a party, and shall be represented by a guardian *ad litem*, and the facts alleged in the [54 bill, whether admitted or not, shall be proved by disinterested witnesses, and the court, upon being satisfied that "the interest of the infant manifestly requires the sale of his real estate, or any part thereof," and that "by such sale the rights of others will not be violated," may decree a sale, in which case the proceeds of the sale shall be invested and applied for the benefit of the infant, "either in the purchase of real estate, or in such manner as the court shall think best," and upon his death shall descend as real estate. 5 Stat. 621, 622; Rev. Stat. D. C. §§ 957-968.

But this Act contains no express repeal of the Maryland Act of 1798; it does not mention the maintenance or education of infants, but authorizes the sale of their real estate whenever their interest manifestly requires it; its chief purpose evidently is to authorize a change of investment; and it cannot be presumed to have been intended to take away the authority of the orphans' court, when discharging its appropriate duty of ascertaining the amount proper to be expended for an infant's maintenance and education, to order a sale of his real estate for this single object with the approval of the court of chancery.

There is nothing in the nature of the interest that these children took under the will of their father, which should prevent a sale of it under the Statute of 1798, when necessary for their maintenance and education. That Statute is not restricted to legal estates, or to estates in possession. The effect of the testator's dispositions, though obscured by some confusion and superfluity of language, was to give the legal estate in all his land to his widow for life; the equitable and beneficial estate for her life to her and the two children, or the survivors of them, in equal shares; and the legal estate in remainder, after the death of the widow, to the two children, in fee; with two limitations over in fee, by way of executory devise (neither of which impaired the precedent estates, or ever took effect), the one, of the share of a child, dying before the mother, to the surviving child; and the other, of the whole estate to the mother, in case she should survive both children. The legal estate in re- [54 mainder in the children, which nothing but their own death before the determination of the widow's life estate could prevent from vesting in possession, vested in them from the death of the testator, subject to be devested by their dying before the widow. *Doe* v. *Considine*, 78 U. S. 6 Wall. 458, 476 [18: 869, 875]; *McArthur* v. *Scott*, 113 U. S. 340, 379 [28: 1015, 1027]. Their legal estates in remainder, as well as their equitable estates for life, were present interests, which might be sold for their maintenance and education.

The records of the orphans' court, and of the Circuit Court of the United States of the District of Columbia sitting in chancery, produced from the proper custody, clearly prove the following facts: Mrs. Thaw, who by the will of her husband was appointed

executrix thereof, and guardian of their two children, and exempted from giving bond as executrix, gave bond as guardian on March 24, 1844. On March 29, 1844, she presented to the orphans' court a petition on oath, representing that she had paid all her husband's debts, and that the property left by him was insufficient to support her and the children, and praying for an order of sale of the real estate for the relief of her immediate wants and for the support and education of the children. On that petition, the orphans' court, on the same day, by an order reciting that it had heard and considered the case "on the petition, exhibits, accompanying proofs and representation of Eliza V. Thaw in her capacity of guardian and executrix," decreed that, provided the Circuit Court of the United States of the District of Columbia sitting as a court of chancery should by proper order approve thereof she should be authorized, as guardian of the children and for herself, to make sale and conveyance of the said real estate, first giving bond for the performance of the trust thereby imposed upon her, and immediately after the sale making report thereof to the court. On or about April 29, 1844, a copy of that petition and order, duly certified by the register of wills, was filed on the chancery side of the Circuit Court of the United States of the District of Columbia. On October 12, 1844, the order of the orphans' court was approved by the circuit
547] court sitting in chancery, as is shown by the entry on its docket or minute book, which, in the absence of any extended record, is competent and conclusive proof of its doings. *Philadelphia, W. & B. R. Co.* v. *Howard*, 54 U. S. 13 How. 307, 331 [14: 157, 167]. On May 17, 1845, the petitioner gave bond with sureties for the performance of the trust imposed upon her by the order so approved. The dates of the sale and of the report thereof to the orphans' court do not appear. But it does appear, by the minutes of its proceedings, that on January 21, 1848, there was filed in and approved by that court a "sale of real estate of Joseph Thaw, deceased," which, in the absence of evidence of any other sale of his real estate having been ordered or made, must be inferred to have been a report of this sale. All the facts recited in the deed executed by Mrs. Thaw to Agricol Favier on March 17, 1848, are thus proved by independent evidence, the competency of which is beyond doubt.

The objection that the petition presented by Mrs. Thaw to the orphans' court was irregular and insufficient to support the jurisdiction of that court, because it asked for a sale of the land for the benefit of the petitioner, as well as of her wards, is sufficiently answered by *Mr. Justice* Cox, delivering the judgment below, as follows: "It is true that the guardian, in her application, confused somewhat her own interests with those of the wards, and alleged the insufficiency of the property to support *herself* and the children as a ground for selling, and asked the sale as well to relieve *her own immediate wants* as for the support of the children. But it is fair to read this part of the application as referring to her own undivided interest for life in the property. It is not to be read as an application to sell the estate of the children for her support. It is also true that the court had no jurisdiction over the wife's interest in the property, and could not pass title to it by its decree. But if the wife chose to unite in the sale and convey her interest, which she must be held to have done, we see no reason why the court could not decree a sale of the share of the infants." "And if there was error in the form of the decree because it embraced the widow's interest also, it did not affect its efficacy as to the interest of the infants, but was a harmless and inoperative error not to be noticed collaterally. The only question that could arise would be as to the proper apportionment of the proceeds between the mother and the wards. But this question could only arise after the sale, and would not affect the transfer of title." 5 Mackey, 227.

The petition and the order of the orphans' court thereon, fairly and reasonably construed, show that a sale of the infant's interest in the real estate under the will of their father was prayed for and ordered as necessary for their maintenance and education. So far as concerned the interest of the infants, therefore, the court had before it everything that was necessary to support its jurisdiction. In this form of proceeding, the guardian sufficiently and fully represented the infants, and no notice to them was required by the Statute of Maryland or by any general rule of law. The want of proof of such notice, or of any record of the evidence on which the orphans' court proceeded in making the order, or the chancery court in approving it, or of any subsequent accounting by the guardian for the proceeds of the sale, is immaterial. The orders of those courts within their jurisdiction were conclusive proof in favor of the purchaser and grantee at the sale, and cannot be collaterally impeached on any such ground. *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 157 [7: 381]. *Grignon* v. *Astor*, 43 U. S. 2 How. 319 [11: 283]; *Comstock* v. *Crawford*, 70 U. S. 3 Wall. 396 [18: 34]; *McNitt* v. *Turner*, 83 U. S. 16 Wall. 352 [21: 341]; *Mohr* v *Manierre*, 101 U. S. 417 [25: 1052].

The cases, on which the plaintiff relies, of *Bank of United States* v. *Ritchie*, 33 U. S. 8 Pet. 128 [8: 890], and *Hunter* v. *Hatton*, 4 Gill, 115, 124, were wholly different. Both were cases of decrees in equity upon suits *inter partes* in the ordinary form. In the one case, the decree was directly attacked by bill of review, in the nature of a writ of error; and in the other case, a notice required by express statute had not been given.

Judgment affirmed.

2] JOHN M. MOFFITT, *Plff. in Err.*,
v.
CHARLES E. MILLER ET AL., Ex'rs of CHESTER A. ARTHUR, Deceased, Late Collector.

Duties on granite.

[No. 54]

Decided Nov. 25, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for defendant in an action to recover back duties illegally exacted. *Affirmed.*

Messrs. Edward Hartley and *Walter H. Coleman* for plaintiff in error.

The Attorney-General and *Mr. Assistant-Attorney-General Maury* for defendant in error.

The plaintiff in error imported in 1875, at New York, from St. Johns, New Brunswick, three cargoes of Red Granite, and, under the Revised Statutes then in force, the defendant collected a duty thereon of 20 per cent *ad valorem*, as a "manufactured article not enumerated nor provided for" in the tariff schedules. Plaintiff paid this rate, protesting that the importations were "granite, building stone and monumental stone," dutiable by enumeration under Schedule M, title 33, U.S. Rev. Stat., at $1.50 per ton, or, by similtude thereto, under Rev. Stat., sec. 2499, and brought this action to recover back the amount of the duties alleged to have been excessively exacted.

By the **Court:** *Judgment affirmed with costs*, by a divided court.

NOTE.—*As to action to recover back duties paid under protest; protest, how made, and its effect,—see note* to Greely v. Thompson, 13: 397.

THE INLAND AND SEABOARD COASTING COMPANY
v.
FRANCIS A. TOLSON.

(See S. C. Reporter's ed. 572-578.)

Practice.

[No. 532.]

Decided November 4, 1889.

IN ERROR to the Supreme Court of the District of Columbia. *Dismissed with costs on motion of defendant in error.*

January 6, 1890.

MOTION to rescind the judgment entered November 4, 1889; to restore the cause to the docket, and for leave to amend the writ of error herein by inserting therein, as plaintiffs in error, the names of Henry A. Willard, John W. Thompson, Samuel Norment and J. H. Baxter. *Granted, and case restored to the docket.*

Mr. **Nathaniel Wilson,** in support of motion:

The writ of error may be amended, under the authority conferred by section 1005 of the Revised Statutes.

Moore v. *Simonds*, 100 U. S. 145 (25: 590); *Knickerbocker Life Ins. Co.* v. *Pendleton*, 112 U. S. 696 (28: 870, 871), 115 U. S. 339 (29: 432); *Pearson* v. *Yewdall*, 95 U. S. 294 (24: 436).

Messrs. **C. C. Cole** and **A. A. Birney,** in opposition to motion:

The court had express statutory power to make the rule, and it is binding upon the court and the parties.

Columbia Bank v. *Oakley*, 17 U. S. 4 Wheat. 242 (4: 561); *Mills* v. *United States Bank*, 24 U. S. 11 Wheat. 439 (6: 514); *Hiriart* v. *Ballon*, 34 U. S. 9 Pet. 156 (9: 85).

The objection to the writ of error is jurisdictional, and it cannot be obviated by amendment.

Estis v. *Trabue*, 128 U. S. 229 (32: 438); *Owings* v. *Kincannon*, 32 U. S. 7 Pet. 399 (8: 727); *Wilson* v. *New York L. & F. Ins. Co.* 37 U. S. 12 Pet. 140 (9: 1032); *Morris* v. *Simonds*, 100 U. S. 145 (25: 590).

But if the amendment be within the discretion of the court it should not be granted.

Pearson v. *Yewdall*, 95 U. S. 294 (24: 436).

By the **Court:** *Motion granted, and case restored to the docket.*

HENRY T. THOMAS [65
v.
JAMES A. MURRAY.

JEFFERSON McCAULEY [64
v.
JAMES A. MURRAY.

BENJAMIN C. KINGSBURY, [64
v.
JAMES A. MURRAY.

Practice.

[Nos. 519, 520, 521.]

Decided April 7, 1890.

IN ERROR to the Supreme Court of the Territory of Montana. *Writs of error dismissed for the want of jurisdiction and causes remanded to the Supreme Court of the State of Montana.*

These were actions for the recovery of the possession of lands in the Territory of Montana, and for $10,000 damages in each case for withholding their possession. The judgment in each case was in favor of the plaintiff for the recovery of the possession of the premises in controversy and one dollar damages. Affidavits as to the value of the land were filed on the motion.

Mr. **Walter H. Smith,** for defendants in error, moved to dismiss each of the cases on the ground that the value of the premises in each of said cases does not exceed $5,000, and cited the case of *Street* v. *Ferry*, 119 U. S. 385 (30: 439).

Messrs. **Hiram Knowles** and *S. S. Burdett*, for plaintiffs in error, in opposition to the motion, filed affidavits as to value.

By the **Court:** *Motion to dismiss granted.*

0] JOHN T. SHERMAN ET AL., *Plffs. in Err.*,
v.
WILLIAM H. ROBERTSON, Collector, etc.
(See S. C. Reporter's ed. 570-571.)

Duties—what law applied.

1. Goods imported before the Act of March 3, 1883, took effect, if kept in the custody of the custom officers until after that period, are to be charged with duties according to the law in force when they are entered for consumption.
2. *Hartranft* v. *Oliver*, 125 U. S. 525 (31: 813), followed.

[No. 180.]

Submitted Nov. 25, 1889. Decided Dec. 2, 1889.

IN ERROR to the Circuit Court of the United States for the Southern District of New York. *Reversed.*

This case was submitted on the following stipulation, signed by counsel of both parties:

"This cause having been tried, on the third and sixth days of December, 1885, in the Circuit Court of the United States for the Southern District of New York, before the Hon. Hoyt M. Wheeler, *Judge*, and a jury—

"And evidence having been thereupon given in behalf of the plaintiffs, substantially as hereinafter stated; and no evidence having been given in behalf of the defendant; and the said circuit court having thereupon refused to submit the case to the jury, and having granted defendant's motion to direct a verdict for the defendant upon the evidence; and judgment having been thereupon thereafter, on the 15th day of May, 1886, duly entered in favor of the defendant and against the plaintiffs for the sum of $35.40 costs, as taxed, execution thereon stayed thirty days, pending plaintiffs' appeal, and so forth—

"Now, it is conceded by the attorney-general, in behalf of the defendant in error, that the facts in this cause, as shown by the plaintiffs' bill of exceptions, contained within the record on this appeal, duly filed in the office of the clerk of this court, are, in all substantial respects, the same as the facts upon which judgment was rendered for the plaintiffs in the court below in the cause *Hartranft* v. *Oliver*, which was argued in this court March 22, 1888, and is reported in vol. 125 of the United States Reports at page 525 [31: 813]—that is to say:

"1. The plaintiffs herein imported white cotton goods into the Port of New York. The vessel carrying the goods arrived at that port on the 30th day of June, 1883, and was immediately boarded by customs officers of the United States, who took into their custody all goods on board.

"2. The plaintiffs could not have obtained possession of their said goods from the said customs officers without a certain 'permit,' to be issued by the defendant after the goods were 'entered' by the plaintiffs at the custom-house of the said port, and the goods could not be so entered there until after the vessel itself was entered or reported there.

"3. The plaintiffs had a clerk waiting at the said custom-house for the purpose of entering their said goods as soon as the vessel should be so entered or reported there on the said 30th day of June, 1883, but that the vessel was not so entered or reported there until [5" at or about 2 o'clock P. M. of that day, and that it was then too late to enter the said goods in the usual course of business within that day in the said custom-house.

"4. The first day of July, 1883, was a Sunday. The said goods were duly entered at the said custom-house on the second day of July, 1883, having remained meantime solely in the custody of the said customs officers on board the said vessel.

"5. The said goods were not in any public storehouse or bonded warehouse on the first day of July, 1883, otherwise than as hereinabove appears.

"6. The defendant, as collector of said port, levied customs duties upon plaintiffs' said goods, at the rates provided for by section 2504 of the Revised Statutes of the United States, amounting to $2,754.41.

"The plaintiffs objected and protested against such levy upon the ground that the levy should have been made under the Act of Congress entitled 'An Act to Reduce Internal Revenue Taxation, and for Other Purposes,' approved March 3, 1883, under which last-mentioned Act the duties upon the said goods would have amounted to $2,179.59, but they paid the amount of the said levy of the defendant and duly brought this action to recover the difference or excess so paid, to wit, to recover $574.82.

"And hereupon the counsel for both parties deem it not necessary to print the record on this appeal or to argue the appeal before the court, and the attorney-general, in behalf of the defendant, submits to the direction of the court upon the motion of plaintiffs' counsel for judgment.

"Dated November 18, 1889."

Messrs. **Waldo Hutchins** and *Wm. Forse Scott* for plaintiffs in error.

Mr. **O. W. Chapman,** *Solicitor-Gen.*, for defendant in error.

By the **Court:**

Judgment reversed with costs on the authority of the decision of this court in the case of *John F. Hartranft, Collector*, v. *John M. Oliver et al.*, No. 190, October Term, 1887; and cause remanded with directions to enter judgment for plaintiffs.

JOHN IRWIN, *Plff. in Err.*, [57
v.
THE SAN FRANCISCO SAVINGS UNION ET AL.

(See S. C. Reporter's ed. 578-580.)

Swamp land grant—title of State—oral evidence.

1. Land may be proved to come within the swamp land grant made by the United States to the States by the Act of 1850 (9 Stat. 519), by oral testimony, when not listed nor patented to the State by the Secretary of the Interior.
2. The title to such swamp and overflowed lands passed by said Act to the State, although they were not listed to the State, nor patented by the United States.

4. *Wright* v. *Roseberry*, 121 U. S. 488 (30: 1039), followed.

[No. 181.]

Submitted Jan. 23, 1890. Decided Feb. 3, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of California to review a judgment for plaintiff in an action of ejectment to recover swamp and overflowed lands. *Affirmed.*

Plaintiffs claim under a patent from the State of California issued in 1874. Defendant claims possession as an officer of, and in behalf of, the United States.

The facts are fully stated in the opinion of the circuit court, which is as follows:

Before **Field**, *Circuit Justice*, and **Sawyer**, *Circuit Judge*.

By the court, **Field**, *Circuit Justice:*

This is an action to recover possession of a tract of land, situated partly in the County of Napa, and partly in the County of Solano, consisting of 7,413 acres and a fraction of an acre. It is alleged to be swamp and overflowed land, and that the title to it therefore passed to the State by the Act of Congress of September 20, 1850, "to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." (9 Stat. 519.)

The first section of that Act grants to the State of Arkansas "the whole of those swamp and overflowed lands made unfit thereby for cultivation," which were unsold at the date of its passage. The fourth section extends the provisions of the Act to and confers the benefits upon each of the other States of the Union in which swamp and overflowed lands are situate. The Act is a grant *in præsenti* to each State then in the Union of lands situate within its limits of the quality described. Its language is that they "shall be and the same are hereby granted to said State," words which import an immediate transfer of interest, and not one in the future. The provisions of the second section making it the duty of the Secretary of the Interior, as soon as practicable after the passage of the Act, to make out an accurate list and plat of the lands described, to transmit the same to the governor of the State, and on his request to cause a patent to be issued to the State; and declaring that "on that patent the fee simple to the said lands shall vest in the State," subject to the disposal of the Legislature thereof,—did not prevent the immediate passing of the title. The patent, with the definite description by metes and bounds of the land which it would furnish, would serve a useful purpose. It would render it unnecessary for the State, or grantees from the State, to make any further proof of the character of the land should any controversies arise respecting it. In many ways, doubts might be created on the subject; the evidence might be conflicting as to whether the greater part of a legal subdivision fell within the description required as being "wet and unfit for cultivation." In all such cases the patent would solve the doubt, for the determination in that respect of the Secretary of the Interior would be controlling. The ascertainment and designation of the lands as those described would be conclusive as against collateral attack. But the title of the State to the lands, they being swamp and overflowed, cannot be defeated, nor in any way impaired, by the delay or refusal of the Secretary of the Interior to have the required list made and patent issued. The State and her grantees might be embarrassed in the assertion of their rights, but no other consequences would follow.

Such is the purport of the advice given to the Secretary of the Interior by the Attorney-General of the United States in his communication of November 10, 1858. "It is not necessary" he said, "that the patent should issue before the title vests in the State under the Act of 1850. The Act of Congress was itself a present grant wanting nothing but a definition of boundaries to make it perfect, and to attain that object the Secretary of the Interior was directed to make out an accurate list and plat of the lands, and cause a patent to be issued therefor. But when a party is authorized to demand a patent for land, his title is vested as much as if he had the patent itself, which is but evidence of his title." 9 Ops. Atty-Gen. 254. Such is also the purport of several decisions of the Supreme Court of California. In *Owens* v. *Jackson*, 9 Cal. 322, which was an action like the present one for the possession of swamp and overflowed lands under a patent of the State, the defendant demurred to the complaint because it did not show that the land had been surveyed and patented to the State. The demurrer was sustained in the court below, but the supreme court reversed the decision, holding that the State had the right to dispose of the swamp and overflowed lands granted to her by the Act of 1850, prior to a patent from the United States, so as to convey a present title to the patentee as against a trespasser. "The Act of Congress," said the court, "describes the land, not by specific boundaries, but by its quality, and is a present legislative grant of all the public lands within the State of the quality mentioned. The patent is matter of evidence and description by metes and bounds. The office of the patent is to make the description of the lands definite and conclusive as between the United States and the State." See also *Summers* v. *Dickinson*, 9 Cal. 554, and *Kernan* v. *Griffith*, 27 Cal. 87.

In *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19: 599], the question was presented to the Supreme Court of the United States whether the grant by the Act of Congress of June 10th, 1852, to Missouri of lands to aid in the construction of certain railroads, covered the swamp and overflowed lands granted to her by the Act of September 20, 1850, no patent for those lands having been issued to her, after observing that there was a present grant by Congress of certain lands to the States within which they lie, but by a description requiring something more than a mere reference to townships, ranges and sections to identify them, and that it was made the duty of the Secretary of the Interior to ascertain the character of the lands, and to furnish the State with evidence of it, the court said: "The right of

the State did not depend on his action, but on the Act of Congress, and though the States might be embarrassed in the assertion of this right by the delay or failure of the Secretary to ascertain and make out lists of these lands, the right of the States to them could not be defeated by that delay." And the court further observed that, as the Secretary had no satisfactory evidence under his control to enable him to make out these lists, he must, if he attempted it, rely on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed; that "the matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was to primarily decide it, or before the court, whose duty it became because the Secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose."

In *French* v. *Fyan*, 93 U. S. 169 [23: 812], this subject is further considered, and the circumstances under which parol evidence to show that lands claimed as swamp and overflowed will be received are stated with greater precision. That was an action of ejectment for swamp and overflowed lands, and the only question raised related to the refusal of the court below to receive oral testimony to impeach the validity of a patent issued by the United States to the State of Missouri for the land in question under the Act of 1850, the purpose of the testimony being to show that the land in controversy was not in point of fact swamp land within the meaning of that Act. The land had been certified in 1854 to the Missouri Pacific Railroad Company as part of the land granted to aid in the construction of its road by the Act of June 10, 1852, and the plaintiff had become vested with the title of the company. To overcome this title the defendant gave in evidence the patent to the State under the Swamp Land Act, under which he claimed by regular conveyances. The plaintiff then offered to prove by witnesses who had known the character of the land in dispute since 1849, that it was never wet and unfit for cultivation. The court below refused to receive the testimony, and the propriety of its ruling was thus brought before the supreme court. After observing that it had been more than once decided that the Swamp Land Act was a grant *in præsenti* by which the title to those lands passed at once to the State in which they lay, except as to States admitted to the Union after its passage, and that the patent therefor, which is the evidence that the lands contained in it had been identified as swamp lands, relates back and gives certainty to the title as of the date of the grant, the court said that by the second section of the Act the power and duty devolved upon the Secretary of the Interior, as the head of the department which administered the affairs of the public lands, of determining what lands were of the description granted, and made his office the tribunal whose decision on this subject was to be controlling, and it was his duty to have accurate lists and plats of the lands described made out and transmitted to the governor of the State, upon whose request a patent was to be issued. Parol evidence to show that the land covered by the patent to the State was not swamp and overflowed land was therefore held to be inadmissible. In commenting upon the case of *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19: 599], which was supposed to justify the offer of the parol testimony, the court said that "the admission of the testimony in that case was placed expressly on the ground that the Secretary of the Interior had neglected or refused to do his duty; that he had made no selections of lists whatever, and would issue no patents, although many years had elapsed since the passage of the Act." "There was no means," it added, "as this court has decided, to compel him to act. If the party claiming under the State in that case could not be permitted to prove that the land which the State had conveyed to him as swamp land was in fact such, a total failure of justice would occur and the entire grant of the State might be defeated by this neglect or refusal of the Secretary to perform his duty."

The result of these two cases in the supreme court is this: That wherever the Secretary of the Interior has acted and certified the lists required by the Act of 1850 and issued the patent, his determination is so far conclusive as to the character of the land that it cannot be collaterally attacked. But where he has failed to make such list and issue the patent it is competent for the State, or parties claiming from her, to prove by parol testimony that the land is of the character mentioned in the Act of 1850 which passed to her.

On the seventh of April, 1874, the State, through her properly authorized officers, issued a patent of the tract in controversy to one George W. Pearson, describing it as swamp and overflowed land, and giving its metes and bounds. Through him by various mesne conveyances the plaintiffs trace their title, each having acquired an undivided one-third interest in the premises as tenants in common with the others. The State, by various enactments, had provided for the sale of lands of this character, and no question is made as to the conformity of the proceedings with their requirements in the issue of the patent. The objection is taken to the acquisition of any title by the State until the lands had been listed and patented to her by the United States. The patent of the State is the conveyance of whatever interest she had at that time in the land, and if it were within the description of swamp and overflowed land her interest was paramount to that of the United States, unless their title antedates the Act of 1850. An attempt was made at the trial to show that it passed as an appurtenant to Mare Island under the alleged Mexican grant to Castro, of which we shall hereafter speak. Laying that aside for the present, the question is, Was the tract swamp and overflowed land within the Act of 1850? In the absence of any action of the Secretary of the Interior which would be conclusive in the matter as against collateral attack, the testimony of witnesses having knowledge of the subject as to the character of the land

was admissible under the decisions mentioned. That testimony clearly showed that the land was subject to periodical overflow by the rising of the tides in the Bay of San Pablo so as to make it unfit to raise ordinary crops of the country without protecting it with levees from such overflow. The Act of 1850 grants swamp and overflowed lands; swamp lands, as distinguished from overflowed lands, may be considered such as require drainage to fit them for cultivation. Overflowed lands are those which are subject to such periodical or frequent overflows as to require levees or embankments to keep out the water and render them suitable for cultivation. It does not make any difference whether the overflow be by fresh water, as by the rising of rivers or lakes, or by the flow of the tides. When drainage, reclamation or leveeing is necessary to enable the farmer to use them for some of the ordinary purposes of husbandry, the lands are within the terms of the Act of Congress and the title passed by it to the State.

The patent of the State is thus prima facie evidence that the land embraced by it is of the character represented, and the testimony on the subject is without contradiction. Indeed, we do not understand that the defendant questions its force; he denies only its relevancy and competency. The main defense is founded on the theory that until the land is listed to the State and patented by the United States, no title to the State passes. For the reasons expressed this position is not tenable.

The other defenses are, that the defendant holds possession of the premises as commander of the navy-yard at Mare Island for the United States and that they have title to the premises in controversy under a grant of the island to Victor Castro by the Mexican government and under sundry mesne conveyances from him, and that the action is barred by the Statute of Limitations of the State.

Neither of these defenses is, in our judgment, tenable. The fact that the defendant is an officer of the navy of the United States, and is acting under their orders, gives no justification to the retention of the premises against the claim of the true owners. The government of the United States is one of law, and their officers cannot deprive any citizen of his property except as the law authorizes it, and no law can authorize it except upon just compensation to the owner. This subject has been so fully considered in the learned and exhaustive opinion of the supreme court, delivered by *Mr. Justice* Miller in the recent case of the *United States* v. *Lee*, generally known as the *Arlington Case*, that nothing could be added by us. 106 U. S. 196 [27: 171]. Its reasoning is conclusive.

The alleged grant to Victor Castro by the Mexican government covers only Mare Island. The decree of confirmation rendered by the United States land commission, May 8, 1852, describes the premises thus: "The place of which confirmation is hereby given is situated in the Bay of San Francisco (San Pablo) and is called the Isle de la Yegua, or Mare Island, and being an island is bounded by the water's edge."

An appeal was taken from the decree to the district court of the United States, but what action was there had upon it does not appear. The answer alleges that the title was confirmed by that court on the second of March, 1857, but no record of the fact, if such were the case, was produced. Assuming that it was confirmed, the title recognized was only to the island "bounded by the water's edge." Without these words, the island could not be extended beyond the water's edge. By the common law—and by that law must decrees written in the English language be interpreted—the boundary of the island, so far as its ownership as private property is concerned, is determined by ordinary high-water mark. The shore, which belongs to the public, is the line between that mark and low-water mark over which daily tides ebb and flow. *United States* v. *Pacheco*, 69 U. S. 2 Wall. 589 [17: 865]; 3 Kent, Com. 427. If we could pass over the language of the decree, and apply the rule of the civil law, assuming that it was in force in California at the date of the grant, the extent of the land of the island susceptible of private ownership would be less than under the rule of the common law. Under neither could the private ownership of the land of the island extend to lands regularly covered each month by the flow of the tides. Such ownership was all that was conceded by the grant to Castro, and the decree affirming the claim of his grantees under it. Large portions of the land in controversy are also separated from the island by navigable sloughs.

Previously to August 31st, 1852, the title which Castro possessed had become vested by various mesne conveyances in William H. Aspinwall and George W. P. Bissel, who on that day presented a petition to the board of land commissioners under the Act of March 3, 1851, for the settlement of private land claims in California, praying for a confirmation of their claim under that grant. The decree of May 8, 1852, from which we have quoted, confirming the claim, was made upon their petition. On the 4th of January, 1853, they sold and conveyed the island to the United States, describing it as "all that tract of land called and known as Mare Island in the Bay of San Pablo, as recently surveyed by the board of officers of the United States sent to California for the selection of a site for a navy-yard there, including all the tule or low and marsh land belonging to the same, or which has ever been reputed or claimed to belong to the same." This description is more extensive than the one given in the grant to Castro, or by the commissioners in the decree confirming the claim under it. Nothing is said in either grant or decree of the tule or low or marsh land belonging to the island, or which had been reputed or claimed to belong to it. These words are of the vaguest character. Whatever may have been intended by them, certain it is that the grantors, Aspinwall and Bissel, could only convey what they acquired under the grant, and the United States took, and could only take, such interest, and that, as we have seen, was limited to the island bounded by the water's edge.

From the date of that conveyance the

United States have been in possession of the island, and have constructed there large and expensive buildings for the uses of the navy, including a navy-yard. They have also occasionally asserted ownership over the adjacent overflowed lands, but the acts done by them were not of a character to indicate any settled purpose of occupying the lands or devoting them to any public uses. They have not constructed any levees to prevent their overflow, or made any efforts to reclaim the lands, or to subject them to any uses of the government. Two shanties, ten by twelve, erected in 1874 or 1875, on the lands nearly eight miles distant from the island, were soon abandoned and no other buildings have been erected on them. It is plain that the acts which the United States are said to have done to mark their control of the overflowed lands, if done by a private party, would not bar the plaintiffs from asserting their right of possession. There was on their part no such possession as would set the Statute of Limitation running and which in time might ripen into a title against the true owners. It was not open, exclusive and continuous such as to give notice to the owners of an intention to claim title adversely to them; and the testimony indicates that the plaintiffs were ignorant of any adverse claim on the part of the United States till a short time before the commencement of this suit. It was not accompanied by any of the ordinary acts indicating ownership; and at no time were any such acts done except in the instance mentioned, where the two shanties were constructed but soon afterwards abandoned.

But independently of this consideration we doubt very much whether the United States can acquire title by adverse possession against the right of a private citizen. The theory that the open and uninterrupted possession of land by a party not being the real owner may ripen into title is founded upon the supposed acquiescence of the owner in the claim of the occupant by his not entering upon the property or taking legal proceedings to recover its possession. Statutes of Limitation do not run against the United States except when expressly provided by Congress, and no action will lie against them by a private citizen except by their consent.

Legal proceedings to enforce the claim of a citizen to lands in possession of the United States could not therefore be taken, and no statute can run against one to whom the courts are closed for the maintenance of his claim. Nor could the citizen assert his claim to such lands by entering upon them. There can be no private entry upon land for the assertion of one's rights, where the law does not allow an action against the occupant for the possession. In the present case the United States are not sued. They cannot be sued. The defendant is not sued in his official character but as an individual. He is alleged to be in possession. He admits that he is, and justifies that possession by alleging that he is an officer of the United States and acting under their authority. He can only make good this defense by showing that the United States were lawfully authorized to *put him in* possession of the land, and such authority they only possessed if they held the title, or had the assent of the owner, neither of which is shown in the present case.

We do not give any weight to the fact that in 1853, by order of the President of the United States, Mare Island was reserved with all its alleged appendages of tule or marsh lands, ordinarily reputed to belong to such island; for if such reservation was intended to include all the swamp and overflowed lands in controversy, it was to that extent inoperative, the title, as we have already seen, having passed to the State by the Act of September 20, 1850.

It follows from what we have said that findings must be had upon all the issues in favor of the plaintiffs, and judgment entered therein in their favor for the possession of the premises in controversy.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.* for the United States:

This is an action of ejectment, brought in the Superior Court of Solano County, Cal. and afterwards removed into the United States circuit court, to recover a large bod of swamp and overflowed lands contiguou to the main land of Mare Island, upon whic island the United States has a navy-yard a has erected extensive buildings, etc.

The plaintiff in error, the defendant b low, was the officer in command of the sa navy-yard at the time the suit was brougl and had no other interest in the controvers The case was tried without a jury under stipulation in writing, and judgment re dered for the plaintiffs, to the effect th they were entitled to the possession of t lands in controversy.

This writ of error raises but one questic

The plaintiffs claimed title to the swa and overflowed lands in question, under State of California, and introduced in e dence a patent from the State to one J W. Pearson, from whom they derived ti

This evidence was objected to by the fendant on the ground "that a patent iss by the State to any individual for swamp overflowed lands does not convey title to lands therein described unless it be sho that the same lands have been patented the United States to the State, or listed the State by the Land Department of t United States. That it has not been show by competent evidence that it has been de termined by the proper authority of the Lan Department of the United States that th lands described in the patent, or any par thereof, are swamp or overflowed lands within the meaning of the Act of Congre approved September 28, 1850, commonly known as the Arkansas Land Act."

The objection was overruled and the patent read to the jury, whereupon the defendant excepted.

The plaintiffs then introduced other evidence, parol and documentary, for the purpose of showing that the land sued for answered to the description of swamp and overflowed lands, and the defendant moved the court to strike out and exclude all such evidence, including the patent, but the court

denied the motion, and thereupon the defendant excepted.

The opinion of the eminent circuit justice upon the questions raised by the bill of exceptions appears to be sustained by the subsequent opinion of this court in *Wright* v. *Roseberry*, 121 U. S. 488 (30: 1039).

The case is therefore submitted without further observation.

Mr. **Geo. A. Nourse** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is conceded by counsel for plaintiff in error that this case is governed by *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039], and the judgment is therefore, upon the authority of that case, *affirmed*.

CARLISLE MASON ET AL., *Plffs. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 581-586.)

Writ of error, who must join in bringing—amendment by adding parties, when not allowed.

1. When a judgment is joint, against several, and the interests of all are affected by the judgment, all must join in the writ of error, or it will be dismissed, unless there has been a summons and severance.
2. Where the writ of error was sued out by a part only of joint defendants against whom a joint judgment was rendered, this court will not permit it to be amended here by inserting the names of the other defendants as plaintiffs in error, nor a judgment of severance, on their consent.

[No. 214.]

Submitted May 5, 1890. Decided May 19, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment against John McArthur, postmaster at Chicago, and his sureties on his official bond, for failure to pay over money of the United States which came into his hands as postmaster.

On motion to amend the writ of error, citation and bond, or for a severance. *Motion denied and writ of error dismissed.*

The judgment was rendered July 14, 1886, against said postmaster and his five sureties, to wit, Carlisle Mason, John Alston, James Steele, Thomas S. Dobbins and Soloman McKichan. The writ of error was sued out by only two defendants, as plaintiffs in error, to wit, Carlisle Mason and John Alston. There was no summons and severance. The case was reached regularly on the docket, and counsel for plaintiff in error was proceeding with his argument, when his attention was called to the fact that the error proceeding was prosecuted by only two of the six defendants below against whom the joint judgment was rendered. The case was passed until the counsel for plaintiff in error might present affidavits which it was suggested might cure the defect.

On May 3, 1890, the following motion was filed:

"And now come Carlisle Mason, John Alston, John McArthur, James Steele, Thomas S. Dobbins and Solomon McKichan, who jointly and severally move for leave to amend the writ of error by inserting therein their names, they being all of the defendants in the judgment rendered by the Circuit Court for the Northern District of Illinois, on the 16th day of July, 1886, and also by a similar amendment to the citation and bond; [582] [583]

"And that the said John McArthur may be allowed to join in the errors assigned by the said Carlisle Mason and John Alston;

"Or, in case said application cannot be allowed, that an order and judgment of severance be entered so that the judgment rendered in the court below against said John McArthur, James Steele, Thomas S. Dobbins and Solomon McKichan may be allowed to stand, and the said Carlisle Mason and John Alston permitted to prosecute the writ of error and their assignments made upon the record herein.

"Or that such other and further order may be entered as may be consistent with the rules and practice of this court in order to permit a review of the rulings and decisions of the court below.

"W. C. Goudy,
"Attorney for the above-named persons."

The motion was made on the following papers:

"The undersigned, John McArthur, James Steele, Thomas S. Dobbins and Soloman McKichan, against whom, with Carlisle Mason and John Alston, a judgment was rendered by the circuit court of the United States on the fourteenth day of July, 1886, in favor of the United States of America, for three hundred thousand dollars debt, to be satisfied upon making the sum of $108,648.50 damages, together with costs, and from which judgment a writ of error was prosecuted and is now pending in the Supreme Court of the United States—

"Do hereby enter our appearance in the Supreme Court of the United States and consent to an amendment of the writ of error in any way which said court may see proper to allow, and also, if permitted by the court, join in the assignments of error, and, in case that shall not be allowed, consent to a judgment of severance so that said writ of error may be prosecuted by our co-defendants in said judgment, Carlisle Mason and John Alston, and to any further order that may be necessary to enable the plaintiffs in error to prosecute said suit in said supreme court. [584]

"John McArthur,
"James Steele,
"Soloman McKichan,
"Thomas S. Dobbins,
"By his attorney,
"William C. Goudy."

"SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1889.

"Carlisle Mason and John Alston,
Plaintiffs in Error,
v.
The United States. } No. 214.

"In error of the Circuit Court of the United States for the Northern District of Illinois.

"Wm. C. Goudy, being sworn, says that he

represented John McArthur, Carlisle Mason, John Alston, James Steele and Thomas S. Dobbins, in the Circuit Court of the United States for the Northern District of Illinois in this suit commenced by the United States against them and others, from about the first of January, 1878, in connection with John W. Ela, until some time in the year 1885, when this deponent assumed the sole defense for said persons, the said John W. Ela becoming unable to attend to the business at that time because of sickness.

"That the deponent represented all of said persons on the trial of 1886 which resulted in the judgment of July 14, 1886, and was authorized to take all such steps in their behalf as was necessary to bring the case to the Supreme Court of the United States for review. That he procured the writ of error, which now appears in the record, from the clerk of the Circuit Court of the United States for the Northern District of Illinois, supposing that the cause would be brought to this court for review of the alleged errors in the court below, the same as if said writ of error had named all of the defendants in said judgment, and that if the same should be reversed, it would be re-
585] versed as to all, that being the practice in the State of Illinois; and that his attention was not called to the practice prevailing in the supreme court until the cause came on for argument. Deponent further says that he had authority to have used the names of John McArthur, John Alston, Carlisle Mason, James Steele and Thomas S. Dobbins in the prosecution of the writ of error, and that, as he understands it, he had the right to use the name of Solomon McKichan in connection with the other defendants, according to the rules of law; but the deponent further says that he now perceives that said writ of error is defective in describing the suit as one between the United States of America, plaintiff, and Carlisle Mason, John Alston and others, defendants, when the writ should have named all of the defendants in the judgment for the purpose of correctly describing the suit, and that the same error exists in the citation, and the suit should have been docketed in this court in the names of all of the defendants in said judgment.

"The deponent further says that he has procured the signatures of John McArthur, James Steele and Solomon McKichan to a paper attached hereto entering their appearance and consent to such proceedings as may be necessary to enable this court to determine the errors assigned, and that he could have procured the personal signature of Thomas S. Dobbins, the remaining defendant, except for the reason of his absence from Chicago, his place of residence, in Colorado, at some point which deponent has been unable to ascertain in time to procure the signature during the present term, and for that reason he has exercised the authority which he has as attorney by signing the name of said Thomas S. Dobbins to said paper. And deponent further says that he has been fully authorized to sign all the said names except that of Solomon McKichan, as attorney, without obtaining their consent at the present time, but that he preferred having them append their signatures in person to such consent and has done so as far as possible at the present time.

"William C. Goudy.

"Subscribed and sworn before me this 1st day of May, 1890.

"J. L. McKittrick, Notary Public."

The writ of error sued out is as follows:

"Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court, between the United States of America, plaintiff, and Carlisle Mason, John Alston and others, defendants, in an action of debt, a manifest error hath happened, to the great damage of the said Carlisle Mason and John Alston, defendants, as by their complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then," etc.

Mr. **W. C. Goudy,** for appellant, for motion:

The proceedings for the amendment of the writ of error must be had in this court.

Mussina v. *Cavazos*, 73 U. S. 6 Wall. 357 (18 = 811); *West* v. *Barnes*, 2 U. S. 2 Dall. 401 (1 = 433).

Under the authority of section 1,005 of the Revised Statutes, a writ of error may be amended by inserting the proper return day.

Atherton v. *Fowler*, 91 U. S. 143 (23: 265); *Texas & P. R. Co.* v. *Kirk*, 111 U. S. 48 (28: 481); *Semmes* v. *U. S.* 91 U. S. 24 (23: 194); *Nat. Bank* v. *Bank of Commerce*, 99 U. S. 60 (25: 362); *Mossman* v. *Higginson*, 4 U.S. 4 Dall. 13 (1: 720); *Hampton* v. *Rouse*, 82 U. S. 15 Wall. 684 (21: 250).

It may be amended by inserting the names of the parties.

Estis v. *Trabue*, 128 U.S. 229 (32: 438); *Moore* v. *Simonds*, 100 U. S. 145 (25: 590); *Pearson* v. *Yewdall*, 95 U. S. 294 (24: 436); *Smith* v. *Jackson*, 1 Paine, 489.

Sec. 70 of the Practice Act of Illinois allows the removal of a case to the supreme court by writ of error, where a judgment is against two or more persons, by either one of such persons.

In this court all the parties against whom a joint judgment is rendered must join in the writ of error or else there must be a proper summons and severance.

Estis v. *Trabue*, 128 U. S. 225 (32: 437); *Masterson* v. *Herndon*, 77 U. S. 10 Wall. 416 (19: 953); *Carey* v. *Giles*, 10 Ga. 1.

Where on an appeal judgment is rendered against an appellant and his sureties on an appeal, they should all be joined in a writ of error, or the writ will be dismissed.

Dill v. *Jones*, 2 Ga. 79; *Morris* v. *Wiley*, 2 Ga. 287; *Long* v. *Strickland*, 2 Ga. 348; *Carey* v. *Rice*, 2 Ga. 408; *Coffee* v. *Newson*, 2 Ga. 439; 2 Tidd, Prac. 1134, 1135.

On a judgment against several parties, the writ of error must be brought in all their names (*Harpur's Case*, 6 Coke, 25 *b*; *Rasing* v. *Ruddoch*, Cro. Eliz. 648; *Andrews* v. *Lord Cromwell*, Cro. Eliz. 892, Yelv. 4; *Hacket* v. *Herne*, Carth. 7, 8; *Walter* v. *Stokoe*, 5 Mod.

16, 69, Carth. 367, Comb. 354, 1 Ld. Raym. 71; *Walter* v. *Stokoe*, Carth. 368, 1 Ld. Raym. 151; *Penoyer* v. *Brace*, Carth. 404, 1 Salk. 319, Comb. 441, 1 Ld. Raym. 244; *Burr* v. *Atwood*, Carth. 447, 1 Ld. Raym. 328; *Ginger* v. *Cowper*, 1 Str. 606, 8 Mod. 316, 2 Ld. Raym. 1403; *Rous* v. *Etherington*, 1 Salk. 312, Holt, 313, 2 Ld. Raym. 870; *Elkins* v. *Paine*, 2 Ld. Raym. 1532; *Shepherd* v. *Orchard*, 6 Mod. 40; *Brewer* v. *Turner*, 1 Str. 234; *Salter* v. *Grosvenor*, 8 Mod. 303; *Brace* v. *Pennoyer*, 5 Mod. 338; *Ratcliff* v. *Burton*, Lee, Cas. *t.* Hardw. 135; *Mason* v. *Simmonds*, Barnes, 202; *Vavasor* v. *Faux*, 1 Wils. 88; *Knox* v. *Costello*, 3 Burr. 1789-1792; *Laroche* v. *Wasbrough*, 2 T. R. 737; *Walker* v. *Slackoe*, Holt, 54), provided they are all living and aggrieved by the judgment.

But when one of several parties dies, the writ of error must be brought by the survivors.

Bethill v. *Parry*, Palm. 151.

And in trespass against three, if there be judgment against two and in favor of the third, the two only may bring a writ of error.

Cannon v. *Abbot*, 1 Lev. 210; *Parker* v. *Lawrence*, Hob. 70; *Lady Cass* v. *Title*, 1 Str. 683; *Sword-Blade Co.* v. *Dempsey*, 2 Str. 892; *Rex* v. *Inhabitants of All Saints*, Id. 1110; *Verelst* v. *Rafael*, Cowp. 425, *S. C.* 2 W. Bl. 1067; *Barnwell* v. *Graunt*, Style, 190; *Ball* v. *Richards*, 3 Salk. 146.

So, if a writ of error be brought in the names of several, and one or more of them refuse to appear and assign errors, they must be summoned and severed; after which the writ of error may be proceeded in by the rest alone.

Andrews v. *Lord Cromwell*, Yelv. 3, 4, Cro. Eliz. 891, 892; *Lancaster* v. *Lowe*, Cro. Jac. 94; *Blunt* v. *Snedston*, Cro. Jac. 117; *Hacket* v. *Herne*, Carth. 7, 8; *Shepherd* v. *Orchard*, 6 Mod. 40; *Frescobaldi* v. *Kinaston*, 2 Str. 783; *Cannon* v. *Abbot*, 1 Lev. 210; *Parker* v. *Lawrence*, Hob. 70; *Barnwell* v. *Graunt*, Style, 190; *Verelst* v. *Rafael*, Cowp. 425.

A writ of error was not amendable at common law.

Thompson v. *Crocker*, 1 Salk. 49, 1 Ld. Raym. 564.

But now, by Stat. 5 Geo. I., chap. 13, all writs of error may be amended.

Sword-Blade Co. v. *Dempsey*, 2 Str. 892, Fitzg. 201, 268; *Fortescue* v. *Mason*, 2 Str. 863; *Edwards* v. *Dempsey*, 1 Barn. 405, 421; *Wright* v. *Kenning*, 1 Barn. 62, 65; *Verelst* v. *Rafael*, Cowp. 425, 2 W. Bl. 1067; *Barnard* v. *Guy*, 2 Smith, 259; *Gardiner* v. *Merrot*, 2 Ld. Raym. 1587; *Oliver* v. *Hunning*, 1 Ld. Raym. 691; *Rex* v. *Inhabitants of All Saints*, 2 Str. 1110; *Henriques* v. *Dutch West India Co.* 2 Str. 807, *Gardner* v. *Merrett*, 2 Str. 902; *Dickinson* v. *Plaisted*, 7 T. R. 474; *Sampayo* v. *De Payba*, 5 Taunt. 82.

The writ should be amended in the court where the original record lay.

Rutter v. *Redstone*, 2 Str. 837; *Tully* v. *Sparks*, 2 Str. 869; *Verelst* v. *Rafael*, 2 W. Bl. 1067; Arch. Pr. 236, 237.

Where a judgment is given against several, any of them may bring a writ or error, but it must be in the names of all; otherwise the court will quash it.

Laroche v. *Wasbrough*, 2 T. R. 738; *Knox* v. *Costello*, 3 Burr. 1789; *Brewer* v. *Turner*, 1 Str. 233; *Cooper* v. *Ginger*, 1 Str. 606; *Vavasor* v. *Faux*, 1 Wils. 88; *Gerrard* v. *Arnold*, 1 Ld. Raym. 405; *Burr* v. *Atwood*, 1 Ld. Raym. 328; *Walter* v. *Stokoe*, 1 Ld. Raym. 71; Rolle, Abr. 747; *Raynolds* v. *Dignam*, Dyer, 89 *b*; *Reg.* v. *Bishop of Gloucester*, 3 Leonard, 176, Cro. Eliz. 65; *Anon.* Style, 406; *Hacket* v. *Herne*, 3 Mod. 134; *Spenser* v. *Earl of Rutland*, Yelv. 209; *Rous* v. *Etherington*, 2 Ld. Raym. 870; *Ginger* v. *Cowper*, 2 Ld. Raym. 1403; *Elkins* v. *Paine*, 2 Ld. Raym. 1532; *Ratcliff* v. *Burton*, Lee, Cas. *t.* Hardw. 135; *Bethill* v. *Parry*, Palm. 151.

If a party or his attorney enter into an agreement not to bring a writ of error, he is afterwards precluded from bringing it.

Camden v. *Edie*, 1 H. Bl. 21; *Cates* v. *West*, 2 T. R. 188; *Wright* v. *Nutt*, 1 T. R. 388; *9 Henry VI. 46 b*, Rolle, Abr. 749; *Holland* v. *Lee*, 1 Rolle, Rep. 302; *Knox* v. *Costello*, 3 Burr. 1789.

A party co-defendant in the judgment, who refuses to join in the proceedings in error as a party thereto, should be summoned and severed (*Bradshaw* v. *Callaghan*, 8 Johns. 558; *Fenner* v. *Bettner*, 22 Wend. 621; *Smetters* v. *Rainey*, 14 Ohio St. 287); after which the person who sued out the writ may go on alone.

Fotterall v. *Floyd*, 6 Serg. & R. 315; *Smetters* v. *Rainey*, 13 Ohio St. 568; *Cairnes* v. *Knight*, 17 Ohio St. 68; *Umsted* v. *Buskirk*, Id. 114; Powell, Appellate Proceedings, 273, 274.

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, in opposition:

Any summons or judgment of severance should have been had in the circuit court.

Todd v. *Daniel*, 41 U.S. 16 Pet. 521 (10: 1054).

Severance must be had before the return day of the writ of error.

Bacon, Abr. 268; *Blunt* v. *Snedston*, Cro. Jac. 117.

Summons and severance cannot be had after the expiration of two years from the rendition of the judgment.

Rev. Stat. § 1008.

The defect of parties plaintiff in error cannot be cured by amendment.

Thomson v. *Crocker*, 1 Salk. 49; *Walter* v. *Stokoe*, 1 Ld. Raym. 71; *The Protector*, 78 U. S. 11 Wall. 82 (20: 47).

Until sec. 1005, Rev. Stat. (17 Stat. 196), became the law, June 1, 1872, it was not in the power of this court to supply the defect in the statement of the parties in the writ of error even from the record.

Wilson v. *Life & Fire Ins. Co.* 37 U. S. 12 Pet. 140 (9:1032); *Deneale* v. *Archer*, 33 U. S. 8 Pet. 526 (8: 1032).

Since the enactment of said section 1005, the meaning of "and others" in the writ may be supplied by amendment, if the names of the others can be ascertained from the record.

Moore v. *Simonds*, 100 U. S. 145 (25: 590.)

But the defect in the writ of error here is that all the defendants did not join. This defect cannot be cured by reference to the record. To grant such an amendment as is here requested would be in violation of, rather than in accordance with, sec. 1005, Rev. Stat. By the Statute 5 Geo. I., chap. 13, all writs of error may be amended and made agreeable to the record by the respective courts where such writs of error shall be returnable.

Elkins v. *Paine*, 2 Ld. Raym. 1532.

It has been expressly held by this court that a defect of parties plaintiff in error is not amendable.

Estis v. *Trabue*, 128 U. S. 225 (32: 437); *Ex parte Sawyer*, 88 U. S. 21 Wall. 235 (22: 617).

All the parties against whom a judgment of this kind is entered must join in a writ of error, or there must be a proper summons and severance.

Williams v. *Bank of U. S.* 24 U. S. 11 Wheat. 414 (6: 508); *Owings* v. *Kincannon*, 32 U. S. 7 Pet. 399 (8:727); *Wilson* v *Life & Fire Ins. Co.* 37 U. S. 12 Pet. 140 (9: 1032); *Todd* v. *Daniel*, 41 U. S. 16 Pet. 521 (10: 1054); *Smyth* v *Strader*, 53 U. S. 12 How. 327 (13: 1008); *Davenport* v. *Fletcher*, 57 U. S. 16 How. 142 (14: 879); *Mussina* v. *Cavazos*, 61 U. S. 20 How. 280, 289 (15: 878, 879); *Clifton* v. *Sheldon*, 64 U. S. 23 How. 481, 484 (16: 429, 430); *Masterson* v. *Herndon*, 77 U. S. 10 Wall. 416 (19. 953); *Hampton* v. *Rouse*, 80 U. S. 13 Wall. 187 (20: 593); *Simpson* v. *Greely*, 87 U. S. 20 Wall. 152 (22: 338); *Fiebelman* v. *Packard*, 108 U. S. 14 (27: 634).

Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction.

Wilson v. *Life & Fire Ins. Co.* 37 U. S. 12 Pet. 140 (9: 1032).

It will then, of its own motion, dismiss the case without awaiting the action of a party.

Hilton v. *Dickinson*, 108 U. S. 165, 168 (27: 688, 689).

Even if the court could otherwise allow an amendment, the fact that the Statute has run would prevent its doing so in the present case.

Estis v. *Trabue*, 128 U. S. 225 (32: 437); *Wilson* v. *Life & Fire Ins. Co.* 37 U. S. 12 Pet. 140 (9: 1032).

By the **Court:**

[586] Motion for leave to amend writ of error, citation and bond denied; and *writ of error dismissed.*

---

[580] CHARLES DAVENPORT, *Plff. in Err.*,
v.
TOWN OF PARIS.

(See S. C. Reporter's ed. 580-581.)

Requisites to a review in this court—cases followed.

1. This court will not review a case tried by the court where there is no finding of facts by the court, nor proper statement of facts by the parties, nor bill of exceptions.
2. A stipulation, such as is contained in the statement of the case below, which does not state the ultimate facts of the case, presenting questions of law only, is not sufficient.
3. *Glenn* v. *Fant*, 134 U. S. 398 (33: 969); *Raimond* v. *Terrebonne Parish*, 132 U. S. 192 (33: 309); *Andes* v. *Slauson*, 130 U. S. 435 (32: 989), and *Bond* v. *Dustin*, 112 U. S. 604 (28: 835),—followed.

[No. 268.]

Submitted Apr. 8, 1890. Decided Apr. 14, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois, to review a judgment for defendant, in an action on bonds and coupons of the Town of Paris, Edgar County, Illinois, issued in aid of a railroad. *Affirmed.*

The case was tried by the court without a jury. The record contained no finding of facts by the court, nor bill of exceptions. There is no statement of facts in the record, except the following:

"*Stipulation as to facts, etc.*"

"It is stipulated in the matter of *Charles Davenport* v. *The Town of Paris*, in assumpsit, now pending in the United States Circuit Court for the Southern District of Illinois, that the instruments sued on, being bonds numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 20, 23, 24, 25, 21, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79 and 80, with coupons now attached, which purport to be the bonds of the Town of Paris, were signed, respectively, by Henry Van Sellar and James A. Dittoe on the dates of said instruments, and that the said Henry Van Sellar was on that date supervisor of said Town of Paris, and that the said James A. Dittoe was on the said date the town clerk of said Town of Paris.

"It is also agreed that a jury is waived in [58 said matter. The above coupons are as follows: 61 of series 8, 9 and 10, and 51 of series 7, being 234 coupons.

"It is further stipulated that said bonds and coupons are identical in character with the bonds and coupons in the matter of *Skinner* v. *East Oakland*, tried in this court and appealed to the United States Supreme Court, tried there and reported in 94 U. S. 255 (24: 125), and issued in the same manner, the only difference being that these bonds and coupons were issued by the Town of Paris instead of the Town of East Oakland.

"In case of appeal to the United States Supreme Court this case may be submitted under Rule 20 on written briefs.

"George A. Sanders, for Pl't'ff.
"H. Van Sellar, for Def't."

(Indorsed) "Filed June 27, 1881.
"J. A. Jones, Clerk."

Mr. **George A. Sanders** for plaintiff in error.

Mr. **R. B. Lamon** for defendant in error.

Mr. Chief Justice **Fuller** delivered the decision of the court:

The judgment in this case is affirmed on the authority of *Glenn* v. *Fant*, 134 U. S. 398 [33: 969]; *Raimond* v. *Terrebonne Parish*, 132 U. S. 192 [33: 309]; *Andes* v. *Slauson*, 130 U. S. 435 [32: 989]; *Bond* v. *Dustin*, 112 U. S. 604 [28: 835], and cases cited.

FOLLOWING ARE MEMORANDA

OF

ALL CASES DISPOSED OF AT OCTOBER TERM, 1889,

WITHOUT OPINIONS, AND NOT ELSEWHERE OR OTHERWISE REPORTED IN THIS EDITION.

---

[9] ANTOINE M. SOBRAL *v.* ALFRED MARCHAND. [No. 12.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Mr. J. R. Beckwith for appellant. *Messrs. J. D. Rouse* and *William Grant* for appellee.

October 15, 1889. Dismissed with costs on authority of counsel for appellant.

---

[9] H. J. SPRINGFIELD *et al.* *v.* GEORGE H. THOMAS. [No. 14.]

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Mr. Samuel F. Rice for plaintiffs in error.

October 15, 1889. Dismissed with costs on authority of counsel for plaintiffs in error.

---

[8] THE WASHINGTON AND GEORGETOWN RAILROAD COMPANY *v.* THE DISTRICT OF COLUMBIA. [No. 21.]

In Error to the Supreme Court of the District of Columbia.

Messrs. Walter D. Davidge and *Enoch Totten* for plaintiff in error. *Messrs. A. G. Riddle* and *H. E. Davis* for defendant in error.

December 2, 1889. Judgment reversed with costs per stipulation and on the authority of the decision of this court in the case of *The Metropolitan Railroad Company* v. *The District of Columbia*, No. 5 of October Term, 1889 [132 U. S. 1 (33:231)]; and cause remanded with directions to enter judgment for the defendant on the demurrer to the pleas of the Statute of Limitations.

---

[9] THE BALTIMORE AND OHIO RAILROAD COMPANY *v.* WILLIAM SUTHERLAND. [No 38.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Messrs. Jno. K. Cowen and *Hugh L. Bond, Jr.*, for plaintiff in error. *Messrs. John H. Doyle* and *G. R. Walker* for defendant in error.

January 29, 1890. Judgment reversed, costs in this court to be paid by plaintiff in error; and cause remanded with directions to remand the cause to the state court.

---

[4] JAMES GOODERHAM WORTS *et al.* *v.* THE CITY OF WATERTOWN. [No. 53.]

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

Messrs. James G. Jenkins and *F. C. Winkler* for plaintiffs in error. *Mr. Daniel Hall* for defendant in error.

October 29, 1889. Dismissed with costs per stipulation.

WM. H. ROBERTSON, Coll'r, etc., *v.* LOUIS LUTZ *et al.* [No. 59.] [647]

In Error to the Circuit Court of the United States for the Southern District of New York.

The Attorney-General for plaintiff in error. *Messrs. Edward Hartley* and *Walter H. Coleman* for defendants in error.

November 4, 1889. Dismissed with costs on motion of *Mr. Solicitor-General Chapman*, for plaintiff in error. [648]

JOHN HAWLOWETZ *v.* GEORGE V. KASS. [No. 61.] [638]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. Paul Goepel for plaintiff in error. *Mr. Arthur V. Briesen* for defendant in error.

November 4, 1889. Dismissed with costs pursuant to 10th Rule.

THE CEDAR FALLS PAPER MANUFACTURING CO. *v.* THE BRADNER-SMITH PAPER CO. [No. 62.] [632]

In Error to the Circuit Court of the United States for the District of Minnesota.

Messrs. John N. Rogers and *E. W. Tolerton* for plaintiff in error. *Mr. Anson B. Jackson* for defendant in error.

November 4, 1889. Dismissed with costs pursuant to the 10th Rule.

SAMUEL ROWLAND, Survivor, etc., *v.* THE ATLANTIC MILLING COMPANY. [No. 65.] [648]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. George H. Forster for appellant. *Mr. Arthur V. Briesen* for appellee.

November 5, 1889. Dismissed with costs pursuant to the 10th Rule.

COLBERT JEFFRIES *v.* CHARLES L. BARTLETT, Executor, etc. [No. 70.] [639]

In Error to the Supreme Court of the State of Georgia.

Mr. Henry Jackson for plaintiff in error.

November 6, 1889. Dismissed with costs per stipulation of the parties.

THE CENTRAL TRUST COMPANY OF NEW YORK *et al.* *v.* MRS. M. H. C. BACON. [No. 71.] [633]

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Messrs. Henry B. Tompkins, W. M. Baxter, George Hoadly and *Edgar M. Johnson* for ap-

pellants. *Mr. Henry H. Ingersoll* for appellee.

November 6, 1889. Dismissed for the want of jurisdiction.

---

[644] THE NEW ORLEANS WATER WORKS CO. *v.* THE CITY OF NEW ORLEANS. [No. 73.]

In Error to the Supreme Court of the State of Louisiana.

[645] *Messrs. Gus. A. Breaux, S. P. Blanc, Thomas J. Semmes* and *J. R. Beckwith* for plaintiff in error. *Messrs. Edgar H. Farrar* and *B. F. Jones* for defendant in error.

November 5, 1889. Dismissed with costs on the authority of counsel for plaintiff in error.

---

[630] THE BATE REFRIGERATING COMPANY *v.* JOSEPH EASTMAN. [No. 80.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. E. N. Dickerson, Jr., for plaintiff in error. *Mr. John R. Bennett* for defendant in error.

January 20, 1890. Dismissed per stipulation, on motion of *Mr. Augustus H. Garland*, in behalf of counsel.

---

[631] JOHN I. BLAIR *et al.* *v.* JAMES I. WALKER *et al.* [No. 82.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Walter C. Larned for appellants.

November 7, 1889. Dismissed with costs pursuant to the 10th Rule.

---

[652] THE UNITED STATES *v.* JOHN G. AGAR, Administrator of John A. Walsh, Deceased. [No. 94.]

Appeal from the Court of Claims.

The Attorney-General and *Mr. H. J. May* for appellant. *Mr. S. T. Thomas* for appellee.

November 8, 1889. Dismissed per stipulation.

---

[635] JAMES DOUGHERTY *v.* THE CITY AND COUNTY OF SAN FRANCISCO. [No. 98.]

In Error to the Circuit Court of the United States for the District of California.

Messrs. Luther H. Pike and *John B. Mhoon* for defendant in error. No brief filed for plaintiff in error.

November 18, 1889. Judgment affirmed with costs.

---

[647] WILLIAM T. RICHARDS, Trustee, etc., *v.* GEORGE HAYS. [No. 104.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Mr. Charles Howson for appellant. *Messrs. George Harding* and *Francis T. Chambers* for appellee.

November 18, 1889. Dismissed with costs pursuant to the 10th Rule.

---

[651] JOHN THORNTON *v.* GEORGE H. WOOSTER. [No. 109.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. J. C. Fraley and *B. F. Lee* for appellant. *Mr. Frederic H. Betts* for appellee.

November 14, 1889. Dismissed per stipulation.

[6 THE MUTUAL BENEFIT LIFE INSURANCE COMPANY OF NEW JERSEY *v.* KATHERINE SALENTINE. [No. 117.]

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

Messrs. James G. Jenkins and *F. C. Winkler* for plaintiff in error. *Mr. George P. Miller* for defendant in error.

November 18, 1889. Judgment reversed, costs in this court to be paid by the plaintiff in error; and cause remanded with directions to remand to state court.

[63 THE CHICAGO AND ALTON RAILROAD COMPANY *v.* HENRY H. WATERMAN. [No. 118.]

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

Messrs. Corydon Beckwith and *O. H. Feathers* for plaintiff in error. *Messrs. I. C. Sloan* and *William Ruger* for defendant in error.

November 18, 1889. Judgment reversed, costs in this court to be paid by the plaintiff in error; and cause remanded with directions to remand to state court.

[647 ROBERT RAY, Sheriff, etc., *et al.* *v.* LEWIS C. NELSON *et al.* [No. 123.]

Appeal from the Circuit Court of the United States for the District of Colorado.

Mr. L. C. Rockwell for appellants. *Mr. John D. Pope* for appellees.

November 18, 1889. Dismissed with costs pursuant to the 10th Rule.

[647 THE PRATT MANUFACTURING COMPANY *v.* JAMES B. BERRY *et al.* [No. 127.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Mr. Charles H. Knox for appellant. *Mr. J. W. Lee* for appellees.

November 19, 1889. Dismissed with costs pursuant to the 10th Rule.

[648 MICHAEL SCHULTZ *v.* J. J. OSTRANDER. [No 129.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. L. M. Hosea for appellant.

November 19, 1889. Dismissed with costs pursuant to the 10th Rule.

[64 THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE *v.* THE KNOXVILLE & OHIO RAILROAD COMPANY *et al.* [No. 130.]

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Mr. L. C. Houk for appellants.

November 19, 1889. Dismissed with costs pursuant to the 10th Rule.

[647 MARY E. PICKETT *v.* D. L. FERGUSON *et al.* [No. 139.]

In Error to the Supreme Court of the State of Arkansas.

Messrs. S. P. Walker and *C. W. Metcalf* for plaintiff in error. *Mr. D. H. Poston* for defendant in error.

November 22, 1889. Dismissed with costs pursuant to the 10th Rule.

[ ] THE SOUTHERN DEVELOPMENT COMPANY v. THE HOUSTON AND TEXAS CENTRAL RAILWAY COMPANY *et al.* [No. 149.]
Appeal from the Circuit Court of the United States for the Eastern District of Texas.
Messrs. E. H. Farrar and *E. B. Kruttschnitt* for appellant.
December 4, 1889. Dismissed with costs pursuant to the 10th Rule.

[ ] THE VIRGINIA MIDLAND RAILWAY CO. v. GEORGE C. WILKINS, Receiver, etc. [No. 156.]
Appeal from the Circuit Court of the United States for the Eastern District of Virginia.
Messrs. John N. Staples and *Linden Kent* for appellant.
October 17, 1889. Dismissed with costs on motion of *Mr. Linden Kent* of counsel for appellant.

[ ] THE CONTINENTAL LIFE INSURANCE COMPANY v. JOHN MITCHELL *et al.* [No. 157.]
In Error to the Circuit Court of the United States for the Northern District of Illinois.
Mr. W. H. Swift for plaintiff in error.
December 6, 1889. Dismissed with costs pursuant to the 10th Rule.

THE SHAW RELIEF VALVE COMPANY v. THE CITY OF NEW BEDFORD. [No. 165.]
Appeal from the Circuit Court of the United States for the District of Massachusetts.
Messrs. Thomas H. Talbot and *Charles H. Drew* for appellant. *Messrs. Thomas S. Sprague* and *Charles J. Hunt* for appellee.
December 12, 1889. Dismissed with costs pursuant to the 10th Rule.

M. A. DISBROW & COMPANY v. THE FIRST NATIONAL BANK OF STEVENS POINT, WISCONSIN. [No. 175.]
In Error to the Circuit Court of the United States for the Western District of Wisconsin.
Mr. C. W. Felker for plaintiffs in error.
December 17, 1889. Dismissed per stipulation.

[ ] E. & A. H. BATCHELLER & COMPANY v. JOHN ADDEN *et al.* [No. 178.]
Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.
Messrs. S. P. Blanc, G. A. Breaux and *M. F. Dickinson, Jr.*, for appellants. *Mr. A. A. Ranney* for appellees.
December 18, 1889. Dismissed with costs pursuant to the 10th Rule.

[ ] THE BALTIMORE AND OHIO RAILROAD COMPANY v. THE STATE OF WEST VIRGINIA. [No. 182.]
Appeal from the Circuit Court of the United States for the District of West Virginia.
Messrs. Jno. K. Cowen and *Hugh L. Bond, Jr.*, for appellant. *Mr. D. B. Lucas* for appellee.
January 3, 1890. Dismissed with costs on motion of *Mr. Hugh L. Bond, Jr.*, for appellant.

[ ] THE NEWPORT AND WICKFORD RAILROAD & STEAMBOAT COMPANY v. JOHN BEATTIE. [No. 183.]
In Error to the Circuit Court of the United States for the District of Rhode Island.
Mr. Wheeler H. Peckham for the plaintiff in error. *Mr. Lynde Harrison* for the defendant in error.
December 20, 1889. Dismissed per stipulation.

JOHN SMITH v. THE EXCHANGE BANK OF WAYNESBURG, PA., use of John C. Flenniken and Wm. T. E. Webb, now for use of F. W. Downey. [No. 185.] [649]
In Error to the Court of Common Pleas of Greene County, State of Pennsylvania.
Mr. P. A. Knox for plaintiff in error.
December 20, 1889. Dismissed with costs pursuant to the 10th Rule.

RICHARD W. MONTROSS *et al.* v. CHARLES W. BULLARD *et al.* [No. 186.] [643]
Appeal from the Circuit Court of the United States for the Northern District of Illinois.
Mr. J. W. Merriam for appellants. *Mr. L. L. Coburn* for appellees.
January 6, 1890. Dismissed with costs on the authority of counsel for appellants.

THE TUBULAR RIVET COMPANY v. CHARLES W. COPELAND. [No. 203.] [651]
Appeal from the Circuit Court of the United States for the District of Massachusetts.
Mr. Chauncey Smith for appellant. *Mr. G. M. Plympton* for appellee.
January 30, 1890. Dismissed with costs pursuant to the 10th Rule.

ROWLAND HAZARD, Commissioner, v. FREDERICK L. AMES *et al.* [No. 204.] [638]
Appeal from the Circuit Court of the United States for the District of Massachusetts.
Mr. Elias Merwin for appellant. *Messrs. John F. Dillon, S. Bartlett* and *Robert D. Smith* for appellees.
November 20, 1889. Dismissed per stipulation, on motion of *Mr. J. M. Wilson*, in behalf of counsel.

ROWLAND HAZARD, as Administrator, etc., v. FREDERICK L. AMES *et al.* [No. 205.] [638]
Appeal from the Circuit Court of the United States for the District of Massachusetts.
Mr. Elias Merwin for appellant. *Messrs. John F. Dillon, S. Bartlett* and *Robert D. Smith* for appellees.
November 20, 1889. Dismissed per stipulation, on motion of *Mr. J. M. Wilson*, in behalf of counsel.

THE CELLULOID MANUFACTURING COMPANY *et al.* v. SYLVESTER TOWER. [No. 206.] [633]
Appeal from the Circuit Court of the United States for the District of Massachusetts.
Mr. Frederick H. Betts for appellants. *Mr. H. M. Ruggles* for appellee.
January 31, 1890. Dismissed with costs pursuant to the 10th Rule.

LEILA BRYANT *et al.* v. THE CHARTER OAK LIFE INSURANCE COMPANY OF HARTFORD. [No. 209.] [632]
Appeal from the Circuit Court of the United States for the Northern District of Illinois.
Mr. C. M. Osborn for appellants. *Mr. A. P. Hyde* for appellee.
January 31, 1890. Dismissed with costs pursuant to the 10th Rule.

54] JESSE B. WILSON, Receiver, etc., v. A. B. GRUNWELL *et al.* [No. 210.]
Appeal from the Supreme Court of the District of Columbia.
Mr. W. Willoughby for appellant. *Mr. A. L. Merriman* for appellees.
January 20, 1890. Dismissed per stipulation, on motion of *Mr. W. Willoughby*, for appellant.

46] SETH OSBORNE, Administrator, etc., v. JOHN H. GREEN. [No. 211.]
Appeal from the Supreme Court of the District of Columbia.
Messrs. W. Willoughby and *S. F. Beach* for appellant. *Mr. A. S. Worthington* for appellee.
March 17, 1890. Decree affirmed with costs.

36] THE GLOBE NAIL COMPANY v. THE SUPERIOR NAIL COMPANY *et al.* [No. 218.]
Appeal from the Circuit Court of the United States for the Northern District of Illinois.
Mr. L. L. Coburn for appellant. *Mr. C. K. Offield* for appellees.
March 14, 1890. Dismissed with costs per stipulation.

37] WILLIAM P. GWIN *et al.* v. JAMES A. TALBOTT *et al.* [No. 220.]
In Error to the Supreme Court of the Territory of Montana.
Mr. Hiram Knowles for plaintiffs in error. *Mr. W. H. Smith* for defendants in error.
March 18, 1890. Dismissed with costs pursuant to the 10th Rule, and cause remanded to the Supreme Court of the State of Montana.

43] JOHN L. MORRIS v. JAMES A. TALBOTT *et al.* [No. 221.]
In Error to the Supreme Court of the Territory of Montana.
Mr. Hiram Knowles for plaintiff in error. *Mr. W. H. Smith* for defendants in error.
44] *March 19, 1890.* Dismissed with costs, and cause remanded to the Supreme Court of the State of Montana.

29] JOSEPH F. BALDWIN v. TILLY HAYNES. [No. 222.]
Appeal from the Circuit Court of the United States for the District of Massachusetts.
Mr. Frederick P. Fish for appellant. *Mr. Esek Cowen* for appellee.
March 19, 1890. Dismissed with costs pursuant to the 10th Rule.

36] THOMAS FENTON v. SALT LAKE COUNTY *et al.* [No. 230.]
Appeal from the Supreme Court of the Territory of Utah.
Mr. Arthur Brown for appellant. *Messrs. Franklin S. Richards* and *Z. Snow* for appellees.
March 21, 1890. Dismissed with costs on authority of counsel for appellant.

35] THE DISMAL SWAMP CANAL CO. v. THE COMMONWEALTH OF VIRGINIA. [No. 231.]
In Error to the Supreme Court of Appeals of the State of Virginia.
Messrs. John S. Wise, Joseph Christian and *John Goode* for plaintiff in error. No appearance for defendant in error.
March 21, 1890. Dismissed with costs pursuant to the 10th Rule.

THE DISMAL SWAMP CANAL CO. v. WILLIAM [635]
LAMB, Mayor, etc. [No. 232.]
In Error to the Supreme Court of Appeals of the State of Virginia.
Messrs. John S. Wise, Joseph Christian and *John Goode* for plaintiff in error. No appearance for defendant in error.
March 21, 1890. Dismissed with costs pursuant to the 10th Rule.

JAMES E. JUSTICE v. THE COMMONWEALTH [639]
OF VIRGINIA. [No. 233.]
In Error to the Supreme Court of Appeals of the State of Virginia.
Messrs. John S. Wise, Joseph Christian and [640]
John Goode for plaintiff in error. No appearance for defendant in error.
March 11, 1890. Dismissed with costs pursuant to the 10th Rule.

MRS. JULIA A. NUTT v. THE PARISH OF TEN- [6 45
SAS. [No. 235.]
In Error to the Circuit Court of the United States for the Western District of Louisiana.
Messrs. S. Prentiss Nutt and *Wade R. Young* for plaintiff in error. No appearance for defendant in error.
March 24, 1890. Dismissed with costs pursuant to the 10th Rule.

THE OREGON RAILWAY AND NAVIGATION [6
COMPANY v. THE OREGONIAN RAILWAY COMPANY (LIMITED). [Nos. 236, 237 and 238.]
In Error to the Circuit Court of the United States for the District of Oregon.
Mr. J. N. Dolph for plaintiff in error. *Messrs. George F. Edmonds* and *A. H. Garland* for defendant in error.
March 31, 1890. Judgments reversed with costs, and causes remanded with directions to grant new trials, on the authority of the decision of this court in the case between the same parties, reported in 130 U. S. 1 [32: 83].

HENRY N. STONE v. CLARA L. LOUD, Execu- [
trix of Samuel C. Loud, Deceased. [No. 242.]
Appeal from the Circuit Court of the United States for the District of Massachusetts.
Messrs. Thomas L. Wakefield and *William A. McKenney* for appellant. *Mr. J. E. Maynadier* for appellee.
November 18, 1889. Dismissed with costs, on motion of *Mr. William A. McKenney*, of counsel for appellant.

AUGUST TRUM, Trustee, etc., v. LEANDER J. J.
S. TURNEY *et al.* [No. 243.]
Appeal from the Circuit Court of the United States for the Southern District of Illinois.
Messrs. John M. Palmer, Joseph Wilby and
E. W. Kittredge for appellant. *Messrs.*
Tompkins and *R. P. Hanna* for appellees.
April 2, 1890. Decree reversed with costs, and cause remanded with directions to remand the cause to the state court.

THE CITIZENS' BANK OF TOPEKA, KAN., v. N [634]
THAN F. CABOT *et al.*, Administrators, etc. [No. 248.]
In Error to the Circuit Court of the United States for the District of Vermont.

Mr. Martin H. Goddard for plaintiff in error. *Mr. Kittredge Haskins* for defendants in error.
March 27, 1890. Dismissed per stipulation.

3] WM. H. ROBERTSON, Collector, etc., v. BENNETT B. SCHNEIDER. [No. 249.]
In Error to the Circuit Court of the United States for the Southern District of New York.
The Attorney-General for plaintiff in error. *Mr. H. E. Tremain* for defendant in error.
March 24, 1890. Dismissed with costs on motion of *Mr. Solicitor-General Taft*, for plaintiff in error.

3] WM. H. ROBERTSON, Collector, etc., v. FRANKLIN ROLFE. [No. 250.]
In Error to the Circuit Court of the United States for the Southern District of New York.
The Attorney-General for plaintiff in error. No appearance for defendant in error.
March 28, 1890. Dismissed with costs on motion of *Mr. Assistant Attorney-General Maury*, for plaintiff in error.

6] OTIS BROS. & CO. *et al.* v. CRANE BROTHERS MANUFACTURING CO. *et al.* [No. 254.]
Appeal from the Circuit Court of the United States for the Northern District of Illinois.
Messrs. C. K. Offield and *M. B. Philipp* for appellants. *Mr. L. L. Bond* for appellees.
March 31, 1890. Dismissed with costs pursuant to the 10th Rule.

1] LOUIS M. BLADES v. RAND, MCNALLY & CO. [No. 255.]
Appeal from the Circuit Court of the United States for the Northern District of Illinois.
Mr. C. K. Offield for appellant. *Mr. N. C. Gridley* for appellees.
March 31, 1890. Dismissed with costs pursuant to the 10th Rule.

2] THE UNITED STATES v. ROBERT BATES KINGSBURY *et al.* [No. 258.]
In Error to the Circuit Court of the United States for the Western District of Texas.
The Attorney-General for plaintiff in error. *Mr. A. J. Falls* for defendants in error.
March 17, 1890. Dismissed on motion of *Mr. Solicitor-General Taft*, for plaintiff in error.

0] CHARLES H. KRIPPENDORF v. WILLIAM L. HYDE *et al.* [No. 259.]
Appeal from the Circuit Court of the United States for the District of Indiana.
Mr. D. V. Burns for appellant. *Messrs. J. L. McMaster, Augustin Boice, Benj. Harrison, A. W. Hatch, Lew Wallace, Horace Speed* and *Henry Wise Garnett* for appellees.
April 1, 1889. Dismissed with costs pursuant to the 10th Rule.

2] NANCY A. MAAG *et al.* v. WILLIAM L. HYDE *et al.* [No. 260.]
Appeal from the Circuit Court of the United States for the District of Indiana.
Mr. D. V. Burns for appellants. *Messrs. A. W. Hatch* and *Lew Wallace* for appellees.
April 2, 1890. Dismissed with costs pursuant to the 10th Rule.

3] THE SCHOONER "COMET," Her Tackle, etc., W. H. ALDRICH, Master, v. D. S. STETSON & COMPANY, Owners, etc., *et al.* [No. 263.]
Appeal from the Circuit Court of the United States for the District of South Carolina.
Messrs. Theodore G. Barker, Henry T. Wing and *Harrington Putnam* for appellant. *Mr. J. P. Kennedy Bryan* for appellees.
December 3, 1889. Dismissed per stipulation, on motion of *Mr. James Lowndes*, in behalf of counsel.

MILETUS J. WINE v. LOUDON MULLIN, Trustee, etc. [No. 265.] [654]
Appeal from the Circuit Court of the United States for the District of Colorado.
Mr. Nathaniel Wilson for appellant. *Mr. L. S. Dixon* for appellee.
March 10, 1890. Dismissed per stipulation, on motion of *Mr. Nathanial Wilson*, for appellant.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY v. SCOFIELD, SHURMER & TEAGLE. [No. 267.] [640]
In Error to the Supreme Court of the State of Ohio.
Messrs. George C. Greene, Ashley Pond and *E. J. Estep* for plaintiff in error. *Mr. J. E. Ingersoll* for defendants in error.
April 3, 1890. Dismissed with costs on authority of counsel for plaintiff in error.

JOHN C. BURROUGHS *et al.* v. THE UNION MUTUAL LIFE INSURANCE COMPANY OF MAINE. [No. 272.] [632]
Appeal from the Circuit Court of the United States for the Northern District of Illinois.
Mr. Edward Raby for appellants.
April 9, 1890. Dismissed with costs pursuant to the 10th Rule.

WILLIAM SENSENDERFER v. SAMUEL A. KEMP *et al.* [No. 280.] [649]
In Error to the Supreme Court of the State of Missouri.
Messrs. Wm. D. Baldwin, Levin H. Campbell and *Samuel P. Sparks* for plaintiff in error. *Mr. George P. B. Jackson* for defendant in error.
April 28, 1890. Judgment affirmed with costs.

WILLIAM SENSENDERFER v. J. C. SWISHER, Executor, etc., *et al.* [No. 281.] [649]
In Error to the Supreme Court of the State of Missouri.
Messrs. Wm. D. Baldwin, Levin H. Campbell and *Samuel P. Sparks* for plaintiff in error. *Mr. George P. B. Jackson* for defendants in error.
April 28, 1890. Judgment affirmed with costs.

JAMES MILLIGAN *et al.* v. JAMES C. SAVERY. [No. 283.] [643]
In Error to the Supreme Court of the Territory of Montana.
Mr. Thomas L. Napton for plaintiffs in error.
April 17, 1890. Dismissed with costs pursuant to the 10th Rule, and cause remanded to the Supreme Court of the State of Montana.

JOHN H. BASS v. GEORGE MILMINE. [No. 285.] [630]
Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. R. S. Taylor for appellant. *Messrs. L. M. Ninde* and *T. E. Ellison* for appellee.

May 5, 1890. Decree affirmed with costs by a divided court.

---

[642] THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY *v.* ELIZABETH R. ADAMS. [No. 287.]

In Error to the Circuit Court of the United States for the District of Indiana.

Messrs. Augustin Boice, Chas. A. Kent and *John L. McMaster* for plaintiff in error. *Mr. W. H. H. Miller* for defendant in error.

April 28, 1890. Judgment affirmed with costs and interest, by a divided court.

---

[634] GEORGE CORNWALL *v.* THE STATE OF VIRGINIA. [No. 290.]

[645] C. W. NEWTON *et ux.* *v.* THE STATE OF VIRGINIA. [No. 291.]

[632] NATHANIEL BURRUSS *v.* THE STATE OF VIRGINIA. [No. 292.]

In Error to the Supreme Court of Appeals of the State of Virginia.

Mr. William L. Royall for plaintiffs in error. *Mr. R. A. Ayers* for defendant in error.

April 21, 1890. Dismissed with costs on authority of counsel for the plaintiffs in error.

---

[631] ORESTES S. BROWN *et al.* *v.* JULIA A. BROWN *et al.* [No. 303.]

Appeal from the Supreme Court of the Territory of Dakota.

Messrs. C. K. Davis and *R. J. Wells* for appellants. *Mr. S. S. Burdett* for appellees.

April 24, 1890. Dismissed with costs pursuant to the 10th Rule, and cause remanded to the Supreme Court of the State of South Dakota.

---

[630] ISAAC W. BIRDSEYE *et al.* *v.* SOLOMON HEILNER *et al.* [No. 304.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Mr. Edmund Wetmore for appellants. *Mr. Levingston Gifford* for appellees.

April 24, 1890. Dismissed per stipulation.

---

[649] J. M. SHIVELY *v.* NANCY WELCH *et al.* [No. 305.]

Appeal from the Circuit Court of the United States for the District of Oregon.

Mr. John H. Mitchell for appellant. *Mr. J. N. Dolph* for appellees.

May 5, 1890. Dismissed for the want of jurisdiction.

---

[642] JOHN M. MILLER *et al.* *v.* THE DOMESTIC SEWING MACHINE COMPANY. [No. 308.]

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Mr. Fred. A. Baker for plaintiffs in error. *Mr. George Wm. Moore* for defendant in error.

April 25, 1890. Dismissed with costs pursuant to the 10th Rule.

---

[631] THE BOARD OF COUNTY COMMISSIONERS OF YELLOWSTONE COUNTY, M. T., *v.* THE BOARD OF COUNTY COMMISSIONERS OF CUSTER COUNTY, M. T. [No. 309.]

Appeal from the Supreme Court of the Territory of Montana.

Messrs. E. W. Toole and *W. F. Sanders* for appellant. *Mr. J. W. Strevell* for appellee.

May 23, 1890. Decree affirmed with costs, and cause remanded to the Supreme Court of the State of Montana.

LEWIS J. W. HASSELMAN *v.* ALLEN R. [6
RUSSELL *et al.* [No. 312.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. C. P. Jacobs for appellant.

April 28, 1890. Dismissed with costs pursuant to the 10th Rule.

LEWIS W. HASSELMAN *v.* GAAR, SCOTT AND [63
COMPANY. [No. 313.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. C. P. Jacobs for appellant. *Mr. Edward Boyd* for appellees.

April 29, 1890. Dismissed with costs pursuant to the 10th Rule.

FRANCOIS HENRY JUMEL *et al.* *v.* STEPHEN [63
M. CHESTER. [No. 317.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. Thomas M. Wheeler and *George S. Boutwell* for appellants. *Mr. Douglas Campbell* for appellee.

April 2, 1890. Dismissed per stipulation, on motion of *Charles E. Hovey*, in behalf of counsel.

THE OREGON RAILWAY AND NAVIGATION [6
COMPANY *et al.* *v.* SPENCER IRWIN *et al.* [No. 320.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. A. H. Holmes and *Jno. F. Dillon* for appellants. *Mr. Thomas H. Hubbard* for appellees.

April 30, 1890. Dismissed per stipulation.

THE OREGON RAILWAY AND NAVIGATION [6
COMPANY *et al.* *v.* HARRIS C. FAHNESTOCK. [No. 321.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Messrs. A. H. Holmes and *Jno. F. Dillon* for appellants. *Mr. Thomas H. Hubbard* for appellee.

April 30, 1890. Dismissed per stipulation.

JOHN H. LAW *et al.* *v.* THE FIRE ASSOCIATION [6
OF PHILADELPHIA. [No. 325.]

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. E. W. Kittredge for plaintiffs in error.

May 1, 1890. Dismissed with costs, on motion of *Mr. Joseph Wilby*, for plaintiffs in error.

EBENEZER KITZMILLER *v.* JOHN T. PIERCE. [6
[No. 327.]

In Error to the Supreme Court of Appeals of the State of West Virginia.

Messrs. Joseph T. Hoke and *C. C. Cole* for plaintiff in error.

May 1, 1890. Dismissed with costs pursuant to the 10th Rule.

THE LAMSON CASH RAILWAY CO. *v.* JOSEPH [6
C. MARTIN *et al.* [No. 360.]

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Mr. M. B. Philipp for appellant. *Messrs. T. L. Livermore* and *Frederick P. Fish* for appellees.

October 28, 1889. Dismissed per stipulation, on motion of *Mr. M. B. Philipp*, of counsel for appellant.

2] THE UNITED STATES *v.* EDWARD SAMUEL, etc. [No. 386.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

The Attorney-General for plaintiff in error. *Mr. John Samuel* for defendant in error.

March 17, 1890. Dismissed, on motion of *Mr. Solicitor-General Taft*, for plaintiff in error.

37] DAVID GOSLIN *et al.* *v.* C. F. A. HINRICHS. [No. 413.]

In Error to the Circuit Court of the United States for the Northern District of Texas.

Messrs. A. S. Lathrop and *W. Hallett Phillips* for plaintiffs in error. *Mr. Fred. W. Hinrichs* for defendant in error.

November 11, 1889. Dismissed with costs, on motion of *Mr. W. Hallett Phillips*, of counsel for plaintiffs in error.

PHIL. LEICHT, JR., *v.* D. W. MCLANE *et al.* [No. 430.]

In Error to the Supreme Court of the State of Iowa.

Mr. P. Henry Smyth for plaintiff in error. *Mr. W. E. Blake* for defendants in error.

May 19, 1890. Dismissed with costs per stipulation, on motion of *Mr. Wm. A. McKenney*, in behalf of counsel.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY *v.* JACOB P. MEDAY. [No. 452.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. John L. Cadwalader for plaintiff in error. *Mr. Wm. P. Chambers* for defendant in error.

January 13, 1890. Dismissed per stipulation, on motion of *Mr. James Lowndes*, in behalf of counsel.

JOSEPH C. WARREN, Sheriff, etc., *et al.* *v.* A. W. HENDERSON. [No. 650.]

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

Mr. R. H. Battle for appellants. No appearance for appellee.

January 22, 1890. Dismissed with costs, on motion of counsel for appellants.

THE STEAM GAUGE AND LANTERN CO. *v.* THE ST. LOUIS RAILWAY SUPPLIES AND MANUFACTURING COMPANY. [No. 672.]

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Mr. Edwin S. Jenney for appellant. *Mr. F. N. Judson* for appellee.

November 19, 1889. Dismissed per stipulation, on motion of *Mr. E. M. Marble*, in behalf of counsel.

1] THE TOWN OF ELMWOOD *v.* AMOS W. DOWS. [No. 687.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Messrs. Lyman Trumbull and *H. B. Hopkins* for plaintiff in error. *Mr. T. S. McClelland* for defendant in error.

January 7, 1890. Dismissed per stipulation, on motion of *Mr. Lyman Trumbull*, for plaintiff in error.

THE CHICAGO, PORTAGE & SUPERIOR RAILWAY COMPANY *v.* SARAH R. ANGLE, Administratrix, etc. [No. 690.] [633]

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

Mr. S. U. Pinney for plaintiff in error.

May 23, 1890. Dismissed with costs, on motion of *Mr. A. H. Garland*, in behalf of counsel for plaintiff in error.

THE PENNSYLVANIA RAILROAD COMPANY *v.* MARY A. MAGEE *et al.* [No. 761.] [646]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. Wayne MacVeigh for plaintiff in error. *Mr. M. Hampton Todd* for defendants in error.

December 23, 1889. Dismissed with costs per stipulation, on motion of *Mr. E. D. F. Brady*, in behalf of counsel.

JOHN P. DAVIE *et al.* *v.* JOHN A. MCCORMICK, Collector, etc. [No. 818.] [634]

In Error to the Supreme Court of the State of Texas.

Mr. J. M. Burroughs for plaintiffs in error. *Mr. F. Charles Hume* for defendant in error.

May 19, 1890. Dismissed with costs per stipulation, on motion of *Mr. William A. McKenney*, in behalf of counsel.

THE IOWA FALLS AND SIOUX CITY RAILROAD CO. *v.* JOHN BECK. [No. 827.] [639]

THE IOWA FALLS AND SIOUX CITY RAILROAD CO. *v.* LEVANT WENTWORTH *et al.* [No. 828.]

THE IOWA FALLS AND SIOUX CITY RAILROAD CO. *v.* ELEANOR NICHOLS *et al.* [No. 829.]

THE IOWA FALLS AND SIOUX CITY RAILROAD CO. *v.* SLOCUM NICHOLS *et al.* [No. 830.]

In Error to the Supreme Court of the State of Iowa.

Mr. Wm. L. Joy for plaintiff in error. No appearance for defendants in error.

March 24, 1890. Dismissed with costs, on motion of *Mr. Isaac S. Struble*, in behalf of counsel for plaintiffs in error.

THE MUTUAL RESERVE FUND LIFE ASSOCIATION *v.* MAMIE KEARY *et al.* [No. 873.] [644]

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Messrs. Alfred Taylor, Fred S. Parker and *W. C. Jones* for plaintiff in error.

April 21, 1890. Dismissed with costs, on motion of *Mr. S. S. Henkle*, in behalf of counsel for plaintiff in error.

JOHN W. DOUGLASS, Administrator, etc., *v.* JOHN BLAKE KENDALL, Exr., etc., *et al.* [No. 905.] [635]

Appeal from the Supreme Court of the District of Columbia.

Messrs. J. W. Douglass and *A. A. Birney* for appellant. *Mr. Job Barnard* for appellees. [636]

March 10, 1890. Dismissed per stipulation, on motion of *Mr. A. A. Birney*, for appellant.

[634] THE DELAWARE DIVISION CANAL CO. *v.* THE COMMONWEALTH OF PENNSYLVANIA. [No. 1092.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. M. E. Olmsted for plaintiff in error. *Messrs. W. S. Kirkpatrick* and *John F. Sanderson* for defendant in error.

May 19, 1890. Dismissed with costs, on motion of *Mr. M. E. Olmsted*, for plaintiff in error.

---

[649] DANIEL SHORDON *v.* DEWITT C. REED *et al.* [No. 1098.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. Edward H. Risley for appellant. *Mr. W. G. Howard* for appellees.

October 21, 1889. Dismissed with costs, on motion of counsel for appellees.

---

[646] THE PENNSYLVANIA RAILROAD COMPANY *v.* MARY BOWERS. [No. 1108.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. Geo. Tucker Bispham for plaintiff in error. No appearance for defendant in error.

February 3, 1890. Dismissed with costs, on motion of *Mr. John Hampton Barnes*, for plaintiff in error.

---

[640] THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY *v.* THE COMMONWEALTH OF PENNSYLVANIA. [No. 1154.]

In Error to the Supreme Court of the State of Pennsylvania.

Mr. M. E. Olmsted for plaintiff in error. *Messrs. W. S. Kirkpatrick* and *John F. Sanderson* for defendant in error.

May 19, 1890. Dismissed with costs, on motion of *Mr. M. E. Olmsted*, for plaintiff in error.

---

[652] THE UNITED STATES *v.* FRANK IVES. [No. 1169.]

Appeal from the Court of Claims.

The Attorney-General for appellant. *Mr. Geo. A. King* for appellee.

May 19, 1890. Dismissed per stipulation, on motion of *Mr. Geo. A. King*, for appellee.

---

[639] EBEN N. HORSFORD *et al.* *v.* J. J. GUDGER *et al.* [No. 1175.]

Appeal from the Circuit Court of the United States for the Western District of North Carolina.

Messrs. Theo. F. Davidson and *Andrew Fiske* for appellants. *Mr. H. A. Gudger* for appellees.

January 27, 1890. Decree reversed per stipulation.

---

[643] WILLIAM MILNE, EXR., etc., *v.* ANN MARIA DEEN. [No. 1184.]

In Error to the Circuit Court of the United States for the Southern District of New York.

Mr. E. C. Perkins for plaintiff in error. *Mr. Esek Cowen* for defendant in error.

January 13, 1890. Judgment affirmed with costs and interest by a divided court.

---

[630] GEORGE J. BIPPUS, Trustee, *v.* THE FARMERS' LOAN AND TRUST COMPANY. [No. 1311.]

Appeal from the Circuit Court of the United States for the District of Indiana.

Mr. Jno. L. Cadwalader for appellant. *Messrs. Herbert B. Turner* and *B. H. Bristow* for appellee.

April 29, 1890. Dismissed per stipulation, on motion of *Mr. George W. Wickersham*, for appellant.

E. J. LEBRETON, Administrator, etc., *et al.* *v.* [64
BARBARA JENNINGS, Administratrix, etc. [No. 1362.]

In Error to the Supreme Court of the State of California.

Mr. W. C. Belcher for plaintiffs in error. *Mr. J. C. Bates* for defendant in error.

March 17, 1890. Dismissed for the want of jurisdiction.

ROBERT FRANK *v.* NATHAN S. WHITE *et al.* [63
[No. 1419.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Mr. M. Salomon for plaintiff in error. *Mr. J. A. Baldwin* for defendants in error.

December 12, 1889. Dismissed per stipulation, on motion of *Mr. J. M. Flower*, in behalf of counsel.

JOSEPH CHURCH *et al.* *v.* HELEN M. KELSEY [63
et al. [No. 1453.]

In Error to the Supreme Court of the State of Pennsylvania.

Motions to dismiss or affirm submitted Dec. 16, 1889, by *Mr. H. W. Palmer* in support of motions, and by *Mr. A. Ricketts* in opposition thereto.

January 6, 1890. Judgment affirmed with costs.

ISAAC B. FELTS *v.* JACOB W. HOYSRADT. [636
[No. 1454.]

In Error to the Supreme Court of the State of Pennsylvania.

Motion to dismiss or affirm submitted Dec. 16, 1889, by *Mr. W. H. Jessup* in support of motion, and by *Mr. A. Ricketts* in opposition thereto.

January 6, 1890. Dismissed with costs.

HIRAM L. BROWN *et al.* *v.* THE LANSING [632
WHEEL-BARROW COMPANY. [No. 1463.]

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

October 21, 1889. Docketed and dismissed with costs, on motion of *Mr. C. J. Hunt*, for appellee.

HENRY LEO NELSON *v.* WILLIAM BLANDING [64
et al. [No. 1466.]

In Error to the Circuit Court of the United States for the Northern District of California.

October 21, 1889. Docketed and dismissed with costs, on motion of *Mr. Calderon Carlisle*, for defendants in error.

M. M. DODDS *v.* JOHN CHAFFE *et al.* [No. [63
1478.]

JOHN CHAFFE *et al.* *v.* M. M. DODDS. [No. [63
1549.]

Appeals from the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. M. L. Bell for Dodds. *Messrs. U. M. Rose* and *G. B. Rose* for Chaffe *et al.*

May 19, 1890. Dismissed per stipulation, on

motion of *Mr. Wm. A. McKenney*, in behalf of counsel.

37] ROBERT S. HALE *v.* GOTLIEB SCHERER *et al.* [No. 1493.]
In Error to the Supreme Court of the Territory of Montana.
October 29, 1889. Docketed and dismissed with costs, on motion of *Mr. W. K. Mendenhall*, for defendants in error.

52] ROBERT TURNER *et al.* *v.* ALFRED A. K. SAWYER. [No. 1499.]
Appeal from the Circuit Court of the United States for the District of Colorado.
November 1, 1889. Docketed and dismissed with costs, on motion of *Mr. Fillmore Beall*, for appellee.
January 27, 1890. Order of November 1, 1889, set aside and leave granted to re-docket cause upon payment of costs.

29] CHARLES D. ARMS *et al.* *v.* PETER L. KIMBERLY. [No. 1517.]
Appeal from the Circuit Court of the United States for the Northern District of Ohio.
November 25, 1889. Docketed and dismissed with costs, on motion of *Mr. Samuel Griffith*, for appellee.

38] WARREN L. HINDS *v.* MARY HINDS. [No. 1518.]
Appeal from the Supreme Court of the District of Columbia.
November 25, 1889. Docketed and dismissed with costs, on motion of *Mr. M. F. Morris*, for appellee.

18] DAVID J. HENNESSY *v.* GEORGE V. BACON *et al.* [No. 1522.]
Appeal from the Circuit Court of the United States for the District of Minnesota.
December 9, 1889. Docketed and dismissed with costs, on motion of *Mr. O. K. Davis*, for appellees.
January 13, 1890. On motion of *Mr. M. F. Morris*, for appellant, order of Dec. 9, 1889, set aside and leave granted to re-docket the case on payment of costs, and upon the further condition that the case be submitted on printed briefs on or before the first day of the next term.

53] QUINCY A. VINAL, as Administrator, etc., *v.* THE CONTINENTAL CONSTRUCTION AND IMPROVEMENT COMPANY. [No. 1528.]
In Error to the Circuit Court of the United States for the Northern District of New York.
December 23, 1889. Docketed and dismissed with costs, on motion of *Mr. William A. McKenney*, for defendant in error.

29] ANDREW ALBRIGHT *v.* THE AMERICAN BELL TELEPHONE COMPANY. [No. 1534.]
Appeal from the Circuit Court of the United States for the District of New Jersey.
January 6, 1890. Docketed and dismissed with costs, on motion of *Mr. Henry G. Atwater*, for appellee.

THE MOBILE AND OHIO RAILROAD COMPANY [*et al.* *v.* THE STATE OF TENNESSEE *et al.* [No. 1555.]
Appeal from the Circuit Court of the United States for the Western District of Tennessee.
February 3, 1890. Docketed and dismissed with costs, on motion of *Mr. S. A. Champion*, for appellees.

THE NORTH PENNSYLVANIA RAILROAD COMPANY *v.* THE COMMONWEALTH OF PENNSYLVANIA. [No. 1556.] [(
In Error to the Supreme Court of the State of Pennsylvania.
Mr. George R. Kaercher for plaintiff in error.
May 1, 1890. Dismissed with costs, on motion of *Mr. Wm. B. Lamberton*, for plaintiff in error.

F. C. HOWES *v.* LEVI M. KELLOGG *et al.* [[No. 1557.]
In Error to the Supreme Court of the State of California.
Mr. Thomas Mitchell for plaintiff in error. *Mr. H. A. Barclay* for defendants in error.
April 21, 1890. Dismissed for the want of jurisdiction.

LOUIS TRAGER *et ux.* *v.* JOHN F. JENKINS. [([No. 1571.]
In Error to the Circuit Court of the United States for the Southern District of Mississippi.
Messrs. Chas. J. Boatner, D. E. Fox and *Van H. Manning* for plaintiffs in error. *Mr. W. Hallett Phillips* for defendant in error.
April 28, 1890. Dismissed for the want of jurisdiction.

THE UNITED STATES *v.* RICHARD S. TUTHILL. [6 [No. 1573.]
In Error to the District Court of the United States for the Northern District of Illinois.
The Attorney-General for plaintiff in error.
April 21, 1890. Dismissed, on motion of *Mr. Attorney-General Miller*, for plaintiff in error.

THE LEHIGH VALLEY RAILROAD COMPANY *v.* [6 THE COMMONWEALTH OF PENNSYLVANIA. [No. 1574.]
In Error to the Supreme Court of the State of Pennsylvania.
Mr. M. E. Olmsted for plaintiff in error. *Messrs. W. S. Kirkpatrick* and *John F. Sanderson* for defendant in error.
May 19, 1890. Dismissed with costs, on motion of *Mr. M. E. Olmsted*, for plaintiff in error.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY *v.* THE COMMONWEALTH OF PENNSYLVANIA. [No. 1576.] [(
In Error to the Supreme Court of the State of Pennsylvania.
Mr. M. E. Olmsted for plaintiff in error. *Messrs. W. S. Kirkpatrick* and *John F. Sanderson* for defendant in error.

May 19, 1890. Dismissed with costs, on motion of *Mr. M. E. Olmsted*, for plaintiff in error.

---

[636] WM. H. ENSIGN *et al.* v. MILLS W. BARSE *et al.* [No. 1593.]

[636] WM. H. ENSIGN *et al.* v. JOHN L. MCKINNEY *et al.* [No. 1594.]

In Error to the Supreme Court of the State of New York.

Mr. E. D. Northrup for plaintiffs in error. *Mr. M. F. Elliott* for defendants in error.

May 19, 1890. Dismissed per stipulation, on motion of *Mr. Wm. A. McKenney*, in behalf of counsel.

B. F. HAMMOND *et al.* v. JAMES CONNOLY [63
et al. [No. 1621.]

In Error to the Circuit Court of the United States for the Northern District of Texas.

May 5, 1890. Docketed and dismissed with costs, on motion of *Mr. Frederic D. McKenney*, for defendants in error.

CASES
DISMISSED IN VACATION
PURSUANT TO
RULE 28
BETWEEN THE FINAL ADJOURNMENT AT
OCTOBER TERM, 1888,
AND THE COMMENCEMENT OF
OCTOBER TERM, 1889.

1] THE BRADLEY AND HUBBARD MANUFACTURING COMPANY *v.* THE CHARLES PARKER COMPANY. [No. 108.]
Appeal from the Circuit Court of the United States for the District of Connecticut.
Mr. Charles E. Mitchell for appellant. *Mr. C. R. Ingersoll* for appellee.
October 8, 1889.

1] STILLMAN W. WHEELOCK *et al.* *v.* MILTON W. SHIRK, Executor, etc. [No. 208.]
Appeal from the Circuit Court of the United States for the Northern District of Illinois.
Mr. Charles M. Osborn for appellants. *Mr. John S. Miller* for appellee.
July 29, 1889.

7] THE PIONEER PRESS COMPANY *v.* LILLIE MITCHELL. [No. 335].
In Error to the Circuit Court of the United States for the District of Minnesota.
Messrs Wm. D. Cornish and *Gordon E. Cole* for plaintiff in error. *Messrs. W. T. Turnbull* and *Charles C. Flandrau* for defendant in error.
July 29, 1889.

32] L. D. BROWN *et al.* *v.* G. E. MCCONNELL. [No. 364.]
Appeal from the Supreme Court of the Territory of Washington.
Mr. Leander Holmes for appellants. *Messrs. W. W. Upton* and *A. H. Garland* for appellee.
August 26, 1889.

GERHARD WESSELS *v.* THE STEAMSHIP "ALENE," Her Engines, etc., THE ATLAS STEAMSHIP CO., Claimant. [No. 618.] [653]
Appeal from the Circuit Court of the United States for the Eastern District of New York.
Messrs. James K. Hill, Henry T. Wing and *Harrington Putnam* for appellant. *Mr. Everett P. Wheeler* for appellee. [654]
October 9, 1889.

CHARLES H. MORSS *v.* FRANCIS L. MANCHESTER *et al.* [No. 749.] [644]
Appeal from the Circuit Court of the United States for the Eastern District of New York.
Mr. Charles H. Swan for appellant. *Mr. Edwin H. Brown* for appellees.
June 8, 1889.

THE SOUTH AND NORTH ALABAMA RAILROAD COMPANY *v.* THE PLANTERS AND MERCHANTS' MUTUAL INSURANCE COMPANY OF MOBILE, ALABAMA. [No. 751.] [650]
In Error to the Supreme Court of the State of Alabama.
Mr. Thomas G. Jones for plaintiff in error. *Mr. Gaylord B. Clark* for defendant in error.
July 18, 1889.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF

UNITED STATES

IN

OCTOBER TERM, 1890.

Vol. 137.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1890,

AND REPORTED HEREIN,

VOL. 137,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Rep. U. S.	Title.	Here in.	Off. Rep. 137 U. S.	Title.	Here in.
-8	The Max Morris	586	78–79	Hennessy v. Bacon	605
-9	" "	587	79–82	" "	606
-12	" "	588	82–84	" "	607
-15	" "	589	84–85	" "	608
	" "	590	86–87	Crowley v. Christensen	620
-20	York v. Texas	604	87–89	" "	621
-21	" "	605	89	" "	622
-24	Butler v. Steckel	582	89–91	" "	623
-25	" "	583	91–94	" "	624
-28	" "	584	94–95	" "	625
-30	" "	585	95–96	Seeberger v. Cahn	599
30	Hostetter v. Park	568	96–98	" "	600
-33	" "	569	98–100	Fitzgerald & M. Const. Co. v. Fitzgerald	608
-34	" "	570			
-39	" "	571	100–103	" " "	609
-41	" "	572	103–104	" " "	610
-42	Dable Grain Shovel Co. v. Flint	618	104–106	" " "	611
-43	" " "	619	106–109	" " "	612
	" " "	620	109–112	" " "	613
-45	Harding v. Woodcock	580	112–113	" " "	614
-46	" "	581	113–115	Williams v. United States	590
	" "	582	115–118	" " "	591
-49	Texas & P. R. Co. v. Southern P. Co.	614	118–121	" " "	592
			121–124	" " "	593
-52	" " "	615	124–127	" " "	594
-53	" " "	616	127–130	" " "	595
-56	" " "	617	130–133	" " "	596
	" " "	618	133–136	" " "	597
-58	Shenfield v. Nashawannuck Mfg. Co.	573	136–138	" " "	598
			139	Lawrence v. Rector	600
-59	" " "	574	139–141	" "	601
-61	Fishburn v. Chicago, M. & St. P. R. Co.	585	141–142	Gurnee v. Patrick County	601
			142–144	" " "	602
	" " "	586	144–145	" " "	603
-62	La Confiance Compagnie Anonyme d'Assurance v. Hall	573	145–146	The Steamship Haverton	603
			146	" " "	604
-63	Washington Market Co. v. District of Columbia	572	147	*Re* Grimley	636
			147–150	" "	637
63	*Re* Huntington	567	150–153	" "	638
	" "	568	153–156	" "	639
64	Florsheim v. Schilling	574	156–157	" "	640
-66	" "	575	157	*Re* Morrissey	644
-69	" "	576	158–160	" "	645
-72	" "	577	160–161	United States v. Trinidad Coal & C. Co.	640
-75	" "	578			
-77	" "	579	161–164	" " "	641
-78	" "	580	164–166	" " "	642

Off. Rep. 127 U. S.	Title.	Here in.
166–169	United States v. Trinidad Coal & C. Co.	643
169–171	" " "	644
171–172	Morgan's Louisiana & T. R. & S. S. Co. v. Texas C. R. Co. / Texas C. R. Co. v. Morgan's Louisiana & T. R. & S. S. Co.	625
172–175	" " "	626
175–178	" " "	627
178–180	" " "	628
180–183	" " "	629
183–185	" " "	630
190	" " "	631
190–193	" " "	632
193–195	" " "	633
195–198	" " "	634
198–201	" " "	635
201–202	" " "	636
202	Jones v. United States	691
203–204	" " "	692
204–207	" " "	693
207–210	" " "	694
210–212	" " "	695
212–215	" " "	696
215–217	" " "	697
217–220	" " "	698
220–223	" " "	699
223–224	" " "	700
225	Falk v. Robertson	645
225–226	" "	646
226–234	" "	647
234	" "	648
234	Fourth Nat. Bank of New York v. American Mills Co.	655
235	" " "	656
235	" " "	657
235–238	" " "	658
238–239	" " "	659
239	French v. Carter	664
240–242	" "	665
242–244	" "	666
244–245	" "	667
245	Wheeler v. Jackson	659
250	" "	660
250–252	" "	661
252–254	" "	662
254–257	" "	663
257–258	" "	664
258	MacFarland v. Jackson	664
258	Dobson v. Lees	652
259–260	" "	653
260–263	" "	654
263–266	" "	655
266	Broom v. Armstrong	648
266	" "	649
266–276	" "	650
276–278	" "	651
278–280	" "	652
280	United States v. Lynch	700
280–283	" " "	701
283–286	" " "	702
286–287	" " "	703
287–289	Grover & Baker Sewing Mach. Co. v. Radcliffe	670
289–294	" "	671
294–297	" "	672
297–299	" "	673
300	Johnson v. Risk	683
300–302	" "	684
302–305	" "	685

Off. Rep. 127 U. S.	Title.	Here in.
305–308	Johnson v. Risk	686
308–309	" "	687
310–312	Auffmordt v. Hedden	674
312–319	" "	675
319–321	" "	676
321–323	" "	677
323–324	" "	678
324–327	" "	679
327–329	" "	680
329–330	" "	681
330	The Nacoochee	687
331–333	" "	688
333–338	" "	689
338–340	" "	690
340–342	" "	691
342–344	Solomons v. United States	667
344–345	" " "	668
345–348	" " "	669
348	" " "	670
348–349	Montana R. Co. v. Warren	681
349–352	" " "	682
352–354	" " "	683
355–356	Central Nat. Bank v. United States	703
356–359	" " " "	704
359–365	" " " "	705
365	" " " "	706
366–367	Handley v. Stutz	706
367–368	" "	707
368–370	" "	708
370	Hamilton v. Home Ins. Co.	708
370–373	" " "	709
373–376	" " "	710
376–379	" " "	711
379–384	" " "	712
384–386	" " "	713
386–388	The Propeller Burlington	731
388–390	" " "	732
390–392	" " "	733
392	" " "	734
393–395	*Re* Lancaster	713
395–397	Fond Du Lac County v. May	714
397–399	" " " "	715
399–402	" " " "	716
402–405	" " " "	717
405–408	" " " "	718
408	" " " "	719
408–409	May v. Juneau County	720
409–411	" " "	720
411	Union Stock Yards Bank v. Gillespie	724
413–414	" " " "	725
414–417	" " " "	726
417–420	" " " "	727
420–423	" " " "	728
423	" " " "	729
423–424	Busell Trimmer Co. v. Stevens	719
424–427	" " "	720
427–430	" " "	721
430–432	" " "	722
432–435	" " "	723
435	" " "	724
436	Texas Land & C. Co. v. Scott	730
436	" " "	731
436–439	Robertson v. Oelschlaeger / Oelschlaeger v. Robertson	744
439–442	" "	745
442–444	" "	746
445	New York Belting & P. Co. v. New Jersey Car Spring & R. Co.	741
445–447	" " "	742

Off. Rep. 137 U. S.	Title.	Here in.
447–450	New York Belting & P. Co. v. New Jersey Car Spring & R. Co.	743
450	" " "	744
451	*Re* Pennsylvania Co.	738
451–453	" " "	739
453–455	" " "	740
455–457	" " "	741
457–458	*Re* Pennsylvania Co.	741
458–459	Bass v. Taft	752
459–462	" "	753
462–464	" "	754
465	Hoffman v. Overbey	754
465–466	" "	755
466–467	" "	756
467–469	" "	757
469–472	" "	758
472–473	" "	759
473	Bank of British North America v. Cooper	759
474–475	" " " "	760
475–478	" " " "	761
478–479	" " " "	762
480–481	Ambler v. Eppinger	765
481–483	" "	766
483–485	Holden v. Minnesota	734
485–488	" "	785
488–491	" "	736
491–494	" "	737
494–496	" "	738
496	Bassett v. United States	762
501–503	" " "	763
503–506	" " "	764
506–507	" " "	765
507–509	Chicago, M. & St. P. R. Co. v. Artery	747
509–512	" " " "	748
512–514	" " " "	749
514–517	" " " "	750
517–520	" " " "	751
520–521	" " " "	752
521–523	Wellford v. Snyder	780
523–524	" "	781
525–527	" "	782
527–528	" "	783
528–530	St. Paul, M. & M. R. Co. v. Phelps	767
530–533	" " " "	768
533–536	" " " "	769
536–539	" " " "	770
539–541	" " " "	771
541–542	" " " "	772
542–544	Merritt v. Cameron	772
544–546	" "	773
546–549	" "	774
549–552	" "	775
552	" "	776
553–554	Cadwalader v. Partridge	783
554–555	" "	784
556–558	Mackall v. Casilear	776
558–560	" "	777
560–564	" "	778
564–567	" "	779
567	" "	780
568	Baltimore & P. R. Co. v. Fifth Baptist Church	784
568–570	" " "	785
570–572	" " "	786
572–575	" " "	787

Off. Rep. 137 U. S.	Title.	Here in.
575–576	Baltimore & P. R. Co. v. Fifth Baptist Church	788
576–577	Lloyd v. McWilliams	788
577–578	Smith v. Gale	792
579	Sire v. Ellithorpe Air Brake Co.	801
579–581	" " "	802
581–583	" " "	803
584	Ayers v. Watson	803
585–586	" "	804
586–587	" "	805
587–591	" "	806
591–594	" "	807
594–596	" "	808
596–599	" "	809
599–602	" "	810
602–604	" "	811
604	Preston v. Prather	788
605–608	" "	789
608–611	" "	790
611–613	" "	791
613–615	" "	792
615	Green v. Elbert	792
616–618	" "	793
618–620	" "	794
621–623	" "	795
623–624	" "	796
624–626	*Re* Converse	796
626–629	" "	797
629–630	" "	798
630–632	" "	799
632	Red River Cattle Co. v. Needham	799
633–635	" " "	800
635–636	" " "	801
636	United States, *ex rel.* Redfield, v. Windom	811
637–638	" "	812
638–641	" "	813
641–644	" "	814
644–646	" "	815
646–647	" "	816
647	Duncan v. Navassa Phosphate Co.	825
650–651	" " "	827
651–654	" " "	828
654–655	Egan v. Clasbey	822
655–658	" "	823
658–661	" "	824
661–663	Packer v. Bird	819
663–669	" "	820
669–671	" "	821
671–673	" "	822
673	United States v. Page	828
673–676	" " "	829
676–679	" " "	830
679–681	" " "	831
681–682	" " "	832
682–684	Cope v. Cope	832
684–687	" "	833
687–689	" "	834
689	Massachusetts Benefit Asso. v. Miles	834
689–692	" " "	835
692	" " "	836
692–694	Caldwell v. Texas	816
694–696	" "	817
696–699	" "	818
699	" "	819

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1890.

Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

Ex parte:

In the Matter of WILBUR HUNTINGTON, *Petitioner.*

(See S. C. Reporter's ed. 63, 64.)

Habeas corpus, when this court will deny.

1. This court will not issue a writ of habeas corpus, even if it has the power, in cases where it may as well be done in the proper circuit court, if there are no special circumstances in the case making direct action or intervention by this court necessary or expedient.
2. *Ex parte Mirzan*, 119 U. S. 584 (30: 518), followed.

Motion for leave to file submitted Oct. 27, 1890. Decided Nov. 3, 1890.

ON MOTION for leave to file a petition for a writ of habeas corpus. *Denied.*

The petitioner is in the custody of the marshal of the United States for the Southern District of New York, imprisoned in such custody, for declining to answer certain interrogatories addressed to him as a witness in a case in the Circuit Court of the United States in and for the District of Colorado, in which George M. Daniel was plaintiff, and David R. C. Brown *et al.* were defendants, on behalf of the plaintiff, under an order of that court made January 30, 1890, directing the issuing a commission or *dedimus potestatum* to take his deposition. On May 15, 1890, in pursuance of said order, a commission was sued out of and under the seal of said court, directed to Charles Nettleton, commissioner in the City of New York, with interrogatories and cross-interrogatories annexed, to take the deposition of the petitioner. Huntington, the petitioner, appeared before said commissioner in the City of New York, and, after being sworn, answered some of the interrogatories, and refused, under the advice of counsel, to answer others.

Petitioner, upon his being informed of the plaintiff's intending to examine him as a witness orally, had previously caused application to be made to the court to limit his examination to interrogatories and cross-interrogatories. As the result of this application the examination was ordered to be upon certain interrogatories and cross-interrogatories; upon which, petitioner made motion to resettle the same and submitted his objections, demurrers and exceptions thereto; some of which being sustained and others overruled, he prayed and was allowed an appeal to the supreme court from so much of the order as overruled any of his demurrers and exceptions, and the commissioner in the City of New York proceeded to execute the said commission by examining petitioner upon the interrogatories and cross-interrogatories allowed; petitioner, not further insisting upon his demurrers and exceptions, except as hereinafter stated, duly answered all the interrogatories, except so much of those numbered 17, 20 and 24 as required him to disclose the source from which he obtained certain moneys. The refusal to answer was on the ground that the inquiry proposed to investigate petitioner's private business affairs and confidences, and was not pertinent to the issues in this litigation, and was without any just or adequate ground, and without any allegation in the bill of complaint setting forth any ground for allowing the interrogatory, whereby the court had not jurisdiction to allow the inquiry or enforce its answer against petitioner's exception and demurrer, and because the answer would not be competent evidence on the hearing for want of appropriate allegations in the bill of complaint; and because petitioner had appealed to the Supreme Court of the United States from the order of said circuit court allowing the interrogatories and overruling the exceptions and demurrer thereto, which appeal was still pending and undisposed of, and would be defeated by petitioner answering the interrogatories.

The commissioner reported said refusal to answer to the said circuit court, and thereupon the said court, on the 16th of September, 1890, made an order that petitioner appear before the said commissioner at his office in New York City, within thirty days from said last-mentioned date, and answer the said interrogatories, and, failing in that, the said petitioner

should be deemed and considered as in contempt of said court, and should stand committed to the custody of the marshal of the United States for the Southern District of New York, until he should answer the said interrogatories as aforesaid, or until discharged by due course of law.

Petitioner, in pursuance of said last-mentioned order, appeared before said commissioner at the said commissioner's office, in the City of New York, on the 16th day of October, 1890, and then and there the same interrogatories were again put to him, and he declined to answer precisely as before and upon the same grounds; and thereupon, in pursuance of said order, the said marshal of the United States for the Southern District of New York took petitioner into his custody, as in contempt as adjudged as aforesaid, and continues to hold petitioner imprisoned in such custody for the said alleged contempt, petitioner still declining, by advice of counsel and for said reasons, to answer said interrogatories.

Petitioner prays that a writ of habeas corpus, to be directed to the said United States marshal of the Southern District of New York, may issue, so that petitioner may be forthwith brought before this court to submit and receive what the law may require, and that a writ of certiorari issue to the said circuit court, requiring said circuit court to certify and return to this court the said records, and all papers, petitions, documents and proceedings under the control of said circuit court concerning said detention and imprisonment.

Mr. **Backus W. Huntington,** for petitioner:

Where the impertinence relates to or affects the witness himself, he has the right to demur.

3 Greenl. Ev. (14th ed.) § 323.

Where the rights of the witness are involved, the question is one of strict legal right, and no question of discretion is presented.

Haebler v. *Bernharth*, 115 N. Y. 462, 463.

A witness cannot be committed for contempt for declining to answer, if the question be irrelevant.

Re Odell, 6 Dem. 344; 1 Barb. Ch. Pr. (2d ed.) 512, *note*, citing *People* v. *Dyckman*, 24 How. Pr. 223; Rapalje, Contempt, § 65.

An answer disputing a contract cannot be supported by proof of its performance, and matters not pleaded cannot be proved.

Ward v. *Duke of Buckingham*, 3 Bro. P. C. 581; *Williams* v. *Llewellyn*, 2 Younge & J. 68; *Birce* v. *Bletchley*, 6 Mad. 17; *Blake* v. *Marnell*, 2 Ball & B. 47; *Bennett* v. *Neale*, Wightw. 324; *Gordon* v. *Gordon*, 3 Swanst. 472; *Walpole* v. *Orford*, 3 Ves. Jr. 402; *Hall* v. *Maltby*, 6 Price, 259; Gresley, Eq. Ev. 231, 232.

The plaintiff will not be permitted to offer or require evidence of any material fact not distinctly stated in the complaint.

Story, Eq. Pl. §§ 28, 257; *Crocket* v. *Lee*, 20 U. S. 7 Wheat. 522 (5: 513); *Jackson* v. *Ashton*, 36 U. S. 11 Pet. 249 (9: 706); *Sprigg* v. *Albin*, 6 J. J. Marsh. 158; *Bristol* v. *Rensselaer & S. R. Co.* 9 Barb. 158; *Bailey* v. *Ryder*, 10 N. Y. 363; *Allen* v. *Mercantile Mut. Ins. Co.* 46 Barb. 642; *Currie* v. *Cowles*, 6 Bosw. 452; 1 Barb. Ch. Pr. (2d ed.) 88, *note x*, 40; *Gordon* v. *Gordon*, 3 Swanst. 472; *Holloway* v. *Millard*, 1 Mad. 414; *Jonau* v. *Ferrand*, 3 Rob. (La.) 366; 1 Greenl. Ev. (14th ed.) § 448; *Storm* v. *United States*, 94 U. S. 76 (24: 42).

Per **Curiam:**

Petitioner alleges that he is detained by the [64
United States marshal for the Southern District of New York, by virtue of an order purporting to be an order of the Circuit Court of the United States for the District of Colorado. *The motion for leave to file a petition for the writ of habeas corpus is denied*, upon the authority of *Ex parte Mirzan*, 119 U. S. 584 [30: 513], and cases cited.

D. HERBERT HOSTETTER, Admr., [30
Appt.,
v.
WILLIAM G. PARK ET AL., Executors of R. C. GRAY, Deceased, ET AL.

(See S. C. Reporter's ed. 30-41.)

Deviation, what is—usage of trade—bill of lading—usage, when part of the contract—danger of navigation.

1. A deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of a voyage, in reference to the terms of a policy of marine insurance.
2. But it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade.
3. The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage.
4. Parties who contract on a subject matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary.
5. When the contract in the bill of lading, that the goods are to be delivered at New Orleans without delay, is qualified by the exception of the dangers of navigation and unavoidable accidents, if the navigation was in its course according to the usage of the trade, and the goods are lost by the vessel striking an unseen obstruction and sinking, the loss occurred through a danger of navigation.

[No. 3.]

Argued and Submitted Oct. 21, 1890. Decided Nov. 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Pennsylvania, dismissing a libel in admiralty *in personam*, against the owners of a steam-tug and barge, for damages for the loss of goods shipped by libelants from Pittsburg to New Orleans. *Affirmed.*

The facts are stated in the opinion.

Mr. **A. H. Clarke,** for appellant:

Deviation must be a necessity, otherwise the carrier is responsible.

The Delaware, 81 U. S. 14 Wall. 579 (20: 779); Park, Mar. Ins. 294; *Phœnix F. Ins. Co.* v. *Cochran*, 51 Pa. 154.

An unnecessary deviation will discharge the insurance.

Coles v. *Marine Ins. Co.* 3 Wash. C. C. 159; *Davis* v. *Garrett* 6 Bing. 716.

The shortness of the time or distance of the deviation is immaterial.

Maryland Ins. Co. v. *LeRoy* 11 U. S. 7 Cranch, 30 (3: 259).

The law applicable to deviation applies equally to and is in full force on all river and lake navigation.

Jolly v. *Ohio Ins. Co.* Wright (Ohio) 539.

It matters not how short may be the deviation, nor how harmless.

Fernandez v. *Great Western Ins. Co.* 48 N. Y. 571; *Brown* v. *Tayleur*, 4 Ad. & El. 241.

A ship must visit ports in the geographical order of their distance from the port of departure.

Clason v. *Simmonds*, 6 T. R. 533, *note; Deblois* v. *Ocean Ins. Co.* 16 Pick. 303; *Kane* v. *Columbian Ins. Co.* 2 Johns. 264; *Johnson* v. *New York Cent. R. Co.* 33 N. Y. 610; *The Reeside*, 2 Sumn. 567; *Hone* v. *Mutual S. Ins. Co.* 1 Sandf. 137.

What is necessary to constitute a custom binding upon a shipper? Going out of the direct course for freight, sometimes followed and at others not, does not establish a usage which is binding.

Marsden v. *Reid*, 3 East, 577.

When parties in the same trade or business differ as to the existence of a custom it cannot be regarded.

Collings v. *Hope*, 3 Wash. C. C. 149.

It must be known by those it will affect.

Adams v. *Otterback*, 56 U. S. 15 How. 539 (14: 805).

It should receive the tacit acquiescence of all classes engaged in the trade which it is sought to affect and control.

Dixon v. *Dunham*, 14 Ill. 324; Browne, Usages and Customs, 16.

It must be uniformly pursued, uniform and fixed.

Martin v. *Delaware Ins. Co.* 2 Wash. C. C. 255; *Wayne* v. *Steamboat General Pike*, 16 Ohio, 425.

An unreasonable custom is not sustained.

Coleman v. *Chadwick*, 80 Pa. 81; *Wallace* v. *Morgan*, 28 Ind. 399; *Daun* v. *City of London Brewery Co.* L. R. 8 Eq. 155; *Walsh* v. *Frank*, 19 Ark. 270; *Strong* v. *Grand Trunk R. Co.* 15 Mich. 206; *Steamboat Albatross* v. *Wayne*, 16 Ohio, 513; *Barrett* v. *Williamson*, 4 McLean, 589; *Wilson* v. *Bauman*, 80 Ill. 493.

Messrs. **James H. Reed** and *Philander C. Knox*, for appellees:

The cognizance of this court in admiralty appeals is confined to the questions of law arising on the record, and to such rulings excepted to at the time as may be presented by a bill of exceptions prepared as in actions at law.

The Abbotsford, 98 U. S. 440 (25: 168); *The Benefactor*, 102 U. S. 214 (26: 157); *The Francis Wright*, 105 U. S. 387 (26: 1101); *The Annie Lindsley*, 104 U. S. 187 (26: 717); *Merchants Mut. Ins. Co.* v. *Allen*, 121 U. S. 71 (30: 859).

The failure to find the law as requested by appellant is not error where based upon the facts proposed by him which the court refused to adopt.

The Annie Lindsley, 104 U. S. 188 (26: 718).

Deviation is a voluntary departure without necessity or reasonable cause from the regular and usual course of the voyage.

Coffin v. *Newburyport M. Ins. Co.* 9 Mass. 436.

Usage is the predominating test as to deviation.

Phillips, Ins. §§ 980, 981.

A vessel may stop at usual places for landing and taking in passengers and goods, and for other purposes, especially in river or coasting passages.

Phillips, Ins. § 980; *Lowry* v. *Russell*, 8 Pick. 360; *Child* v. *Sun Mut. Ins. Co.* 3 Sandf. 26.

Usage will justify deflections and delay.

Phillips, Ins. § 1003; *Lockett* v. *Merchants Ins. Co.* 10 Rob. (La.) 339.

The nature and object of a voyage may justify intermediate voyages and sailing forwards and backwards.

Phillips, Ins. § 1013; *Ashley* v. *Pratt*, 16 Mees. & W. 471; *Lowry* v. *Russell*, 8 Pick. 360; *Thatcher* v. *McCulloh*, Olcott, 371; *Ougier* v. *Jennings*, 1 Camp. 505; *Bentaloe* v. *Pratt*, Wall. C. C. 58; *Oliver* v. *Maryland Ins. Co.* 11 U. S. 7 Cranch, 490 (3: 415); *Bulkley* v. *Protection Ins. Co.* 2 Paine, C. C. 82; *McMasters* v. *Pennsylvania R. Co.* 69 Pa. 377; *Kingston* v. *Knibbs*, 1 Camp. 508; *Moxon* v. *Atkins*, 3 Camp. 200; *Pittsburgh Ins. Co.* v. *Dravo* (Pa.) 2 W. N. C. 194; *Salvador* v. *Hopkins*, 3 Burr. 1707; *Vallance* v. *Dewar*, 1 Camp. 503.

Mr. Justice **Blatchford** delivered the [31] opinion of the court:

This is a libel in admiralty, *in personam*, brought in the District Court of the United States for the Western District of Pennsylvania, by David Hostetter and George W. Smith, copartners as Hostetter & Smith, against R. C. Gray and the executors of M. W. Beltzhoover, deceased, as owners of the steam-tug Iron Mountain and the barge Ironsides No. 3, to recover $10,182.76, with interest, for damages sustained by the libelants, by the loss of sundry boxes of bitters and other merchandise shipped by the libelants at Pittsburg on board the barge Ironsides No. 3, towed by the steam-tug Iron Mountain, to be transported from Pittsburg to New Orleans. The libel was filed March 4, 1880. The bill of lading for the shipment was made December 5, 1874, and the loss occurred December 18, 1874. The bill of lading stated that the articles shipped were "in good order and condition," and were "to be delivered without delay, in like good order, at the Port of New Orleans, La. (the dangers of navigation, fire and unavoidable accidents excepted)."

The libel alleged that Gray and Beltzhoover were the owners of the tug and the barge at the time of the shipment and the loss; that the goods were shipped on board of the barge; that the tug, having the barge and other barges in tow, proceeded down the Ohio River and arrived safely at Mt. Vernon, Indiana, on December 17, 1874, and there took on board of the barge additional cargo; that the tug, instead of proceeding down the river and towards New Orleans without delay and in accordance with the bill of lading, dropped or left all of the barges except the Ironsides No. 3, and wrongfully and without notice to the libelants deviated from and abandoned the voyage to New Orleans, by steaming up the Ohio River several miles to the Town of New York Landing, in [3

Henderson County, Kentucky, and there took on board of the barge additional cargo; that, on December 18, 1874, the voyage down the river was again undertaken, by attempting to pass for the third time over the distance between New York Landing and Mt. Vernon; that, shortly after leaving that landing, or in rounding out therefrom, or at a point about half a mile or a mile below, and before again reaching Mt. Vernon, the barge, being in tow of the tug and having on board the goods of the libelants, struck some unseen obstruction and sank in deep water, causing the loss and damage in question; and that such deviation and temporary abandonment of the voyage were contrary to the contract entered into by the bill of lading, and against the law governing common carriers.

The answer of the respondents averred that the goods were shipped by the libelants with the understanding and knowledge that the respondents had the right to complete the cargo of the barge at any place between Pittsburg and New Orleans where they might be able to secure the same, and to receive and discharge cargo upon and from the barge in accordance with the usage and custom of trade and navigation on the Ohio and Mississippi Rivers. It denied that the steam-tug and the barges in tow of her abandoned their voyage and refused to proceed thereon without delay, and averred that with all possible dispatch they took on said additional cargo at Mt. Vernon and at New York Landing, to which latter place, on the Ohio River, in the immediate vicinity of Mt. Vernon, the steam-tug towed the barge Ironsides No. 3 from Mt. Vernon, according to the usage and custom of navigation upon that river, and were only prevented from proceeding with the goods of the libelants towards New Orleans by reason of one of the dangers of navigation, which occasioned the loss of the goods and of the barge and its contents; that it was at the time stated, and always since the transportation of goods by means of barges towed by steam vessels first began on the Ohio and Mississippi Rivers and their tributaries had been, the uniform, continued, general, and well and publicly known usage and custom of such vessels and barges to load partially at the port of departure, if that was necessary either by reason of the stage of water or lack of cargo, and to take on additional cargo at any place where the same might be had between the ports of departure and destination; that, on the voyage in question, the barge left Pittsburg partially laden, and arrived at Mt. Vernon without having secured a full cargo; that, in securing additional cargo along the rivers navigated *en route* to the port of destination, it was at the time, and had been since barge navigation of those rivers began, the constant, general, well-known and uniform custom and usage for the owners or agents of the vessels and barges to land their fleets at the larger, safer and more convenient landings along those rivers, and there meet and contract with shippers for the transportation of their goods, and then detach from the fleet the barge or barges designated to receive such cargo, if the cargo was not there, and send the barge or barges so designated to the place where the cargo might be stored, whether up, down or across the river, within such reasonable distance as might be reached without great or unreasonable delay or expense: that Mt. Vernon is a point where shippers within a radius of fifteen or twenty miles therefrom meet carriers upon the Ohio River, and is the place where shippers whose goods are received at New York Landing meet and contract with carriers for their transportation to points below; that, in pursuance of such general, uniform, constant and well-known usage and custom, the fleet of barges landed at Mt. Vernon, and the respondents there contracted with certain shippers whose goods were at New York Landing, a point between two and three miles above Mt. Vernon, to carry the same to New Orleans, and detached from the fleet the barge Ironsides No. 3, and the tug towed her to New York Landing, and there took on board of her additional cargo, with all possible dispatch and without unreasonable delay; that, in rounding out to leave New York Landing, the barge, without fault, negligence or want of skill on the part of those navigating her or the steam-tug, ran upon and struck, in deep and navigable water, an obstruction unknown, unseen, unmarked and in no way indicated, and which could not have been seen, known or avoided by the exercise of any degree of skill, care or caution, by reason whereof the barge was sunk and totally lost and her cargo greatly damaged; that the voyage was not abandoned or wrongfully deviated from, but the action of the respondents in the premises was lawful, customary and right, and in accordance with the established usage of the trade in which they were plying, which usage was well known to the libelants at the time of the shipment of their goods; and that the goods were damaged and lost through one of the dangers of navigation, within the exception of the bill of lading.

An amendment to the libel was afterwards filed, setting up that the sinking of the barge was not the result of an obstruction in the river, but was caused by negligent management on the part of the employés of the respondents, in that the barge, while at New York Landing, was overloaded on her port side with sacks of corn, so that she grounded, and, when pulled off by the steam-tug, careened to the port side with her cargo, so that a break occurred in her, causing her to sink.

The respondents answered this amendment by a general denial of its averments.

The district court made a decree dismissing the libel, with costs. The opinion of *Judge* Acheson, the district judge, reported in 11 Fed. Rep. 179, sustained the defense of usage. The libelants appealed to the circuit court, which court, held by *Mr. Justice* Bradley, dismissed the libel, with costs. The circuit court found the following facts and made the following conclusion of law:

"1. On December 6th, 1874, the steam towboat Iron Mountain, having in tow several barges (one called Ironsides No. 3), partly loaded with a miscellaneous cargo, left Pittsburg bound for New Orleans. The libelants

shipped by the barges 2,000 boxes of bitters and eighteen boxes of showcards, which were placed on Ironsides No. 3, the bill of lading stipulating that the goods were 'to be delivered without delay, in like good order, at the Port of New Orleans, La. (the dangers of navigation, fire and unavoidable accidents excepted).' A copy of the bill of lading is annexed to the original libel.

"2. The tow-boat and her barges, after taking on additional cargo at various intermediate places, arrived safely at Mt. Vernon, Indiana, 819 miles below Pittsburg, and landed to take on freight at the Mt. Vernon wharf-boat. The proprietors of the wharf-boat had engaged for the barges corn which lay piled in sacks at two or three farm landings on the Indiana shore, the furthest pile being about two miles above the wharf-boat. The tow-boat detached from the fleet the barge Ironsides No. 3, which was but partly loaded, and proceeded with it up stream to these piles. After loading this corn the boat crossed the river with the barge and took on corn which was offered at two landings on the Kentucky side, viz., New York Landing, about three miles above the wharf-boat, and Whitmon's Landing, which is somewhat lower down. After taking on the corn at Whitmon's the tow-boat started to return to her fleet, but while backing out in the river the barge suddenly took water and soon sank, becoming a total wreck, the cargo, including the libelants' goods, sustaining great damage. This occurred late in the evening of December 18, 1874. A protest, signed by the officers and some of the crew, was executed December 23, 1874, assigning as the cause of the disaster that the boat struck some unseen obstruction. Immediate notice by telegram of the sinking of the barge with their goods was given the libelants.

"3. That it has been the general usage in the Pittsburg and New Orleans barge trade, coeval with the commencement of the business, and constantly practiced where cargo is to be taken on *en route* to the port of destination at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge or barges designated to receive such cargo, and tow the same to the several points where the cargo may be stored, whether up or down stream or across the river.

"4. That at the time of the sinking of the barge Ironsides No. 3 it was the general and established usage for barges towed by steam vessels in the Pittsburg and New Orleans trade, having cargo to receive at New York Landing and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo the barge upon which it was to be placed, and that the course pursued by the Iron Mountain on the occasion in question was in conformity with such usage of the trade.

"5. That the usage so practiced at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business and conduces to the safety of the whole tow, and is therefore a reasonable usage.

"6. That while the steam tow-boat Iron Mountain, with the barge Ironsides No. 3 in tow, was backing out from Whitmon's Landing, and when out in the river, the barge struck some unmarked, unknown and hidden object below the surface of the water, which caused her to take water and sink, and this without negligence on the part of the tow-boat, or on the part of the owners of the tow-boat and barge, their agents or servants; and that it was an unavoidable accident.

"The conclusion of law from the foregoing facts found is, that the respondents were not liable to the libelants for the loss, damage and injury complained of in the libel, and that the libel should be dismissed."

After the decree of the circuit court was made, George W. Smith died, and Hostetter, as surviving partner of the firm, appealed to this court from the decree of the circuit court. Since the appeal was taken Hostetter has died, and his administrator has been substituted as a party, and Gray has died, and his executors have been substituted as parties.

The only questions presented to us by the counsel for the libelants for consideration are as to what constitutes a deviation from the voyage, and what a custom or usage binding upon the libelants. No question of fact is open, because we are concluded by the facts found by the circuit court. *The Gazelle*, 128 U. S. 474, 484 [32: 496, 499], and cases there cited.

The findings of fact are distinct and specific that "it has been the general usage in the Pittsburg and New Orleans barge trade, coeval with the commencement of the business, and constantly practiced where cargo is to be taken on *en route* to the port of destination at several points in the same neighborhood, to land and tie up the tow or fleet of barges at the more commodious and safer landing, and detach from the tow the barge or barges designated to receive such cargo, and tow the same to the several points where the cargo may be stored, whether up or down stream or across the river;" that "at the time of the sinking of the barge Ironsides No. 3 it was the general and established usage for barges towed by steam vessels in the Pittsburg and New Orleans trade, having cargo to receive at New York Landing and other points between there and Mt. Vernon, Indiana, to land and tie up the fleet at the latter place and tow back for such cargo the barge upon which it was to be placed, and that the course pursued by the Iron Mountain on the occasion in question was in conformity with such usage of the trade;" that "the usage so practiced at Mt. Vernon and elsewhere, as mentioned in the foregoing findings, tends to cheapen the cost of transportation, facilitates business and conduces to the safety of the whole tow, and is therefore a reasonable usage;" that, "while the steam tow-boat Iron Mountain, with the barge Ironsides No. 3 in tow, was backing out from Whitmon's Landing, and when out in the [31

river, the barge struck some unmarked, unknown and hidden object below the surface of the water, which caused her to take water and sink, and this without negligence on the part of the tow-boat, or on the part of the owners of the tow-boat and barge, their agents or servants; and that it was an unavoidable accident."

The only question presented is, whether the conclusion of law made by the circuit court from the foregoing facts, that the respondents were not liable to the libelants for the loss and damage in question, was justified by those facts. On this point we entirely concur with the circuit court. It is true that that court does not find directly as a fact, what is averred in the answer, that the usage in question was well known to the libelants at the time their goods were shipped; but it does not find to the contrary, thus leaving for consideration the question of law, whether the existence of such a usage as is found as a fact, is to be presumed conclusively to have been known to the libelants, so as to have formed part of the contract of carriage created by the bill of lading, and to control its terms, and to have made the accident which caused the loss of the goods of the libelants a danger of navigation and an unavoidable accident, excepted in the bill of lading. It was distinctly found by the circuit court to have been "an unavoidable accident."

[40] A deviation is defined to be "a voluntary departure, without necessity or reasonable cause, from the regular and usual course" of a voyage, in reference to the terms of a policy of marine insurance; but it is no deviation, in respect to such a voyage, to touch and stay at a port out of its course, if such departure is within the usage of the trade. *Coffin* v. *Newburyport M. Ins. Co.* 9 Mass. 436, 447; *Bentalos* v. *Pratt*, Wall. C. C. 58; *Bulkley* v. *Protection Ins. Co.* 2 Paine, C. C. 82; *Oliver* v. *Maryland Ins. Co.* 11 U. S. 7 Cranch, 487, 491 [3: 414, 415]; *Columbian Ins. Co.* v. *Catlett*, 25 U. S. 12 Wheat. 383 387, 388 [6: 664, 666, 667]; *Gracie* v. *Marine Ins. Co.* 12 U. S. 8 Cranch, 75, 83 [3: 492, 495]; *Child* v. *Sun Mut. Ins. Co.* 3 Sandf. 26; *Lockett* v. *Merchants Ins. Co.* 10 Rob. (La.) 339; *Vallance* v. *Dewar*, 1 Camp. 503; *Ougier* v. *Jennings*, Id. 505; *Kingston* v. *Knibbs*, Id. 508; *Moxon* v. *Atkins*, 3 Camp. 200; *Salvador* v. *Hopkins*, 3 Burr. 1707; Phillips, Ins. §§ 980, 997, 1003.

The same doctrine is applicable in the case of a bill of lading, even though the usage be not known to the particular shipper, if it be established as a general usage. Phillips, Ins. §§ 980, 1003; *Thatcher* v. *McCulloh*, Olcott, 365, 369, 370; *Lowry* v. *Russell*, 8 Pick. 360, 362; *McMasters* v. *Pennsylvania R. Co.* 69 Pa. 374; *Pittsburg Ins. Co.* v. *Dravo* (Pa.) 2 W. N. C. 194.

It is well settled that parties who contract on a subject matter concerning which known usages prevail, incorporate such usages by implication into their agreements, if nothing is said to the contrary. *Robinson* v. *United States*, 80 U. S. 13 Wall. 363, 366 [20: 653, 654].

The contract in the bill of lading, that the goods are to be delivered at New Orleans "without delay," is qualified by the exception of "the dangers of navigation" and "unavoidable accidents;" and if the navigation was in its course according to the usage of the trade, as is found to be the fact, the loss in question occurred through a danger of navigation. *Western Transp. Co.* v. *Downer*, 78 U. S. 11 Wall. 129 [20: 160]; *The Favorite*, 2 Biss. 502; *Williams* v. *Grant*, 1 Conn. 487.

The claim made in the amendment to the libel, that the sinking of the barge was caused by negligent loading of the sacks of [41] corn, is covered by the finding of fact that the sinking took place without negligence on the part of the steam-tug or her owners or their agents or servants, and was an unavoidable accident.

The decree of the Circuit Court is affirmed.

THE WASHINGTON MARKET COMPANY, *Appt.*, [62
v.
THE DISTRICT OF COLUMBIA ET AL.

(See S. C. Reporter's ed. 62, 63.)

Appeal, when dismissed without costs.

Where a suit is brought to restrain the sale of property for street assessments and to annul and cancel certain tax-lien certificates, and the assessments and certificates have been annulled and canceled by the court below after the appeal to this court, the appeal will be dismissed without costs to either party.

[No. 10.]

Submitted Oct. 21, 1890. Decided Oct. 27, 1890.

APPEAL from the Supreme Court of the District of Columbia. *Dismissed.*

The facts are stated in the opinion.

Mr. **William Birney** for appellant.

Messrs. **Geo. C. Hazelton** and **S. T. Thomas** for appellees.

Per **Curiam:**

This is an appeal from the decree of the Supreme Court of the District of Columbia dismissing the bill of complaint filed by appel- [63 lant therein, the object of the bill having been to restrain the defendants from selling, or attempting to sell, certain property of complainant, on account of certain assessments for street improvements, and also to cancel and annul two tax-lien certificates therein named; and counsel for appellant having stated in open court that such assessments and lien certificates have been, pending this appeal, quashed and annulled at law by the Supreme Court of the District of Columbia, and that only the disposition of costs is involved herein, *it is ordered that said appeal be dismissed without costs to either party.*

LA CONFIANCE COMPAGNIE d'ASSURANCE CONTRE l'INCENDIE, *Plff. in Err.*, v. JOHN C. HALL.

(See S. C. Reporter's ed. 61, 62.)

Removal of causes.

Where the existence, at the commencement of the suit, and when the removal was asked, of such diverse citizenship as authorizes the removal of a cause from a state court to the United States circuit court does not appear affirmatively in the petition for removal or in the record, the judgment will be reversed with costs, and the cause remitted to the circuit court, with direction to remand it to the state court.

[No. 11.]

Argued and Submitted Oct. 21, 1890. Decided Nov. 3, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Missouri, to review a suit against Hall, defendant, upon his bond as agent for plaintiff, for a failure to pay to plaintiff money received by him as agent. *Reversed.*

The facts are stated in the opinion.

Messrs. **Chas. B. Alexander** and *John J. McCook* for plaintiff in error.

Mr. **Given Campbell** for defendant in error.

Fuller, *Ch. J.:*

This action was commenced by plaintiff in error in a state court, and removed to the Circuit Court of the United States for the Eastern District of Missouri upon petition of the defendant, on the ground that the plaintiff was an alien and citizen of France and the defendant a citizen of Missouri. The existence of such diverse citizenship at the commencement of the suit, as well as when the removal was asked, did not appear affirmatively in the petition for removal or in the record when that was filed.

We are compelled to reverse the judgment, with costs, and remit the cause to the circuit court, with a direction to remand to the state court. *Stevens* v. *Nichols*, 130 U. S. 230 [32: 914]; *Crehore* v. *Ohio & M. R. Co.* 131 U. S. 240 [33: 144]; *Jackson* v. *Allen*, 132 U. S. 27 [33: 249].

Ordered accordingly.

ABRAHAM SHENFIELD, *Appt.*, v. THE NASHAWANNUCK MANUFACTURING COMPANY ET AL.

(See S. C. Reporter's ed. 56-59.)

Patent for suspender straps—no invention—old combination.

1. Letters-patent granted to Abraham Shenfield, November 9, 1875, No. 169,855, for an improvement in suspender button straps, are invalid, as the improvement is devoid of invention.
2. It did not involve invention to make a suspender-end of flat cord in substantially the same way that suspender-ends of round cord had been made, and in substantially the same way in which flat button ends had been made for the purpose of fastening or securing other articles of wearing apparel than trousers.
3. The connection of the end to the attaching piece gave no patentable character to the loop and was old, as was the attachment to the buckle, nor was any new mode of operation produced by the combination of the devices in this article.

[No. 19.]

Argued Oct. 21, 1890. Decided Nov. 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a suit for infringement of letters-patent granted to Abraham Shenfield for an improvement in suspender button straps. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing, with costs, appellant's bill of complaint filed for infringement of letters-patent granted to him, dated November 9, 1875, No. 169,855, for an improvement in "suspender button straps." The cause was heard upon the pleadings and proofs. The opinion by Shipman, *J.*, will be found reported in 27 Fed. Rep. 808, 23 Blatchf. 541. [1

The specification and claim, with references to the drawings, were as follows:

"Suspender-ends have been made of leather, felt, jean and similar material, with a button-hole cut in the same, and in most instances the materials have been pasted together, in addition to lines of stitching surrounding the button-hole.

"Suspender-ends have also been made of a round cord, with the ends turned back and fastened to form loops; but this round cord is objectionable, as it does not lie flat against the person or beneath the buttons.

"I make use of a suspender-end made of a double flattened cord or strip, bent around into a loop, and united together, leaving sufficient of the loop open to form the button-hole. At the other end the suspender-end is united to a buckle or clasp by a loop, or folded piece of leather, or other material stitched to the suspender-end. My suspender-end, made as aforesaid, is a new and very useful article of manufacture.

"In the drawing Figure 1 is a perspective view of the suspender complete, and Fig. 2 illustrates the mode of making the suspender-end.

"The straps *a* and buckles *b* of the suspender are of any usual or desired character, and the suspender-ends *c* are received between the attaching-pieces *d*, and united by sewing or otherwise. Each suspender end is formed of a flattened cord or strip folded to form the button-hole loop 2, and the edges united together, as at 3, so as to leave the necessary opening for the button.

"The cord or strip of flat material is composed of silk, linen, cotton, worsted or other suitable threads, or a mixture of two or more, and the threads are woven, braided, knitted, crocheted or otherwise laid up into the form of [58

lete flat cord or strip, and when the strip
d to form the button-hole loop the seam
ay be made by sewing, knitting, crochet-
otherwise; or the knitting or crocheting
mmenced at the central line 3, and ex-
d at both sides thereof and around the
on-hole by the successive ranges of inter-
ed loops.

This suspender-end can either be made by
d or by machinery.

"I claim as my invention—

"The suspender-end made of a flat cord or
rip of fibrous material, bent into a loop, laid
atwise, united at the inner edges 3, and con-
nected to the attaching-pieces *d*, as set forth."

It was stipulated: "That prior to the year 1870 there had frequently been publicly used in the manufacture and wearing of cloaks and jackets button-loops formed of flat braid bent edgewise upon itself and sewed together at the meeting edges, leaving an opening for the button-hole at the bend; that the ends of the braid in such button-loops were permanently attached to a button or like device which was affixed to one side of the body of the garment, and that the button-loop held the garment together by being buttoned onto a button or like device sewed to the other side of the garment, and that when in use the braid forming the button-loop rested under the button, and that such braids were made by machinery."

Various letters-patent were put in evidence on defendant's behalf, as follows: to H. F. Briggs, No. 5,565, dated May 16, 1848, for "Improvement in Shoulder Braces;" to J. Hotchkiss, No. 8,606, dated December 23, 1851, for "Improvement in Suspenders;" to J. Hotchkiss, No. 11,160, dated June 27, 1854, for "Improvement in Manufacturing Suspender-Ends;" to D. W. Canfield, No. 37,149, dated December 16, 1862, for "Improvement in Combined Shoulder-Brace and Suspender;" to A. W. Upton, No. 47,348, dated April 18, 1865, for "Improvement in Suspenders;" and to T. J. Flagg, No. 144,970, dated November 25, 1873, for "Improvement in Suspenders." There also appeared in evidence a description and illustration of crocheted towel loops, from *Harper's Bazar* of September, 1868, and an extract from the same publication of July, 1871, with a design showing a crocheted suspender-end united at the inner edges just above the button-hole and attached to a crocheted attaching piece.

[59]

Mr. **E. N. Dickerson,** for appellant:

The utility of the change, as ascertained by its consequences, is the real practical test of the sufficiency of an invention. Where the utility is proved to exist in any degree, a sufficiency of invention to support the patent must be presumed.

Smith v. *Goodyear Dental Vulcanite Co.* 93 U. S. 495 (23: 954); *Thayer* v. *Spaulding*, 27 Fed Rep. 66; *Strauss* v. *King*, 18 Blatchf. 88; *Lindsay* v. *Stein*, 10 Fed. Rep. 908; *Bogart* v. *Hinds*, 26 Fed. Rep. 149; *Strong* v. *Noble*, 6 Blatchf. 477; *Celluloid Mfg. Co.* v. *Chrolithion C. & C. Co.* 25 Fed. Rep. 482; *Palmer* v. *Johnston*, 34 Fed. Rep. 337.

Mr. **William A. Jenner,** for respondents:

[illegible] combination of old devices in a new article [illegible] producing any new mode of operation [illegible] *Thompson* v. *Boisselier*, 114 U. S. 1 (29: 16); *Vinton* v. *Hamilton*, 104 U. S. 485 (26: 807); *Hall* v. *Macneale*, 107 U. S. 90 (27: 367); *Burt* v. *Evory*, 133 U. S. 349 (33: 647).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The suspender-end of the appellant's patent is a button-loop of flat cord or strip of fibrous material "bent edgewise upon itself and sewed together at the meeting edges, leaving an opening for the button-hole at the bend," as described in the instance of cloak-button loops made of flat braid. It appears from the specification, stipulation or proofs that suspender-ends of round cord, with the ends turned back and fastened to form loops, were known when this patent was procured, as were also suspender-ends of flat material and with the inner edges united by stitching, or by a clamp, just above the button-hole, so as to form it. The prior patents and the crocheted towel loops and suspender-ends also illustrate the common practice of uniting the suspender-ends to attaching pieces of leather or cloth.

We agree with the learned judge holding the circuit court, that it did not involve invention "to make a suspender-end of flat cord in substantially the same way that suspender-ends of round cord had been made, and in substantially the same way in which flat button-ends had been made for the purpose of fastening or securing other articles of wearing apparel than trousers." The connection of the end to the attaching piece gave no patentable character to the loop and was old, as was the attachment to the buckle, nor was any new mode of operation produced by the combination of the devices in this article.

The decree of the Circuit Court is affirmed.

SIMON FLORSHEIM ET AL.
v.
GUSTAV SCHILLING.

(See S. C. Reporter's ed. 64-78.)

Patents for corsets and gores, void—superior article—mechanical skill—combination—old devices.

1. The patents, No. 238,100, for an improvement in corsets, and No. 238,101, for an improvement in elastic gores, gussets and sections for wearing apparel, which were issued to Simon Florsheim and Thomas H. Ball, February 22, 1881, are void for want of novelty, except the last two claims in No. 238,101.
2. The substitution of one material for another which does not involve change of method nor develop novelty of use, even though it may be in a superior article, is not necessarily a patentable invention. In this particular instance the substitution itself was not new.
3. The grouping of the springs, as they appear in patent No. 238,100, is not an invention, but a matter of mechanical judgment, the natural growth of the development of mechanism as distinguished from invention.
4. The combination in this corset of the conventions secured and put into use by the patents, making it a superior and cheaper article, is not itself a patentable invention.

5. The combination of old devices into a new article, without producing any new mode of operation, is not invention.

[No. 23.]

Argued Oct. 21, 22, 1890. Decided Nov. 10, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, dismissing a suit in equity for the infringement of letters-patent for an improvement in corsets and in elastic gores, gussets and sections for wearing apparel. *Affirmed.*

The facts are stated in the opinion.

Mr. **L. L. Coburn,** for appellants:

The old publication or patent must contain such a complete and full description of the thing patented as to enable one skilled in the art to make the patented thing from it, without reference to the later patent.

Eames v. *Andrews*, 122 U. S. 40 (30: 1064); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Cohn* v. *United States Corset Co.* 93 U. S. 366 (23: 907); *Downton* v. *Yeager Milling Co.* 108 U. S. 466 (27: 789).

It is a good defense to prove that a part of the entire invention is found in one prior patent, printed publication or machine, and another part in another.

Parks v. *Booth*, 102 U. S. 104 (26: 57); *Bates* v. *Coe*, 98 U. S. 31 (25: 68); *Johnson* v. *Forty-Second Street, M. & St. N. Ave. R. Co.* 33 Fed. Rep. 499.

Mr. **L. L. Bond,** for appellee:

The original application for letters-patent (with its accompanying drawings and model) filed by an inventor should possess great weight in showing what his invention really was.

Earle v. *Sawyer*, 4 Mason, 9; *Hogg* v. *Emerson*, 47 U. S. 6 How. 485 (12: 525); *Chicago & N. W. R. Co.* v. *Sayles*, 97 U. S. 554 (24: 1053).

That woven corset tubes or pockets are old, see *Cohn* v. *United States Corset Co.*, 93 U. S. 366 (23: 907).

Changing or substituting material is not invention.

Hotchkiss v. *Greenwood*, 52 U. S. 11 How. 248 (13: 683); *Hicks* v. *Kelsey*, 85 U. S. 18 Wall. 670 (21: 852); *Terhune* v. *Phillips*, 99 U. S. 593 (25: 294); *Stow* v. *Chicago*, 104 U. S. 547 (26: 816).

It is not invention to transfer a device from one object or use to another.

Royer v. *Roth*, 132 U. S. 201 (33: 322); *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 295 (30: 945); *Marchand* v. *Emken*, 132 U. S. 195 (33: 332); *Cornplanter Patent*, 90 U. S. 23 Wall. 224 (23: 170); *Miller* v. *Bridgeport Brass. Co.* 104 U. S. 350 (26: 783); *Pearce* v. *Mulford*, 102 U. S. 112 (26: 93); *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *Slawson* v. *Grand St. P. P. & F. R. Co.* 107 U. S. 649 (27: 576), and cases there cited; *Heald* v. *Rice*, 104 U. S. 755 (26: 916).

An interference proceeding, or other proceeding in the Patent Office, does not work an estoppel.

Andrews v. *Hovey*, 124 U. S. 694 (31: 557).

A reference to several patents or prior machines showing parts of a combination may be had for the purpose of showing that there was no invention in putting the parts into their new relation with each other.

Gardner v. *Herz*, 118 U. S. 192 (30: 163).

When relating to a machine or process for producing a given article, better or cheaper may be considered, but when they relate to the things produced, they are never considered.

Smith v. *Nichols*, 88 U. S. 21 Wall. 119 (22: 567); *Crouch* v. *Roemer*, 103 U. S. 797 (26: 426); *Tucker* v. *Spaulding*, 80 U. S. 13 Wall. 453 (20: 515); Curtis, Pat. §§ 72, 73.

Mr. Justice **Lamar** delivered the opinion of the court: [65]

This is a suit in equity brought in the Circuit Court of the United States for the Northern District of Illinois, by Simon Florsheim and Thomas H. Ball against Gustav Schilling, for the alleged infringement of letters-patent Nos. 238,100 and 238,101, the first of which was for an "improvement in corsets," and the second for an "improvement in elastic gores, gussets and sections for wearing apparel," both of which were issued to the complainants February 22, 1881, on applications filed, respectively, August 12 and July 16, 1880, the invention in each purporting to have been made by the complainant Florsheim.

The material parts of the specification in No. 238,100, and its claims, are as follows:

"The object I have in view is such an improvement upon the corset shown in the patent granted November 25, 1879, to Gustav Schilling and myself, that while the same will possess all of the advantages obtained by the use of the covered and grouped metal spiral springs it will allow an easier and more equal expansion of the entire corset, will adapt itself more perfectly to the form of the wearer, and will better supply the popular want, in that it will have means for lacing the corset at the back. The improved corset also includes a better and cheaper method of securing the springs and forming the groups, whereby the elastic sections can be stitched in place on a machine without interfering with the springs, and the elasticity of the sections cannot be injured by the stitching.

"My invention consists in the peculiar means for accomplishing this object, as fully hereinafter explained, and pointed out by the claims.

"In the accompanying drawings, forming a part hereof, figure 1 is a view of the corset in position from the front; Fig. 2, a similar view from the rear; Fig. 3, an elevation of a portion of one side of the corset, showing one of the elastic side sections; Fig. 4, a detail view, showing the preferred way of arranging and forming the springs of a group, one side of the covering cloth being removed; and Fig. 5, a vertical section through a portion of one of the elastic side sections of the corset. [66]

"Like letters denote corresponding parts in all the figures.

"The corset is composed of two separable parts, A B, which are secured together at the front, as usual, by studs and loops, and at the back have eyelets for receiving lacings. The central sections, C D, at the sides of the corset, which extend from under the arms down over the hips, instead of being made as usual, are constructed of two layers or thicknesses of cloth or other material, which thicknesses are sewed or woven together a portion of their width to form horizontal tubes which receive

and cover small closely coiled spiral springs E, of metal. The pieces of cloth from which the sections C D are formed are considerably wider than such sections when completed, so that when puckered laterally they will be of the desired width. The tubes are located in the center of the sections, and do not extend to the edges of the same, as seen in Fig. 4, so that margins will be left at the ends of the tubes, which margins are lapped with the adjoining sections of the corset and stitched thereto. The springs are arranged in groups, as shown, with puckered spaces of cloth between such groups. The number of springs composing the groups will vary according to location, so as to give the requisite stiffness and elasticity. Thus, at the top and bottom of the elastic side sections the groups of springs should not be made so stiff as at the waist of the corset. The springs are passed through the tubes, which are puckered over the springs to the desired extent. The springs terminate at the ends of the tubes and are secured to the thicknesses, so as to leave clear margins of unpuckered cloth outside of such springs. This is a great advantage over the construction shown in the patent
[7] before referred to, since it enables the elastic sections to be stitched into the corset on a sewing machine, which cannot be well done when the ends of the springs are secured by the same stitching, since the needle strikes the coils of the spring and either cuts the spring or breaks the needle. Herein also is one of the peculiar advantages over rubber cloth. Rubber cloth, when stitched into a corset, always has more or less of the rubber cords cut off by the needle, and it is thus greatly weakened, while in my corset the elasticity of the sections cannot be affected by the stitching.

"The cheapest manner of arranging and securing the groups of springs to secure the above advantages is by making all the groups of each section from a single continuous length of metal spiral spring. The spring is secured at its upper end by stitches passed through the thickness at the end of the upper tube and inclosing one or more coils of the spring. The spring is then passed back and forth through the tubes, which are puckered at the same time. After forming one group the spring extends down between the thicknesses to the next group, and so on till the lowest group (or the uppermost group, as the case may be) is finished, when the spring may be cut off, if there is more than required, and will be secured by stitches passed through the thickness. The elastic section can then be placed in the corset, the plain margins being lapped with the edges of the adjoining sections and secured by lines of machine-stitching.

"By making the groups of springs of a single piece of coiled wire passed back and forth through the tubes and from one group to the other the groups relieve each other somewhat, and when one group is subjected to great strain the springs of the adjoining groups are stretched also. In addition, by constructing the spring in this manner no ends are left to wear through the cloth, as would be the case if separate springs, sewed at their ends, were used. It would be impracticable to insert separate springs and sew them in position at the ends of tubes, and if such springs were used, they would pull away from the fastening stitches in a short time. The springs can only be stretched to the full width of the cloth composing the side sections, and they will be thus [6
limited in their expansion so as not to be injured by being stretched too far.

"By having the elastic sections in the sides of the corset the corset can adapt itself to different forms without the use of other elastic sections or gores, and such elastic side sections, by extending the entire length of the corset, from under the arms down over the hips, allow the front and back of the corset to expand and contract from these central side points independently of each other and more easily and freely than when a back elastic section is used.

"My side elastic sections are made continuous from the top to the bottom of the corset, leaving no open spaces.

"The covered metal springs possess great advantages over rubber cloth for this purpose other than those before mentioned. The rubber cloth is not nearly so durable, and soon wears out and loses its elasticity at points subjected to the most strain. The rubber cloth also has equal stiffness throughout, and cannot be regulated to have different degrees of elasticity at different points; and it further does not possess that independent elasticity obtained by the groups of springs, each group acting wholly independent of all the other groups. The covered metal springs also do not heat and bind the flesh, as does the rubber cloth.

"It is essential also that the springs be arranged in groups, since, if placed contiguous throughout the elastic sections, the corset would be much too heavy and expensive, and such sections would be too stiff at some points and not stiff enough at others.

"As a modification of the corset it could be made continuous at the back without any provision for lacing, or the back could be provided with an elastic section; but I prefer the construction shown, since it enables the wearer to adjust the corset by means of the lacings, so that the elastic sections will always give to the corset an easy and pleasant tension.

"What I claim as my invention is—

"1. In a corset, an elastic section composed of two thicknesses of cloth or material having tubes in combination with the spiral metal springs E, inclosed by such tubes and arranged in groups to regulate the elasticity of the sec- [6
tion, such groups being all composed of a single continuous spring passed back and forth through the tubes and secured at its ends, substantially as described and shown.

"2. An elastic section or gore composed of material having tubes extending only part way across the same, and plain margins outside of said tubes, and spiral metal springs arranged in groups in such tubes, the springs of the several groups being made continuous, substantially as described.

"3. A corset laced at the back and having the elastic side sections, C D, extending from under the arms down over the hips, each of such sections being composed of material having puckered tubes extending part way across the same, and plain margins outside of said tubes, and spiral metal springs arranged in groups in such tubes and made continuous, substantially as described and shown."

In No. 238,101 the specification, so far as is necessary to be considered, and the claims, are as follows:

"The substitution of spiral metal springs for india rubber as an element in elastic gores, gussets and sections for wearing apparel has not heretofore proved successful, for the reason that in all instances the springs have been stayed at their ends by the same stitching that secures the gore to the material of the article of wearing apparel to which it is applied. This stitching cannot be done by machine, since the wire of the springs would be cut by the needle when struck squarely, or the needle itself be broken; and when the elastic gore or section is sewed in position by hand, and the springs are secured by the same stitching, the seams are thick and uneven, and present a bungling appearance, which destroys the salableness of the article, in addition to the fact that the hand sewing has heretofore made the use of metal springs impracticable on account of the increased cost.

"It is the object, therefore, of my invention to overcome the objections to the employment of spiral metal springs as a substitute for india rubber in elastic gores, gussets and sections for wearing apparel, and this I accomplish by extending the springs only part way across the covering material, and staying them at their ends by securing them to such covering material itself, while the covering material is extended beyond the ends of the springs to form inelastic margins, by which the gore can be secured in position by stitching these margins, on a sewing machine, to the material of the article of wearing apparel to which the gore is applied. This elastic gore is adapted more especially for corsets, for the sides of gaiters, and for use upon the waistbands of overalls and pantaloons; but it can be employed upon other articles of wearing apparel wherever rubber cloth is now used, and also, on account of its strength, durability, coolness, its independence of action, and the nicety with which its elasticity can be regulated, in many places where rubber cloth cannot be employed to advantage.

"My invention consists, first, in securing the metal springs to the covering material and extending such covering material beyond the ends of the springs to form inelastic margins; second, in puckering the center of such covering material, while the inelastic margins are left plain and unpuckered; third, in weaving the covering material of such elastic gore with the covering tubes formed therein in the process of manufacture, such material and the tubes being woven of a particular pattern to suit the location where the elastic gore is intended to be used, the tubes not extending to the ends of the material; and fourth, in the peculiar fastening for securing the springs to the covering material, all as fully hereinafter explained and pointed out by the claims.

"In the elastic gore the covering material performs three offices, viz.: It covers the springs, limits their expansion and furnishes means for securing the gore in position.

"What I claim as my invention is—

"1. An elastic gore, gusset or section for wearing apparel, composed of a covering material having tubes, spiral metal springs inclosed by such tubes and not extending to the edges of the covering material, and stayed at their ends by such covering material, and inelastic margins outside of the springs, substantially as described, for the purpose set forth.

"2. An elastic gore, gusset or section, composed of a covering material having tubes and spiral metal springs inclosed by such tubes, [7 and not extending to the edges of the covering material, and stayed at their ends by such covering material, said covering material being puckered at its center over the springs, and having plain unpuckered margins extending wholly outside of the springs, substantially as described and shown.

"3. An elastic gore, gusset or section, composed of a covering material woven with tubes therein of a particular pattern to suit the location where the elastic gore, gusset or section is intended to be used, such tubes not extending to the edges of the covering material, and spiral metal springs inclosed by such tubes and stayed by the covering material at the ends of the tubes, substantially as described and shown.

"4. In an elastic gore, gusset or section, the combination of the covering material made of double thickness, and having tubes not extending to the edges of the covering material, with spiral metal springs inclosed by such tubes, and fastenings extending across the ends of the tubes between the thicknesses of the covering material, substantially as described and shown."

The bill, filed June 12, 1882, contained the usual allegations as to the issue of the patents in suit, charged that the defendant had infringed both of them in the district where the suit was brought, and prayed an injunction, an accounting and damages.

The defenses pleaded were: (1) non-infringement; (2) that there is no patentable novelty in either of the alleged inventions; and (3) that the defendant himself was the original inventor of the devices in question.

Issue was joined, proofs were taken, and on the 11th of January, 1886, the court entered a decree, holding that there had been no infringement as complained of, and that the patents in suit were void for want of novelty, and ordering that the bill be dismissed for want of equity. This decree was afterwards modified so as to not apply to the last two claims in No. 238,101. From this decree the complainants have appealed. The opinion of the circuit court is reported in 26 Fed. Rep. 256.

In construing these patents the court below very properly took into consideration the state [7 of the art when the applications for them were made, and found that some of the elements were embraced in the English patent of John Mills, of March 14, 1815, others in the English patent of the Millers, of December 31, 1866, and the remainder in the American patent issued to Mary J. C. Vanorstrand, February 1, 1876. That is to say, the court found that there was no feature whatever in the patents in suit that had not been used and applied long previously in prior inventions. The court also ruled that, in this view of the case, it became unnecessary to consider the testimony taken bearing upon the question of the defendant's

ged invention of the devices in the patents uit.

. is assigned for error that the court erred in entering a decree finding non-infringement, because it was stated in the opinion that was unnecessary to consider the testimony aring upon the question of infringement, under the view taken of the question of novelty;) in finding that there was no novelty in complainants' invention, because one feature was ound in one old patent; and another feature n another, and still another feature in a third patent, all of which constituted the subject matter of the claims in complainants' patent; and (3) in finding that the description in the English patent issued to the Millers in 1866 was sufficiently clear to enable a person to construct from it an elastic gore or gusset like the one shown and patented.

After a careful examination of the evidence relied on in support of these assignments of error we cannot assent to the positions assumed by the appellants. We concur with the circuit court that all the claims in these patents, except the last two claims in No. 238,101, are invalid by reason of their long prior use as inventions secured by patents which cover every feature described in those claims; and that the combination of these features in No. 238,100 is not a patentable invention.

What are the characteristic features of the device or mechanism described in No. 238,100? They are all, as a close analysis will show, limited, confessedly, to a corset constructed with an arrangement of elastic sections or gussets at the two respective sides, extending from the arm-pits to the hips, consisting of coils of spiral wire inserted in, and passed back and forth through, tubes or channels wrought between two thicknesses of the material of the gusset. On comparing with this the gusset shown and described in the English Mills patent, set up in the answer of the defendant, we find that the latter contains the elastic section or gusset, the elasticity secured by coils of spiral wire inclosed between two thicknesses of the material out of which the said gusset or section is made, which gusset extends from the top to the bottom of the corset. Mills, in his specification, says: "My improvement of elastic stays for women and children . . . consists of the introduction of a flexible or elastic portion in those parts of the stays best calculated to give relief to the wearer, and at the same time preserving that stability and support usually given to the body by the common adoption of whale-bone, steel and other hard or flexible materials. . . . This flexible portion is composed of springs, either of brass, copper or iron wire, or of any other matter or thing capable of producing sufficient elasticity; but that which I recommend is small brass wire worm springs, which extend by a small degree of force. These I place close together in runners or spaces stitched in between two pieces or laying of silk, satin or other fit material, puckered or quilted loosely to give room for expansion, the ends of the springs and their covering of silk, satin or other matter on them sewed or otherwise fastened to and between the two half pieces of the stay previously made of the usual materials, such as jean or other cotton, linen, silk, woolen or leather, with the proper busks or necessary portions of steel, whale-bone or other substance commonly adopted, calculated to distend the stay and brace and support the body. . . . The manufacture of these patent stays is not confined to form or shape, neither to the use of any particular article or material of which to make the same, but adopts such as custom or propriety dictates, adhering to the principle of inserting elastic portions into the stays of such forms, agreeable to the foregoing principle, as under all circumstances may be found most eligible and best calculated to afford that relief for which the patent is granted."

The counsel for appellants contends that this [ ] Mills patent does not have a single element contained in the appellants' patent in suit. He says: "The Mills patent does not contain the spiral metal springs arranged in groups, the springs being composed of a single continuous spring passed back and forth through the tubes, nor does it have any plain margins on the sides of the sections, nor does it have elastic sections extending from under the arms down over the hips;" and that they only "extend from one end of the shoulder-strap down the back of the corset."

It may be observed, in reply to this, that the drawings of the Mills patent, according to the evidence of one of the defendant's experts, show a plain margin on each side of the elastic section or gusset for attachment to the main parts of the corset, and that the Mills specification leaves it in the discretion of the manufacturer as to where the elastic section is to be placed,—whether at the sides of the corset or at the back,—the statement being that it should be placed where it will be found most eligible and best calculated to give relief to the wearer, etc.

What are the particular features of the improvements which it is alleged distinguish the patent in suit from those contained in the Mills patent? According to the contention of appellants' counsel, they are: (1) the continuous spring; (2) the inelastic margin at the sides of the gusset, whereby it may be attached to the corset without the connecting stitches crossing the springs; (3) the location of the elastic gusset at the sides; and (4) the grouping arrangement of the springs. The first two of these features, *i. e.*, the continuous spring and the inelastic margin, are described in the English patent of the Millers issued in 1866, as fully and explicitly as they are in the patent of the appellants in this suit.

The specification in the patent of the Millers is as follows:

"This invention has for its object improvements in the manufacture of elastic gussets suitable for use in boots and stays and for other purposes. . . .

"Now, according to our invention, we secure the vulcanized india-rubber springs between two pieces of woven fabric, leather or other material, by stitching with a sewing machine, the stitches running in parallel lines and passing through the two pieces of fabric or material between the india-rubber springs, *and the springs, in place of being each a separate piece, are in one piece*, the length of vulcanized india-rubber cord at the end of each traverse across the gusset being turned round and caused to return parallel to itself; thus the liability of the

india rubber to slip and work out of the gusset is much reduced. When gussets made in this manner are worked into boots or other articles the stitches by which they are secured are passed through a *margin on each side of the gusset and not through the india-rubber part of the gusset, as heretofore.*

"In order that our invention may be fully understood and readily carried into effect we will describe the manner in which we prefer to proceed.

"We first cut the material—leather, silk, cotton or any other woven fabric—and the lining to the size required for the gusset when extended and for leaving the required margin. We then turn over the top edge and baste or tack it down to the lining; we then commence to stitch with a sewing-machine a series of rows in parallel lines transversely across the gusset, the stitching passing through the two materials, commencing at the top and so on from row to row until the whole of the gusset is stitched; the distance between the rows of stitches will depend on the thickness of the india-rubber thread to be inserted; about eight or ten rows to the inch is usually a convenient distance; we then pass between the two materials, into every space or cavity between the rows of stitches, wires or needles, of a length somewhat longer than the width of the gusset and of the size of the cavity; the gusset is then ready to be contracted or drawn up to the size required."

Then follows the description of the machine used for contracting the gusset, and after that there is a description of the method for inserting the elastic rubber cord, which, as before stated, is a continuous one. The specification again refers to the plain margin at the sides of the gusset and describes the method by which it may be reinforced or rendered stronger than the ordinary margin.

[76] There is evidence in the record tending to show that the machine used by complainants for puckering the material between which the metal springs are placed is substantially identical with the one described in the Miller patent for performing the similar function of what is there termed contracting or drawing up the gusset to the required size. And it seems perfectly clear that the method of inserting the metal springs in the one and the elastic rubber cord performing the same functions in the other is substantially the same.

Counsel for appellants discusses at some length the Miller patent, and attempts to show that the gusset is not sufficiently described therein to enable one skilled in the art to make one like that described in the Florsheim patent. We think, however, his argument does not overthrow the conclusion of the court that there is no patentable difference between the gussets described in the English patent of the Millers and those described in the Florsheim patent. It is true that in the Miller patent an india-rubber spring is used instead of a metal spiral spring, as in both the Florsheim and the Mills patents. But the substitution of one material for another, which does not involve change of method nor develop novelty of use, even though it may result in a superior article, is not necessarily a patentable invention. *Hotchkiss* v. *Greenwood*, 52 U. S. 11 How. 248 [13: 683]; *Hicks* v. *Kelsey*, 85 U. S. 18 Wall. 670 [21:852]; *Terhune* v. *Phillips*, 99 U. S. 592 [25:293]; *Gardner* v. *Herz*, 118 U. S. 180 [13:158]; *Brown* v. *District of Columbia*, 130 U. S. 87 [32: 863]. In this particular instance the substitution itself was not new; for, as we have seen, wire coil was used for springs in corsets as early as the year 1815.

With regard to the two remaining features, —the location of the elastic gusset in the side of the corset instead of the back, and the grouping of the springs,—the former is found fully described in the specification of the American patent granted in 1876 to Mary J. C. Vanorstrand. A certified copy of this patent, though introduced in evidence, does not appear in the record; but we were furnished, on the argument, with a copy of it, and that corset contained elastic gussets extending on both sides from the arm-pits to the hips.

The grouping of the springs is no less distinctly described and shown in the Schilling [77] and Florsheim patent of 1879, a certified copy of which appears in the record. The different arrangement of these groupings as they appear in the patent sued upon is not an invention, but is a mere matter of mechanical judgment, "the natural outgrowth of the development of mechanical skill as distinguished from invention." *Burt* v. *Evory*, 133 U. S. 349, 358 [33: 647, 651], and authorities there cited; *Brown* v. *Piper*, 91 U. S. 37 [23: 200].

The argument is advanced that the combination in this corset of the prior inventions secured and put into use by prior patents, making it a superior and cheaper article, is itself a patentable invention. We are unable to agree with appellants' counsel on this point. In *Pickering* v. *McCullough*, 104 U. S. 310, 318 [26: 749, 751], this court, speaking through *Mr. Justice* Matthews, said: "In a patentable combination of old elements, all the constituents must so enter into it as that each qualifies every other. . . . It must form either a new machine of a distinct character and function, or produce a result due to the joint and co-operating action of all the elements, and which is not the mere adding together of separate contributions." "The combination of old devices into a new article, without producing any new mode of operation, is not invention." *Burt* v. *Evory*, *supra*. See also *Hailes* v. *Van Wormer*, 87 U. S. 20 Wall. 353 [20: 241]; *Reckendorfer* v. *Faber*, 92 U. S. 347 [23: 719]; *Double-Pointed Tack Co.* v. *Two Rivers Mfg. Co.* 109 U. S. 117 [27: 877]; *Bussey* v. *Excelsior Mfg. Co.* 110 U. S. 131 [28: 95]; *Phillips* v. *Detroit*, 111 U. S. 604 [28:532]; *Stephenson* v. *Brooklyn C. R. Co.* 114 U. S. 149 [29:58]; *Beecher Mfg. Co.* v. *Atwater Mfg. Co.* 114 U. S. 523 [29:232]; *Thatcher Heating Co.* v. *Burtis*, 121 U. S. 286 [30:942]; *Hendy* v. *Golden State M. Iron Works*, 127 U. S. 370 [32: 207].

In the light of these authorities, our judgment is that the appellants' patent No. 238,100 was for a corset that had been in long and publicly known use, each part of it previously patented; that it involved nothing original in the construction of those parts nor in their relation to one another, nor any change in the function of any one of them; and that the combination of them produced no original mechanism or device.

The greater part of the foregoing observations apply equally to the patent No. 238,101, [78] for an elastic gore or gusset for wearing apparel, and we concur in the conclusion of the court below, that the first two claims of that patent are void for want of novelty, and all the elements in those claims are found in the English patent of the Millers already considered.

For these reasons *the decree of the Court below is affirmed.*

---

[43] JOHN H. HARDING, *Plff. in Err.*,
v.
W. M. WOODCOCK, Collector of Internal Revenue.

(See S. C. Reporter's ed. 43-48.)

Ministerial officer, not liable as a trespasser—collector of internal revenue.

1. A ministerial officer, in a case in which it is his duty to act, cannot, upon any principle of law, be made a trespasser.
2. A collector of internal revenue, a ministerial officer, is not liable for the enforcement of an assessment for taxes regular on its face, made by the commissioner of internal revenue.

[No. 29.]

Argued and Submitted Oct. 22, 1890. Decided Nov. 3, 1890.

IN ERROR to the Circuit Court of the United States for the Middle District of Tennessee, to review a judgment in favor of defendant, a collector of internal revenue, in an action for the wrongful seizure and sale of plaintiff's property, upon an assessment against him as a distiller of liquors, made by the commissioner of internal revenue. *Affirmed.*

Statement by *Mr. Justice* **Field:**

This is an action against the Collector of Internal Revenue of the Fifth Collection District of Tennessee, for an alleged wrongful seizure and sale of property of the plaintiff upon an assessment against him as a distiller [44] of liquors, made by the commissioner of internal revenue. It was commenced in a state court of Tennessee, and upon application of the defendant was removed to the circuit court of the United States. The material facts as disclosed by the record are these: The plaintiff in 1881 and in 1882 owned and operated a distillery of liquors in the County of Robertson, Tennessee, and had executed the bond required by statute in such cases. In July, 1881, an assessment was made against him for taxes alleged to be due to the United States, amounting to $4,339.37, for whiskey supposed to have been produced by him at his distillery. The plaintiff thereupon applied to the commissioner, in accordance with the statutes and the regulations of the Treasury Department, to reconsider the assessment, termed in the statute an appeal to him, but a reconsideration was refused. Upon the assessment the defendant, as collector, on the 3d of January, 1882, seized property belonging to the plaintiff consisting of 578 gallons of whiskey, and, on the 16th of that month, sold the same for $32. On the 2d of June, 1882, he seized other personal property of the plaintiff, and also levied upon the distillery premises containing ten acres, and soon afterwards sold both for $76.72. The price thus received was greatly below the actual value of the property. The plaintiff delivered the personal property and the distillery to the purchaser, with a deed of the latter premises.

In March, 1882, an action was brought by the United States against the distillery and the sureties on his bond to recover the taxes assessed, and in November, 1883, a verdict was rendered in their favor. The question in issue in the action was the validity of the taxes assessed. The verdict and the judgment thereon were produced and relied upon as establishing the invalidity of the assessment and the liability of the Collector for the damage sustained by the plaintiff for the seizure and sale of his property. The first seizure and sale, as stated above, took place before the action was begun, and the second seizure and sale, though afterwards, were made before the trial in the action was had.

The declaration contains three counts. The first sets forth substantially the facts as stated above, except the amount at which the property seized was sold. It also avers that the plaintiff at the time protested against the seizure and sale in both cases, and that by them he was deprived of the use, control and ownership of his property, to his great damage. The second count is for a conversion of the property, and the third for trespass on the distillery premises. To the declaration, the defendant, in addition to the general issue of not guilty, filed several special pleas, among others, one of justification of the acts complained of, averring that they were done by him as collector in the enforcement of the assessment duly made and certified to him by the commissioner of internal revenue, with a direction to collect the same by distraint. There was a replication to this plea, and a demurrer to the replication, which was finally disposed of by the court ordering the plea to be stricken out. The rulings upon the other special pleas do not require notice, as they are not material to the disposition of the question presented. The principal facts as disclosed by the pleadings were also established by the evidence on the trial, the plaintiff introducing the warrants issued to the Collector for the seizure and sale of the property.

The court instructed the jury that the taxes for which the defendant, as collector, seized and sold the plaintiff's property having been assessed, and the assessment certified to him, the assessment was a complete protection to him against the suit of the plaintiff, and directed the jury to return a verdict in his favor, which was accordingly done, and judgment entered thereon. This instruction was excepted to, and constitutes the alleged error for a reversal of the judgment.

Messrs. **S. Watson and G. N. Tillman,** for plaintiff in error:

This suit is practically an action against the United States, although the Collector is the defendant on the record.

Rev. Stat. §§ 3220, 3226; *Philadelphia* v.

Collector, 72 U. S. 5 Wall. 720 (18: 614); *United States* v. *Frerichs*, 124 U. S. 315 (31: 471); *Lovejoy* v. *Murray*, 70 U. S. 3 Wall. 1 (18: 129).

The plaintiff is entitled to recover the full value of the property seized and sold.

Stoll v. *Pepper*, 97 U. S. 438 (24: 1070); *Erskine* v. *Hohnbach*, 81 U. S. 14 Wall. 613 (20: 745); *Dollar Sav. Bank* v. *United States*, 86 U. S. 19 Wall. 227 (22: 80); *Clinkenbeard* v. *United States*, 88 U. S. 21 Wall. 65 (22: 477); Rev. Stat. § 3213; *Conner* v. *Long*, 104 U. S. 228 (26: 723); *Hills* v. *Exchange Bank*, 105 U. S. 310 (26: 1052).

Mr. **Wm. H. Taft,** *Solicitor-General*, for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiff contended in the court below, and renews the contention here, that the plea of justification interposed by the defendant for the acts complained of, the seizure and sale of the property, having been stricken out, he is left defenseless in the action. That such would be the effect of the ruling if the declaration was one in form for an ordinary trespass may be conceded. But the rule that a justification to an alleged trespass, to avail, must be pleaded, does not apply here. The striking out of the plea did not remove the fact that the seizure and sale were made under proceedings which protected the officer of the government from personal liability, because in the declaration itself his liability is charged upon a state of facts which shows that he acted in conformity with the law, and could not, therefore, be held responsible for the alleged invasion of the rights of the plaintiff in its enforcement.

When the assessment was certified to the Collector, his duty in enforcing it was one which he could not refuse to perform. There was no discretion vested in him to revise or alter it in any respect. His duty was purely ministerial. In *Erskine* v. *Hohnbach*, 81 U. S. 14 Wall. 613, 616 [20: 745, 747], which, like the present action, was brought against a collector of internal revenue for the seizure and sale of property of the plaintiff upon an assessment for taxes duly made by the assessor of the district, the court held that the assessment, certified to him (the collector), was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject matter, constituted his protection. At that time, 1871, officers, termed assessors, made the assessment for taxes due to the United States on distilled spirits in their several districts (13 Stat. chap. 172, secs. 8, 20), but their office was abolished in 1873, and the power to assess for such taxes vested in the commissioner of internal revenue. 17 Stat. chap. 13, secs. 1 and 2, pp. 401, 402. In the case referred to the liability of a ministerial officer in the enforcement of process was the subject of consideration, and it was there held that whatever may, at one time, have been the conflict in the adjudged cases as to the extent of protection afforded to such officers acting in obedience to process or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts and render judgment thereon, it was now well settled "that if the officer or tribunal possesses jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer, in its regular enforcement, against any prosecution the party aggrieved may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued." This doctrine was deemed applicable to collectors of internal revenue in enforcing an assessment for taxes regular on its face, made by the assessors of the district and duly certified to them.

The same doctrine was reasserted in protection of a collector of internal revenue in the subsequent case of *Haffin* v. *Mason*, 82 U. S. 15 Wall. 671, 675 [21: 196, 197], the court observing that "a ministerial officer, in a case in which it is his duty to act, cannot upon any principle of law be made a trespasser."

No question is raised as to the regularity in form of the assessment certified to the Collector. It is assumed on both sides that it is not open to objection in that respect. The principal point urged by the plaintiff in error is that the defendant should not have proceeded to enforce the assessment after the action by the United States was commenced on the bond of the distiller to collect the same taxes. But it is plain that the officer had no discretion in the matter. He could not suspend or in any way delay the performance of the duty imposed upon him because the government may have judged it proper to proceed for the same taxes by action, not only against the distiller, but against the sureties on his bond also. The government may have thought that the property which could be reached by the Collector would prove inadequate to meet the amount claimed. By instituting the action it did not waive its right to pursue any other remedies afforded by the law to secure the payment of its claim. Nor could the Collector consider whether in the pending action it might not be ultimately determined that the taxes were illegal which he was endeavoring to collect. He had completed his duty more than a year before that decision was rendered. Had the judgment of their illegality been pronounced before the enforcement of the assessment by the Collector, and been brought to his notice, a different question might possibly be raised.

What remedy the plaintiff may have for the loss of his property or for the amount of the proceeds obtained on its sale, we are not called upon to determine in this case. There may be, perhaps, a claim against the government. All that we decide is, that a liability cannot be fastened upon the Collector, a ministerial officer, for the enforcement of an as

sessment for taxes regular on its face, made by the commissioner of internal revenue. Of such an officer the law exacts unhesitating obedience to its process.

Judgment affirmed.

---

[21] THEODORE H. BUTLER ET AL., *Appts.*,
v.
GEORGE STECKEL ET AL.

(See S. C. Reporter's ed. 21-30.)

Patent for bretzel cutters, invalid—invention—previous attempts.

1. The patent No. 274,264, granted to Theodore H. Butler and others, for an improvement in bretzel cutters, is invalid, as not involving invention, but only mechanical skill.
2. In view of the state of the art, it required no invention to make a single die to cut dough, on a flat surface, into any particular shape desired, whether the shape of a bretzel or any other shape.
3. The existence of invention in a single die to cut bretzels on a flat surface is not shown by the fact that a large number of persons had before attempted unsuccessfully to make a machine to cut and twist bretzels, or cut them with dies set in revolving cylinders, and had expended considerable money and time for that purpose.

[No. 36.]

Argued Oct. 24, 1890. Decided Nov. 3, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois dismissing a suit in equity for the infringement of letters-patent. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Lysander Hill** and *Joseph R. Edson*, for appellants:

If a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention.

Hoe v. *Cottrell*, 18 Pat. Off. Gaz. 59, 61; *Webster Loom Co.* v. *Higgins*, 105 U. S. 591 (26: 1181); *Clough* v. *Gilbert & B. Mfg. Co.* 106 U. S. 178 (27: 138); Walker, Pat. § 68; *Atlantic Works* v. *Brady*, 107 U. S. 192 (27: 438).

The fact that a device has gone into general use, and has displaced other devices which had been previously employed for analogous uses, is sufficient.

Smith v. *Goodyear Dental Vulcanite Co.* 93 U. S. 492 (23: 953); *Spill* v. *Celluloid Mfg. Co.* 18 Blatchf. 190; *Pearl* v. *Ocean Mills*, 11 Pat. Off. Gaz. 2; *Penn* v. *Bibby*, L. R. 2 Ch. App. 127.

The invention so made and patented was and is a patentable invention.

Many v. *Sizer*, 1 Fish. Pat. Cas. 17; *Furbush* v. *Cook*, 2 Fish. Pat. Cas. 668; *Whipple* v. *Middlesex Co.* 4 Fish. Pat. Cas. 41; *Strong* v. *Noble*, 3 Fish. Pat. Cas. 586; *Platt* v. *United States P. B. R. N. & M. Mfg. Co.* 5 Fish. Pat. Cas. 265; *Putman* v. *Weatherbee*, 8 Pat. Off. Gaz. 320; *Dalton* v. *Nelson*, 13 Blatchf. 357; *Washburn & M. Mfg. Co.* v. *Haish*, 4 Fed. Rep. 900; *Eppinger* v. *Richey*, 14 Blatchf. 307; *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 492 (23: 953).

Messrs. **Thomas A. Banning** and *Ephraim Banning* for appellees.

Mr. Justice **Blatchford** delivered the opinion of the court:

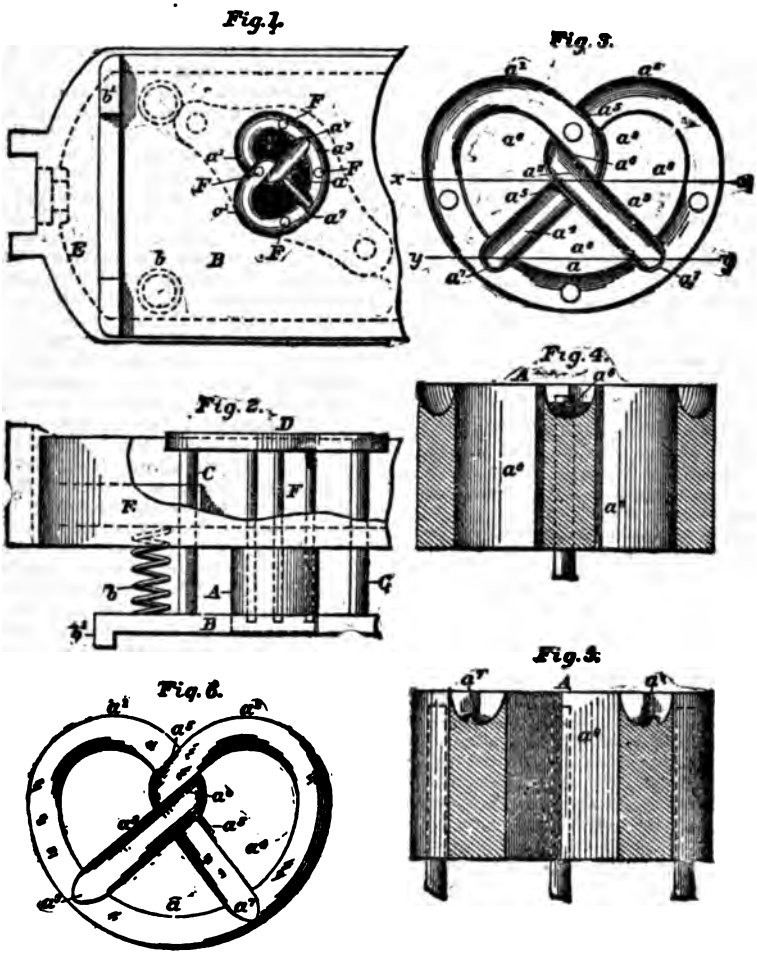
This is a suit in equity, brought in the Circuit Court of the United States for the Northern District of Illinois, March 28, 1883, by Theodore H. Butler, George W. Earhart and William M. Crawford, against George Steckel and Frederick Steckel, to recover for the infringement of letters-patent No. 274,264, granted to the plaintiffs March 20, 1883, on an application filed July 6, 1882, for an "improvement in bretzel-cutters."

The specifications, claims and drawings of the patent are as follows:

"This invention relates to an improvement in molds or dies for stamping or cutting out bretzels, having for its object more especially to cause the product or bretzel to have the appearance of a hand-made bretzel; and it consists in the peculiar construction of the mold or die to effect this result, and other details of construction, substantially as hereinafter more fully set forth.

"In the accompanying drawings, Figure 1 is a plan view of our improved bretzel die or mold. Fig. 2 is a side view, partly broken away, thereof. Fig. 3 is an enlarged detailed plan view of the die proper. Figs. 4 and 5 are sectional views, taken respectively on the lines *x x* and *y y* of Fig. 3. Fig. 6 is a view of the product or bretzel of our die. In carrying out our invention we construct the die A after the fashion or configuration of the ordinary bretzel in its general shape—that is, as more clearly shown in Fig. 3. For the purpose of this specification we will describe the channel or groove constituting the bretzel-die as consisting of a bow or an approximately heart-shaped portion, *a*, with its meeting portions a' extended so as to cross each other, as at a^2. The underlapped portion is further extended, as at a^3, said extension crossing or overlapping an extension, a^4, of the previously overlapped portion a^2. The extensions a^3 a^4 are projected into the body of the bow *a*. At a^2 the creaser of one arm of the groove or channel is extended, as at a^5, across its other arm and united to a^3, while the creaser a^3 is extended on one side, as at a^6, across a^2. The ends of a^3 a^4 project into the bow *a* and terminate in creasers a^7. This construction enables the creasing of the product or bretzel at the points above detailed, which imparts to the die-made bretzel the appearance of having been made by hand, or a natural appearance. The die A may be used, as shown in connection with means to permit its manipulation by hand, which consists of a base, B, through which it is adapted to move or operate, the guides or uprights C, the top plate D and the sliding hand-piece E. The uprights or guides C are fixed to the base B and to the plate D. Around the plate D and the guides slides the hand-piece E, cushioned preferably upon helical springs *b*, secured upon the base B. FF are the expelling-studs, secured to the top plate, D, and to the base B, below which they extend a short distance, and through coincident apertures distributed through the die A. The die is fixed to the vertically-sliding box or hand-piece E. When the hand-piece E is pressed downward the operation of cutting or stamping out the bretzel

from the dough will be performed. Upon the rising of the die, effected automatically by the spring, the studs, whose lower ends, as above stated, project a short distance below the die in its elevated position, will expel the plastic bretzel from the die, should it have a tendency to adhere or stick to it. The die can also be readily applied as well to a cylindrical surface as to other surfaces, and used in any number desired. Cams or other suitable devices may be employed in lieu of the hand, for operating the dies. We are aware that the form of the creasers can be changed without departing from the principle of our invention. The product of the die herein shown is not herein semblance to a hand-made twisted bretzel is produced, while the creaser heretofore used, as a^6, does not produce the desired result. Each die has three off-bearing scrap-passages, a^3, which pick up the internal scraps and deliver them into the box or hand-piece E. It will be observed that our dies form two kinds of scrap —to wit, connected scraps and internal scraps, the latter being picked up by the dies, and, after passing through the channels a^3, are delivered into the box E, or other suitable receiver. We are aware that it is not new to cut lozenges by means of a plate having a series of tubes which cut the lozenges, leaving a connected scrap, the lozenges being carried up-



claimed, as it will be made the subject matter of a subsequent application. The cutter herein shown is adapted, by means of the feet or projections b' on the base B, to be moved upon a flat surface and over the dough, and to cut from the same bretzels, which being left upon a flat surface after cutting are not so liable to become misshaped as when cut by rotary cutters as heretofore, and, by the additional creasers a^5 a^6, and the novel creasers a^1 a^1, perfect ward in the tubes; also, that it is old to cut bretzels by means of dies which at once deliver the internal scraps, as they are cut, into one of the cylinders which carry the dies.

"Having thus fully described our invention, we claim and desire to secure by letters-patent—

"1. A flat die for cutting bretzels, having the bow a, the loops d d, the intermediate twisted portion and the ends a^3 a^4, and provided with the central creaser, a^6, the side

creasers, a^5 a^5, and the end creasers, a^7 a^7, projecting into the bow a, substantially as shown and described.

"2. In a bretzel-cutter, the combination of the die A, perforated, as described, for the reception and passage of the scraps and for the expelling-studs F, with said studs, the guide-rods C, the base B, provided with feet or projections b', the springs b, perforated plate D and the hand-piece E, substantially as shown and described.

"3. A flat bretzel-shaped die, having three off-bearing internal scrap-passages or channels, and perforations for the expelling-studs, in combination with the expelling-studs, substantially as shown and described."

The answer of the defendants set up, among other defenses, "that bretzels, for the cutting of which from the dough said pretended invention was made, are an old and well-known article, and have been known and in common use for a great many years, and long prior to the said pretended invention; that bretzels are a kind of hard brittle cake, of a particular form, known and associated with that particular form throughout the whole civilized world, and that all that complainants claim to have done in their said invention was the making of a die for cutting them in that form; that the bretzels cut by such die are in no way improved or different from the bretzels heretofore made; that long prior to complainants' said pretended invention dies were in common and public use for cutting dough into various shapes and figures; that such dies were so used for cutting the various letters of the alphabet, different kinds of animals, birds, fishes, hearts, diamonds, and any and every kind and variety of attractive or fantastic shapes that confectioners or dealers might fancy or desire; that such dies were made to cut any and every form that might be desired; that, in making such dies, the only change that would be required would be in the form of the cutter, which could be and was varied at pleasure as occasion required; that dies like those above described for cutting various forms were made in every respect like the dies shown, described and claimed in complainants' patent, for many years before their application for letters-patent, with the exception that the cutters were not perhaps of the shape shown and claimed in complainants' patent, but were shaped to cut every variety of form, except, perhaps, a bretzel; that the only difference between such dies and complainants' dies was in the form of the cutter, which form could be and was varied at pleasure; that the making a die to cut bretzels did not require and did not permit any invention, in view of the well-known existence and use of dies for cutting various forms, as above described; that the complainants' patent does not contain or claim anything that, in view of the state of the art, could form the subject of a valid patent; and that dies like those above described for cutting various forms were, for many years before complainants' application for their patent, made and sold by Jacob Roth, of the firm of Roth, McMahan & Co., at his factory, No. 60 West Washington Street, Chicago, Illinois." The answer also alleged "that *dies for cutting bretzels* like that described and claimed in complainants' patent have been made and publicly used in this country long before complainants' said pretended invention thereof and more than two years before their application for a patent therefor;" and "that, in view of the state of the art at and prior to the alleged invention of the plaintiffs, no invention was required in making the inventions claimed in the patent sued on."

Issue was joined and proofs on both sides were taken, and the case was heard in the circuit court by *Judge* Blodgett, who made a decree dismissing the bill, with costs, from which decree the plaintiffs have appealed to this court. His opinion is reported in 27 Fed. Rep. 219. He says: "The bretzel has heretofore been chiefly made by rolling out a strip of dough, and bending it into nearly a semi-elliptical or heart shape, and crossing the ends, and laying them upon the outer rim of the circle. This form leaves, of course, three interior openings, and in cutting the bretzel from the sheet of dough, as it passes under the cutter, provision must be made for the interior scrap which is cut from the dough, and this is done by having an opening extending through the plate and cutting dies, so that the interior scrap is carried off through the tubes connected with these openings. . . . The proof shows that it is old in the art connected with the preparation of food, to cut crackers, cookies and cakes of various sorts into many shapes, including the shapes of animals, and shows the use, for at least ten years before the application for the patent in question, of dies in bakeries, for cutting cakes, in the shape of the capital letter 'B' and the character '&' with two or more scrap passages; and with dies of this character in public use, I cannot myself see any patentable novelty in the dies of the patent. They are simply made to cut a piece of dough in the shape of a hand-made bretzel, while the dies offered by the defendants as anticipating the complainants' dies cut pieces of dough into forms corresponding with the letter 'B' and character '&,' from which the internal scrap must be removed. These old dies also show expelling studs, by which the cut figure is expelled or pushed out of the die after being cut, performing the same function that is performed by the expelling studs in the patent. It is true, I doubt not, that it requires considerable mechanical skill to make a die which would cut a bretzel from dough so as to imitate a hand-made bretzel, because the hand-made bretzel is somewhat clumsily shaped, the parts are bent, twisted and laid upon each other; and it was undoubtedly a matter requiring some study, effort and experiment to make the shape of the die correspond with the external formation of the bretzel. This, however, seems to me not to involve invention, but mere mechanical skill. The cutter might be compelled to experiment some—that is, cut several dies—but that is not invention. The proof also shows that a large number of persons, before these patentees, had attempted to make a machine which would cut bretzels, and considerable money and time seem to have been expended in efforts to produce such a machine; but the noticeable thing in regard to all these early efforts was the fact that most of those engaged in them were trying to draw out and

twist the dough by machinery rather than to cut or stamp dough from a flat sheet, while others were endeavoring to cut them with dies set in revolving cylinders; and, as soon as the idea of cutting the dough from a flat sheet was conceived, the difficulty seems to have vanished, and success followed the effort, as the only change made was to adapt the old letter dies to the shape of a bretzel." The opinion further said that it seemed, from the proof, inasmuch as the bretzel is an article of time-honored history in the German countries, connected to some extent with the older religious observances of that people, and intimately with their present social enjoyments, that, in the first efforts at making them by machinery, it was assumed that they must in every respect simulate those made by hand or they would not be acceptable to the public, and must not only simulate them in appearance, but the manipulation of the dough must be substan-
9] tially the same as in those made by hand, but when the machine-made bretzels were introduced to the public, and accepted in place of the hand-made article, the problem was solved; and that the merit of these patentees seemed to have been in overcoming a fixed prejudice in favor of the hand-made goods rather than in inventing any radically new process for making the same goods by machinery. We unanimously concur with the circuit court in its views.

It is urged by the appellants that the circuit court erred in finding, as a fact, that dies existed which cut cakes in the shape of the capital letter 'B' and the character '&,' with two or more scrap passages. But we find that the evidence establishes that fact.

In view of the testimony as to the state of the art, it required no invention to make a single die to cut dough, on a flat surface, into any particular shape desired, whether the shape of a bretzel or any other shape. *Smith* v. *Nichols*, 88 U. S. 21 Wall. 112, 119 [22: 566, 567]; *Dunbar* v. *Myers*, 94 U. S. 187, 199 [24: 84, 89]; *Pomace Holder Co.* v. *Ferguson*, 119 U. S. 835, 838 [30: 406, 407], and cases there cited; *Peters* v. *Active Mfg. Co.* 130 U. S. 626, 628, 629 [32: 1057, 1058]; *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 161, 167 [33: 295, 298].

All that it was necessary to do was to take the bretzel as a pattern and make a die to correspond in shape with it. The bretzel presented all the lines and creases, points and configurations that were required in the die. The question was one, not of invention, but simply of mechanical skill and imitation. The perforations in the die for the passing upward of the scraps, and the expelling studs for pushing off the bretzel from the die, and all the details specified in the second claim of the patent, were old in machines that had been used by bakers for many years. All that was necessary was to take out the old cutter and put in one in the reverse form of a bretzel. The rest of the machine had been used in the same way in connection with other forms of dies. There is nothing in the suggestion that bretzel dough is different from other doughs, in respect to the action of a die upon it.

In regard to the point taken that the existence of invention in this case is shown by the fact that a large number of persons had before [3
attempted unsuccessfully to make a machine to cut bretzels, and had expended considerable money and time for that purpose, it is to be said, as stated by the circuit court, that most of them were engaged in trying to draw out and twist the dough by machinery, rather than to cut out the form of a bretzel by a single die from a flat sheet, or else were endeavoring to cut bretzels with dies set in revolving cylinders. It also appears that those efforts were largely made in attempts to cut out the bretzel by two opposite dies, and that, as soon as the idea occurred of cutting the dough by a single die from a flat sheet, success came at once, by merely changing the shape of the old single die. It also appears, as suggested by the circuit court, that there was a prejudice against machine-made bretzels.

The decree of the Circuit Court is affirmed.

CATHERINE FISHBURN, *Plff. in Err.*, [6
v.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

(See S. C. Reporter's ed. 60, 61.)

Practice—review of denial of motion for new trial—right of review.

1. Courts of the United States are not governed by the statute or practice of the state courts, as to motions for new trial and bills of exceptions.
2. According to the practice of the courts of the United States, the overruling of a motion for a new trial is not the subject of exception; and where the only exception, in respect to which error is assigned, is overruling a motion for new trial, this court will not review the case.
3. The right of review in this court is limited to questions of law appearing on the face of the record.

[No. 42.]

Argued Oct. 31, 1890. Decided Nov. 3, 1890.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin, to review a judgment for defendant, in an action for damages for wrongfully ejecting plaintiff from one of defendant's passenger trains. *Affirmed.*

The facts are stated in the opinion.

Mr. **B. F. Dunwiddie** for plaintiff in error.

The court declined to hear further argument.

Messrs. Burton Hanson and *John W. Cary* for defendant in error.

Fuller, *Ch. J.:*

This was an action for damages brought by plaintiff in error against defendant in error for wrongfully ejecting her from one of its passenger trains, and resulted in a verdict and judgment in favor of defendant in error.

In regard to motions for new trial and bills of exceptions, courts of the United States are independent of any statute or practice prevail- [61
ing in the courts of the State in which the trial is had. *Missouri Pac. R. Co.* v. *Chicago & A. R. Co.* 132 U. S. 191 [33: 309].

The only exception in respect to which plaintiff assigns error here was to the overruling of

her motion for a new trial, which is not the subject of exception, according to the practice of the courts of the United States.

Various objections to the charge of the court were set out as grounds for the motion for new trial, but it nowhere appears that exceptions were taken to any of these matters, save as involved in the overruling of that motion, nor does the record show that the action of the circuit court was invoked upon the ground that there was no evidence to sustain the verdict.

Our right of review is limited to questions of law appearing on the face of the record, and we find none such presented here.

The judgment must therefore be affirmed.

---

[1] THE STEAMER MAX MORRIS, JOHN MORRIS, Claimant, *Appt.*,
v.
PATRICK CURRY ET AL.

(See S. C. *The Max Morris*, Reporter's ed. 1-15.)

Damages in admiralty for negligence, when divided.

1. A longshoreman, employed to load coal on board a steamship, and injured while so employed, by his falling from the steamer's bridge to her deck, partly through his own negligence and partly through the negligence of the steamer's officers, is entitled, in a suit in admiralty against the vessel for damages for such injury, to a decree for divided damages.

2. The admiralty rule of the division of damages, in cases of collision, where both vessels are in fault, is applicable to all cases of marine tort, founded upon negligence and prosecuted in admiralty.

[No. 44.]

Submitted May 5, 1890. Decided Nov. 17, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York in favor of the libelant in admiralty for damages for a personal injury through the negligence of those in charge of the vessel. *Affirmed.*

Messrs. Butler, Stillman & Hubbard and **Wilhelmus Mynderse**, for appellant:

The libelant cannot recover when his own negligence has contributed to the accident.

Whart. Neg. § 300; *The Explorer*, 20 Fed. Rep. 135, 139; *Leathers* v. *Blessing*, 105 U. S. 626 (26: 1192); *The Calista Hawes*, 14 Fed. Rep. 498; *The Kate Cann*, 8 Fed. Rep. 719; *The Rheola*, 19 Fed. Rep. 926.

Contributory negligence is a defense to the action, the claim being prosecuted in the admiralty court by a libel *in personam*.

Holmes v. *Oregon & C. R. Co.* 5 Fed. Rep. 523, 528; *Peterson* v. *The Chandos*, 4 Fed. Rep. 645, 649; *The Germania*, 9 Ben. 356; *The E. B. Ward, Jr.* 20 Fed. Rep. 702, 704.

The admiralty rule of division of damages, applicable to collision cases, has never been applied to cases of personal injuries.

The Schooner Catharine v. *Dickinson*, 58 U. S. 17 How. 178 (15: 233).

A servant cannot recover for injuries sustained through the negligence of a fellow servant.

The Victoria, 13 Fed. Rep. 43; *The Harold*, 21 Fed. Rep. 428; *The Edith Godden*, 23 Fed. Rep. 43; *Atles* v. *Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389, 395 (22: 619, 621).

The decree cannot be sustained by the rule that when a seaman falls sick or sustains injury in the service of his vessel certain responsibilities as to care and attention devolve upon the vessel.

The City of Alexandria, 17 Fed. Rep. 390; Curtis, Rights and Duties of Seamen, 109; *The Atlantic*, Abb. Adm. 451; *Nevitt* v. *Clarke*, Olcott, 316; *The Ben Flint*, 1 Abb. 126.

Messrs. **Roger Foster** and *James A. Patrick*, for appellee:

The power of an admiralty court to divide damages in maritime cases is not confined to cases of collision, but extends to other cases of admiralty jurisdiction.

Snow v. *Carruth*, 1 Spr. Adm. 324; *Christian* v. *Van Tassel*, 12 Fed. Rep. 884; *The Syracuse*, 18 Fed. Rep. 828; *The Reba*, 22 Fed. Rep. 546; *The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, Id. 140.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in admiralty, brought in the District Court of the United States for the Southern District of New York, by Patrick Curry against the Steamer Max Morris.

The libel alleges that on the 27th of October, 1884, the libelant was lawfully on board of that vessel, being employed to load coal upon her by the stevedore who had the contract for loading the coal; that, on that day, the libelant, while on the vessel, fell from her bridge to the deck, through the negligence of those in charge of her in having removed from the bridge the ladder usually leading therefrom to the deck, and in leaving open, and failing to guard, the aperture thus left in the rail on the bridge; that the libelant was not guilty of negligence; and that he was injured by the fall and incapacitated from labor. He claimed $3,000 damages.

The answer alleges negligence on the part of the libelant and an absence of negligence on the part of the claimant.

The district court, held by *Judge* Brown, entered a decree in favor of the libelant for $150 damages, and $32.33 as one half of the libelant's costs, less $47.06 as one half of the claimant's costs, making the total award to the libelant $135.27. The opinion of the district judge is reported in 24 Fed. Rep. 860. It appears from that that the judge charged to the libelant's own fault all his pain and suffering and all mere consequential damages, and charged the vessel with his wages, at $2 per day, for 75 working days, making $150.

The claimant appealed to the circuit court, on the ground that the libel should have been dismissed. It was stipulated between the parties that the facts as stated in the opinion of the district judge should be taken as the facts proved in the case, and that the appeal should be heard on those facts. *Judge* Wallace, who heard the case on appeal in the circuit court, delivered an opinion, in August, 1886, which is reported in 28 Fed.

Rep. 881, affirming the decree of the district court. No decree was made on that decision, but the case came up again in the circuit court on the 14th of March, 1887, the court being held by *Mr. Justice* Blatchford and *Judge* Wallace, when a certificate was signed by them stating as follows: "The libelant was a longshoreman, a resident of the City and County of New York, and was, at the time when the said accident occurred, employed as longshoreman, by the hour, by the stevedore having the contract to load coal on board the steamship Max Morris. The injuries to the libelant were occasioned by his falling through an unguarded opening in the rail on the after end of the lower bridge. The Max Morris was a British steamship, hailing from Liverpool, England. The defendant contends, as a matter of defense to said libel, that the injuries complained of by libelant were caused by his own negligence. The libelant contends that the injuries were occasioned entirely through the fault of the vessel and her officers. The court finds, as a matter of fact, that the injuries to the libelant were occasioned partly through his own negligence and partly through the negligence of the officers of the vessel. It now occurs, as a question of law, whether the libelant, under the above facts, is entitled to a decree for divided damages. On this question the opinions of the judges are in conflict." On motion of the claimant, the question in difference was certified to this court, and a decree was entered by the circuit court affirming the decree of the district court and awarding to the libelant a recovery of $135.27, with interest from the date of the decree of the district court, and $26.30 as the libelant's costs in the circuit court, making a total of $172. From that decree the claimant has appealed to this court. Rev. Stat. §§ 652, 693; *Dow* v. *Johnson*, 100 U. S. 158 [25: 632].

The question discussed in the opinions of *Judge* Brown and *Judge* Wallace, and presented to us for decision, is whether the libelant was debarred from the recovery of any sum of money, by reason of the fact that his own negligence contributed to the accident, although there was negligence also in the officers of the vessel. The question presented by the certificate is really that question, although stated in the certificate to be whether the libelant, under the facts presented, was entitled to a decree "for divided damages." It appears from the opinion of the district judge that he imposed upon the claimant "some part of the damage" which his concurrent negligence occasioned, while it does not appear from the record that the award of the $150 was the result of an equal division of the damages suffered by the libelant, or a giving to him of exactly one half, or of more or less than one half, of such damages.

The particular question before us has never been authoritatively passed upon by this court, and is, as stated by the district judge in his opinion, whether, in a court of admiralty, in a case like the present, where personal injuries to the libelant arose from his negligence concurring with that of the vessel, any damages can be awarded, or whether the libel must be dismissed, according to the rule in common-law cases.

The doctrine of an equal division of damages in admiralty, in the case of a collision between two vessels, where both are guilty of fault contributing to the collision, had long been the rule in England, but was first established by this court in the case of *The Schooner Catharine* v. *Dickinson*, 58 U. S. 17 How. 170 [15: 233], and has been applied by it to cases where, both vessels being in fault, only one of them was injured, as well as to cases where both were injured, the injured vessel, in the first case, recovering only one half of its damages, and, in the second case, the damages suffered by the two vessels being added together and equally divided, and the vessel whose damages exceeded such one half recovering the excess against the other vessel. In the case of *The Schooner Catharine* v. *Dickinson*, *supra*, both vessels being held in fault for the collision, it was said by the court, speaking by *Mr. Justice* Nelson (p. 177 [235]), that the well-settled rule in the English admiralty was "to divide the loss," and that "under the circumstances usually attending these disasters" the court [9] thought "the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation."

This rule, recognized as one of an equal division of the loss, has been applied by this court in the following cases: *Rogers* v. *Steamer St. Charles*, 60 U. S. 19 How. 108 [15: 563]; *Chamberlain* v. *Ward*, 62 U. S. 21 How. 548 [16: 211]; *The Washington*, 76 U. S. 9 Wall. 513 [19: 787]; *The Sapphire*, 78 U. S. 11 Wall. 164 [20: 127]; *The Ariadne*, 80 U. S. 13 Wall. 475 [20: 542]; *The Continental*, 81 U. S. 14 Wall. 345 [20: 801]; *Atlee* v. *Northwestern U. Packet Co.* 88 U. S. 21 Wall. 389 [22: 619]; *The Teutonia*, 90 U. S. 23 Wall. 77 [23: 44]; *The Sunnyside*, 91 U. S. 208 [23: 302]; *The America*, 92 U. S. 432 [23: 724]; *The Alabama*, Id. 695 [763]; *The Atlas*, 93 U. S. 302 [23: 863]; *The Juniata*, Id. 337 [930]; *The Stephen Morgan*, 94 U. S. 599 [24: 266]; *The Virginia Ehrman*, 97 U. S. 309 [24: 890]; *The City of Hartford*, Id. 323 [930]; *The Civilta*, 103 U. S. 699 [26: 599]; *The Connecticut*, Id. 710 [467]; *The North Star*, 106 U. S. 17 [27: 91]; *The Sterling*, Id. 647 [98], and *The Manitoba*, 122 U. S. 97 [30: 1095].

It may be well to refer particularly to some of these cases, which have a bearing upon the present question. In the case of *The Washington*, two vessels were held in fault for a collision which resulted in injuries to an innocent passenger on one of them, who proceeded against both in the same libel. This court held that the damages to the passenger ought to be apportioned equally between the two vessels, with a reservation of a right in the libelant to collect the entire amount from either of them, in case of the inability of the other to respond for her portion. In that case, the rule of the equal division of damages was extended to damages other than those sustained by either or both of the vessels in fault.

In *Atlee* v. *Northwestern U. Packet Co.*, a

barge owned by the libelant was sunk by striking a stone pier owned by the respondent, built in the navigable part of the Mississippi River. Both parties being found in fault by the district court, that court divided the damages sustained by the libelant, and rendered a decree against the owner of the pier for one half of them. The circuit court held the owner of the pier to be wholly in fault, and decreed the entire damage against him. He having appealed, this court, after two hearings of the case, reversed the decree of the circuit court and reinstated that of the [10] district court. In the opinion of this court, delivered by *Mr. Justice* Miller, the case is treated as one of collision. The pier having been placed by the respondent in the navigable water of the Mississippi River without authority of law, this court held him to be responsible for the damages sustained by the libelant from the striking of the pier by the barge. It held also that there was negligence on the part of the barge, and said (p. 395 [621]): "But the plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other; and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum." This court, therefore, treated the case as if it had been one of a collision between two vessels.

The case of *The Alabama* was like that of *The Washington*, where an innocent party recovered damages against two vessels, both of which were in fault in a collision. In that case it is said in the opinion of the court, delivered by *Mr. Justice* Bradley (p. 697 [764]), that "the moiety rule has been adopted for a better distribution of justice between mutual wrong-doers; and it ought not to be extended so far as to inflict positive loss on innocent parties."

The case of *The Atlas*, was that of a suit [11] against the Atlas by an insurance company for the loss of a canal-boat and her cargo while she was in tow of a tug, through a collision between the Atlas and the tug. The tug was not sued. The district and circuit courts, in view of the fact that the collision was caused by the mutual fault of the Atlas and the tug, decreed to the libelant, against the Atlas, one half of its damages. This court held that, as the owner of the cargo which was on board of the canal-boat was not in fault, the libelant was entitled to recover the entire amount of its damages from the Atlas, the tug not having been brought in as a party to the suit. By Rule 59 in Admiralty, promulgated by this court March 26, 1883 (112 U. S. 743 [20: 927]), the claimant or respondent in a suit for damage by collision may compel the libelant to bring in another vessel or party alleged to have been in fault.

The case of *The Juniata* is worthy of attention. In that case, one Pursglove, the owner of a steam-tug, filed a libel against the Juniata to recover for damages sustained by the tug by a collision between it and the Juniata, and also damages for personal injuries to himself. The district court held both vessels to have been in fault, and made a decree of $10,000 in favor of Pursglove, for one half of his damages. This decree was affirmed by the circuit court and by this court. It is quite evident from the report of the case that damages were awarded to Pursglove for his personal injuries, although his tug was held to have been in fault.

Some of the cases referred to show that this court has extended the rule of the division of damages to claims other than those for damages to the vessels which were in fault in a collision.

In England, the common-law rule that a plaintiff who is guilty of contributory negligence can recover nothing, was made by statute to yield to the admiralty rule in respect to damages arising out of a collision between two ships, by subdivision (9) of section 25 of chap. 66 of 36 & 37 Vict., being the Judicature Act of August 5, 1873 (L. R. 8 Stat. 321), which provides as follows: "(9.) In any cause or proceeding for damages arising out of a collision between two ships, if both ships shall be found to have been in fault, the rules in force in the court of admiralty, so far as they have been at variance with the rules in force in the courts of common law, shall prevail." The same provision was enacted in the same language by subdivision (9) of section 28 of chap. 57 of 40 & 41 Vict., being the Judicature Act in relation to Ireland, of August 14, 1877 (L. R. 12 Stat. 362).

The admiralty rule of the division of damages was laid down by *Sir* William Scott, in 1815, in *The Woodrop-Sims*, 2 Dodson, 83, 85, where he says that if a loss occurs through a collision between two vessels, where both parties are to blame, the rule of law is "that the loss must be apportioned between them, as having been occasioned by the fault of both of them." This rule was approved by the House of Lords, on an appeal from Scotland, in *Hay* v. *Le Neve*, 2 Shaw, 395, in 1824.

The rule of the equal apportionment of the loss where both parties were in fault would seem to have been founded upon the difficulty of determining, in such cases, the degree of negligence in the one and the other. It is said by Cleirac (Us et Coutumes de la

Mer, p. 68) that such rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of the parties, or when they see faults on both sides.

As to the particular question now presented for decision, there has been a conflict of opinion in the lower courts of the United States. In the case of *Peterson* v. *The Chandos*, 4 Fed. Rep. 645, 649, in the District Court for the District of Oregon, which was a libel in admiralty against a vessel, for a personal injury, it was said by *Judge* Deady that the libelant could not recover for an injury caused by his own negligence, which contributed to the result, even though the vessel was in fault. The same rule was recognized by him, in the same court, in a suit in admiralty, in *Holmes* v. *Oregon & C. R. Co.*, 5 Fed. Rep. 528, 538, and by *Judge* Hughes, in the District Court for the Eastern District of Virginia, in *The Manhasset*, 19 Fed. Rep. 430.

On the other hand, *Judge* Pardee, in the Circuit Court for the Eastern District of Louisiana, in *The Explorer*, 20 Fed. Rep. 185, and *The Wanderer*, Id. 140, cases in admiralty where the libelant sued for personal injuries, and he and the vessel were both held in fault, laid it down as a rule that, in cases of marine torts, courts of admiralty could exercise a conscientious discretion, and give or withhold damages upon enlarged principles of justice and equity. In the first of those cases, the court allowed to the libelant $280 for the loss of 40 days' time, at $7 a day, and the sum of $40 paid by him for his admission to a hospital, and the costs of the case, as the vessel's share of the expenses resulting from the injury to which the vessel contributed through the negligence of her master and officers. In the other case, it was held that, while the libelant could not be rewarded for his negligence at the expense of the vessel, she should be held responsible for her negligence, to the extent of paying for the direct care, attention, medical services and expenses required for the libelant. These last two cases proceed upon the same principle that appears to have been adopted by the district and circuit courts in the present case; and the same view was applied by the District Court for the Eastern District of New York, in *The Truro*, 31 Fed. Rep. 158; and by the District Court for the Eastern District of Virginia, in *The Eddystone*, 33 Fed. Rep. 925. This principle, it is contended, is sanctioned by the language used by this court in *The Marianna Flora*, 24 U. S. 11 Wheat. 1, 54 [6: 405, 417]: "Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law;" and in *The Palmyra*, 25 U. S. 12 Wheat. 1, 17: [6: 531, 536]: "In the admiralty, the award of damages always rests in the sound discretion of the court, under all the circumstances."

The rule of giving one half of the damages has been applied by the District and Circuit Courts in the Southern District of New York, in cases where a boat and her cargo were lost or damaged through negligence on the part of a steam-tug which towed the boat, where there was fault also on the part of the boat. Those were not [14 cases of collision, and there was no damage to the steam-tug, and she alone was sued for the loss. Such cases were those of *Mason* v. *Steam-Tug William Murtaugh*, 8 Fed. Rep. 404, and *The William Murtaugh*, 17 Fed. Rep. 260; *Williams* v. *Steam-Tug William Cox*, 8 Fed. Rep. 645, affirmed by the circuit court, *The William Cox*, 9 Fed. Rep. 672; *Connolly* v. *Ross*, 11 Fed. Rep. 342; *The Bordentown*, 16 Fed. Rep. 270. Also, in cases where the vessel towed was held to be in fault for not being in proper condition (*Philadelphia & R. R. Co.* v. *New England Transp. Co.* 24 Fed. Rep. 505); and where a boat was injured by striking the bottom of a slip, in unloading at the respondent's elevator, the boat herself being also in fault (*Christian* v. *Van Tassel*, 12 Fed. Rep. 884); and where the vessel towed was old and unseaworthy. *The Syracuse*, 18 Fed. Rep. 828; *The Reba*, 22 Fed. Rep. 546. In *Snow* v. *Carruth*, 1 Spr. Adm. 324, in the District Court for the District of Massachusetts, damage to goods carried by a vessel on freight was attributable partly to the fault of the carrier and partly to the fault of the shipper; and, it being impossible to ascertain for what proportion each was responsible, the loss was divided equally between them.

All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule, and an extension of the admiralty rule in a direction which we think is manifestly just and proper. Contributory negligence, in a case like the present, should not wholly bar recovery. There would have been no injury to the libelant but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in fault, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the district judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the safety of life and limb and the public good will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libelant, in a case like the present, where their fault is clear, provided the libelant's fault, though evident, is [15 neither willful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort, founded upon negligence and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libelant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

The necessary conclusion is, that the ques-

tion whether the libelant, upon the facts found, is entitled to a decree for divided damages, must be answered in the affirmative, in accordance with the judgment below. This being the only question certified, and the amount in dispute being insufficient to give this court jurisdiction of the whole case, our jurisdiction is limited to reviewing this question. *Union Bank of Chicago* v. *Kansas City Bank*, 136 U. S. 223 [34: 341]. Whether, in a case like this, the decree should be for exactly one half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it.

Decree affirmed.

113] JOHN G. WILLIAMS, Admr. of FRANCIS TAYLOR, Deceased, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 113-138.)

Officer of Albemarle Guards, when not entitled to pay—resolutions of Congress—Continental army—Act of July 5, 1832—evidence.

1. A colonel of the Albemarle Guards, a regiment raised in 1799, in Virginia, on continental establishment, who did not continue in the service of the Continental Congress until the end of the war, is not entitled to five years' pay under the Resolutions of Congress of Oct. 21, 1780, and March 22, 1783.
2. An acceptance of an appointment as an officer in the regiment of the Albemarle Guards, authorized by the Resolution of Jan. 9, 1799, of the Continental Congress, took the officer out of his former position in the line.
3. The Resolution of Congress of Oct. 21, 1780, had reference only to officers thrown out by the reduction of the Continental army, and did not apply to officers of the Albemarle Guards, although they should continue in the service to the end of the war.
4. An officer in the Albemarle Guards is not entitled to judgment against the United States, for his pay as such officer, under the provisions of the Act of July 5, 1832 (4 Stat. at L. 563).
5. The report of the commissioner of the State of Virginia, made March 19, 1834, to the governor of that State, as to unsatisfied revolutionary claims of that State on the government of the United States, although approved and adopted by the governor of that State, is not obligatory in law, nor conclusive as evidence against the United States.

[No. 46.]

Argued Oct. 31 and Nov. 3, 1890. Decided Nov. 17, 1890.

APPEAL from a judgment of the Court of Claims, dismissing the petition of the Administrator of Francis Taylor against the United States, for five years' pay of said Taylor as an officer in the continental service from the State of Virginia in the War of Revolution. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Geo. S. Boutwell** and **P. E. Dye** [114 for appellant.

Mr. **A. X. Parker,** *Assistant Atty-Gen.*, for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an appeal from a judgment of the Court of Claims, dismissing the petition of John G. Williams, Administrator *de bonis non* of Francis Taylor, against the United States.

The original petition was filed by George Taylor Jenkins and others, December 8, 1865. After a traverse and an amended petition, an answer was filed to the latter, and also a special plea, and the case was submitted to the court June 10, 1868. On June 15, 1868, a judgment was rendered dismissing the petition. A motion for a new trial was made in December, 1868, and granted in December, 1869. An amended petition was filed in December, 1877, and a traverse thereto; and in February, 1878, the court ordered that John G. Williams, as Administrator *de bonis non* of Francis Taylor, be substituted as the claimant, and he filed, on the 18th of April, 1878, the petition which is now before us. A traverse was filed thereto, together with a special plea, to which latter there was a replication. The court entered a judgment, on June 7, 1880, dismissing the petition and filed certain findings of fact and conclusions of law, with an opinion, which are set forth in the report of the case, in 15 Ct. Cl. 514. Those findings embrace identically the findings now before us, to and including finding 10.

On the 7th of September, 1880, at the same term, the claimant filed a motion for a new trial, on the ground of newly discovered evidence. This motion was held over until the 14th of March, 1887, when the court overruled it, giving an opinion which is reported in 22 Ct. Cl. 116. It also then substituted new findings of fact and conclusions of law instead of the original ones (the findings of fact being the same as the original ones to and including finding 10, and adding finding 11). On the 16th of May, 1887, it made an order which vacated and set aside the judgment of June 7, 1880, and entered a new judgment *nunc pro tunc* as of March 14, 1887, dismissing the petition. The appeal of the claimant is for a review of this last judgment.

The amended findings of fact, with the conclusions of law thereon, are as follows:

"1. Francis Taylor was commissioned captain in the Second State Regiment of the Virginia forces on continental establishment May 8, 1776; he continued in active service and was promoted and commissioned major in said regiment with rank from July 12, 1778, and he became supernumerary major by the arrangement of the Continental army at White Plains in September, 1778.

"2. The regiment, commonly designated as the Albemarle Guards, was originally authorized by the Resolution 19th December, 1778, of the House of Delegates of the State of Virginia, but was taken up on continental establishment under and by virtue of the Resolution 9th January, 1779 (3 Jour. Cong. p. 179). From the 9th January to the 5th March, 1779, Francis Taylor was in command of the regiment as

lieutenant-colonel. On March 5, 1779, he was commissioned as colonel by the governor of Virginia, and as such commanded said battalion up to the 15th day of June, 1781, when the battalion was disbanded by the discharge of such men as were enlisted to serve only during the continuance of the convention prisoners in the State of Virginia.

"3. There is no evidence showing that Colonel Francis Taylor ever resigned his commission in the continental service, or that he was ever otherwise than ready and willing to render service in the same or higher grade when required so to do.

"4. The acceptance of the Virginia line and officers of the commutation offered under the Resolution of Congress of March 22, 1783, was made and duly reported as required by the Resolution.

"5. Colonel Francis Taylor died on or about the 16th day of November, 1799.

"6. Colonel Francis Taylor was not paid the half-pay for life under the Resolution of Congress of October 21, 1780, and no commutation certificate was issued to him or his heirs in lieu thereof.

"7. Colonel Francis Taylor, during his lifetime, and his heirs and legal representatives since, have made frequent and continuous application to the government and to Congress for the payment of this claim up to the time of bringing this suit; and on the 22d day of January, 1859, a memorial to Congress praying its payment was referred by the House of Representatives to this court for adjudication.

"Which resolution is in the words following:

" '*Ordered*, That the petitions and papers in the cases of Dr. Charles Taylor, Colonel Francis Taylor and James Broadus be withdrawn from the files of the House and referred to the Court of Claims.' (House Journal, 1858-59, p. 241.)

"8. It appears, and the court finds the fact to be, that on the 5th March, 1779, Lieutenant-Colonel Taylor, then commanding the regiment known as the Albemarle Guards, was commissioned as colonel by the governor of Virginia, and that he continued to command the regiment with the rank of colonel until it was disbanded. It further appears that the regiment continued in the continental service after the expiration of the year's service designated in the Resolution of 9th January, 1779 (3 Jour. Cong. p. 179), and until the 15th June, 1781, when the regiment was disbanded. It further appears that on the 13th February, 1781, while the Baron Steuben was acting as inspector-general of the continental forces, and was charged with the duty of consolidating and reducing the regiments of the line furnished by Virginia, under the Resolutions of 3d and 21st October, 1780 (3 Jour. Cong. pp. 532, 538), Mr. Jefferson, then governor of Virginia, addressed the following official communication to Colonel Taylor:

" 'Richmond, Feb. 13, 1781.

" 'Sir: . . . Congress having determined newly to model their forces, the Baron Steuben is now here on that business.

" 'The Assembly have directed the executive to have the same done as to the state troops.

" 'Your regiment, being in the continental service, will be submitted to Baron Steuben. Till this be done, which, however, will be done in a few days, no promotions can take place.' . . .

"And on the 14th March, 1781, Mr. Jefferson, as governor of Virginia, likewise addressed the following official communication to Colonel Taylor:

" 'In Council, March 14, 1781.

" 'Col. F. Taylor.

" 'Sir: Before this comes to hand Col. Wood will have received orders to carry the conventioners to Knowland's Ferry, thence to be guarded by the State of Maryland.

" 'At that place, therefore, you will please to discharge such of your regiment as were enlisted to serve only during the continuance of the conventioners in Albemarle or in this State.' . . .

"It also appears that Mr. Jefferson, while governor of Virginia, on the 28th of November, 1779, addressed the following communication to the commander-in-chief:

" 'Williamsburg, November 28, 1779.

" 'To his Excellency General Washington:

" 'Sir: Your Excellency's letter on the discriminations which have been heretofore made between the troops raised within this State and [118 considered as part of our quota, and those not so considered, was delivered me four days ago. I immediately laid it before the Assembly, who thereupon came to the resolution I now send you.

" 'The Resolution of Congress of March 15, 1779, which you were so kind as to inclose, was never known in this State till a few weeks ago, when we received printed copies of the Journal of Congress.

" 'It would be a great satisfaction to us to receive an exact return of all the men we have in continental service who come within the description of the Resolution, together with our state troops in continental service. Colonel Cabell was so kind as to send me a return of the continental regiments commanded by Lord Stirling, of the First and Second Virginia State Regiments and of Colonel Gist's regiment.

" 'Besides these are the following, viz.: Colonel Harrison's regiment of artillery, Colonel Baylor's horse, Colonel Bland's horse, General Scott's new levies, part of which are gone to Carolina and a part are here. Colonel Gibson's regiment stationed on the Ohio, Heath and O'Hare's independent companies at the Stomel station, Colonel Taylor's regiment of guards to the convention troops, of these we have a return.

" 'There may possibly be others not occurring to me.

" 'A return of all these would enable us to see what proportion of the Continental army is contributed by us.' . . .

"It further appears that no official records are known to exist which set forth the grounds upon which Colonel Taylor was commissioned as colonel of the Albemarle Guards on the 5th March, 1779; nor any official record which would explain the reason why the said regiment continued in service beyond the year for which it was enlisted under the Resolution of

9th January, 1779; nor any official record which would show whether the said regiment or a portion of it did or did not re-enlist for the war under the Resolution of January 23d, 1779 (3 Jour. Cong. p. 190); nor any official record which would show whether a portion of the said regiment continued in service after the regiment was disbanded on the 15th June, [119] 1781; nor any official record which would show that Colonel Taylor was discharged from the service when his regiment was disbanded.

"But it appears from an ancient writing found in the public archives of the State of Virginia, purporting to be the proceedings of 'a board of field officers, begun at Chesterfield, February 10, 1781, by order of Major-General Baron Steuben, for the purpose of arranging the Virginia line,' that the regiments reduced in the State of Virginia under the Resolutions 3d and 21st October, 1780 (3 Jour. Cong. pp. 522-538), were the eleven regiments of the Virginia line and one regiment of artillery, the former during the month of February being reduced to eight regiments; and that the only colonels mentioned in the said proceedings as reduced were Colonels William Heath and Abraham Buford, two of the twelve regiments being at the time without colonels. It does not appear that any other reduction of Virginia troops took place under the Resolutions 3d and 21st October than that at Chesterfield; nor does it appear that the regiment known as the Albemarle Guards was reduced by the Baron Steuben or by any other official authority under the Resolutions aforesaid. The ancient writing referred to is among the official papers of the first auditor's office of the State of Virginia; it is not signed or authenticated by any person, but was placed among the official records not long subsequent to the proceedings of the board, and has always been treated by the officers having it in charge as an authentic record of the proceedings of the board.

"9. No certificate of indebtedness, as prescribed by the Resolution March 22, 1783 (4 Jour. Cong. p. 178), was ever issued to Colonel Taylor by the superintendent of finance for the commutation of five years' full pay, instead of the half-pay for life given to officers of the Continental army by the previous Resolution, October 21, 1780; nor by the paymaster-general, as prescribed by the Resolution 4th July, 1783 (5 Jour. Cong. p. 237).

"On the 30th July, 1783, the State of Virginia, by the auditor of public accounts, pursuant to an Act of Assembly, passed at the November Session, 1781 (10 Hening, Stat. 462), settled the account of Colonel Taylor for the balance of his full pay, commonly known as [120] 'depreciation pay,' and issued to him evidence of indebtedness for £679 19*s.* 2*d.*, this being for his services as lieutenant-colonel from the 24th December, 1778, to the 5th March, 1779, and for his services as colonel from the 5th March, 1779, to the 15th June, 1781. And at various times subsequent to the 27th November, 1783, the State of Virginia, by the proper officers, issued to Colonel Taylor land warrants for eight years of service as an officer in the Continental army.

"The foregoing payment of the State of Virginia of £679 19*s.* 2*d.* was one of the payments of that State to continental officers subsequently assumed and refunded to the State by the United States. On the 4th of February, 1850, the commissioner of pensions issued to the administrator of Colonel Taylor's estate a land warrant for services as colonel in the Continental army.

"10. The five years' full pay authorized by the Resolution 22d March, 1783 (4 Jour. Cong. p. 178), amounted, for a colonel of infantry, to the sum of $4,500.

"11. On the 19th day of March, 1834, John H. Smith, commissioner, reported to the governor of the Commonwealth of Virginia, in the case of the heirs of Francis Taylor, in the following words:

"'*Heirs of Francis Taylor, Colonel Continental.*

"'Colonel Taylor has received land for a service of eight years as major.

"'He was colonel in the continental service, and ought to have been allowed land in that character.

"'There is no proof of his being entitled to land for a longer time than eight years.

"'His heirs are entitled to the difference between the bounty to a colonel and that to major for a service of eight years.

"'This claim has been reported in List No. 2, which has been printed by order of the House of Delegates.

"'Respectfully submitted,

"'John H. Smith, Comr., etc.

"'March 19th, 1834.

"'To his Excellency Governor Floyd.'

"The name of Francis Taylor was reported with the rank of colonel in the continental line for a service of eight years by John H. Smith, commissioner, in List No. 2, 'of officers of the Virginia continental and state lines,' etc., 'whose names appear on the Army Register,' and that said List No. 2 was reported by the governor in his message to the House of Delegates of the Commonwealth of Virginia, and was by them ordered printed in 1834, as Executive Doc. No. 31.

"Subsequently the governor of the Commonwealth of Virginia rendered his decision on the report of the commissioner in the case of the heirs of Francis Taylor in the following words:

"'To the heirs of Francis Taylor for his services as colonel in the continental line from October 1, 1775, to the close of the war:

"'*Ordered*, That the register issue warrants accordingly, if not already drawn.'

"And upon the foregoing findings of fact the court decides as conclusions of law—

"(1.) The foregoing circumstantial facts set forth in finding 8, taken in connection with the contemporary Resolutions of the Continental Congress and the historical events of the war occurring during the same period, are not sufficient evidence to authorize or sustain a finding of the ultimate fact that a portion of the soldiers of Colonel Taylor's regiment of guards re-enlisted for the war and became soldiers in the continental service without the limitations attached to their original enlistment under the Resolution 9th January, 1779.

"(2.) The facts set forth in all of the findings are not sufficient to authorize or sustain a find-

ing of the ultimate fact that Colonel Taylor's regiment of guards was reduced on the 15th June, 1781, under and in pursuance of the Resolutions 3d and 21st October, 1780 (3 Jour. Cong. pp. 532-538).

"(3.) The claimant, upon the foregoing findings, is not entitled to judgment under and by virtue of the provisions of the Act 5th July, 1832 (4 Stat. at L. p. 563).

"(4.) The report of the commissioner of the State of Virginia set forth in finding 11, though approved and adopted by the governor of that State, is neither obligatory in law, nor conclusive as evidence, against the United States."

On the 14th of March, 1887, after the 11th finding of fact had been filed, the claimant moved to amend it by prefixing thereto the following:

"On the 11th day of March, 1834, the General Assembly of the Commonwealth of Virginia passed an Act in these words:

"'*Be it enacted by the General Assembly*, That John H. Smith be, and he is hereby, appointed and constituted a commissioner, whose duty it shall be to continue the examination directed under a Resolution of the General Assembly of the 21st day of February, 1833, touching the revolutionary documents of this Commonwealth, and he shall lay before the governor any information he may discover as to any unsatisfied revolutionary claims of this Commonwealth on the government of the United States.

"'It shall, moreover, be the duty of the said commissioner to examine all claims for military land bounties, not heretofore decided on, which may arise under any existing law or resolution of the General Assembly, and report the facts relating to the same, together with any remarks which he may deem pertinent and proper, to the governor of this Commonwealth, whose decision thereupon shall be final.'"

The court made on this application the following ruling: "Inasmuch as the supreme court takes judicial cognizance of statutes, state as well as national, and the practice of finding state laws would be an inconvenience, this request is refused."

At the same time the claimant asked the court to find the following fact: "12. Colonel Francis Taylor was an officer in the continental service on the 22d day of March, 1783, and continued therein as such officer to the end of the war." On that application the court made the following ruling: "Inasmuch as this finding involves a deduction from specific facts and circumstances which, so far as they are established by the evidence, are set forth in the previous findings, and really involves a conclusion of law, it is refused."

The claim of the plaintiff now made before us is for the sum of $4,500, being the amount of five years' full pay to Colonel Francis Taylor as a colonel of infantry, as being authorized by the Resolution of the Continental Congress of March 22, 1783 (4 Jour. Cong. p. 178), mentioned in finding 10, with interest thereon from September 3, 1783, the date of the final treaty of peace between the United States and Great Britain, at the rate of six per cent per annum, amounting in the aggregate to $32,310. This claim is founded upon the view that Colonel Taylor was in the military service, in the continental line, to the close of the War of the Revolution in 1783.

The Resolution of Congress of March 22, 1783, was as follows: "Whereas the officers of the several lines under the immediate command of his excellency General Washington, did, by their late memorial transmitted by their committee, represent to Congress that the half-pay granted by sundry resolutions was regarded in an unfavorable light by the citizens of some of the States, who would prefer a compensation for a limited term of years, or by a sum in gross, to an establishment for life; and did, on that account, solicit a commutation of their half-pay for an equivalent in one of the two modes above mentioned, in order to remove all subject of dissatisfaction from the minds of their fellow-citizens; and whereas Congress are desirous, as well of gratifying the reasonable expectations of the officers of the army, as of removing all objections which may exist in any part of the United States, to the principle of the half-pay establishment, for which the faith of the United States hath been pledged; persuaded that those objections can only arise from the nature of the compensation, not from any indisposition to compensate those whose services, sacrifices and sufferings have so just a title to the approbation and rewards of their country:

"*Therefore, resolved*, That such officers as are now in service, and shall continue therein to the end of the war, shall be entitled to receive the amount of five years' full pay in money, or securities on interest at six per cent per annum, as Congress shall find most convenient, instead [124
of half-pay promised for life by the Resolution of the 21st day of October, 1780; the said securities to be such as shall be given to other creditors of the United States, provided it be at the option of the lines of the respective States, and not of officers individually in those lines, to accept or refuse the same; and provided also that their election shall be signified to Congress through the commander-in-chief, from the lines under his immediate command, within two months, and through the commanding officer of the southern army, from those under his command, within six months, from the date of this Resolution:

"That the same commutation shall extend to the corps not belonging to the lines of particular States, and who are entitled to half-pay for life as aforesaid; the acceptance or refusal to be determined by corps, and to be signified in the same manner, within the same time as above mentioned:

"That all officers belonging to the hospital department, who are entitled to half-pay by the Resolution of the 17th day of January, 1781, may collectively agree to accept or refuse the aforesaid commutation, signifying the same through the commander-in-chief within six months from this time; that such officers as have retired at different periods, entitled to half-pay for life, may collectively, in each State of which they are inhabitants, accept or refuse the same; their acceptance or refusal to be signified by agents authorized for that purpose, within six months from this period; that with respect to such retiring officers, the com-

mutation, if accepted by them, shall be in lieu of whatever may be now due to them since the time of their retiring from service, as well as of what might hereafter become due; and that so soon as their acceptance shall be signified, the superintendent of finance be, and he is hereby, directed to take measures for the settlement of their accounts accordingly, and to issue to them certificates bearing interest at seven per cent. That all officers entitled to half-pay for life not included in the preceding Resolution may also collectively agree to accept or refuse the aforesaid commutation, signifying the same within six months from this time."

[125] The Resolution of October 21, 1780 (3 Jour. Cong. p. 538), referred to in the Resolution of March 22, 1783, was preceded by another Resolution of October 3, 1780 (3 Jour. Cong. p. 532). The material provisions of these Resolutions are set forth in the opinion of the Court of Claims (15 Ct. Cl. 514), in the terms contained in the margin.*

[126] It is apparent, from the conclusions of law (1) and (2) and the opinion of the Court of Claims, that the question litigated before that court was the ultimate fact, whether a portion of the soldiers of Colonel Taylor's regiment of Albemarle Guards (which regiment was originally raised for a service of one year, and was disbanded June 15, 1781) re-enlisted for the war and became soldiers in the continental service, without the limitations attached to their original enlistment under the Resolution of the Continental Congress of January 9, 1779 (3 Jour. Cong. p. 179). That Resolution was as follows: "*Resolved*, That a battalion, consisting of 600 men, properly officered, be forthwith raised on continental establishment in Virginia, for the space of one year from the time of their enlistment, unless sooner discharged, under the direction of the governor and council of that State, who are hereby empowered to appoint the officers of the said battallion out of those of the Virginia line who have been left out of the late arrangement of the Continental army, as far as their numbers will reach; the regiment to consist of one lieutenant-colonel commandant and captain, one major and captain, six captains, one captain lieutenant, seven lieutenants, nine ensigns, one surgeon, one surgeon's mate, eight companies of 75 men each, including corporals, three sergeants, one drum and one fife to each company:

"That these troops be stationed at, and not removed (except to such distances as the duty of the post may require) from, the barracks in Albemarle County, as guards over the convention troops; that they receive the usual pay of the Continental army, and a suit of clothes as a bounty to each non-commissioned officer and private:

"That as soon as the said regiment shall be so far completed as to be able to do the duty of the post, the militia now in the service there be discharged."

It also appears that the further question was litigated, whether the court was authorized to find the ultimate fact that the regiment of guards, when it was disbanded on the 15th of June, 1781, was "reduced," within the terms of the Resolutions of October 3 and 21, 1780.

The opinion of the Court of Claims says of the claims in suit that it "has regretfully reached the conclusion that the moral probabilities on which it rests do not constitute such a foundation of circumstantial evidence as would sustain a verdict in a suit at *nisi prius*, or authorize a judgment in this court."

It further says: "During the period of the Revolution the term 'muster out' was not used, and troops, either individually or as organizations, are spoken of as 'discharged' when dismissed from the continental service. A regiment broken up and consolidated is spoken of as 'reduced,' and officers who were thereby thrown out and became unattached were designated as 'supernumeraries.' The consolidated regiments, moreover, are variously designated as 'the new arrangement,' the 'new establish-

---

*"The Continental Congress, by the Resolutions 3d October and 21st October, 1780 (3 Jour. Cong. pp. 532, 538), determined to reorganize the army in a manner which would involve the consolidation or reduction of regiments. The army, which was to be reduced, as designated by the Resolutions, then consisted of sixteen 'additional regiments,' some or all of which had not been 'annexed to the line' of any 'particular State,' of certain specifically-named irregular battalions and light corps, and of eighty battalions, known as the continental line. As to the 'sixteen additional battalions' and the irregular battalions specifically named, the Resolutions directed that they 'be reduced,' and the non-commissioned officers and privates 'be incorporated with the troops of their respective States.' This provision related to troops which had been raised directly by Congress, and its purpose was three-fold—to sweep them out of existence as organizations, to transfer the men to the regular regiments of the continental line, and to credit them to the quotas of their respective States.

"The Resolutions next provided for the further reorganization of the army at large—of the continental line. So far as this case is concerned, it is sufficient to say that they provided, in effect, that the eleven regiments in the line furnished by Virginia should be reduced to eight, and that no mention of the Albemarle Guards is made in the Resolutions.

"Having thus provided for the transfer of men and reduction of regiments, the Resolutions further declared with regard to the officers who would necessarily be thrown out by the reduction:

"'And whereas, by the foregoing arrangement many deserving officers must become supernumerary, and it is proper that regard be had to them:

"'*Resolved*, That from the time the reform of the army takes place they be entitled to half-pay for seven years, in specie or other current money equivalent, and also grants of land at the close of the war, agreeably to the Resolution of the 16th of September, 1776.

"'*Ordered*, That a copy of the foregoing arrangement of the army be sent to the commander-in-chief for his opinion thereon, and that, if there shall appear no material objections, the same be carried into immediate effect.' (Resolution October 3, 1780.)"

"'Congress resumed the consideration of the report of the committee on General Washington's letter of the 11th; and thereupon . . .

"'*Resolved*, That the whole of the troops be enlisted during the war, and join their respective corps by the 1st day of January next.

"'That the commander-in-chief and commanding officer in the southern department direct the officers of each State to meet and agree upon the officers for the regiments to be raised by their respective States, from those who incline to continue in the service; and where it cannot be done by agreement, to be determined by seniority, and make return of those who are to remain, which is to be transmitted to Congress, together with the names of the officers reduced, who are to be allowed half-pay for life. (Resolution, October 21, 1780.)"

ment,' the 'newly constructed corps,' etc. As to the term 'disbanded,' it seems to have had no technical significance. When a regiment was disbanded some of its soldiers may have been discharged and some transferred to other regiments, the term denoting simply the dissolution of the regiment."

The opinion says that Francis Taylor, who was then a major and supernumerary officer, thrown out by the consolidation of regiments in 1778, known as the White Plains arrangement, and liable to be called into service on the one hand and entitled to half-pay for life on the other, was assigned to the command of the Albemarle Guards, with the rank of lieutenant-colonel, that body being a regiment raised for the purpose of guarding the captured army of General Burgoyne, known as "the convention troops," the duty of guarding whom had been assigned to the State of Virginia; and that Francis Taylor was commissioned as colonel of the regiment by the governor of Virginia on the 5th of March, 1779. It also says that the regiment of guards was not designated in direct terms in the Resolutions of October 3 and 21, 1780, nor embraced in any general classification contained in those Resolutions; that it was raised for the space of one year from the time of enlistment, unless sooner discharged; that it was to be "stationed at, and not removed (except to such distance as the duty of the post may require) from, the barracks in Albemarle County, as guards over the convention troops;" that if it continued on that basis until it was discharged in June, 1781, its officers did not become supernumeraries under the Resolutions of October 3 and 21, 1780, for reorganizing the Continental army; that the guards would have passed out of existence before the time for reorganization arrived; and that as originally constituted, it had no enlisted soldiers who could be transferred to the regiments of the line, because its soldiers were enlisted for a limited period and for a limited, designated service, which service was to be rendered within prescribed, narrow territorial limits. The opinion states the question to be, therefore, whether the guards, or a portion of them, had re-enlisted for the war, under the Resolution of Congress of January 22, 1779 (8 Jour. Cong. p. 190), and became reduced, or consolidated with other regiments, under the Resolutions of October, 1780.

The Resolution referred to, of January 23, 1779, was "that the commander-in-chief be authorized and directed to take the most effectual measures to re-enlist for the continuance of the war all such of the continental troops as are not expressly engaged for that period;" and it promised new bounties and rewards "to each able-bodied soldier now in the service and who shall voluntarily re-enlist during the war."

The opinion then proceeds to consider the arguments adduced on the part of the claimant to show that the soldiers of the guards did re-enlist, and in regard to those arguments says: "The circumstances and coincidences so much relied upon, though they might appeal strongly, as establishing a moral probability, to a body possessed of legislative discretion, do not rise to the standard of legal evidence and are insufficient to authorize a judgment or sustain a verdict. No authenticated document nor official record has been produced to show that a single soldier of Colonel Taylor's regiment had re-enlisted for the war, or was liable to serve beyond the limits of the State of Virginia, or could have been transferred to regiments of the line, under the Resolutions. No such averment was made by Colonel Taylor himself in his petitions to Congress and the House of Delegates, nor is it alluded to in any contemporary report, letter or communication. Neither the House of Delegates, in 1783, nor the Secretary of War, General Knox, in 1791, regarded the Albemarle Guards as one of the regiments which had been reduced and consolidated under the Resolutions of 1780; and the silence of the Resolutions themselves, with all their particularity as to other commands, indicates that the Continental Congress were not aware of there being soldiers in the guards who were liable to be transferred to the line. Moreover, the time when the regiment was disbanded, June 15, 1781, was subsequent to the consolidation, of the Virginia regiments by the Baron Steuben (February), and the apparent cause of disbandment was not its consolidation with other regiments, but the termination of the service or duty for which it had been raised and on which it had been exclusively engaged. The mention of the guards in the Resolutions 9th February, 1780 (3 Jour. Cong. 432), and in the correspondence of Mr. Jefferson with General Washington, on which great stress was laid in the argument, was applicable to the regiment, whether its soldiers had re-enlisted or not; for it was proper and just that its soldiers, who were continuing in service beyond the period of their enlistment, and who, in all seeming likelihood, were to continue in the service of guarding the prisoners till the end of the war, should be credited to the quota of Virginia."

The opinion then gives the language of the Resolutions of February 9, 1780, which are set forth in the margin,* and proceeds: "The first [138 purpose of the Resolutions was manifestly to fix and determine the number of men which each State should contribute. The second likewise related to state quotas, being a declaration that all of the men whose terms of service would not expire before the last of Septem

*"*Resolved*, That for the ensuing campaign the States be respectively required to furnish, by draughts or otherwise, on or before the first day of April next, their respective deficiencies of the number of 35,211 men, exclusive of commissioned officers, which Congress deem necessary for the service of the present year.

"That the quotas of the several States be as follows:

New Hampshire	1,215
Massachusetts Bay	6,070
Rhode Island	810
Connecticut	3,238
New York	1,620
New Jersey	1,620
Pennsylvania	4,855
Delaware	405
Maryland	3,238
Virginia	6,070
North Carolina	3,640
South Carolina	2,430

[exclusive of blacks.]

"That all the men whose times of service do not expire before the last date of September next be counted towards the quotas of the States to which they respectively belong, whether they compose the battalions in the line of the several States, those of the additional corps, including the guards, the artillery and horse, or the regimental artificers in

ber following should be credited to their respective States, accompanied by a pledge that the men (not the officers and men) of certain irregular organizations, 'including the guards,' 'should be provided for, deemed and treated in the same manner' as the men in the line. The third provision was a recommendation to the States 'to make like provision for the officers and men' of the designated irregular corps, 'including the guards', as might be made 'for the officers and men of their respective battalions.' In the first provision the guards were referred to as a corps which had, or which might have had, men who should be credited on the quota of Virginia; in the third the officers and men of the guards are designated as among those for whom the States should make the same provision which they would make 'in pursuance of any resolution of Congress' for the officers and men of their respective battalions. It is true that the language of the Resolutions does seem to indicate that then, on the 9th February, 1780, there were men in the guards 'whose times of service do not expire before the last date of September next.' But it is also true that the words, 'including the guards,' in the first provision, may have been intended merely as a comprehensive, sweeping clause, equivalent to saying that all men whose times of service did not expire, in whatever corps they might be found, should be counted upon the quota of Virginia; and that the same words in the third provision were intended as new legislation, as a special provision to classify the guards, who were continuing to serve beyond their times of enlistment, with men whose enlistment would not expire 'before the last date of September next.' Be that as it may, we cannot accept the ambiguous phraseology of the Resolutions as authoritatively fixing the desired fact that the guards, or a portion of them, had re-enlisted for the war, and were liable to be reduced and consolidated under the Resolutions which followed in October of the same year. It was proper and just that these officers and men should be thus provided for; but it does not follow that such a recognition establishes the fact that they stood on the same basis of enlistment for the war and for service in the field that the troops of the line stood upon."

131]

Referring to the fact of the "depreciation pay" which Colonel Taylor received for the time he served as colonel of the guards, from March 5, 1779, to June 15, 1781, under the Resolution of Congress of April 10, 1780 (3 Jour. Cong. p. 447), which provided that "no person shall have any benefit of this Resolution, except such as were engaged during the war, or for three years, and are now in service," the opinion says: "Finally, the depreciation pay, which, under the Resolution 10th April, 1780, was only to be given to persons who 'had engaged to serve during the war, or for three years,' may well have been allowed to Colonel Taylor, as a supernumerary officer in actual service, by virtue of the terms of his original enlistment. But whatever the theory upon which it was allowed, we cannot infer from it the fact that Colonel Taylor's regiment, in whole or in part, had re-enlisted for the war, and that he had been reduced under the Resolutions of October, 1780. Upon the whole of the evidence we must rule that it is insufficient to sustain a verdict, and that we are not at liberty, when sitting in the stead of a jury, to pass upon it or to deduce ultimate facts from it."

[13

In the report of the case on the motion for a new trial (22 Ct. Cl. 116), it is stated that the purpose of the motion "is to establish the fact that Colonel Francis Taylor, of the Albemarle Guards, continued in the service of the Continental Congress after the disbandment of his command in June, 1781, until the end of the war." On the argument before this court, the counsel for the claimant contends that his right to recover depends upon the question whether Colonel Taylor continued in the service until the end of the war, or was retired before that time, and thereby became entitled to half-pay for life or to the commutation therefor; that, if it be found that he did not continue in the service until the end of the war, yet if he was retired or "reduced" at any time after October 21, 1780, he was entitled to half-pay for life, under the Resolution of that date; that, as he was entitled to half-pay for life as a major in 1778, the burden is upon the United States to show that he did not continue in the service to the end of the war; that it is not shown that he retired from the service in June, 1781, when the regiment was disbanded, or that he again became a supernumerary; that, although the law providing half-pay for life was modified by the Resolutions of October 8 and 21, 1780, while he still commanded the guards, yet the only modification was as to the time when the half-pay should begin, the modification being that it should begin at the time the officer was reduced or retired from the service; that this modification was in force in June, 1781, when the guards were disbanded; that under its provisions Colonel Taylor would have been entitled to half-pay for life in his new grade as colonel, to begin from the time the guards were disbanded, even if he had then retired from the service; that if he had been treated, in June, 1781, as a supernumerary major, he still would have been entitled from that date to half pay as a major; that there is no evidence that he was reduced in rank; and that he was a colonel in the Continental army on the 15th of June, 1781.

[13

In the brief presented to us on this appeal, the counsel for the claimant departs from the questions litigated in the Court of Claims, as shown by the first two conclusions of law and by the opinion of that court, and contends that the issue is as to whether or not Colonel Taylor continued in the service to the end of the war, or retired before that time; and that

the departments of the quartermaster-general and commissary-general of military stores, who, being credited to the States respectively, should be provided for, deemed and treated in the same manner with the men in the several state lines; and it is recommended to the several States to make like provision for the officers and men of the artillery, horse, additional corps, including the guards and regimented artificers, as may be made in pursuance of any resolution of Congress, for the officers and men of their respective battalions; with such exceptions, respecting the regimented artificers, as have been made by Congress in their Acts concerning them."

the ultimate fact to be proved is the duration of his own personal service, and not the duration of the service of any of the soldiers composing the guards. The contention appears to be that, under the Resolutions of October, 1780, a continuous service thoughout the war by Colonel Taylor, or his retirement before its close, entitled him to half-pay for life.

But this view is not tenable, because the Resolution of October 3, 1780, provided for half-pay for only seven years, and only for those officers who became supernumeraries under the arrangement provided for by that Resolution; and the Resolution of October 21, 1780, had reference only to the same officers, whose names were to be transmitted to Congress, and who are called therein "officers reduced,"—that is, in the language of the Resolution of October 3, 1780, officers "thrown out by the reduction." Those were the only officers who were by the latter Resolution "allowed half-pay for life." It is inaccurate, therefore, to say that the only change made by the Resolutions of October, 1780, was as to the time half-pay for life should begin.

Whether Colonel Taylor retired from service at the time the regiment was disbanded, or whether he continued in the service to the end of the war, he was not a "reduced" officer, within the meaning of that term, as used in the Resolutions of October, 1780. The scheme of those Resolutions did not apply to such organizations as that of the guards, nor to officers who were not "reduced" under those Resolutions, although they should continue in service to the end of the war. An officer who left the service at the end of the war was not "reduced."

The commission of Francis Taylor as colonel came from the governor of Virginia, and the order to discharge the soldiers of the regiment also came from him. It was an irregular regiment, created for a particular service and charged with a specific duty, to be performed in a designated locality. Service in the regiment was inconsistent with service in the Continental army. Such commission as Francis Taylor held prior to January 9, 1779, was practically revoked by the terms of the Resolution of Congress of that date, which authorized the governor and council of the State of Virginia to appoint the officers of the new regiment out of those of the Virginia line who had been "left out of the late arrangement of the Continental army," and by his acceptance of the appointment of lieutenant-colonel of the new regiment. His obligation to serve in the guards disqualified him from continuing as a supernumerary in the continental service. He could not perform duty under his commission as lieutenant-colonel or colonel of the guards, and at the same time hold himself in readiness to respond to a call to the field in the continental service.

The third conclusion of law made by the Court of Claims was that, upon its findings of fact, the claimant was not entitled to judgment under and by virtue of the provisions of the Act of July 5, 1832 (4 Stat. 563). In regard to that Statute, the court remarks, in its opinion, that it was intended to reimburse the State of Virginia for certain judgments which had been recovered against that State in her own courts, by officers, for half-pay, and to pay directly, without waiting for judgments to be recovered against the State, similar claims covered by the decision in *Lilly's Case*, 1 Leigh, 529; that the first section of that Act is limited to officers commanding in the "Virginia line;" that the second section refers to certain regiments and corps specifically designated by name, and does not specify the Albemarle Guards; that the third section directs the Secretary of the Treasury "to adjust and settle those claims" of officers "of the aforesaid regiments and corps, which have not been paid or prosecuted to judgments against the State of Virginia;" and that the benefits of the third section are clearly limited to the regiments and corps enumerated in the second section, and cannot be extended to the officers of other regiments or corps, though they may have a valid claim for half-pay against that State. It is said in the brief of the counsel for the claimant that it was never contended by him that that Act was anything more than a legislative interpretation of the several Resolutions of the Continental Congress which are in question, or that it created any new liability on the part of the United States. We concur in the view of the Court of Claims.

The fourth conclusion of law of that court was, that the report of the commissioner of the State of Virginia, set forth in finding 11, although approved and adopted by the governor of that State, was neither obligatory in law upon, nor conclusive as evidence against, the United States.

The State of Virginia, on the 11th of March, 1834 (Laws of 1834, chap. 6, p. 22), passed an Act appointing John H. Smith a commissioner, and making it his duty to continue an examination previously directed touching the revolutionary documents of the State, and to lay before the governor any information he might discover as to any unsatisfied revolutionary claims of the State on the government of the United States; and further making it his duty to examine all claims for military land bounties, not theretofore decided on, which might arise under any existing laws or resolutions of the General Assembly, and to report the facts relating to the same, together with any remarks he might deem pertinent and proper, to the governor of the State, "whose decisions thereupon shall be final." The decision of the governor on the report of the commissioner in the case of the heirs of Francis Taylor was made in September, 1850, and speaks of Taylor "as colonel in the continental line from October 1, 1775, to the close of the war." It is contended by the claimant that, under section 906 of the Revised Statutes, this decision of the governor of Virginia is conclusive against the United States, to show that Taylor continued in the continental service until the close of the war.

The provision of section 906 is, that records and exemplifications of books kept in any public office of any State, when authenticated in the manner provided by that section, "shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State" from which they are taken. The Court of Claims, in its opinion overruling the motion for a new trial (22 Ct. Cl. 116),

states that the clause above quoted from section 906 did not impart to the authenticated state record anything more than "faith and credit," and did not extend the effect of a decision against a State to the United States, nor make an award or judgment which might be final against a State "either obligatory in law, or conclusive as evidence, against the United States." We concur in this view.

It is also alleged for error by the claimant, that the Court of Claims refused to find that "Colonel Francis Taylor was an officer in the continental service on the 22d day of March, 1783, and continued therein as such officer to the end of the war," stating, as the ground of its refusal, that the proposed finding involved a deduction from specific facts and circumstances which, so far as they were established by the evidence, were set forth in the previous findings, and really involved a conclusion of law. The claimant contends that the finding requested was a conclusion of fact drawn from other specific facts and circumstances established by the testimony; that he was entitled to have that conclusion of fact found by the court; that such fact was not a question of law; and that, even if it were, the court erred in not finding it as a conclusion of law.

Perhaps under the rulings of this court in *United States* v. *Pugh*, 99 U. S. 265, 270 [25: 322, 323]; *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.* 107 U. S. 485, 503 [27: 337, 343]; *The Belgenland*, 114 U. S. 355, 362 [29: 152, 154], and *McClure* v. *United States*, 116 U. S. 145, 151 [29: 572, 574], the question involved in the proposed finding which was refused, was a question of law. In *United States* v. *Pugh*, one of the issues to be determined was, whether the proceeds of the sale of certain captured property belonging to the claimant had been paid
37] into the treasury. No direct proof to that effect had been given, but, if shown at all, it was by way of inference from certain circumstantial facts established by the evidence and set forth in the findings of the Court of Claims. This court said that the Court of Claims had found all the facts which had been established directly by the evidence; that those facts were "the results of evidence, and whether they establish the ultimate fact to be reached is, if a question of fact at all, to say the least, in the nature of a question of law;" that the inquiry presented was as to the legal effect of facts proved, not of the evidence given to make the proof; that the question of practice to be settled was whether, under the rule of this court as to appeals from the Court of Claims, the judgment of the latter court as to the legal effect of what might, perhaps not improperly, be called the ultimate circumstantial facts in a case, was final and conclusive, or whether it could be reviewed by this court; that, under that rule, this court could not consider the evidence, but its attention must be confined to the legal effect on the rights of the parties of the facts found by the Court of Claims; and that, in that way, the weight of the evidence was left for the sole consideration of that court, but the ultimate effect of the facts which the direct evidence had established was left open for review here on appeal. But whether the proposed finding which was refused in the present case was a conclusion of law from the facts already found, or an additional conclusion of fact, we are of opinion that the Court of Claims was correct in refusing to find it.

In the opinion of the Court of Claims in 22 Ct. Cl. 116, it is stated that part of the newly discovered evidence set up as a ground for a new trial consisted of "certain resolves and proceedings of the Continental Congress, and certain resolves of the General Assembly of Virginia, and official correspondence in the first and second volumes of the State Papers of Virginia." In regard to these papers the Court of Claims says that it is "of the opinion that if they had been put in evidence on the trial they would not have changed the result." We concur in this view, after having examined the papers.

This case is very much like that of Dr. Charles Taylor, reported as *Williams* v. *United States*, [1
18 Ct. Cl. 395. Charles Taylor was a surgeon's mate in the Continental army from 1776 to 1778, and then was reduced and became a supernumerary officer. In 1779 he was appointed a surgeon's mate in the regiment of Albemarle Guards, and accepted and held that position. In October, 1779, he was promoted to be surgeon in the regiment, and held that place until the regiment was discharged, June 15, 1781. He claimed five years' full pay as surgeon in the Virginia line of the Continental army, under the same Resolutions and proceedings that are now involved in the case of Colonel Francis Taylor. The Court of Claims decided that he could not have full pay as an officer of the guards and at the same time be entitled to half-pay as a reduced and supernumerary officer. The claim was rejected and there was an appeal to this court. The opinion of this court is reported as *Williams* v. *United States*, Book 25 U. S. L. ed. 309, and 14 Ct. Cl. 590. It is also referred to as No. 1058 on page ccxxviii. of the Appendix to 131 U. S. In its opinion, this court, in affirming the judgment of the Court of Claims, said that Dr. Charles Taylor did not continue in service until the end of the war, within the meaning of the Resolutions of October 21, 1780, and March 22, 1783; that, when he accepted his appointment in the regiment of the guards, in January, 1779, he ceased to be a supernumerary surgeon's mate, and became an active officer in that regiment; that, when it was discharged, because its term of enlistment had expired, he was out of service; that, when it was raised, the governor and council of Virginia were authorized by Congress to appoint its officers out of those in the Virginia line who were then supernumerary; and that the acceptance of an appointment in the new regiment took the officer out of his former position in the line.

Judgment affirmed.

ANTHONY F. SEEBERGER, Collector, *Plf. in Err.*,
v.
BERNARD CAHN ET AL.

(See S. C. Reporter's ed. 95-98.)

Customs Acts, interpretation of—manufactures of worsted—shoddy—duty on worsteds.

1. In the interpretation of Customs Acts, when goods of a particular kind, which would otherwise be comprehended in a class, are subjected to a distinct rate of duty from that imposed upon the class generally, they are taken out of that class for the purpose of the assessment of duties.
2. Though worsted is a product of wool, yet manufactures of worsted being subjected by the Customs Act of 1883 to different duties from those imposed on manufactures of wool, a manufacture of worsted cannot be considered as a manufacture of wool, within the meaning of that Statute.
3. Shoddy, though a product, and in some sense a manufacture, of wool, is not to be considered as itself wool, or a manufacture of wool, within the meaning of the Customs Act of 1883, for by that Act a duty is imposed on shoddy of ten cents per pound.
4. Goods called or known in the trade as worsteds, and composed mainly of worsted, but mixed with a small proportion of shoddy and cotton, are, by the Act of 1883, subject to the duty as manufactures of worsted, and not as manufactures of wool.

[No. 47.]
Argued Nov. 3, 1890. Decided Nov. 17, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review a judgment for plaintiffs, in an action against a Collector of Customs to recover back duties paid under protest. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an action of assumpsit against a Collector of Customs to recover back duties paid under protest. Plea, non-assumpsit. A jury was duly waived, and the case submitted to the court, which made the following finding of facts:

"The plaintiffs imported an invoice of cloths popularly known as 'diagonals,' which were classed by the Collector as woolens, and a duty of 35 cents per pound and 35 per cent *ad valorem* assessed upon them under paragraph 362, New Tariff Index. The plaintiffs claimed that the goods should have been classed as 'manufactures of worsted not otherwise provided for,' under paragraph 363, New Tariff Index, and the duty assessed at 24 cents per pound and 35 per cent *ad valorem*. The duties were paid under protest, appeal taken and suit brought, all in apt time. The goods in question are used mainly for the manufacture of men's wearing apparel, and are denominated or known to the trade as 'worsteds,' and are composed mainly of worsted, but the worsted fibre is mixed with at least 10 per cent of shoddy, this shoddy being made from wool, and some cotton. Worsted is made by combing the long-fibred wools, so that the fibres shall lie or be arranged alongside of each other; while wool is worked by carding, so as to interlock the fibres with each other. Shoddy is a separate manufacture of wool, and is added to the worsteds in question for the purpose of giving weight and body to the fabric."

Upon these facts the court gave judgment for the plaintiffs. 30 Fed. Rep. 425. The defendant sued out this writ of error.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.*, for plaintiff in error.

Messrs. **Edwin B. Smith** and *Charles Curie*, for defendant in error:

The commercial designation is to be ascertained in settling the meaning of the Tariff Laws.

Robertson v. *Salmon*, 130 U. S. 415 (32: 996); *Elliott* v. *Swartwout*, 35 U. S. 10 Pet. 153 (9: 379).

The fact that worsted was merely wool dealt with in a particular way did not make wool a component of an article containing worsted.

Riggs v. *Frick*, Taney, 105; *Chester* v. *Curtis*, 1 Blatchf. 499.

The recognition of worsted and its manufactures, in every tariff from 1818 down, makes its status *res judicata*. The position thus given it in law was long before assigned it in fact, in manufactures, commerce and common life.

Burnley, Wool and Wool-Combing, 3, 4; Beaumont, Wool and Worsted Manuf. 4, 5, § 4.

Though an article made of worsted and shoddy may be derived from wool, yet it is not made of wool.

Meyer v. *Arthur*, 91 U. S. 570 (25: 455).

No presumptions will be indulged by the court to exact any higher rate of duty than the terms of the statute clearly impose.

Hartranft v. *Weigmann*, 121 U. S. 616 (30: 1015), and citations; *Merritt* v. *Welsh*, 104 U. S. 694 (26: 896); *Morrill* v. *Jones*, 106 U. S. 467 (27: 268).

It is never very safe ground, in the construction of a statute, to give weight to views of its policy, which are themselves open to doubt and controversy.

Municipal Bldg. Soc. v. *Kent*, L. R. 9 App. Cas. 273; *Sutton* v. *Sutton*, L. R. 22 Ch. Div. 518.

Goods commercially known as worsteds should be so deemed for tariff purposes.

Swan v. *Arthur*, 103 U. S. 597 (26: 525); *Arthur* v. *Butterfield*, 125 U. S. 70 (31: 643).

Mr. Justice **Gray** delivered the opinion of the court:

The Act of March 3, 1883, chap. 121, under "Schedule K, Wool and Woolens" (22 Stat. 508, 509), imposes duties as follows:

"Woolen cloths, woolen shawls and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this Act, valued at not exceeding eighty cents per pound, thirty-five cents per pound and thirty-five per centum *ad valorem;* valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum *ad valorem*.

"Flannels, blankets, hats of wool, knit goods and all goods made on knitting-frames, balmorals, woolen and worsted yarns and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca, goat or other animals (except such as

are composed in part of wool), not specially enumerated or provided for in this Act, valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per pound, and not exceeding forty cents per pound, twelve cents per pound; valued at above forty cents per pound, and not exceeding sixty cents per pound, eighteen cents per pound; valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound; and in addition thereto, upon all the above-named articles, thirty-five per centum *ad valorem;* valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum *ad valorem.*"

In the interpretation of the Customs Acts, nothing is better settled than that words are to receive their commercial meaning; and that when goods of a particular kind, which would otherwise be comprehended in a class, are subjected to a distinct rate of duty from that imposed upon the class generally, they are taken out of that class for the purpose of the assessment of duties.

Of the two successive paragraphs in the Customs Act of 1883, upon which the parties respectively rely, the first imposes a certain scale of duties on "all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this Act;" and the second imposes a lower scale of duties on "all manufactures of every description, composed wholly or in part of worsted." It is hardly necessary to observe that the subsequent words inclosed in a parenthesis "(except such as are composed in part of wool)," evidently qualify only the intervening clause "the hair of the alpaca, goat or other animals," and have no bearing upon this case.

Though worsted is doubtless a product of wool, and might in some aspects be considered a manufacture of wool, yet manufactures of worsted being subjected by the second paragraph to different duties from those imposed by the first paragraph on manufactures of wool, it necessarily follows that a manufacture of worsted cannot be considered as a manufacture of wool, within the meaning of this Statute.

That shoddy, though a product, and in some sense a manufacture, of wool, is not to be considered as itself wool, or a manufacture of wool, within the meaning of the Statute, is clearly shown by the paragraph next preceding the two above quoted, which makes the duty on "woolen rags, shoddy, mungo, waste and flocks, ten cents per pound." *Lennig* v. *Maxwell*, 8 Blatchf. 125.

It being distinctly found, as matter of fact, that the goods in question are called or known in the trade as "worsteds," and are composed mainly of worsted, but mixed with a small proportion of shoddy and of cotton, the circuit court rightly held that they were subject to duty as manufactures of worsted, and not as manufactures of wool.

The cases of *Elliott* v. *Swartwout*, 35 U. S. 10 Pet. 137 [9: 373], and *Riggs* v. *Frick*, Taney, 100, are directly in point; and our conclusion is supported by many decisions of this court in analogous cases. *Homer* v. *Collector*, 68 U. S. 1 Wall. 486 [17: 688]; *Reiche* v. *Smythe*, 80 U. S. 13 Wall. 162 [20: 566]; *Movius* v. *Arthur*, 95 U. S. 144 [24: 420]; *Arthur* v. *Morrison*, 96 U. S. 108 [24: 764]; *Arthur* v. *Lahey*, Id. 112 [766]; *Arthur* v. *Stephani*, Id. 125 [771]; *Arthur* v. *Davies*, Id. 135 [810]; *Arthur* v. *Rheims*, Id. 143 [813]; *Swan* v. *Arthur*, 103 U. S. 597 [26: 525]; *Victor* v. *Arthur*, 104 U. S. 498 [26: 633]; *Robertson* v. *Glendinning*, 132 U. S. 158 [33: 298].

Judgment affirmed.

EDWARD F. LAWRENCE, Admr. of DAVID BALLENTINE, Deceased, ET AL., *Appts.*,
v.
HENRY M. RECTOR.

(See S. C. Reporter's ed. 139-141.)

Case affirmed—amount of recovery.

1. There is nothing in the testimony to change the conclusions of law heretofore reached by this court in this case. See 111 U. S. 276 (28: 427).
2. In a suit in equity to charge defendant as trustee of real property and compel a conveyance to plaintiff, where there is doubt as to the title, and as to the effect of an award by commissioners, and as to the good faith of all the parties, defendant is not liable to account for the rental value, but only for the actual receipts.

[No. 56.]

Argued Nov. 6, 7, 1890. Decided Nov. 17, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas, for the title of land and directing an accounting. *Decree modified and case remanded with instructions to enter a final decree establishing the title of the complainant, and decreeing to him possession, and adjudging that he recover a certain sum and interest.*

The facts are stated in the opinion.

Messrs. **Henry A. Gardner, Sam. W. Williams,** *Robert D. McFadon* and *Sol. F. Clark* for appellants.

Messrs. F. W. Compton, **A. H. Garland, U. M. Rose** and *G. B. Rose* for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

This is the second time this case has been to this court. It came first on demurrer to the bill, and the decision is reported in 111 U. S. 276 [28: 427]. The demurrer, which had been sustained in the circuit court, was overruled by this, and the case remanded with instructions to permit answer and proceed to proof. Obediently thereto answer was filed in the circuit court, and the case proceeded to proof and hearing. The history of the "Hot Springs" litigation, of which his is but a fragment, has been so often referred to in the opinions of this court, par-

ticularly in the case in 111 U. S., *supra*, that reference thereto now is superfluous; and in reference to the principal matter in controversy here, the title to the lots, it is enough to say that every material fact alleged in the bill was proved, and that nothing was developed in answer or testimony to disturb the conclusions of law heretofore reached by this court. The matter of title was established by the decree of the circuit court in accordance with the views of the law entertained and announced by this court, and there is nothing in the testimony to withdraw the case from the scope of that conclusion.

The circuit court entered a decree for title—also directed an accounting. That accounting, as finally settled, credited the defendant with the amount of taxes and assessments paid by him—the amount of purchase-money paid to the United States for the lots and the expenses incurred in obtaining the patent—and the amount due for improvements, on the basis of the lease which established the rights of the parties, and charged him with the money received on certificates from the government for buildings condemned and destroyed, and also the rental value of the premises from the time of the award of the commissioners to the date of the decree. We are of opinion that the rental value ought not to have been charged; that, under the peculiar circumstances of this case, having reference to the doubt that must have arisen as to the matter of title, to the prima facie effect of the award given by the commissioners and to the evident good faith of all the parties in reference thereto, the true measure of liability is not the rental value, but the actual receipts. This account, as stated by the circuit court, was as follows:

To rent of premises		$9,541 66
To amount due on certificates for condemned buildings		10,737 86
		$20,279 52
By amount of taxes and assessments paid	$2,306 98	
By amount purchase-money paid for lots	1,528 00	
By amount expenses in getting patent	112 35	
By amount for improvements as per covenant	8,666 67	
		$12,614 00
Balance due Rector		$7,665 52

This account should be modified so as to charge defendant with amount received on certificates for condemned buildings, $10,737.86, and other amounts actually received from the property, $5,659.07; total, $16,396.93. From which, deducting the credits allowed, there remains a balance of $3,782.93.

The decree of the Circuit Court will therefore be modified and the case remanded with instructions to enter a final decree, as heretofore, establishing the title of the complainant and decreeing to him possession, and adjudging that he recover of the defendants the sum of $3,782.93, with interest from the 11th day of November, 1886, the time of the final decree.

W. S. GURNEE, JR., ET AL., *Plffs. in Err.*, [141
v.
COUNTY OF PATRICK.

(See S. C. Reporter's ed. 141-145.)

Jurisdiction, repeal of law—order remanding cause to state court, not a final judgment—demurrer—Act of March 3, 1887.

1. If a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law.
2. An order remanding a cause from the circuit to a state court is not a final judgment or decree, within the terms of the Act of Feb. 25, 1889 (25 Stat. 693, chap. 236), and this court has no jurisdiction to review it.
3. An order of the circuit court remanding a cause to the state court is not a final judgment, within the meaning of that Act, although the circuit court sustained a demurrer to the declaration in remanding the cause, the demurrer having raised the point that the plaintiffs could not maintain their action because the court by law had no jurisdiction of the case.
4. The proviso in sec. 6 of the Act of March 3, 1887, that that Act shall not affect the jurisdiction over any suit removed from a state court before the passage of that Act, does not give this court jurisdiction over a writ of error from a judgment remanding a cause to a state court, when the suit was removed before the Act of 1887, but not remanded until afterwards.

[No. 57.]

Argued Nov. 7, 1890. Decided Nov. 17, 1890.

IN ERROR to the Circuit Court of the United States for the Western District of Virginia, to review an order of the Circuit Court remanding this cause to the state court for want of jurisdiction. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller:**

Plaintiffs in error are citizens of the State of New York, and the owners and holders of certain bonds of the County of Patrick in the [14
State of Virginia. The record shows that at a meeting of the board of supervisors for the County of Patrick, on April 7, 1884, "the Norfolk and Great Western Railroad Company, for the use and benefit of Walter S. Gurnee, Jr., and Augustus C. Gurnee, and Walter S. Gurnee, Jr., and Augustus C. Gurnee, assignees thereof," presented to the board "seventeen bonds of $1,000 each, executed by the County aforesaid to said railroad company and numbered, respectively, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 23, 24, 25, 29 and 30, and demanded payment of the interest due thereon to the first November, 1883, or a levy for said interest, and filed the following account for said interest, viz.: (Here follows account.) Which account said board of supervisors disallowed and refused to levy for in whole or in part." On the same day notice of appeal to the County Court of Patrick County from the decision of the board was given by the railroad company for the use and benefit of plaintiffs in error, and by plaintiffs in error as "assignees of said bonds," and the appeal perfected.

On May 6, 1884, the case was removed by plaintiffs in error into the Circuit Court of the United States for the Western District of Virginia, and on the 1st of July they filed their declaration in that court against the County. The defendant demurred, and on the 3d of May, 1887, the following order was entered: "This day came the parties, by their attorneys, and in pursuance of an agreement by counsel submitted in vacation to the judges of this court for their decision, the demurrer filed by the defendant to the plaintiffs' declaration and to each count thereof and the said defendant's demurrer to the plaintiffs' declaration and each count thereof being argued, and because it seems to the court that the plaintiffs' declaration and each and every count thereof are insufficient in law, it is considered by the court that the demurrer aforesaid be sustained, and, the record showing that this court has not jurisdiction in this case, it is ordered that the same be remanded to the County Court of Patrick County, Virginia." On the next day it was further ordered: "It being suggested to the court that it is the purpose of the plaintiffs to ask for a writ of error to the final order entered on yesterday remanding this case to the County Court of Patrick County on the ground that this court has no jurisdiction thereof, on the motion of the plaintiffs the order herein entered on yesterday, the 3d of May, 1887, be suspended for ninety days from the rising of this court." The pending writ of error was subsequently allowed.

43]

Messrs. A. T. Britton, **A. B. Browne** and *Henry Wise Garnett*, for plaintiffs in error:

The diverse citizenship of the parties is plainly established.

Sec. 639, Rev. Stat., was not repealed by the Removal Act of March 3, 1875.

Hess v. *Reynolds*, 113 U. S. 73 (28: 927); *Baltimore & O. R. Co.* v. *Bates*, 119 U. S. 464 (30: 436); *Lexington* v. *Butler*, 81 U. S. 14 Wall. 282 (20: 809); *Delaware County* v. *Diebold S. & L. Co.* 133 U. S. 473 (33: 674); *Claflin* v. *Commonwealth Ins. Co.* 110 U. S. 81 (28: 76); *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 387 (19: 736).

The court declined to hear further argument, but granted leave to file brief on question of jurisdiction.

Mr. John W. Daniel, for defendant in error:

The suit was improperly removed to the United States court.

American Bible Soc. v. *Price*, 110 U. S. 61 (28: 70); *Case of the Sewing Machine Cos.* 85 U. S. 18 Wall. 553 (21: 914); *Vannevar* v. *Bryant*, 88 U. S. 21 Wall. 41 (22: 476); *Hancock* v. *Holbrook*, 119 U. S. 586 (30: 538); *Cambria Iron Co.* v. *Ashburn*, 118 U. S. 54 (30: 60); *Jefferson* v. *Driver*, 117 U. S. 272 (29: 897); *Myers* v. *Swann*, 107 U. S. 546 (27: 583); *American Bible Soc.* v. *Grove*, 101 U. S. 610 (25: 847); *Thouron* v. *East Tennessee, V. & G. R. Co.* 38 Fed. Rep. 673; Dillon, Removal of Causes (5th ed.) § 48.

Supplemental points for plaintiffs in error on jurisdiction:

The jurisdiction of the supreme court is not taken away by the Act of March 3, 1887.

Hess v *Reynolds*, 113 U. S. 73 (28: 927).

The case of *Morey* v. *Lockhart*, 123 U. S. 56, 57 (31: 68), does not militate against this view.

The judgment of the circuit court was final upon the merits, and brings the case within the Act of February 25, 1889.

The question of jurisdiction could only be raised by plea. The general demurrer filed herein, under the clear terms of the Virginia Code, was a waiver of all right to interpose any objection to the jurisdiction.

Code Va. 1873, tit. 51, chap. 167, §§ 20, 1092; Code 1887, §§ 3, 260, 778; *Washington & N. O. Tel. Co.* v. *Hobson*, 15 Gratt. 122; *Henderson* v. *Stringer*, 6 Gratt. 130-133; *Smith* v. *Lloyd*, 16 Gratt. 295, 308; *Roe* v. *Crutchfield*, 1 Hen. & M. 361.

The ruling of the circuit court in sustaining a demurrer to a declaration and rendering judgment for the wrong party may be re-examined in this court by a writ of error.

Rogers v. *Burlington*, 70 U. S. 3 Wall. 654 (18: 79); *Suydam* v. *Williamson*, 61 U. S. 20 How. 427 (15: 978).

The suit was removable under the law.

Delaware County v. *Diebold S. & L. Co.* 133 U. S. 473 (33: 674); *Gaines* v. *Fuentes*, 92 U. S. 10, 21, 22 (23: 524, 528); *Ellis* v. *Davis*, 109 U. S. 485, 497 (27: 1006, 1010).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Prior to the Act of March 3, 1875, there could be no appeal or writ of error from an order of a circuit court remanding a suit which had been removed, because such an order was not a final judgment or decree in the sense which authorized an appeal or writ of error. *Chicago & A. R. Co.* v. *Wiswall*, 90 U. S. 23 Wall. 507 [23: 103]. But it was provided by that Act that the order of a circuit court, dismissing or remanding a cause to a state court, should be reviewable by the supreme court on writ of error or appeal as the case might be. 18 Stat. 471, chap. 137, § 5. By section 6 of the Act of March 3, 1887 (24 Stat. 552, 555, chap. 373), as corrected by the Act of August 13, 1888 (25 Stat. 433, chap. 866), the provision to that effect was repealed, and it was also provided by the Act that "no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." Section 6 was accompanied by the proviso "that this Act shall not affect the jurisdiction over or disposition of any suit removed from a court of any State, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this Act."

In *Morey* v. *Lockhart*, 123 U. S. 56 [31: 68], it was held that this court had no power to review on appeal or writ of error an order of the circuit court remanding a cause to a state court, when it was commenced, removed and remanded after the Act of March 3, 1887, went into effect. In *Wilkinson* v. *Nebraska*, 123 U. S. 286 [31: 152], it was decided that the proviso in section six of the Act of March 3, 1887, related only to the jurisdiction of the circuit courts of the United States, and did not confer upon this court jurisdiction over a writ of error from a judg-

[1

ment remanding a cause to a state court, when the suit was begun and removed before the Act of 1887, but not remanded until afterwards. In *Sherman* v. *Grinnell*, 128 U. S. 679 [31: 278], the order to remand was made while the Act of March 3, 1875, was in force, but the writ of error was not brought until after the passage of the Act of March 3, 1887, and it was held that this court could not take jurisdiction. The general rule was applied in these cases that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law. *Baltimore & P. R. Co.* v. *Grant*, 98 U. S. 398, 401 [25: 231, 232]. The opinions in all of them were delivered by *Mr. Chief Justice* Waite, and they are decisive upon the disposition of the case before us.

This case was commenced and removed into the circuit court before the Act of 1887 went into effect, but the suit was remanded afterwards. In this respect the situation is the same as in *Wilkinson* v. *Nebraska*, *supra*.

By the Act of February 25, 1889 (25 Stat. 693, chap. 236), it was provided that in all cases where a final judgment or decree should be rendered in a circuit court of the United States in which there was a question involving the jurisdiction of the court, the party against whom the judgment or decree was rendered should be entitled to an appeal or writ of error to this court, without reference to the amount of such judgment or decree; but where it did not exceed the sum of $5,000. the question of jurisdiction should alone be reviewable. In *Richmond & D. R. Co.* v. *Thouron*, 134 U. S. 45 [33: 871], we held that a remanding order was not a final judgment or decree, within the terms of that Act, and that this court had no jurisdiction to review it.

It is contended, however, that the order of the circuit court here was such a final judgment, because the circuit court sustained the demurrer in remanding the cause, but the position is untenable. The demurrer brought into consideration the contention that the plaintiffs could not maintain their action because the court by law had no jurisdiction of their case, and thereupon the cause was remanded, and having been remanded, *this writ of error cannot be maintained, and is therefore dismissed.*

HENRY DEVERE ET AL., *Appls.*, *v.* STEAMSHIP HAVERTON.

(See S. C. *The Steamship Haverton*, Reporter's ed. 145, 146.)

Jurisdictional amount.

In a suit to recover the value of a boat and goods thereon sunk in a collision, where the value of the boat and goods, which were a total loss, was $6,057, and a decree was entered for $3,028.50, one half the value, the matter in dispute in this court is the difference between $6,057 and $3,028.50, and this court has no jurisdiction.

[No. 60.]

Argued and Submitted Nov. 7, 1890. Decided Nov. 17, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, in favor of libelants, in a suit in admiralty to recover the value of a pilot boat and goods on board of her sunk in a collision. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller**:

This was a libel filed to recover the value of the pilot-boat Mary and Catherine, sunk in a collision, and also of certain personal effects on board of her at the time. The value of the pilot-boat was determined by the circuit court to have been $5,025, and of the personal effects, all of which were a total loss, to have been $1,032. This made a total valuation, according to the findings, of $6,057. For this amount a decree had been entered by the district court, but on appeal the circuit court awarded the sum of $3,028.50, one half the valuation. From that decree an appeal was taken to this court by the libelants.

Mr. **James Parker** for libelants and appellants.

Mr. **J. McConnell** for respondents.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Assuming, as we must do, the total value to [146
have been $6,057, the matter in dispute in this court is the difference between that value and the decree, namely, $3,028.50. We have, therefore, no jurisdiction. *Dows* v. *Johnson*, 110 U. S. 223 [28: 128]. On the argument it was urged with much earnestness on behalf of appellants, that it is within our power, upon the facts as found, to declare the Mary and Catherine entirely and solely in fault, and take away from the libelants what the circuit court awarded them, and that jurisdiction can be maintained by adding the amount the circuit court did not allow to the amount that it is suggested libelants might thus be deprived of. But as the claimants did not appeal, and as, if they had, the worst that could happen to libelants through our action on such cross-appeal would be the taking away of less than $5,000, the suggestion is entitled to no consideration.

There is nothing in the cases of *The Hesper*, 122 U. S. 256 [30: 1175], or *The Alaska*, 130 U. S. 201 [32: 923], to the contrary. In the former, the district court awarded $8,000, while the circuit court gave only $4,200, but that was a case of salvage, in which the value of the property saved was over $100,000, and compensation was sought for the salvage in such sum proportioned to the value as the court might deem meet and reasonable. There was no finding of the circuit court that bound us, and in case of reversal a much larger sum than the jurisdictional amount might have been awarded, in addition to the sum which was. The difference between the judgments of the two courts in no respect represented the amount in dispute. Moreover, that case involved only the power of the circuit court on appeal, and not that of this court. In the latter case, the stipulation given to release the vessel libeled was for the sum of $25,000, for the benefit of five parties, each of whose claim for damages was $10,000, and some of whom might recover more than $5,000, so that the

amount involved in each case, on the question of jurisdiction, was $10,000, which was of course sufficient.

This appeal must be dismissed, and it is so ordered.

---

[15]

F. B. YORK, *Plff. in Err.*, v. STATE OF TEXAS.

(See S. C. Reporter's ed. 15-21)

Fourteenth Constitutional Amendment—state law.

1. Legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, does not deprive him of liberty or property, within the prohibition of the Fourteenth Constitutional Amendment.
2. The mere entry of a judgment for money, which is void for want of proper service, does not deprive the defendant of liberty or property.

[No. 999.]

Submitted Oct. 21, 1890. Decided Nov. 3, 1890.

IN ERROR to the Supreme Court of the State of Texas, to review a judgment of that court affirming a judgment of the District Court of Travis County, Texas, in which defendant, being a nonresident of the State of Texas, was not served with process in the State, but a notice was served upon him at his residence in Missouri, in accordance with the statutes of Texas. *Affirmed.*

The facts are stated in the opinion.

Mr. **Rufus H. Thayer,** for plaintiff in error:

Since the decision made in the case of *Pennoyer* v. *Neff*, 95 U. S. 723 (24: 569), it must be held that service made without this State, as it was upon appellant, is not sufficient to confer jurisdiction on a court of this State to render a mere personal judgment against one, a citizen of and resident in another State.

Freeman v. *Alderson*, 119 U. S. 185 (30:372); *Hart* v. *Sansum*, 110 U. S. 151 (28:101); *Harkness* v. *Hyde*, 98 U. S. 476 (25:237); *Cooper* v. *Reynolds*, 77 U. S. 10 Wall. 308 (19:931).

The appearance of plaintiff in error in response to the notice served on him, and under protest, for the sole purpose of questioning the jurisdiction of the District Court of Travis County, in no sense bound him to submit to the jurisdiction of that court.

Harkness v. *Hyde*, 98 U. S. 476 (25:237); *Commercial & R. Bank* v. *Slocumb*, 39 U. S. 14 Pet. 60 (10:354); *Raquet* v. *Nixon*, Dallam (Tex.) 386; *De Witt* v. *Monroe*, 20 Tex. 289; *Hagood* v. *Dial*, 48 Tex. 625; *Robinson* v. *Schmidt*, 48 Tex. 19; *P. & A. L. Ins. Co.* v. *Fitzgerald*, White & Wilson (Tex.) 785; *United States* v. *Yates*, 47 U. S. 6 How. 605 (12:575); *Decker* v. *New York B. & P. Co.* 11 Blatchf. 76; *Pomeroy* v. *New York & N. H. R. Co.* 4 Blatchf. 120; *Day* v. *Newark India-Rubber Mfg. Co.* 1 Blatchf. 628; *Parrott* v. *Alabama L. Ins. Co.* 4 Woods, 355; *Cunningham* v. *Goelet*, 4 Denio, 72; *Wheelock* v. *Lee*, 74 N. Y. 495; *Sullivan* v. *Frazee*, 4 Robt. 616; *McNab* v. *Bennett*, 66 Ill. 158; *Aultman* v. *Steinan*, 8 Neb. 109; *Wright* v. *Boynton*, 37 N. H. 18; *Branner* v. *Chapman*, 11 Kan. 121; *Wynn* v. *Wyatt*, 11 Leigh, 584; *Cooper* v. *Smith*, 25 Iowa, 269; Hawes, Jurisdiction, § 19; 1 Am. & Eng. Encyclop. Law, subtitle *Appearance*, pp. 182, 183.

Mr. **Jas. S. Hogg,** *Atty-Gen.* of the State of Texas, for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

On the 14th day of November, 1888, a personal judgment was rendered in the District Court of Travis County, Texas, against the [16 plaintiff in error, which judgment was subsequently affirmed by the Supreme Court of the State. Error is now alleged in this, that the district court had no jurisdiction of the person of the defendant. The record discloses that on October 20, 1885, the defendant leased from the State certain school lands, at a stipulated rental. The lease provided that in all suits thereunder the venue should be laid in Travis County, Texas. The State filed its petition on February 15, 1888, alleging nonpayment of the rent due in 1886 and 1887. The defendant being a nonresident, a citizen of St. Louis, Missouri, a notice in accordance with the provisions of the statute was served upon him personally in that city. No question is made but that the service was in strict conformity with the letter of the statute. On March 9, 1888, the defendant appeared by his counsel and filed a special plea, challenging the jurisdiction of the court, on the ground that he was a nonresident and had not been served personally with process within the limits of the State. This plea was overruled. Thereafter, and on the 5th day of October, 1888, the defendant appeared by his attorneys in open court, demanded a jury, paid the jury fee and had the cause transferred to the jury docket. On the 6th day of October he again filed a plea to the jurisdiction, on the same ground, which was also overruled. On the 14th day of November, when the cause was reached and called for trial, he again appeared by his attorneys, waived his right of trial by a jury and his demand of a jury, and declined to further answer to the cause, relying solely upon his plea to the jurisdiction. The court thereupon proceeded to render judgment against him, which, as heretofore stated, was affirmed by the supreme court.

It was conceded by the district and supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the supreme court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto.

It must be conceded that such statutes contravene the established rule elsewhere—a rule [1 which also obtained in Texas at an earlier day, to wit, that an appearance which, as expressed,

is solely to challenge the jurisdiction is not a general appearance in the cause, and does not waive the illegality of the service or submit the party to the jurisdiction of the court. *Harkness* v. *Hyde*, 98 U. S. 476 [25:237]; *Raquet* v. *Nixon*, Dallam (Tex.) 386; *De Witt* v. *Monroe*, 20 Tex. 289; *Hagood* v. *Dial*, 43 Tex. 625; *Robinson* v. *Schmidt*, 48 Tex. 19.

The difference between the present rule in Texas and elsewhere is simply this: Elsewhere the defendant may obtain the judgment of the court upon the sufficiency of the service, without submitting himself to its jurisdiction. In Texas, by its statute, if he asks the court to determine any question, even that of service, he submits himself wholly to its jurisdiction. Elsewhere, he gets an opinion of the court before deciding on his own action. In Texas, he takes all the risk himself. If the service be in fact insufficient, all subsequent proceedings, including the formal entry of judgment, are void; if sufficient, they are valid. And the question is, whether under the Constitution of the United States the defendant has an inviolable right to have this question of the sufficiency of the service decided in the first instance and alone.

The Fourteenth Amendment is relied upon as invalidating such legislation. That forbids a State to "deprive any person of life, liberty or property without due process of law." And the proposition is, that the denial of a right to be heard before judgment simply as to the sufficiency of the service operates to deprive the defendant of liberty or property. But the mere entry of a judgment for money, which is void for want of proper service, touches neither. It is only when process is issued thereon, or the judgment is sought to be enforced, that liberty or property is in present danger. If at that time of immediate attack protection is afforded, the substantial guarantee of the Amendment is preserved, and there is no just cause of complaint. The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties [21] and litigants. *Antoni* v. *Greenhow*, 107 U. S. 769 [27:468]. It certainly is more convenient that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere convenience is not substance of right. If the defendant had taken no notice of this suit, and judgment had been formally entered upon such insufficient service, and under process thereon his property, real or personal, had been seized or threatened with seizure, he could by original action have enjoined the process and protected the possession of his property. If the judgment had been pleaded as defensive to any action brought by him, he would have been free to deny its validity. There is nothing in the opinion of the supreme court or in any of the statutes of the State, of which we have been advised, gainsaying this right. Can it be held, therefore, that legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process and therefore void, deprives him of liberty or property, within the prohibition of the Fourteenth Amendment? We think not.

The judgment is affirmed.

Dissenting: *Mr. Justice* **Bradley** and *Mr. Justice* **Gray.**

DAVID J. HENNESSY, *Appt.*, [7

v.

GEORGE V. BACON ET AL.

(See S. C. Reporter's ed. 78-85.)

Rescission of contract—notice—compromise of claim.

1. If a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties.
2. A compromise of a disputed claim, the parties dealing with each other upon terms of equality, holding no relations of trust or confidence to each other, and each having knowledge, or the opportunity to acquire knowledge, of every fact bearing upon the validity of their respective claims, ought not to be overthrown, even if the court should be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained.

[No. 1103.]

Submitted Oct. 21, 1890. Decided Nov. 10, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Minnesota, in a suit for partition. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

It was adjudged below (35 Fed. Rep. 174) that the appellees Bacon and Rogers each owned in fee an undivided one fourth, and the appellant Hennessy an undivided one half, of certain lands in Washington County, Minnesota, and that partition thereof be made between them upon that basis. Of this decree the appellant complains, his contention being that he holds the legal title to an undivided half of the lands, and that the appellees should be required to surrender to him the title to the other half.

It appears that the lands originally belonged to George N. Chittenden of Illinois, and that by written contract of date March 27, 1882, he [sold them to Bacon, agreeing to convey to the latter, his heirs and assigns, "by a good and sufficient deed of warranty, on or before the 27th day of June, 1882," upon the punctual payment of the consideration, $4,400, at such time as Chittenden should execute a sufficient deed of general warranty. The contract provided that if Bacon failed to pay the consideration, then the contract should be void, "time being of the essence of this agreement."

On the 27th of June, 1882, Bacon,—his wife uniting with him,—for the consideration of five hundred dollars (of which one hundred

dollars was paid in cash), assigned and transferred to Hennessy all his right, title and interest in the agreement with Chittenden. The contract of assignment provided that Hennessy should receive a good, clear and perfect title to the lands through a good warranty deed, with usual covenants, running from Chittenden and wife to Hennessy, or from Bacon and wife to Hennessy, if it should be thought proper to have Bacon and wife take title from Chittenden; also, that Hennessy should pay to Bacon the remainder of the five hundred dollars upon receipt, and only upon receipt, "of such title through such deed to said lands or upon the said Hennessy accepting a deed of warranty" from Chittenden or Bacon. If Hennessy did not receive such title on account of an incurable defect in the title or other cause, the deposit made by him was to be refunded.

On the day of the execution of the contract between Bacon and Hennessy, the latter made a tender of $4,400 to Chittenden's agent residing in St. Paul, in fulfillment of the contract of March 27, 1882, and demanded a conveyance in accordance with its terms. Hennessy was informed, before making the tender, that Chittenden had not executed the required deed, and it was made then only to preserve his rights under the contract. Shortly after the tender, Chittenden left with his agent a deed, in proper form, to be delivered upon the payment of the price of the land, and of this fact notice was promptly given to Hennessy and Bacon. Hennessy received in the meantime an abstract of the title, and discovering therefrom that the record did not show a clear, unincumbered [30] title in Chittenden, he sent to the latter's agent a memorandum of the defects therein appearing of record, and demanded that those defects be remedied. The agent wrote twice to Hennessy, at Dubuque, Iowa, where he resided, urging him to give attention to the matter—stating, in a letter of date of November 6, 1882, that unless some understanding was soon reached he would return the deed to Chittenden, who would probably decline to carry out the sale. Under date of November 16, 1882, he again wrote to Hennessy as follows: "Yours of 15th inst. received in answer to a previous letter. You instructed me to see Mr. Horn. I immediately saw him and satisfied him as to some of the objections, consulted him as to others and left the papers with him. He expressed the wish to see you about the matter in order that he might inform me directly and positively what further would be required to make the title good. I have sought in every way since you went into this transaction to obtain an interview with you or someone authorized to act for you in order to arrive at something definite, and have found it exceedingly difficult to do so. Although instructed to refer me to Mr. Horn, Mr. Kavanagh did not do so until I wrote you, and now that I have interviewed Mr. Horn, I find it difficult to reach any result. I am not accustomed to that way of doing business, and cannot say I particularly appreciate it. I would suggest that the best and quickest way to come to some definite understanding about the matter is for you to meet Mr. Horn and myself at such early time as may be designated by you. Unless this is done by Monday next (Nov. 20) I shall return the deed (which I hold ready for delivery to you) to Mr. Chittenden, and it is doubtful whether he will carry out the same. Allow me to suggest it is part of your manifest duty not to interpose interminable delays to the settlement of the matter, and that if you will appoint the above meeting or designate Mr. Horn or some other person who can act for you in your absence this transaction can speedily be finished."

The evidence is conflicting as to what passed between the parties after that date. But it is certain that the deed from Chittenden remained in the hands of his agent for more than three [8 years; and that Bacon repeatedly urged Hennessy to indicate more distinctly than he had done the nature of his final objections to the title, or give up his contract of purchase. Hennessy contended not only that Chittenden's agent well understood the defects in the title, but that they should be remedied. During all that period the lands were appreciating in value, and by the fall of 1885 were worth more than $30,000. Finally, at the suggestion of Bacon, Rogers determined to buy them, the understanding being that Rogers was to make the purchase, allow Bacon, as commissions, the difference between $5,000 and the amount paid for the lands, and, when Rogers got them, he was to give Bacon an interest of one half upon the latter's paying half the expenses necessary to clear the title. There was an apparent cloud upon the title of record. It arose out of a mortgage in which Sanborn claimed an interest. Rogers, with knowledge of the contract between Bacon and Hennessy, paid Sanborn $1,000 for that interest, and, on the 4th day of November, 1885, took a general warranty deed from Chittenden, paying the latter the sum of $4,705.87. Chittenden took from Rogers a bond to indemnify him against any claim and demand made or that might be made by Bacon and Hennessy, or either of them, and against any loss or damage by reason of the conveyance to Rogers.

On the 16th of December, 1885, Rogers informed Hennessy by letter that, Bacon having forfeited his contract, he had purchased the lands from Chittenden, and put his deed on record. He sought by letters a meeting with Hennessy that the matter might be settled between them. The latter, for some time, took no notice of these letters, but at last he wrote to Rogers, under date of January 21, 1886, saying that, while he was fully assured of the validity of his title to the lands, nevertheless, in the interests of peace and for the sake of avoiding what might prove a long, vexatious and expensive litigation, to say nothing of the bitterness of feeling usually resulting from such disputes, he was willing to meet Rogers and see if some amicable adjustment of the question between them could be reached. He said: "I wish it, however, distinctly under- [8 stood that I do not, by this concession to peace and harmony or good feeling, or anything that may result therefrom, in any way, shape or manner waive any right, or recognize or admit in you, or in anyone else, any right, title or interest, legal or otherwise, in or to the lands in question, or any part thereof, and that I emphatically must oppose, and in the strongest terms, forever, any such right, title and interest in you and any and every existing person,

With that understanding I shall endeavor to meet you for this purpose in the course of the coming week, at such time and place as we may hereafter agree upon. . ."

Hennessy and Rogers finally held a conference, which resulted, March 18, 1886, in a written agreement between them, which recited their respective claims to the lands, and provided: "Now, to settle the same, the said Edward G. Rogers hereby agrees to make and execute to said David J. Hennessy a quitclaim deed of an undivided one half of said property; and the said Hennessy agrees to execute and deliver to said Edward G. Rogers a quitclaim deed of an undivided one half of said property; and also, in further consideration of said deed, to pay said Rogers the sum of ($2,750) two thousand seven hundred and fifty dollars. This settlement to be in full of all claims in favor of said D. J. Hennessy and against one George V. Bacon and one George N. Chittenden growing or arising out of any contracts in regard to the sale or purchase of said land by said Hennessy from said Bacon or said Chittenden. This agreement to be executed and carried out as soon as possible, and at least within 30 days from this date, if possible. Time is not of the essence of this agreement."

Pursuant to this agreement Rogers made a deed to Hennessy for an undivided half of the lands, the latter paying therefor the sum of $2,750, and Hennessy made a deed to Rogers for the other undivided one half. Subsequently, Rogers conveyed one undivided fourth interest to Bacon, and at a later date conveyed to him the remaining one fourth of his original one-half interest for the consideration of $10,000.

The present suit was brought by Bacon for partition between himself and Hennessy upon the basis of the ownership by each of an undivided one-half interest. Hennessy having alleged in his answer that the settlement of March 18, 1886, was a fraud upon him, Rogers, at Bacon's request, repurchased, and took a conveyance for, the one-fourth interest he had sold to Bacon, and, with leave of the court, became a co-plaintiff in the suit with Bacon.

Messrs. **M. F. Morris** and *Dan. P. Lawler*, for appellant:

The deed from George N. Chittenden to Rogers was procured by a fraudulent conspiracy on the part of Bacon, Rogers and E. S. Chittenden, in fraud of the contract rights of the appellant and in breach of the fiduciary relation which existed between him and Bacon.

Story, Eq. Jur. §§ 1258, 1261; *Taylor* v. *Plumer*, 3 Maule & S. 574; *Oliver* v. *Piatt*, 44 U. S. 3 How. 333 (11:622); *Moore* v. *Mandlebaum*, 8 Mich. 441; *Huxley* v. *Rice*, 40 Mich. 73; *Case* v. *Carroll*, 35 N. Y. 385.

Messrs. **Edward G. Rogers** and *Emerson Hadley*, for appellees:

The party to a contract who asks for specific performance must show himself to have been ready, desirous, prompt and eager to carry out his contract. The right to specific performance is not an absolute right, but is discretionary with a court of equity.

Pomeroy, Contracts, § 407; *Brashier* v. *Gratz*, 19 U. S. 6 Wheat. 529 (5:323); *Rogers* v. *Saunders*, 16 Me. 92; *Firth* v. *Greenwood*, 1 Jur. N. S. 866; *Alley* v. *Deschamps*, 13 Ves. Jr. 225; *Merritt* v. *Brown*, 19 N. J. Eq. 286; *Kirby* v. *Harrison*, 2 Ohio St. 326; *Roby* v. *Cossitt*, 78 Ill. 638; *Cooper* v. *Brown*, 2 McLean, 495.

Mr. Justice **Harlan** delivered the opinion of the court:

It may be assumed, for the purposes of the present case, that upon the tender to Chittenden's agent, on the 27th of June, 1882, of the full amount Bacon had agreed to pay for the lands in controversy, Hennessy, as the assignee of Bacon, became entitled to a sufficient deed of general warranty from Chittenden: and that the conveyance from Chittenden to Rogers was so far in derogation of Hennessy's rights as such assignee that a court of equity, in view of the relations between Bacon and Hennessy and of the knowledge Rogers had of the written agreement between them, would have compelled Rogers, at any time prior to March 18, 1886 (the date of the settlement between him and Hennessy), to convey the title to Hennessy, upon the payment by the latter of the balance due Bacon under the contract of June 27, 1882, as well as of the amount Bacon had agreed to pay to Chittenden. As Hennessy rightfully demanded a clear, unincumbered title to the lands, and as Chittenden did not, personally or by his agent, distinctly announce his purpose to rescind altogether the contract of March 27, 1882, unless Hennessy, within a given time, would take such title as appeared of record, it may be that Chittenden was not at liberty, consistently with Hennessy's rights and without previous notice to him, to treat that contract as abandoned, and to make the sale to Rogers, the general rule being that if a party means to rescind a contract because of the failure of the other party to perform it, he should give a clear notice of his intention to do so, unless the contract itself dispenses with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties. 1 Sugden on Vendors, chap. 5, § 5.

But Chittenden assumed to treat his contract with Bacon as forfeited or annulled, and executed a deed to Rogers. Of these facts Hennessy was informed. He knew that Rogers claimed the lands absolutely as his property under the purchase from Chittenden, and that the deed under which Rogers asserted title was recorded. And he had accurate knowledge of the title to the lands so far as it appeared of record. He also knew, at the time of the agreement of 1886, of Rogers' contention that the contract of 1882 had been forfeited by reason of Bacon's failure to comply with its provisions. He, nevertheless, disputed Rogers' claim to the property. But Rogers, with equal distinctness, disputed his claim. And this dispute was settled by the agreement of March 18, 1886, under which Hennessy consented to take an undivided interest of one half at the price of $2,750, and let Rogers have the other half.

He now contends that he was induced to make this settlement by false representations upon the part of Rogers, and because of the suppression of facts that ought to have been, but were not, communicated to him by Rogers. The evidence upon this point is quite conflicting, and does not justify the conclusion that Rogers made any false representations what-

ever, or that he withheld any facts he was under a legal obligation to disclose. Hennessy says that if he had known, when conferring with Rogers, that the latter had agreed to let Bacon have an interest in the lands, he would not have made the settlement; for, that fact, he contends, would have indicated collusion between Rogers and Bacon. We do not see that ignorance of such fact affects the validity of the settlement of 1886, or that it would have [35] prevented its consummation. If Hennessy had been informed of Rogers' promise to give Bacon an interest in the lands, he would have known that such promise could not, under the circumstances, have been enforced. The money that Rogers paid Chittenden was his own, and in the title acquired by him Bacon had no legal interest. Rogers moved in the matter of the purchase from Chittenden entirely upon his own responsibility. With full knowledge of the title that Rogers had acquired, Hennessy deliberately chose to compromise the dispute between them, as shown by the agreement of 1886, and by the deeds executed in pursuance of its provisions. No fraud was practiced by Rogers. He was guilty of no unfairness. He concealed nothing that he was under legal obligation to state. His information in respect to the title was no greater than Hennessy had, or than Hennessy could easily have obtained. It is the case of the compromise of a disputed claim, the parties dealing with each other upon terms of perfect equality, holding no relations of trust or confidence to each other, and each having knowledge, or having the opportunity to acquire knowledge, of every fact bearing upon the question of the validity of their respective claims. *Cleaveland* v. *Richardson*, 132 U. S. 318, 329 [33: 384, 389]. Such a settlement ought not to be overthrown, even if the court should now be of opinion that the party complaining of it surrendered rights that the law, if appealed to, would have sustained. After this settlement was made, Rogers was at liberty, for any reasons deemed by him sufficient, to give Bacon an interest in the one half acquired by him under the settlement of 1886, and the interest thus acquired by Bacon did not inure to Hennessy by reason of the relations created by them by the original contract of 1882. As between Rogers and Bacon the lands became the absolute property of the former under his purchase from Chittenden, and under the settlement of 1886, and, so far as Hennessy was concerned, an undivided one-half interest was confirmed to Rogers, as his property, to dispose of as he deemed best.

Decree affirmed.

---

[98] FITZGERALD AND MALLORY CONSTRUCTION CO., *Plff. in Err.*,

v.

JOHN FITZGERALD.

(See S. C. Reporter's ed. 98-118.)

Service of process—waiver of service—service on corporation—execution of notes by—voluntary payment—implied contract of corporation—motion for new trial.

1. If a person is induced by false representations to come within the jurisdiction of a court in order to serve process upon him, and process is there served, the court will, on motion, set the process aside.
2. Appearance by defendant, and answering and participating in the trial, in a suit in a State in which he does not reside, and in which he has not been served with process, waive non-service of process.
3. Where a foreign corporation is not doing business in a State, and its president or other officer comes into such State, but not on business for the corporation nor representing it in the State, the corporation is not within the State, so that service of process can be made upon it.
4. Although the by-laws of a company require certain formalities in the execution of a promissory note, yet that does not make such formalities essential to the ratification of the contract; and if notes are given by the president of the company, to pay off its debts, and he has the entire management of its business, and its directors, with full knowledge, assent to the execution of the notes, the notes are binding on the company.
5. Where a stockholder, who is a promoter and director of a corporation, indorses its notes at the request of its president, to raise money for its use, and is compelled to protect his indorsement by paying them, the payment is not voluntary, and he can recover of the corporation on the notes.
6. A corporation is bound by an implied contract, in the same manner as an individual, to pay for services which were valuable, and which were rendered under such circumstances as to show that the parties intended and understood that they were to be paid for.
7. A motion for a new trial is addressed to the discretion of the circuit court, and action on such a motion is not a subject of exception.

[No. 1141.]

Submitted Oct. 28, 1890. Decided Nov. 17, 1890.

IN ERROR to the Circuit Court of the United States for the District of Nebraska, to review a judgment in favor of plaintiff against a foreign corporation, in an action upon notes and other demands. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:** [99

This was an action brought by John Fitzgerald, a citizen of Nebraska, in the District Court of Lancaster County, in that State, against the Fitzgerald and Mallory Construction Company, a corporation created under the laws of Iowa. The petition was filed December 22, 1888, and summons issued, which was served on the 24th of December, by the delivery of a copy to S. H. Mallory, described in the return as "the president and managing agent" of the defendant Company.

Under title IV. of the Code of Civil Procedure of Nebraska, section 59 provides: [100 "An action other than one of those mentioned in the first three sections of this title, against a nonresident of this State or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; . . ." Comp. Stat. Neb. 1889, p. 860. Under title VIII., section 198, it is provided that: "The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated: *First.* When the defendant,

or one of several defendants, is a foreign corporation, or a nonresident of this State; . . . ." Under section 199: "An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: *First.* The nature of the plaintiff's claim. *Second.* That it is just. *Third.* The amount which the affiant believes the plaintiff ought to recover. *Fourth.* The existence of some one of the grounds for attachment enumerated in the preceding section." Then follow various sections relating to proceedings in attachment and garnishment. Comp. Stat. Neb. p. 877.

In this case, affidavit for attachment against defendant as a foreign corporation was made, order of attachment and garnishee summons issued, and the latter served upon the Missouri and Pacific Railroad Company, as owing debts to the defendant. The garnishee subsequently answered that it was impossible to make a definite answer as to whether, on an accounting between it and the defendant, there would be due to the defendant any sum or sums of money whatsoever; and that litigation was pending in respect to a contract between it and the defendant for the purchase of certain securities, which it claimed might result, upon a proper accounting, in no indebtedness on its part to the defendant, and until the termination of which it could not answer more specifically.

The petition counted upon fourteen causes of action: (1) Upon a note for $5,002.80, [01] dated July 31, 1888, payable ninety days after date, to the order of the First National Bank of Lincoln, Nebrsaka, with interest at the rate of ten per cent per annum until paid, signed by S. H. Mallory, its president, and indorsed by plaintiff and Mallory. Plaintiff alleged that the note not being paid at maturity, he, who had indorsed it "without any consideration," paid it with interest, and it was thereupon transferred to him by the cashier of the bank; and that the sum of $5,128.25, paid by him with interest from the first day of November, 1888, was now due. (2) Upon a note for $15,290.24, dated July 25, 1888, payable sixty days after date to the order of J. J. P. Odell, cashier, with interest at seven per cent, signed by the defendant corporation by Mallory, its president, indorsed by plaintiff and Mallory, and taken up by Fitzgerald, who had indorsed it without consideration, and paid it with interest, the full sum paid being $15,468.62, which was due with interest from September 25, 1888. (3) For services from May 1, 1885, to May 1, 1886, in doing work with the view of organizing the defendant, which had received all the benefits of the same and agreed to pay therefor, and which services were alleged to be worth $5,000. Also for services from the first day of May, 1886, to the 4th of November, 1886, as superintendent, treasurer or manager of defendant, placing their value at the sum of $6,000. (4) For services as general manager from November 1, 1886, to November 1, 1887, at the agreed salary of $5,000. (5) For same from November 1, 1887, to May 1, 1888, $2,500. (6) For scrapers and plows sold and delivered to defendant at its request, $1,515. (7) For track-laying tram sold and delivered to defendant at its request, $1,500. (8) For money paid for personal expenses incurred at defendant's request during the year 1886, $396.65. (9) For same for year 1887, $227.50. (10) For balance of $1,928 due on a draft for $5,500, signed by defendant by C. H. Lamb, auditor, to order of S. H. Mallory, and accepted by him as president, plaintiff having taken up said draft, and $1,928 being due with interest from July 30, 1888. (11) Upon note for $5,000, signed by defendant by C. H. Lamb, auditor, to order of First National Bank of Chariton, and indorsed to plaintiff for value, and due with interest from November 22, 1888. (12) Upon note for $856.64, dated [1 January 16, 1888, signed by defendant by Mallory, its president, to order of M. S. Cartter & Co., and indorsed to plaintiff, and due with interest from date. (13) Upon note for $917.91, dated November 28, 1888, signed by defendant by Lamb, auditor, to order of First National Bank of Chariton, and indorsed to plaintiff, with interest from date. (14) For money paid since January 1, 1888, upon request of defendant for legal services and advice, and otherwise, for defendant's benefit, $5,000.

Plaintiff prayed judgment for the sum of $51,271.85, with interest on the various sums and from the various dates as demanded.

On the 4th of January, 1889, the defendant filed its demurrer to the petition, upon the grounds of insufficiency, misjoinder and defect of parties, and on the 16th of January its petition to remove the cause into the Circuit Court of the United States for the District of Nebraska, the petition being verified by the affidavit of "the duly authorized attorney of the defendant." The cause having been removed, the defendant applied for leave to answer by a day named, and afterwards obtained leave to amend. The amended answer was filed June 19, and denied the authority of Mallory to make the notes described in the first and second counts; the contract and services set up in the third count (also pleading payment); admitted that plaintiff was employed by defendant under a salary of $5,000 for part of the time referred to in the fourth count; admitted liability for salary named in the fifth count, but alleged plaintiff failed to render the services, to defendant's damage; denied that plaintiff sold and delivered the property declared on in the sixth and seventh counts; that Lamb, auditor, had authority to make the draft set up in the tenth count, alleging that its proceeds were divided between plaintiff and Mallory; that Lamb, auditor, had authority to make the note set up in the eleventh count, alleging that defendant received no benefit therefrom, and that Mallory caused the note to be transferred to plaintiff solely for the purpose of bringing suit thereon; denied that Mallory had any authority to make any of the instruments in writing [10 sued on, and alleged that plaintiff had full knowledge of such want of authority; and denied any liability on the fourteenth count.

The two closing paragraphs are each numbered "11," the last asserting "that the District Court of Lancaster County, State of Nebraska, never had or acquired any jurisdiction of this defendant, and this court has no jurisdiction to hear, try and determine the matters and things in controversy herein." It appears from the record that on the 22d of June the parties were given leave to amend the pleadings to conform to the facts, and it is stated by counsel that this paragraph was then written in on the amended answer.

On the 11th of May the cause was set down for trial by agreement of parties, and came on for trial the 20th of June, 1889, upon the issues joined, and a jury having been impaneled, the trial continued during the 20th, 21st, 22d and 24th days of June, when it was given to the jury, the court instructing them, among other things, to disregard the first branch of the third count and the fourteenth count. The jury returned a verdict on the 25th of June finding the issues for the plaintiff, and assessing the amount of his recovery "at $47,987.97 debt, and $3,474.65, interest thereon at 7 per cent from 25th day of June, 1889, being the sum total of $51,412.62."

Motions in arrest and for new trial were made and overruled, and judgment rendered on the verdict. Pending the trial, on the 22d day of June, a plea to the jurisdiction of the court was filed, setting up that service of the summons in the action was obtained by means of a trick and fraudulent device, whereby the president of the defendant, Mallory, was induced to go from Iowa to the State of Nebraska, where, upon his arrival, he was served with process, which fraud was unknown to defendant when it filed its demurrer to the plaintiff's petition, its petition for removal and its answer and amended answer, and that Mallory, after the service, acting in concert with the plaintiff, concealed the facts from the defendant; and praying that, therefore, proceedings be stayed and the action dismissed. This plea was overruled by the court, and the plaintiff then filed a motion for a nonsuit, upon the ground that the defendant was improperly sued in [104] Lancaster County, Nebraska, and the District Court of that County had no authority to take jurisdiction of the action or of the defendant, and that neither that court nor the United States court had jurisdiction of the defendant; which motion was overruled. The plea to the jurisdiction and evidence bearing thereon, and the motion to dismiss, with an affidavit which accompanied it, were duly made part of the record by bill of exceptions. On the 24th of June the defendant filed a motion to dismiss because the process of the court had been fraudulently used by plaintiff to obtain service on the defendant, defendant being in ignorance thereof until during the trial, and that at the time suit was brought and summons served on Mallory, defendant had no general managing agent, and no managing agent in Nebraska, and no office or place of business there, and that Mallory was not in Nebraska on any business for the defendant; which motion was overruled and the defendant excepted.

The trial was had upon the merits, evidence being adduced on both sides, and exceptions were taken by defendant to various parts of the charge of the court and to the refusal to give certain instructions requested on its behalf. Judgment having been rendered, defendant brought the cause to this court on writ of error.

Messrs. **John F. Dillon and David D. Duncan,** for plaintiff in error:

The court below should have refused to proceed with the action when it was shown that the jurisdiction over defendant was obtained by means of a fraudulent device and trick.

Townsend v. *Smith*, 47 Wis. 623; *Union Sugar Refinery* v. *Mathiesson*, 2 Cliff. 304; *Van Horn* v. *Great Western Mfg. Co.* 37 Kan. 523; *Snelling* v. *Watrous*, 2 Paige, 314; *Wanzer* v. *Bright*, 52 Ill. 35; *Stein* v. *Valkenhuysen*, El. Bl. & El. 65; *Williams* v. *Reed*, 29 N. J. L. 385.

A legal right cannot be established by unlawful means.

Hill v. *Goodrich*, 32 Conn. 590; *Wood* v. *Wood*, 78 Ky. 629; *Ilsley* v. *Nichols*, 12 Pick. 276.

No general appearance resulting from the filing of an answer which specially pleaded the want of jurisdiction in the court can be construed as a condonation of the fraud of which the defendant was then ignorant, or as a waiver of its right to a dismissal of the suit upon the disclosure of the fraud.

Blair v. *Turtle*, 5 Fed. Rep. 394, 1 McCrary, 372; *Townsend* v. *Smith*, 47 Wis. 623; *Chubbuck* v. *Cleveland*, 37 Minn. 466; *Moynahan* v. *Wilson*, 2 Flipp. 130; *Dunlap* v. *Cody*, 31 Iowa, 260; *Duringer* v. *Moschino*, 98 Ind. 495.

Plaintiff was under no obligation to pay the notes and was a mere volunteer.

1 Daniel, Neg. Inst. 250; Bishop, Cont. § 211; Sheldon, Subr. §§ 1, 240; *Durant* v. *Rogers*, 71 Ill. 121; *Bunn* v. *Lindsay*, 95 Mo. 250; *Moshier's Appeal*, 56 Pa. 76; *Moran* v. *Abbey*, 63 Cal. 56; *Winsor* v. *Savage*, 9 Met. 348.

The notes were not executed in conformity with the articles of association or with the by-laws of the corporation.

Bank of Augusta v. *Earle*, 38 U. S. 13 Pet. 519, 587 (10: 274, 307); *Dartmouth College Case*, 17 U. S. 4 Wheat. 636 (4: 659); *Badger* v. *American Popular L. Ins. Co.* 103 Mass. 244; *Salem Bank* v. *Gloucester Bank*, 17 Mass. 1; *Lebanon & R. G. R. Co.* v. *Adair*, 85 Ind. 244; *Head* v. *Providence Ins. Co.* 6 U. S. 2 Cranch, 127 (2: 229).

Plaintiff cannot recover, as upon an implied contract, for services rendered by him as a director or officer of the defendant corporation.

Citizens Nat. Bank v. *Elliott*, 55 Iowa, 104; *Fort Scott First Nat. Bank* v. *Drake*, 29 Kan. 316; *Loan Asso.* v. *Stonemetz*, 39 Pa. 534; *Kilpatrick* v. *Penrose Ferry Bridge Co.* 49 Pa. 118; *Martindale* v. *Wilson-Cass Co.* 134 Pa. 348; *New York & N. H. R. Co.* v. *Ketchum*, 27 Conn. 170; *Maux Ferry G. R. Co.* v. *Branegan*, 40 Ind. 361; *Santa Clara Mining Asso.* v. *Meredith*, 49 Md. 389; *Illinois Linen Co.* v. *Hough*, 91 Ill. 63; *Commonwealth Ins. Co.* v. *Crane*, 6 Met. 64; *Sawyer* v. *Pawners Bank*, 6 Allen, 207; *Merrick* v. *Peru Coal Co.* 61 Ill. 472; *American C. R. Co.* v. *Miles*, 52 Ill. 174; *Gridley* v. *Lafayette, R. & M. R. Co.* 71 Ill. 200;

Cheeney v. *Lafayette, B. & M. R. Co.* 68 Ill. 570; *Gill* v. *New York Cab Co.* 48 Hun, 524.

Mr. **T. M. Marquett,** for defendant in error:

A mere defect of service may be waived by a defendant, and is held to be waived if he enters a general appearance.

Briggs v. *Humphrey*, 1 Allen, 372; *Carney* v. *Taylor*, 4 Kan. 182; *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 394 (19: 789).

Where a party voluntarily appears to the merits of a controversy, he thereby waives all right to object to the process by which he was brought into court.

Creighton v. *Kerr*, 87 U. S. 20 Wall. 12 (22: 310); *United States* v. *Yates*, 47 U. S. 6 How. 605 (12: 575); *Bury* v. *Conklin*, 23 Kan. 460; *Elliott* v. *Lawhead*, 43 Ohio St. 176; *Handy* v. *Ins. Co.* 37 Ohio St. 366; *Maholm* v. *Marshall*, 29 Ohio St. 616; *Mason* v. *Alexander*, 44 Ohio St. 329; *Porter* v. *Chicago & N. W. R. Co.* 1 Neb. 15; *Aultman* v. *Steinan*, 8 Neb. 112; *Hilton* v. *Bachman*, 24 Neb. 505.

It is too late to object to the form in which a note has been made, when the proof is clear that it was given for money paid, and the proceeds were used by the Company.

Creswell v. *Lanahan*, 101 U. S. 351 (25: 854); *Chicago, R. I. & P. R. Co.* v. *Howard*, 74 U. S. 7 Wall. 412 (19: 121); *Indianapolis Rolling Mill* v. *St. Louis, F. S. & W. R. Co.* 120 U. S. 256 (30: 639).

Fitzgerald held the notes as an accommodation indorser, and is subrogated to the rights of a creditor.

Bush v. *Wadsworth*, 60 Mich. 266.

Where a note was made to borrow money for the corporation, which it received and retained for its own benefit, it is estopped to deny, as against the holder, the binding character of the obligation, and the authority of the president in the transaction, as against an accommodation indorser.

Borland v. *Haven*, 37 Fed. Rep. 406; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587 (23: 328).

If a director is employed to perform services which do not pertain to his office, he is entitled to such compensation as such services are reasonably worth.

Morawetz, Priv. Corp. 518.

A motion for a new trial in the courts of the United States is addressed to the sound discretion of the tribunal which tried the case, and to grant or refuse it cannot be made a subject of exceptions.

Schuchardt v. *Allen*, 68 U. S. 1 Wall. 371 (17: 646); *Brown* v. *Clarke*, 45 U. S. 4 How. 15 (11: 855).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is contended that the circuit court should have refused to proceed with the action if it appeared to its satisfaction that the service upon the defendant was obtained by means of a fraudulent device and trick; and that this question was presented by the plea to the jurisdiction, the motion for a nonsuit, the motion to dismiss, and a request, which was refused, for an instruction to the jury to render a verdict for the defendant, if they found from the evidence that the service was fraudulently procured and that the defendant had ignorantly acquiesced therein.

If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process is there served, it is such an abuse that the court will, on motion, set the process aside; but no such motion was made here, and the question as raised went deeper than objection to service merely, and attacked the power of the court to proceed at all.

Under the laws of Nebraska actions against nonresidents and foreign corporations might be brought in any county in which there might be property of, or debts owing to, the defendant, and the plaintiff in a civil action for the recovery of money might, at or after the commencement thereof, have an attachment against the property of a defendant, when such defendant was a foreign corporation or a nonresident of the State. Comp. Stat. pp. 860, 877. The plaintiff had proceeded under these provisions, an order of attachment had been made and garnishee process duly served. There was no pretense that property had been brought into the State by means of fraudulent inducement, or that the claim against the garnishee was fictitious. If the case had gone to judgment under the attachment proceedings, it would only have subjected the property of the defendant lying within the territorial jurisdiction of the court to the payment of the plaintiff's demand. The case would have been in its essential nature a proceeding *in rem*. Had defendant moved to set the service aside and the motion been sustained, the court would not have dismissed the case for want of jurisdiction. The appearance of the defendant, however, converted into a personal suit that which was before a proceeding *in rem*. By its demurrer, petition for removal, answer and amended answer, and participation in the trial, the defendant waived all question of the service of process. And the record shows a resolution adopted by the defendant authorizing the attorney who appeared for it "to appear and represent this Company as its sole attorney in all suits and proceedings at law or in equity now pending, or which may hereafter be brought."

By the amendment to its answer, its plea and motions, the defendant insisted that the court had no jurisdiction to proceed, and thereby declined to stand upon the objection to the service, and submitted itself to the decision of the court in respect to jurisdiction over the subject matter, which jurisdiction, it is entirely clear, the court possessed. These proceedings were taken by defendant after discovering the alleged ground of objection to the service, and there was no action on its part confined solely to the purpose of questioning the jurisdiction over the person. That such jurisdiction resulted under the circumstances admits of no doubt, and the rule to that effect seems well settled in Nebraska, Kansas and Ohio, which all have similar Codes. *Elliott* v. *Lawhead*, 43 Ohio St. 171; *Porter* v. *Chicago & N. W. R. Co.* 1 Neb. 15; *Aultman* v. *Steinan*, 8 Neb. 112; *Meixell* v. *Kirkpatrick*, 29 Kan. 679.

Nor are we impressed with the tenability of plaintiff's position in relation to the service in any view. Where a foreign corporation is not doing business in a State, and the president or any officer is not there transacting business for the corporation and representing it in the State, it cannot be said that the corporation is within the State, so that service can be made upon it. *St. Clair* v. *Cox*, 106 U. S. 350 [27: 222]; *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138 [28: 379]; *Ex parte Schollenberger*, 96 U. S. 369 [24: 853]. So that, whether the president of this Company was inveigled into Lancaster County or not, the service upon him amounted to no more than an informal notice only and did not bring the Company into court, and this the Company was bound to know and must be held to have known. Without regard to the evidence relied on to show that there was concealment of the circumstances in relation to the service, knowledge of these circumstances was wholly immaterial, in view of the fact that the service was unavailing to bring the defendant into court unless it chose to come there. We are of opinion that no error was committed by the court in its rulings upon this subject.

[107] Errors are also assigned in respect to certain instructions given or refused by the court, bearing on the question of recovery upon the notes and drafts described in the petition.

The fifth and eighth of the articles of association of the defendant, and sections three and six of its by-laws, provided as follows:

"Article fifth. The directors . . . shall manage the business of the corporation; they shall have power to sell, lease or mortgage all their property and lands acquired by said corporation; to issue the bonds of the same, signed by the proper officers thereof, for the purpose of raising money to carry on the business of the corporation, and to secure the same by mortgage upon real estate, buildings, machinery and other property of the Company. They shall also appoint a president and vice-president from their own number, a secretary and treasurer, who may or may not be directors, and such other officers as may be deemed necessary. . . ."

"Article eighth. All certificates of stock, contracts and bonds shall be signed by the president and secretary."

"Section 3. The president shall perform the duties that usually pertain to the duties of his office and be the chief executive officer of the Company, and, in the absence of contrary instructions by the board of directors, shall be charged with the general management of the business of the Company."

"Section 6. The treasurer shall give bonds. . . . He shall pay out money only upon the order of the president and such other officers as may be ordered by the board of directors. He shall make a statement of the financial condition of the Company, etc. He shall keep in proper books a regular account of the stock of the Company, etc."

Argument is made that there could be no recovery on the notes and drafts in question, because it is said they were made by the president or auditor of the Company, without the knowledge or consent of the board of directors; and further, that the notes in the first two causes of action named were paid by the plaintiff when he was under no obligation to pay them, and in that respect was a mere volunteer.

The evidence tended to show that Mallory was authorized to build the line of the Denver, Memphis and Atlantic Railroad Company across Kansas, and the State Line and Pueblo Railroad Company, from the state line to Pueblo, in Colorado, being a distance in the aggregate of about six hundred miles of railroad, and which cost some seven millions of dollars; that he had full charge of the location and construction of the road; that he was authorized to draw checks and drafts, and all these notes and drafts were made, accepted or authorized by him; that the directors not only did not give contrary instructions in the first instance, but knew of the giving of the notes and drafts, and did not disaffirm the action of the president; and that the proceeds were used for the payment of construction liabilities of the Company in every instance, either directly or in taking up paper, the proceeds of which had been so used.

The court instructed the jury that if they found from the evidence that the president was given entire management in building the railroads, and in the incurring of liabilities and paying off debts incurred therein, he might appoint other agents, such as a cashier and auditor, for the purpose of making the calculations on pay-rolls and on contracts for building the roads, and might empower any one of such agents who made such calculations upon the pay-rolls of the amount due to those who did the work by contract or otherwise, to draw any checks or bills or sight drafts necessary to pay the same, and "if it became necessary for the benefit of said Company to execute promissory notes or to draw sight drafts, the said president would have ample authority to do the same, and might likewise empower the cashier or the party whose duty it was to ascertain the amounts due to contractors, materialmen and persons working upon the construction or building of said railroad, by the Construction Company, to draw drafts or checks, or even make promissory notes, and that the same, if done for the Company or for its use and benefit, would be binding upon the said Company, unless the president received from the directors certain instructions which limited his authority in the premises." The court also instructed the jury: "As to the promissory notes which were indorsed by the plaintiff and upon which he was held as indorser, if the jury find from the evidence that said notes were executed in good faith by the president of the Construction Company, and that the proceeds, or the proceeds of the notes and drafts of which the notes in question were renewals, were received by and used for the benefit of the Construction Company, and you further find that the plaintiff is now the holder and owner of said notes, you will find for the plaintiff in the full sum of said notes with interest." And fur-

ther: "And although there may be a provision in the by-laws of said Construction Company requiring certain formalities in the execution of a promissory note or draft, yet that does not necessarily make such formalities essential to the ratification of the contract; and if you find from the evidence that said notes were given for the purpose of paying off debts that were due by said Construction Company, and that the directors of said Construction Company had full knowledge of the same and assented to the transaction, to the signing and execution of the notes, you will find that said acts of the president have been fully confirmed, and you will find for the plaintiff the full amount of said notes with interest, provided you find the plaintiff was the owner of the same and is now the lawful holder of them."

These instructions were justified under the evidence. If the moneys were used to pay off indebtedness of the Company, arising in the construction of the road, and for work done under proper authority, the transactions were in pursuance of the authorized purposes of the corporation, and occurred in its legitimate business. The execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary instructions, if they wished to withdraw the general management from the president; and to disaffirm the action of their agents promptly and at once, if they objected to it. *Indianapolis Rolling Mill* v. *St. Louis, F. S. & W. R. Co.* 120 U. S. 256 [30: 639]; *Creswell* v. *Lanahan*, 101 U. S. 347 [25: 853]. The Company was liable upon the original indebtedness, and its change of form in order to relieve the pressure of the creditors was by the direction, with the participation and at the request of the president. We perceive no want of power and no omission of essential formalities in what was done. And the mere fact that Fizgerald was a stockholder in and a promoter and director of the Company, and, with the president, the manager of the work in the prosecution of which the indebtedness arose, would not change the binding character of the obligation. *Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587 [23: 328]; *Gardner* v. *Butler*, 30 N. J. Eq. 721; *Harts* v. *Brown*, 77 Ill. 226.

Again, there was evidence to the effect that Fitzgerald indorsed the notes at the request of the president. Inasmuch as the defendant was answerable for the indebtedness which the money received upon the notes went to pay, if in order to obtain that money Fitzgerald was called on to indorse the notes, and then compelled to protect his indorsement, he could not be treated as a volunteer. There would be no element in such a transaction of the voluntary payment by one of another's debt. So if Fitzgerald was the manager of the work under the president, and the money was used to pay off the subcontractors, materialmen and hands, then, upon the refusal of the Company to repay, Fitzgerald had the right to take up the notes and have them assigned to him; and whether he was the owner and holder of the notes was left to the determination of the jury.

By the first section of the by-laws, the officers of the Company were declared to be "a president, vice-president, secretary and treasurer, and such other officers as may be deemed necessary to carry out the object of the articles of this incorporation."

Under the second branch of the third cause of action, plaintiff claimed to recover for services as superintendent and manager of the Company, and also for expense and trouble when acting as treasurer from May 1 to November 4, 1886. On the latter date the board of directors fixed a definite sum as salary for a general manager, an office not otherwise or before created, so far as the record discloses.

The court instructed the jury that "if Fitzgerald, the plaintiff, acted as superintendent, treasurer or general manager of said Company, and transacted the usual business that [11
devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant" (during the time before compensation was fixed), there would be an implied agreement on the part of the defendant to pay what the services were reasonably worth; and afterwards repeated this instruction more in detail, confining it to services as manager.

If strict verbal accuracy was not observed in giving this direction, in view of the general rule as to compensation for official services rendered in the absence of a specified compensation fixed or agreed upon, yet we do not think, taking all parts of the charge upon that subject together, that any substantial error was committed. The evidence tended to establish that Fitzgerald acted as treasurer for some months in 1886, and that while so acting he went to expense and trouble in the procuring of money for the Company, and in the discharge of duties outside of those assigned to the treasurer as such, as defined in section 6 of the by-laws already quoted; and that as manager or superintendent he procured right of way, superintended the doing of the work, the hiring of the men, the sub-letting of the contracts, etc., which were matters not at all pertaining to his office as director. The character of all these services placed them outside of official duties proper.

The general rule is well stated by *Mr. Justice* Morton (since chief justice of Massachusetts) in *Pew* v. *First Nat. Bank*, 130 Mass. 391, 395: "A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of a party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valu- [11
able, but also that they were rendered under

circumstances as to raise the fair pre-
ption that the parties intended and under-
d that they were to be paid for; or, at
t, that the circumstances were such that
asonable man in the same situation with
person who receives and is benefited by
m would and ought to understand that
mpensation was to be paid for them."
sted by this rule, we think that the court
irly left it to the jury to determine whether
itzgerald rendered services of such a char-
cter and under such circumstances that he
was entitled to claim compensation therefor.
It could not properly have been held as matter of law that he was not so entitled, and the reference to the treasurer, as made in one clause of the charge, even though inaccurate, was not of sufficient moment to require a reversal of the judgment.

The sums claimed in the several causes of action aggregated $56,438.57, and the prayer for judgment was for the sum of $51,271.85, with interest on the various sums from the dates when the liabilities were respectively alleged to have accrued, on some of the items at seven and on others at ten per cent. The court instructed the jury to disregard the first branch of the third cause of action, and the fourteenth cause of action, under each of which $5,000 was claimed. The verdict of the jury assessed the amount of the plaintiff's recovery in two items of "$47,937.97, debt, and $3,474.65, interest thereon at 7 per cent from 25th day of June, 1889, being the sum total of ($51,412.62) fifty-one thousand four hundred and twelve and $\frac{62}{100}$ dollars." Counsel now insists that as, if from $47,937.97 the sum of $46,438.57, the aggregate of the amounts claimed in the several counts, less the amounts excluded, is taken, it will appear that the verdict exceeded the latter aggregate by $1,499.40, and exceeded the principal sum prayed for, after making the same deduction, by $6,666.12, the jury must have disregarded the instructions of the court, and the judgment should be reversed for that reason. The motion for new trial was filed on the 28th of June, and, after being held under advisement, was overruled on the 5th day of December, and the court then entered judgment "against the defendant for the sum of ($51,412.62) fifty-one thousand four hundred and twelve and $\frac{62}{100}$ dollars debt, with interest from June 25, 1889," the date of the return of the verdict, and costs of suit. It thus appears that the court held that the sum total, as found by the jury, was correct, and ignored the division of that amount into two sums. If the $3,474.65 was for interest, it was as much less than the interest properly calculated amounted to as the $47,937.97 was more than the aggregate of the several sums claimed, exclusive of the first branch of the third cause of action, and of the fourteenth. There was also evidence in support of some items of expenditure which apparently could have been recovered under the fourteenth cause of action, and it may be that these were allowed by the jury and the court was of opinion that this was properly done, notwithstanding its instruction. The bill of exceptions shows that on the third day of the trial "both parties were given leave to amend their pleadings to conform to the facts," and some confusion has evidently arisen from the circumstance that what was done under that leave is not clearly shown by the record. The motion for a new trial was addressed to the discretion of the circuit court, and action on such a motion is not a subject of exception.

Upon the whole, we find no sufficient ground for disturbing the judgment, and *it is accordingly affirmed.*

TEXAS AND PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* SOUTHERN PACIFIC COMPANY.

|48|

(See S. C. Reporter's ed. 48-56.)

Jurisdiction over state judgments—right, when claimed—consent decree.

1. To give jurisdiction to this court because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution or treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way.
2. A title, right, privilege or immunity is not properly claimed, under the Act of Congress, when it is suggested for the first time in a petition for a rehearing, after judgment.
3. Where a decree of a state court is entered by consent, and in pursuance of an agreement, the court merely recording the agreement and ordering it to be binding, the Supreme Court of a State may determine that the validity of an article of the agreement was not in controversy or passed upon in making the decree, and in doing so that court does not refuse to give due effect to the final judgment of a court of another State.

[No. 1210.]

Submitted Oct. 21, 1890. Decided Nov. 3, 1890.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment of that court, affirming a judgment of the Civil District Court for the Parish of Orleans in that State, dismissing a suit for an accounting and for the amount claimed to be due under an agreement.

On motion to dismiss or affirm. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

The Texas and Pacific Railway Company, represented by its receiver, filed its petition against the Southern Pacific Company in the Civil District Court for the Parish of Orleans on the 11th of April, 1888. The receiver was subsequently discharged and afterwards died, and the cause was ordered to be proceeded with in the name of the Railway Company as sole plaintiff. By the petition the Company described itself as a corporation created by and under the laws of the United States, namely, certain enumerated Acts of Congress. After stating that the plaintiff had offices in Texas and at New Orleans, and that its lines of railway extended or reached, by track-running arrangements or connections, from El Paso, Texas,

to New Orleans, and to Galveston, Texas, the petition set up an agreement entered into on the 26th of November, 1881, by Huntington of New York, on behalf of himself and his associates, and certain railway corporations, with Gould of New York, on behalf of himself and his associates, and certain railway corporations, a copy of which agreement was annexed; and further alleged that thereafter, on or about February 18, 1885, this agreement was amended by a modification, a copy of which was also annexed. The object of the contract as expressed may be briefly described as in substance the settlement of pending litigation in the courts of Texas, Arizona and New Mexico, the release and relinquishment of certain disputed rights and franchises of plaintiff west of El Paso, and the construction of plaintiff's track to make a junction with the other railroads at a certain point east of El Paso. The petition further averred that the agreement and its modification had been duly adopted and ratified by the several corporations mentioned, and that it had been in all things complied with by the plaintiff as well as by the other parties of the second part.

The petition also averred: "That in pursuance of said agreement the same was duly made a decree of the court in the said litigation herein referred to, and in said courts of Texas, New Mexico and Arizona, as by duly certified copies of said decrees will appear, and in the form shown by the copy hereto annexed as part hereof and marked Exhibit 'C.' Which decrees conformed with and carried out said agreement." Article VI. of the agreement and the modification were then set forth, and related to the disposition of business and division of earnings between points in respect to which the lines of plaintiff and defendant were competing, as subsequently determined.

The petition then alleged that the defendant, a corporation created and organized under the laws of Kentucky, but doing business in Louisiana, and having its principal place of business in the City of New Orleans, with a general manager there authorized to receive service of process, and which Company was controlled by Huntington and his associates, took possession and control, about November, 1884, of the railroad companies mentioned in the agreement as represented by Huntington, etc., and adopted as its own and assumed the rights and obligations of the agreement and its modification, and since had been and was now liable as party of the first part for all the obligations of the parties thereto of the first part: that it rendered accounts of the business done by it, under the agreement and modification, down to March 31, 1887, and the defendant up to that time recognized the plaintiff as the party to whom accounting should be made; that by article XV. of the agreement it was provided that either or any of the several railroad companies, parties thereto, might maintain any action, either at law or in equity, against either, any or all of the other railroad companies, to protect any rights secured by the agreement, or to specifically enforce the same, or to recover damages for a breach of the same affecting its interest; that plaintiff was entitled to an accounting and to a decree against the defendant for the amount which would then appear to be due under said agreement, and demanded judgment against the defendant for the sum of $852,717.78, alleged to be [51] due up to March 31, 1887, and for a further sum of $200,000 and over from March 31, 1887, and a small additional claim for an excess of earnings in its favor in the operation of certain lines of railroad in New Mexico and Arizona, and for such additional claims as might be discovered and ascertained on trial.

Exhibit "C" purported to be a copy of the decree of the District Court of the Third Judicial District of New Mexico, which contained the following clause:

"The aforesaid decree is made to carry out the provisions in this behalf of said agreement, dated November 26, 1881, which is hereby made a part of this decree, and by consent of the parties, and upon consideration by the court, is hereby ordered to be binding upon each and all of the parties hereto in all its stipulations and agreements as therein shown, and said decree does not affect or otherwise interfere with the provisions of the agreement."

To this petition the defendant filed peremptory exceptions to the effect that the contract sued upon, being a railway pool between competing railroad companies to divide between them their earnings from competitive traffic, was illegal, for the reason that it was injurious to the public interest and contrary to public policy, and hence it could not be enforced by a court of justice; that the contract contravened a clause in the Constitution of Texas, in force at the time it was entered into; and that, even if valid, the contract was terminated by the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce," which went into effect the third of April, 1887, and was generally known as the Interstate Commerce Act.

The cause went to trial and testimony was taken on the exceptions, bearing upon the relative positions of the railroad companies that were parties to the pooling agreement, and the injury to the public from the destruction of competition arising therefrom. The Acts of Incorporation of the defendant, and of the various companies, parties to the contract, and represented by Huntington, were introduced in evidence, and the plaintiff offered the Acts of Congress and of the State of Texas, referred to in the pleadings.

The district court on the 21st of December, [52] 1888, entered the following order upon its minutes:

"In these exceptions submitted to the court for adjudication, and the court considering the prohibition contained in art. 10, sec. 5, of the Constitution of Texas, adopted in 1876, and, for reasons orally assigned by the court, the law and evidence being in favor of plaintiff in exceptions, it is ordered that the peremptory exceptions filed herein on May 19th, 1888, be maintained, and accordingly that

plaintiff's suit be dismissed. Judgment rendered December 21st, 1888, with costs."

The plaintiff filed its motion for a new trial, enumerating various grounds therefor, which motion was overruled and judgment signed, whereupon plaintiff carried the cause by appeal to the Supreme Court of the State and there assigned numerous errors. In none of the grounds for new trial or the errors assigned were the alleged federal questions hereafter referred to specially set up. The supreme court held that the pooling contract sued on was illegal and void upon general principles of law and public policy, and upon that ground affirmed the judgment of the court below. The court in its opinion expressly declared that it did not find it necessary to pass upon the defenses based upon the Constitution of Texas and the Interstate Commerce Act.

Plaintiff thereupon filed an application for a rehearing, in which it claimed, among other things, that the court had denied plaintiff's rights under the decrees of the courts of New Mexico, Arizona and Texas; that the Acts of Congress referred to in the petition conferred upon plaintiff the right to enter into the agreement, public policy to the contrary notwithstanding; and that, as the subject matter of the contract sued on related to interstate commerce and Congress had not forbidden such an agreement, "any attempt to apply state laws to annul such agreement is unlawful." The supreme court denied the rehearing, and an application was then made to the chief justice of Louisiana for a writ of error, which was refused, but the writ was subsequently allowed by one of the justices of this court. The cause having been docketed, the defendant in error moved to dismiss or affirm.

Messrs. **Henry J. Leovy** and *Joseph Paxton Blair*, for defendant in error, in support of motion to dismiss or affirm:

It must appear from the record that one of the jurisdictional questions was raised and decided in the state court. It is not sufficient that such a question might have been raised.

De Saussure v. *Gaillard*, 127 U. S. 234 (32: 182); *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 177 (18: 381).

When there are several grounds for the decision of the state court, some presenting federal questions and some not involving such questions, and the decision is based upon one of the latter grounds, which is sufficient to support it, no writ of error lies.

Crossley v. *New Orleans*, 108 U. S. 105 (27: 667); *McManus* v. *O'Sullivan*, 91 U. S. 578 (23: 390); *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 81 U. S. 14 Wall. 23 (20: 850); *Hale* v. *Akers*, 132 U. S. 554 (33: 442); *Hopkins* v. *McLure*, 133 U. S. 380 (33: 660); *San Francisco* v. *Itsell*, Id. 65 (570).

When a decision holding a contract void is made by the highest court of a State upon the general principles by which courts determine that a transaction is good or bad on principles of public policy, the decision is one which this court is not authorized to review.

Tarver v. *Keach*, 82 U. S. 15 Wall. 67 (21: 82); *Delmas* v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661 (20: 757); *New York L. Ins. Co.* v. *Hendren*, 92 U. S. 286 (23: 709); *Marrow* v. *Brinkley*, 129 U. S. 178 (32: 654); *Worthy* v. *Barrett*, 76 U. S. 9 Wall. 611 (19: 565); *Parmelee* v. *Lawrence*, 78 U. S. 11 Wall. 36 (20: 48); *Spies* v. *Illinois*, 123 U. S. 181 (31: 91).

The right alleged to give jurisdiction must be set up or claimed at the proper time.

Brooks v. *Missouri*, 124 U. S. 394 (31: 454); *Chappell* v. *Bradshaw*, 128 U. S. 132 (32: 369); *Mississippi & M. R. Co.* v. *Rock*, 71 U. S. 4 Wall. 180 (18: 382); *Parmelee* v. *Lawrence*, 7[illegible] U. S. 11 Wall. 36 (20: 48); *Susquehanna Boom Co.* v. *West Branch Boom Co.* 110 U. S. 57 (28[illegible] 69); *Medberry* v. *Ohio*, 65 U. S. 24 How. 413 (16[illegible] 739); *Millingar* v. *Hartupee*, 73 U. S. 6 Wall. [illegible] 258 (18: 829); *Detroit City R. Co.* v. *Guthard*, [illegible] 114 U. S. 133 (29: 118).

Until Congress legislates on the subject th[illegible] state courts are perfectly free to deal with con[illegible] tracts affecting interstate commerce and judg[illegible] them according to the principles of comm[illegible] and statute law which prevail in the State [illegible] the forum.

Smith v. *Alabama*, 124 U. S. 478 (31: 51[illegible]); *Nashville, C. & St. L. R. Co.* v. *Alabama*, [illegible] U. S. 101 (32: 354).

Messrs. **W. W. Howe** and **John F. D[illegible]llon**, for plaintiff in error, in opposition to motion to dismiss or affirm:

If a federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it is as much against the right as if it had been specifically referred to and the right directly refused.

Cornell University v. *Fiske*, 136 U. S. 152 (34: 427); *Chapman* v. *Goodnow*, 123 U. S. 548 (31: 238); *Arrowsmith* v. *Harmoning*, 118 U. S. 194 (30: 243); *Cousin* v. *Blanc*, 60 U. S. 19 How. 202 (15: 601); *Anderson* v. *Carkins*, 135 U. S. 483 (34: 272).

The decrees had the effect of *res judicata*.

Oglesby v. *Attrill*, 105 U. S. 605 (26: 1186).

The decree of the Texas court is entitled to full faith and credit in this cause under article 4, sec. 1, U. S. Const.

Dupasseur v. *Rochereau*, 88 U. S. 21 Wall. 130 (22: 588); *Crescent City L. S. L. & S. H. Co.* v. *Butchers Union S. H. & L. S. L. Co.* 120 U. S. 141 (30: 614).

Mr. Chief Justice **Fuller** delivered the opinion of the court: [53

The decision of the Supreme Court of Louisiana was not against the validity of a treaty or statute of, or an authority exercised under, the United States, nor in favor of the validity of a statute of, or an authority exercised under, any State, drawn in question on the ground of repugnancy to the Constitution, treaties or laws of the United States; and, in order to maintain jurisdiction because of the denial by the state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was "specially set up or claimed" at the proper time and in the proper way.

It is contended that the plaintiff Company had the right, under the Acts of Congress

which it was incorporated, to make the contract in question, and hence that the decision that such contract was illegal and contrary to public policy constituted a denial of a right or privilege conferred by a statute of the United States; and also that, as the agreement related to earnings from interstate as well as from intrastate traffic, such decision was an interference with the freedom of interstate commerce, within the prohibition of the commerce clause of the Constitution of the United States. But it does not appear that either of these propositions was presented to the trial court in any way, or advanced in the supreme court, until urged in the petition for a rehearing. The title, right, privilege or immunity was not specially set up or claimed at the proper time and in the proper way. It is true that under the law of Louisiana a judgment of the supreme court does not become final until after six judicial days from the rendering of the judgment have elapsed, within which time a dissatisfied party may apply for a new hearing of the cause, but it does not follow that new grounds for decision will be allowed to be presented, or will be considered on such application, and the general rule is otherwise. La. Code of Practice, arts. 911, 912, pp. 538, 539, 547, 548; *Rightor* v. *Phelps*, 1 Rob. (La.) 330; *Stark* v. *Burke*, 9 La. Ann. 344; *Caldwell* v. *Western M. & F. Ins. Co.* 19 La. 48; *Hanson* v. *Lafayette*, 18 La. 309. And while the court is required to state the reasons of its judgments, it is not obliged to give reasons for refusing a new hearing. Code, arts. 909, 914.

We are of opinion that in Louisiana, as elsewhere, a title, right, privilege or immunity is not properly claimed, under the Act of Congress, when suggested for the first time in a petition for a rehearing, after judgment. The case of *Stewart* v. *Kahn*, 78 U. S. 11 Wall. 493 [20: 176], cited for plaintiff in error, is not to the contrary. The petition referred to there seems to have been simply one for review on appeal, and not a petition filed after the case had been decided by the supreme court, and the record showed the decision of the federal question by both tribunals.

In the case at bar, it does not appear in direct terms or by necessary intendment that these points were brought to the attention of either of the courts prior to the entry of the judgment of affirmance.

If, therefore, the maintenance of this writ of error depended upon the questions thus raised, the motion to dismiss would be sustained; but it is insisted in addition that the state courts did not give due effect to the decrees of the courts of New Mexico and Arizona and of the State of Texas, and that a title or right claimed under an authority exercised under the United States, as well as under the Constitution of the United States, was thereby denied.

No certified copies of the decrees referred to were annexed to the petition, but there was attached an uncertified copy of what purported to have been a decree in the District Court of New Mexico, between plaintiff and sundry of the railroad companies named in the agreement, defendants. Upon the hearing plaintiff did not present certified copies of the decrees and insist upon rulings as to their effect, nor did it specifically aver in its petition that the agreement for the division of earnings had been adjudged to be valid and binding upon the parties by those decrees. [55 The question of the illegality of the contract seems to have been submitted upon the merits, and was so decided, so that there is ground for the argument that the right had not been properly set up or claimed in compliance with the statutory requirement. It is earnestly urged, however, that the exceptions were in the nature of demurrers, and that, being treated as such, the petition, taken in connection with Exhibit C, sufficiently presented the question. And the supreme court in its opinion sent up as part of the record, and to be found reported in 41 La. Ann. 970, said: "A point which overshadows the discussion of all three of the exceptions is made by plaintiff's counsel, who contends that, the agreement between the parties having been sanctioned by a decree of the courts in which the litigation adjusted between the railroad companies was pending, it has now acquired the force and effect of the thing adjudged, and hence it cannot be attacked collaterally;" and it proceeded to consider and dispose of that contention.

We shall overrule the motion to dismiss; but, there having been color for it, will pass upon the motion to affirm.

In reference to the decrees, the Supreme Court of Louisiana held that the rule invoked applied only to matters of pre-existing differences settled and compromised, and not to agreements or contracts for future action and execution; that the subject matter of article VI. of the agreement was not a subject of contention between the parties, either as a difference or in the shape of any pending litigation, at the time the agreement was entered into; that in fact it had had no existence prior to the contract itself, and had no reference to the past, but its whole operation or effect was intended exclusively for the future; that the decree carefully enumerated all the litigious matters which were in suit between the several railway companies, parties to the litigation then pending; and that no other matters in the agreement were affected by the judgment; and *Mr. Justice* Poché, speaking for the court, called attention, as clearing away any doubt, to that part of the decrees which declared that they [56 were made to carry out the provisions in this behalf, and did not affect or otherwise interfere with the provisions of the agreement.

It was concluded that the stipulations of article VI. had not the force and effect of the thing adjudged, and were lawfully liable to attack in the mode and manner adopted by the defendant. It was added that this conclusion was mainly predicated upon the view that the agreement in its entirety did not evidence a single and connected contract, but that the instrument was used as a means to facilitate the execution by two representa-

tives of numerous obligors and distinct obligees of a series of varied and distinct contracts.

By this decision was the validity or due effect of either of these decrees disallowed by the state court? We do not think so.

The decrees were entered by consent, and in accordance with the agreement, the courts merely exercising an administrative function in recording what had been agreed to between the parties, and it was open to the Supreme Court of Louisiana to determine, upon general principles of law, that the validity of article VI. was not in controversy or passed upon in the causes in which the decrees were rendered. In doing so, that court did not refuse to give due effect to the final judgment of a court of the United States or of another State.

The judgment is affirmed.

---

[41] DABLE GRAIN SHOVEL COMPANY, *Plff. in Err.*, *v.* EDWARD E. FLINT ET AL.

(See S. C. Reporter's ed. 41-43.)

Use of machines after patent—right of patentee.

1. Where machines, afterwards patented, were constructed and put in use in the defendants' grain elevators by the inventor himself, while he was in their employment as superintendent of machinery, and before his application for a patent, defendants have the right to continue to use these specific machines after they are patented without paying any compensation to the inventor or his assigns.
2. The patentee has no exclusive right of property in his invention, except under and by virtue of the statutes securing it to him, and according to the regulations and restrictions of those statutes.

[No. 1218.]

Submitted Oct. 21, 1890. Decided Nov. 3, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois, to review a judgment for defendants in an action for the infringement of two patents. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was an action for the infringement of two patents for improvements in machinery for unloading grain from railroad cars, issued in 1866 and 1868 to John Dable, and by him since assigned to the plaintiff.

The defendants filed several pleas, the fourth of which averred "that the only machines for unloading grain from railroad cars, ever used by them during the life of either of said patents set forth in said declaration, were constructed and put into use in their grain elevators by the said John Dable, and with his consent and allowance, while he was in their employ as superintendent of machinery, and prior to his application for either of said letters-patent; and thereby, and by virtue of the statute in such case made and provided, the defendants became *possessed of the right* to use all said machines during the life of each of said patents, without liability to the said John Dable or the plaintiff."

The parties afterwards filed a stipulation in writing, by which they waived a trial by jury; agreed that the facts alleged in the fourth plea were as therein stated, and also that Dable, when he obtained each of his patents, claimed of the defendants compensation for the use of the inventions covered thereby, and that the defendants refused to recognize the claim; and submitted the issue presented by this plea to the judgment of the court upon the facts so stated and admitted.

The circuit court held that these facts constituted a good defense to the action, and therefore entered judgment for the defendants. 42 Fed. Rep. 686. The plaintiff sued out this writ of error.

Mr. **William Zimmerman,** for plaintiff in error:

Letters-patent must grant an exclusive right. Const. art. 1, § 8, cl. 8.

Therefore, section 7 of the Patent Act of 1839 is unconstitutional, because it takes away the exclusive right granted in the Constitution.

McKeever v. *United States*, 18 Ct. Cl. 757; *United States* v. *Palmer*, 128 U. S. 262 (32: 442); *Cammeyer* v. *Newton*, 94 U. S. 225 (24: 72); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Taylor* v. *Thomas*, 89 U. S. 22 Wall. 479 (22: 789).

What is implied in the Constitution is as much a part of the instrument as what is expressed.

United States v. *Babbitt*, 66 U. S. 1 Black, 55 (17: 94); *United States* v. *Freeman*, 44 U. S. 3 How. 556 (11: 724); *Ex parte Yarbrough*, 110 U. S. 651 (28: 274); *Cunningham* v. *Neagle*, 135 U. S. 1 (34: 55); *Pumpelly* v. *Green Bay & M. C. Co.* 80 U. S. 13 Wall. 166 (20: 557).

Viewed in every possible light section 7 of the Patent Act of 1839 fails to reveal that form which is demanded in a government established to do justice and to promote the general welfare, and hence it is hostile to the first great principles of the social compact.

Calder v. *Bull*, 3 U. S. 3 Dall. 386 (1: 648); *Vanhorne* v. *Dorrance*, 2 U. S. 2 Dall. 304 (1: 391); *Taylor* v. *Thomas*, 89 U. S. 22 Wall. 479 (22: 789); *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137 (2: 60); *Bank of Hamilton* v. *Dudley*, 27 U. S. 2 Pet. 492 (7: 496); *Walston* v. *Nevin*, 128 U. S. 578 (32: 544).

A patent for a new invention is an executed contract on the part of the people, and constitutes an exclusive right for a fixed time in such invention.

Lowell v. *Lewis*, 1 Mason, 182; *Grant* v. *Raymond*, 31 U. S. 6 Pet. 218 (8: 376); *Blanchard* v. *Sprague*, 2 Story, 164; *Howe* v. *Underwood*, 1 Fish. Pat. Cas. 160; *Hovey* v. *Stevens*, 3 Woodb. & M. 17; *Hunt* v. *Howe*, 1 McArth. Pat. Cas. 366; *Wintermute* v. *Redington*, 1 Fish. Pat. Cas. 239; *Page* v. *Ferry*, 1 Fish. Pat. Cas. 298; *Savary* v. *Lauth*, 1 McArth. Pat. Cas. 691; *Goodyear* v. *Providence Rubber Co.* 2 Cliff. 351; *Royer* v. *Coupe*, 29 Fed. Rep. 358.

A new invention is private property.

Crowe v. *Aiken*, 2 Biss. 208; *Jones* v. *Thorne*, 1 N. Y. Leg. Obs. 408; *Wheaton* v. *Peters*, 33

U. S. 8 Pet. 591 (8: 1055); *Bartlett* v. *Crittenden*, 5 McLean, 32; *Paige* v. *Banks*, 80 U. S. 13 Wall. 608 (20: 709); *Palmer* v. *De Witt*, 47 N. Y. 532; *Consolidated Fruit Jar Co.* v. *Wright*, 94 U. S. 92 (24: 68).

From the moment the inventor has completed his invention he is entitled to the promised reward, namely, the exclusive right to his invention.

Kendall v. *Winsor*, 62 U. S. 21 How. 322 (16: 165); *Pennock* v. *Dialogue*, 27 U. S. 2 Pet. 1 (7: 327); *Shaw* v. *Cooper*, 32 U. S. 7 Pet. 292 (8: 689); *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 (11: 102).

Any law which will give to others a right, at any time within the life of a patent, to appropriate an invention, must be in violation of the Constitution.

Fletcher v. *Peck*, 10 U. S. 6 Cranch, 87 (3: 162); *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518 (4: 629); *Pumpelly* v. *Green Bay & M. C. Co.* 80 U. S. 13 Wall. 166 (20: 557); *Taylor* v. *Thomas*, 89 U. S. 22 Wall. 479 (22: 789).

State laws cannot apply to actions exclusively federal.

Prigg v. *Pennsylvania*, 41 U. S. 16 Pet. 539 (10: 1060); *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1 (10: 865); *Stuart* v. *Laird*, 5 U. S. 1 Cranch, 299 (2: 115); *Martin* v. *Hunter*, 14 U. S. 1 Wheat. 304 (4: 97); *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264 (5: 257); *Houston* v. *Moore*, 18 U. S. 5 Wheat. 1, 21, 22 (5: 19); *Sturges* v. *Crowninshield*, 17 U. S. 4 Wheat. 122 (4: 529); 1 Kent, Com. 389.

Damages for infringements may be recovered in the name of the party interested.

Adams v. *Bellaire Stamping Co.* 25 Fed. Rep. 270; *Gayler* v. *Wilder*, 51 U. S. 10 How. 477 (13: 504); *Herbert* v. *Adams*, 4 Mason, 15; *Wilson* v. *Rousseau*, 45 U. S. 4 How. 674, 675 (11: 1153, 1154); *Gottfried* v. *Miller*, 104 U. S. 521, 530 (26: 851, 854); *Cammeyer* v. *Newton*, 94 U. S. 225 (24: 72); *Bicknell* v. *Todd*, 5 McLean, 236; *May* v. *Logan Co.* 30 Fed. Rep. 469; *May* v. *Ralls County*, 31 Fed. Rep. 473; *Washburn* v. *Gould*, 3 Story, 122.

When defendants ordered all their places to be provided with those machines, the lawful presumption that he should be paid what the inventions were reasonably worth was implied in that order.

Noonan v. *Bradley*, 76 U. S. 9 Wall. 394 (19: 757); *Mayer* v. *Isaac*, 6 Mees. & W. 612; *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 222 (17: 520); *McKeever* v. *United States*, 18 Ct. Cl. 757; *United States* v. *Palmer*, 128 U. S. 262 (32: 442).

This court has never directly dealt with or recognized this particular question of the statute, and whatever recognition it received has been overruled.

Beedle v. *Bennett*, 122 U. S. 71 (30: 1074); *United States* v. *Palmer*, 128 U. S. 262 (32: 442); *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 (11: 102); *Stimpson* v. *Westchester R. Co.* 45 U. S. 4 How. 380 (11: 1020); *Pierson* v. *Eagle Screw Co.* 3 Story, 408; *Jones* v. *Sewall*, 3 Pat. Off. Gaz. 630; *Agawam Woolen Co.* v. *Jordan*, 74 U. S. 7 Wall. 583 (19: 177); *Kendall* v. *Winsor*, 62 U. S. 21 How. 322 (16: 165); *Elizabeth* v. *American N. Pav. Co.* 97 U. S. 126 (24: 1000); *Andrews* v. *Hovey*, 124 U. S. 694 (31: 557); *Bloomer* v. *McQuewan*, 55 U. S. 14 How. 539 (14: 532); *Bloomer* v. *Millinger*, 68 U. S. 1 Wall. 340 (17: 581); *Adams* v. *Burks*, 84 U. S. 17 Wall. 453 (21: 700); *Birdsell* v. *Shaliol*, 112 U. S. 485 (28: 768); *Wade* v. *Metcalf*, 129 U. S. 202 (32: 661).

In both *Pierson* v. *Eagle Screw Co.* and *Consolidated Fruit Jar Co.* v. *Wright*, *supra*, it is held that the first clause of sec. 7, Act of 1839, is very general, not to say loose.

Messrs. **Ephraim Banning** and **Thomas A. Banning**, for defendants in error:

There can be no exclusive right or private property in an invention until after a patent has been granted.

Gayler v. *Wilder*, 51 U. S. 10 How. 498 (13: 510); *Hendrie* v. *Sayles*, 98 U. S. 551 (25: 178); *Brown* v. *Duchesne*, 60 U. S. 19 How. 195 (15: 599); *Marsh* v. *Nichols*, 128 U. S. 611, 612 (32: 540, 541).

An inventor has no right to his invention at common law.

American H. & L. S. & D. Mach. Co. v. *American T. & Mach. Co.* 4 Fish. Pat. Cas. 294.

The circumstances show an implied agreement to the effect that, in consideration of assistance and privileges accorded in the development of his invention, the inventor agreed that defendants should have a right to use the specific machines constructed by him while in their employ.

McClurg v. *Kingsland*, 42 U. S. 1 How. 202 (11: 102); *Chabot* v. *American B. H. & O. Co.* 6 Fish. Pat. Cas. 71, 78; *Magoun* v. *New England Glass Co.* 3 Bann. & Ard. 114; *Barry* v. *Crane Bros. Mfg. Co.* 22 Fed. Rep. 396; *Wilkens* v. *Spafford*, 3 Bann. & Ard. 274; *Continental Windmill Co.* v. *Empire Windmill Co.* 4 Fish. Pat. Cas. 428, 432; *Brickill* v. *New York City*, 5 Bann. & Ard. 544, 545, 547; *Whiting* v. *Graves*, 3 Bann. & Ard. 222, 224; *Wade* v. *Metcalf*, 16 Fed. Rep. 130, 131; *Slemmer's App.* 58 Pa. 155, 167.

Mr. Justice **Gray** delivered the opinion of the court:

The fourth plea is based upon section 7 of the Act of March 3, 1839, chap. 88 (in force when the patents were granted), providing that "every person or corporation, who has or shall have purchased or constructed any newly invented machine, manufacture or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture or composition of matter so made or purchased, without liability therefor to the inventor or any other person interested in such invention." 5 Stat. 354. In the later statutes, this provision has been reenacted with the qualification that the machine, manufacture or composition of matter must have been purchased from the inventor, or constructed with his knowledge and consent. Act of July 8, 1870, chap. 230, § 37 (16 Stat. 203); Rev. Stat. § 4899.

It is agreed that the machines in question were constructed and put in use in the defendants' grain elevators by the inventor himself, and with his knowledge and consent, while he was in their employment as superintendent [43 of machinery, and before his application for either patent. According to the express

terms of the Statute, therefore, the defendants had the right to continue to use these specific machines without paying any compensation to him or his assigns, whether asked for or not.

To the argument of the plaintiff's counsel, that the Statute is unconstitutional as depriving the inventor of his property without compensation, there is a twofold answer: The patentee has no exclusive right of property in his invention, except under and by virtue of the statutes securing it to him, and according to the regulations and restrictions of those statutes. *Gayler* v. *Wilder*, 51 U. S. 10 How. 477, 493 [13: 503, 510]; *Brown* v. *Duchesne*, 60 U. S. 19 How. 183, 195 [15: 595, 599]; *Marsh* v. *Nichols*, 128 U. S. 605, 612 [32: 538, 541]. And these machines have been set free from his monopoly by his own act, consent and permission. *Wade* v. *Metcalf*, 129 U. S. 202 [32: 661].

Judgment affirmed.

---

[86] P. CROWLEY, Chief of Police of the CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *Appt.*,

v.

HENRY CHRISTENSEN.

(See S. C. Reporter's ed. 86-95.)

License to sell liquor—valid ordinance—sale may be prohibited—or regulated—California decision—return to habeas corpus—refusal to grant license—order reversed.

1. An ordinance of the City and County of San Francisco, which regulates the issuing of a license to sell liquors and wines in quantities less than one quart, and which provides that any person selling without a license shall be guilty of a misdemeanor, does not deny the equal protection of the laws, nor abridge the privileges and immunities of a citizen, contrary to the Fourteenth Amendment of the Constitution of the United States.

2. There is no inherent right in a citizen to sell intoxicating liquors by retail; it is not a privilege of a citizen of the State, or of a citizen of the United States. It may be entirely prohibited by state legislation, or be permitted under such conditions as will limit its evils.

3. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.

4. The decision of the Supreme Court of California, that such ordinance is valid as authorized by the Constitution of that State, is binding upon this court, as no inhibition of the Constitution or of a law of the United States is violated by it.

5. No evidence is necessary to support the return to a writ of habeas corpus. It imports verity, until impeached.

6. The refusal of the police commissioners of San Francisco, in their discretion, to grant a license for the sale of liquor is not a matter for review by this court, as it violates no principle of federal law.

7. The petitioner in this case being in custody of the Chief of Police of San Francisco, for violating said ordinance, and the circuit court of the United States having, upon a writ of habeas corpus, ordered his discharge, such order is reversed.

[No. 1317.]

Submitted Oct. 28, 1890. Decided Nov. 10, 1890.

APPEAL from an order of the Circuit Court of the United States for the Northern District of California, discharging petitioner from the custody of the Chief of Police of San Francisco, under a warrant for selling liquor without a license. *Reversed.*

Statement by *Mr. Justice* **Field:**

This is an appeal from an order of the Circuit Court of the United States for the Northern District of California discharging, on habeas corpus, the petitioner for the writ, the appellee here, from the custody of the Chief of Police of the City and County of San Francisco, by whom he was held under a warrant of arrest issued by the police court of that municipality, upon a charge of having engaged in and carried on in that city the business of selling spirituous, malt and fermented liquors and wines in less quantities than one quart, without the license required by the ordinance of the City and County. The ordinance referred to provides that every person who sells such liquors or wines in quantities less than one quart shall be designated as "a retail liquor dealer" and as "a grocer and retail liquor dealer," and that no license as such liquor dealer, after January 1, 1886, "shall be issued by the collector of licenses, unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the City and County of San Francisco to carry on or conduct said business; but, in case of refusal of such consent, upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer or grocer and retail liquor dealer is to be carried on;" and that such license shall be issued for a period of only three months. The ordinance further declares that any person violating this provision shall be deemed guilty of a misdemeanor.

The Constitution of California provides, in the eleventh section of article 11, that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

The petitioner had, previously to June 10, 1889, carried on the business of retail liquor dealer in San Francisco for some years, under licenses from the board of police commissioners, but his last license was to expire on the 17th of that month. Previously to its expiration he was informed by the police commissioners that they had withdrawn their consent to the further issue of a license to him. He afterwards tendered to the collector of license fees, through which officer it was the practice of the board to issue the licenses, the sum required for a new license, but the tender was not accepted, and his application for a new license was refused. He

then applied to the police commissioners for a hearing before them on the question of revoking their consent to the issue of a further license to him. Such hearing was accorded to him, and the time fixed for it was the 24th of June. But, before any hearing was had, he was arrested upon a warrant of the police court upon the charge of carrying on the business of a retail liquor dealer without a license. He then obtained from the Supreme Court of the State a writ of habeas corpus to be discharged from the arrest, but that court, on the 2d of August, 1890, held the ordinance valid and remanded him to the custody of the Chief of Police. He then applied for the allowance of an appeal from this order to the Supreme Court of the United States, but it was refused by the chief justice of the state court, and the associate justice of the Supreme Court of the United States assigned to the circuit, who could have allowed the appeal, was absent from the State. On the 7th of August following a new complaint was made against the petitioner, charging him with unlawfully engaging in and carrying on in San Francisco the business of a retail liquor dealer without a license under the ordinance of the City and County. Upon this complaint a warrant was issued under which he was arrested. He thereupon applied to the circuit court of the United States for a writ of habeas corpus, which was issued.

In return to the writ, the Chief of Police, the appellant here, stated that he held the petitioner under the warrant mentioned by the petitioner and several other warrants issued by the Police Court of the City and County, upon different charges, made at different times, of his conducting and carrying on the business of a retail liquor dealer in San Francisco without a license, as required by the ordinance of the City and County. He also stated, among other things, that a further license to the petitioner was refused by the police commissioners, because they had reason to believe that the business was carried on by him under his existing license in such a manner as to be offensive, and violative of the criminal laws of the State and of the rights of others. In support of this charge it was averred that in that business the petitioner was assisted by one whom he represented and claimed to be his wife, and that she had on one occasion stolen one hundred and sixty dollars from a person who visited his saloon, and been convicted of the offense in the Superior Court of the City and County, and sentenced to be imprisoned for one year, and on another occasion had stolen a watch and a scarf-pin from a person at the saloon, and was held to answer for the charge. It was also averred that there were more than sixteen citizens of San Francisco owning real estate in the block on which the petitioner carried on his business. It does not appear that on the hearing of the application any proof was offered of the facts alleged either in the petition or in the return. The case was heard upon exceptions or demurrer to the return. To that part respecting the alleged larceny by the wife and her conviction, the demurrer was on the ground that the return also showed that an appeal had been taken from the conviction, which was then pending, and that she might be acquitted of the offense charged.

Several objections were urged by the petitioner to the ordinance. Some of them were of a technical character, and could not be considered. Of the others only one was noticed, which was that by it "the State of California, by its officers, denies to him the equal protection of the laws, and makes and enforces against him a law which abridges his privileges and immunities as a citizen of the United States," contrary to the 14th Amendment of the Constitution of the United States.

The court held that the ordinance made the business of the petitioner depend upon the arbitrary will of others, and in that respect denied to him the equal protection of the laws, and accordingly ordered his discharge. 43 Fed. Rep. 243. From the order the case is brought to this court by appeal under sections 763 and 764 of the Revised Statutes, this latter section as amended by the Act of March 3, 1865, chap. 353 (23 Stat. 437).

Mr. **J. D. Page,** on brief signed also by *Mr. Davis Louderback*, for appellant:

Any State or its municipalities that have been invested with the power, may prohibit entirely or restrain and regulate under any conditions or restrictions it or they may deem expedient, the sale or manufacture of intoxicating liquors.

United States v. *Ronan*, 33 Fed. Rep. 120; *Re Hoover*, 30 Fed. Rep. 55; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129 (21: 929); *Kidd* v. *Pearson*, 128 U. S. 1 (32: 340); *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25 (24: 989); *Mugler* v. *Kansas*, 123 U. S. 655 (31: 208); *License Cases*, 46 U. S. 5 How. 504 (12: 256); *Foster* v. *Kansas*, 112 U. S. 206 (28: 697); *Eilenbecker* v. *Plymouth County*, 134 U. S. 40 (33: 805); *Re Guerrero*, 69 Cal. 88; *Re Bickerstaff*, 70 Cal. 35; *Ex parte Campbell*, 74 Cal. 20; *Wiggins* v. *Varner*, 67 Ga. 583; *Whitten* v. *Covington*, 43 Ga. 421; *Groesch* v. *State*, 42 Ind. 547; *Rohrbacher* v. *Jackson*, 51 Miss. 735, 741; *State* v. *Bayonne*, 44 N. J. L. 114; *House* v. *State*, 41 Miss. 737; *Eureka* v. *Davis*, 21 Kan. 578; *Re Ruth*, 32 Iowa, 250; *Devin* v. *Belt*, 70 Md. 352; *Woods* v. *State*, 36 Ark. 36; *Burnside* v. *Lincoln County Ct.* 86 Ky. 423; *State* v. *Allmond*, 2 Houst. (Del.) 612; *State* v. *Morris County Court*, 36 N. J. L. 72; *Kettering* v. *Jacksonville*, 50 Ill. 39; *State* v. *Ludington*, 33 Wis. 107; *Jones* v. *People*, 14 Ill. 196; *State* v. *Wheeler*, 25 Conn. 290; *State* v. *Brennan's Liquors*, Id. 278; *Santo* v. *State*, 2 Iowa, 165; *Sanders* v. *State*, Id. 230; *State* v. *Stucker*, 58 Iowa, 496; *Our House* v. *State*, 4 G. Greene, 172; *Zumhoff* v. *State*, Id. 526; *State* v. *Donehey*, 8 Iowa, 393; *Reynolds* v. *Geary*, 26 Conn. 179; *Oviatt* v. *Pond*, 29 Conn. 479; *People* v. *Hawley*, 3 Mich. 330; *Com.* v. *Capp*, 5 Gray, 97; *Com.* v. *Howe*, 13 Gray, 26; *LaCroix* v. *Fairfield County*, 50 Conn. 321; *Metropolitan Board of Excise* v. *Barrie*, 34 N. Y. 657; *Fell* v. *State*, 42 Md. 89; *Ex parte Kennedy*, 23 Tex. App. 77; *State* v. *Bradley*, 26 Fed. Rep. 289; *Tanner* v. *Alliance*, 29 Fed. Rep. 196; *Pearson* v. *International Distillery*, 72 Iowa, 348; *Ex parte Swann*, 96

Mo. 46; *Martin* v. *Blattner*, 68 Iowa, 286; *Mette* v. *McGuckin*, 18 Neb. 323; *Pleuler* v. *State*, 11 Neb. 547; *State* v. *Moriarty*, 50 Conn. 415; *State* v. *Thomas*, 47 Conn. 546; *State* v. *Buckley*, 40 Conn. 246; *State* v. *Morgan*, Id. 44; *State* v. *Robinson*, 33 Me. 564; *State* v. *Barrels of Liquors*, 47 N. H. 369; *Lincoln* v. *Smith*, 27 Vt. 328; *Gill* v. *Parker*, 31 Vt. 613; *Bancroft* v. *Dumas*, 21 Vt. 456.

Valid laws passed in the exercise of this sovereign right of the State have prohibited the sale of intoxicating liquors.

Ex parte McLain, 61 Cal. 436; *Pleuler* v. *State*, 11 Neb. 575; *Com.* v. *Whelan*, 134 Mass. 206; *Re Liquor Locations*, 13 R. I. 733; *Tillery* v. *State*, 10 Lea, 85; *State* v. *Tarter*, 11 Lea, 658; *Com.* v. *Casey*, 134 Mass. 194; *Com.* v. *Castello*, 133 Mass. 192; *State* v. *Ludington*, 33 Wis. 107.

Even after a person has paid for and obtained such a license it is not a contract or property.

LaCroix v. *Fairfield County*, 50 Conn. 321; *Calder* v. *Kurby*, 5 Gray, 657; *Columbus City* v. *Cutcomb*, 61 Iowa, 672; *Com.* v. *Brennan*, 103 Mass. 70; *People* v. *Wright*, 3 Hun, 308; *People* v. *Brooklyn Board of Comrs.* 59 N. Y. 92; *Fell* v. *State*, 42 Md. 89; *State* v. *Holmes*, 38 N. H. 225.

The general and unrestricted use of intoxicating liquors tends to produce idleness, disorder, disease, pauperism and crime.

Leisy v. *Hardin*, 135 U. S. 159 (34: 150).

Selling intoxicating liquors is not one of the rights growing out of citizenship of the United States.

United States v. *Ronan*, 33 Fed. Rep. 120; *Re Hoover*, 30 Fed. Rep. 55; *Kidd* v. *Pearson*, 128 U. S. 16 (32: 348); *Mugler* v. *Kansas*, 123 U. S. 657 (31: 209); *License Cases*, 46 U. S. 5 How. 590 (12: 295).

In the following instances Liquor Laws are held valid:

Wiggins v. *Varner*, 67 Ga. 583; *United States* v. *Ronan*, 33 Fed. Rep. 120; *Re Hoover*, 30 Fed. Rep. 52; *Rohrbacher* v. *Jackson*, 51 Miss. 735; *House* v. *State*, 41 Miss. 737.

The State Constitution invests the City and County of San Francisco with power to prohibit the sale of intoxicating liquors or to license or regulate or to restrain it.

Ex parte Campbell, 74 Cal. 20; *Re Guerrero*, 69 Cal. 88; *Re Bickerstaff*, 70 Cal. 35; *Ex parte Mount*, 66 Cal. 448; *Ex parte Wolters*, 65 Cal. 269; *Re Linehan*, 72 Cal. 114.

Mr. **Joseph D. Redding**, with *Mr. Alfred Clarke* on the brief, for appellee:

Arbitrary power unregulated by written rules cannot be applied to the retail liquor business.

Ex parte Christensen (Cal.) 24 Pac. Rep. 747; *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220); *Dent* v. *West Virginia*, 129 U. S. 114 (32: 623); *Robison* v. *Miner*, 68 Mich. 549; *Dunham* v. *Hough* (Mich.) 45 N. W. Rep. 497, 498; *Muscoe* v. *Com.* 14 Va. L. J. 26, 536; *State* v. *Pennoyer*, 5 L. R. A. 709, 65 N. H. 113; *People* v. *Mare*, 99 N. Y. 377; *East St. Louis* v. *Wehrung*, 50 Ill. 28; *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923); *Soon Hing* v. *Crowley*, Id. 703 (1145).

Our estate in our business is a property right.

Dent v. *West Virginia*, 129 U. S. 114 (32:623).

The enforcement of state laws must be attended by the rules of the common law.

Missouri Pac. R. Co. v. *Humes*, 115 U. S. 520 (29: 465).

Absence of notice and hearing in the matter of revoking consent is fatal to the legality of the proceeding.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 418 (33: 970); *Denver* v. *Darrow*, 13 Colo. 460; *Anderson* v. *State* (Ala.) 7 So. Rep. 429; *Philadelphia* v. *Scott*, 81 Pa. 80; *Davidson* v. *New Orleans*, 96 U. S. 105 (24: 620).

Due process of law means an orderly proceeding adapted to the nature of the case.

Chauvin v. *Valiton*, 3 L. R. A. 194, 8 Mont. 451; *Hutson* v. *Woodbridge Prot. Dist.* 79 Cal. 90.

City orders must be subject to General Laws.

McDonald v. *Patterson*, 54 Cal. 245; *Earle* v. *San Francisco Board of Education*, 55 Cal. 489; *Ewing* v. *Oreville Min. Co.* 56 Cal. 654; *Re Maguire*, 57 Cal. 608; *Donahue* v. *Graham*, 61 Cal. 277; *Thomason* v. *Ruggles*, 69 Cal. 469; *Oakland Pav. Co.* v. *Hilton*, Id. 479; *Thomason* v. *Ashworth*, 78 Cal. 75; *People* v. *Bingham*, 83 Cal. 238; *People* v. *Henshaw*, 76 Cal. 436; *Ex parte Ah You*, 82 Cal. 339; *Kennedy* v. *San Francisco Board of Education*, Id. 483.

All orders which contravene the General Laws of the State are void.

Muscoe v. *Com.* 14 Va. L. J. 26; *Pennie* v. *Reis*, 80 Cal. 266; *Wysinger* v. *Crookshank*, 82 Cal. 588; *People* v. *Toal* (Cal.) 23 Pac. Rep. 203; *Ex parte Kubach* (Cal.) 24 Pac. Rep. 737; *Davies* v. *Los Angeles* (Cal.) Id. 771; *San Luis Obispo* v. *Graves* (Cal.) 23 Pac. Rep. 1032; *Ex parte Keeney* (Cal.) 24 Pac. Rep. 34; *Ex parte Reilly* (Cal.) Id. 807; *Oxanna* v. *Allen* (Ala.) 8 So. Rep. 79.

The complaint shown in the return charges no crime.

McDonald v. *Lane*, 80 Ga. 497; *Norton* v. *State*, 65 Miss. 297; *Hazard Powder Co.* v. *Volger* (Wyo.) 18 Pac. Rep. 37.

Ordinances are not public and must be pleaded.

State v. *Murfreesboro*, 11 Humph. 217; *Alderman* v. *Finley*, 10 Ark. 423; *Beaty* v. *Knowler*, 29 U. S. 4 Pet. 152-157 (7: 813-815); *West* v. *Blake*, 4 Blackf. 234; *Briggs* v. *Whipple*, 7 Vt. 15-18; *Case* v. *Mobile*, 30 Ala. 538; *Young* v. *Bank of Alexandria*, 8 U. S. 4 Cranch, 384 (2: 655); *Clevenger* v. *Rushville*, 90 Ind. 261; *Green* v. *Indianapolis*, 22 Ind. 192; *Porter* v. *Waring*, 69 N. Y. 254; *Lenahan* v. *People*, 3 Hun, 167, affirmed, 62 N. Y. 628; *Garvin* v. *Wells*, 8 Iowa, 288; *Winona* v. *Burke*, 23 Minn. 255; *Norton* v. *State*, 65 Miss. 297; *McDonald* v. *Lane*, 80 Ga. 497; *Ninenger* v. *State*, 25 Tex. App. 449; *Garland* v. *Denver*, 11 Colo. 534; Bishop, Crim. Proc. 608; Bishop, Stat. Crimes, 406.

Whoever imprisons another must show that the imprisonment is lawful.

1 Chitty, Pl. (16th Am. ed.) 535; *Gallimore* v. *Ammerman*, 39 Ind. 323; *Carey* v. *Sheets*, 60 Ind. 20, 21; *People* v. *McGrew*, 77 Cal. 570; *Ah Fong* v. *Sternes*, 79 Cal. 33.

Facts must be stated.

San Luis Obispo County v. *Hendricks*, 71 Cal. 246; *Hedges* v. *Dam*, 72 Cal. 522.

Liberty is the imperishable and inalienable right of every person.

Strauder v. *West Virginia*, 100 U. S. 303 (25: 664); *Ex parte Virginia*, Id. 339 (676).

The police court had no jurisdiction to issue the warrant.

People v. *Pittsburg R. Co.* 67 Cal. 625; *Ex parte Kearny*, 55 Cal. 220 *McCall* v. *California*, 136 U. S. 104 (34: 391).

A person imprisoned under a void ordinance is imprisoned by the State without due process of law.

Yick Wo v. *Hopkins*, 118 U. S. 356 (30: 220).

Jurisdictional facts must be apparent on the face of the proceedings or the judgment is void.

Ex parte Kearny, 55 Cal. 228; *Jolley* v. *Foltz*, 34 Cal. 321; *Paulson* v. *Portland*, 1 L. R. A. 673, 16 Or. 450.

The complaint shown in the case charges no crime.

McDonald v. *Lane*, 80 Ga. 497; *Norton* v. *State*, 65 Miss. 297.

The return is faulty. It does not allege that any order was made by the board of supervisors.

Re Fil Ki, 80 Cal. 202; *People* v. *Bushton*, Id. 164; *Lambert* v. *Haskell*, Id. 613.

In cases of this kind each party is an actor, and must set forth in his pleading and show by his proofs that he has strictly complied with the law. If he fail to do this, he can obtain no assistance from the courts.

Woods v. *Sawtelle*, 46 Cal. 392; *Cadierque* v. *Doran*, 49 Cal. 356; *Christman* v. *Brainard*, 51 Cal. 536; *Lane* v. *Pferdner*, 56 Cal. 122; *Gilson* v. *Robinson*, 68 Cal. 543.

The police court denied to us the equal protection of the law.

People v. *Martin*, 60 Cal. 153; *Green* v. *San Francisco Super. Ct.* 78 Cal. 556; *People* v. *Lawrence*, 82 Cal. 182; *Ex parte Benjamin*, 65 Cal. 311; *Fraser* v. *Alexander*, 75 Cal. 154.

The ordinance is null and void for want of publication for at least one week.

San Luis Obispo County v. *Hendricks*, 71 Cal. 246; *People* v. *Russell*, 74 Cal. 578.

Mr. Justice **Field** delivered the opinion of the court:

It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. [9] It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the Constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the Legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable; when they shall be in writing and when they may be made orally, and by what instruments it may be conveyed or mortgaged,—are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non lædas* is a maxim of universal application.

For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business. Some occupations by the noise made in their pursuit, some by the odors they engender, and some by the dangers accompanying them, require regulations as to the locality in which they shall be conducted. Some by the dangerous character of the articles used, manufactured or sold require, also, special qualifications in the parties permitted to use, manufacture or sell them. All this is but common knowledge, and would hardly be mentioned were it not for the position often taken, and vehemently pressed, that there is something wrong in principle and objectionable in similar restrictions when applied to the business of selling by retail, in small quantities, spirituous and intoxicating liquors. It is urged that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.

There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in [9] his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every State show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every State, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week, on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of

the State is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no inherent right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of the State or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which
92] does not affect the authority of the State, or one which can be brought under the cognizance of the courts of the United States.

The Constitution of California vests in the municipality of the City and County of San Francisco the right to make "all such local, police, sanitary and other regulations as are not in conflict with general laws." The Supreme Court of the State has decided that the ordinance in question, under which the petitioner was arrested and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation. The learned circuit judge saw in the provisions of the ordinance empowering the police commissioners to grant or refuse their assent to the application of the petitioner for a license, or, failing to obtain their assent upon application, requiring it to be given upon the recommendation of twelve citizens owning real estate in the block or square in which his business as a retail dealer in liquors was to be carried on, the delegation of arbitrary discretion to the police commissioners, and to real estate owners of the block, which might be and was exercised to deprive the petitioner of the equal protection of the laws. And he considers that his view in this respect is supported by the decision in *Yick Wo* v. *Hopkins*, 118 U. S. 356 [30: 220].

In that case it appeared that an ordinance of the City and County of San Francisco passed in July, 1880, declared that it should be unlawful after its passage "for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the City and County of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone." The ordinance did not limit the power of the supervisors to grant such consent, where the business was carried on in wooden buildings. It left that matter to the arbitrary discretion of the board. Under the ordinance the consent of the supervisors was refused to the petitioner to carry on the laundry business in wooden buildings, where it had been conducted by him for over twenty years. He had, at the time, a certificate [9
from the board of fire wardens that his premises had been inspected by them, and upon such inspection they had found all proper arrangements for carrying on the business, and that all proper precautions had been taken to comply with the provisions of the ordinance defining the fire limits of the city and county; and also a certificate from the health officer that the premises had been inspected by him, and were properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry without injury to the sanitary conditions of the neighborhood had been complied with. The limits of the city and county embraced a territory some ten miles wide by fifteen or more in length, much of it being occupied at the time, as stated by the circuit judge, as farming and pasture lands, and much of it being unoccupied sandbanks, in many places without buildings within a quarter or half a mile of each other. It appeared also that, in the practical administration of the ordinance, consent was given by the board of supervisors to some parties to carry on the laundry business in buildings other than those of brick or stone, but that all applications coming from the Chinese, of whom the petitioner was one, to carry on the business in such buildings were refused. This court said of the ordinance: "It allows without restriction the use for such purposes of buildings of brick or stone; but, as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupants into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure. And both classes are alike only in this, that they are tenants at will, under the supervisors, of their means of living. The ordinance, therefore, also differs from the not unusual case, where discretion is lodged by law in public officers or bodies to grant or withhold licenses to keep taverns, [9
or places for the sale of spirituous liquors, and the like, when one of the conditions is that the applicant shall be a fit person for the exercise of the privilege, because in such cases the fact of fitness is submitted to the judgment of the officer, and calls for the exercise of a discretion of a judicial nature."

It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. In the present case the business is not one that any person is permitted to carry on without a license, but

one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe.

It would seem that some stress is placed upon the allegation of the petitioner that there were not twelve persons owners of real property in the block where the business was to be carried on. This allegation is denied in the return, which alleges that there were more than sixteen such property holders. As the case was heard upon exceptions or demurrer to the return, its averments must be taken as true. At common law no evidence was necessary to support the return. It was deemed to import verity until impeached. Hurd on Habeas Corpus, book 2, chap. 8, secs. 8-10; Church on Habeas Corpus, sec. 122. And this rule is not changed by any statute of the United States. It must therefore be considered as a fact in the case that there were more than sixteen owners of real estate in the block. But if the fact were otherwise, and there was not the number stated in the petition, the result would not be affected. If there were no property holders in the block, the discretionary authority would be exercised finally by the police commissioners, and their refusal to grant the license is not a matter of review by this court, as it violates no principle of federal law. We however find in the return a statement which would fully justify the action of the commissioners. It is averred that in the conduct of the liquor business the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one case convicted of the offense and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indication of the character of the place in which the business was conducted for the exercise of the discretion of the police commissioners in refusing a further license to the petitioner.

The order discharging the petitioner must be reversed, and the cause remanded with directions to take further proceedings in conformity with this opinion; *and it is so ordered.*

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY, *Appt.*,

v.

TEXAS CENTRAL RAILWAY COMPANY ET AL.

TEXAS CENTRAL RAILWAY COMPANY, *Appt.*,

v.

MORGAN'S LOUISIANA AND TEXAS RAILROAD AND STEAMSHIP COMPANY ET AL.

(See S. C. Reporter's ed. 171-202.)

Railroad mortgage, foreclosure of—priority of payment—cross-bill, when filed—jurisdiction as to parties.

1. Where a mortgage of a railroad provides that, when the interest on the bonds secured thereby shall remain unpaid for sixty days after a demand, the trustee in the mortgage shall, upon request of the holders of 75 per cent of the outstanding bonds, take possession of and operate the railroad, and shall, upon like request, foreclose the mortgage, this does not limit the power of the trustee to foreclose the mortgage in equity, without such request; especially where the mortgage contains the clause that nothing contained in it shall prevent a foreclosure by any court of competent jurisdiction.
2. Where one advances money which is applied to pay the operating expenses of a railroad, and to keep it running, he is not entitled to a preference in payment out of the proceeds of a foreclosure sale, on a prior mortgage of the road, over the prior mortgage bondholders, although the earnings of the road were applied to the payment of the interest on the bonds. This is especially so where the money advanced was simply a loan.
3. Where two railroad companies had the same fiscal agent, who received the earnings of both, from which payments were made for each, an account being kept between them, a balance of such account in favor of one company is not entitled to priority of payment from the proceeds of the foreclosure of a prior mortgage on the other, in preference to the mortgage bondholders.
4. A cross-bill may assert rights to the property different from those allowed in the original bill and claim an affirmative decree in favor of the complainant filing it.
5. A delay in filing a cross-bill is within the discretion of the court, which can direct it to be filed even at the hearing.
6. Where property is in the possession of a receiver of the circuit court, that court may decide upon conflicting claims to its possession and control, without regard to the citizenship of the parties.

[Nos. 55, 59.]

Argued and Submitted Nov. 4, 1890. Decided Nov. 24, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Texas, for the foreclosure of railroad mortgages and sale of the mortgaged property and declaring the priority of liens thereon. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:** [172

Morgan's Louisiana and Texas Railroad and Steamship Company, a corporation organized under the laws of the State of Louisiana, filed its bill on April 2, 1885, in the Circuit Court of the United States for the Northern District of Texas, against the Texas Central Railway Company, averring that the latter Company was originally organized and incorporated under the General Laws of Texas, on May 31, 1879, to build and operate a railroad from Ross Station, in McLennan County, to the centre of Eastland County; that on or about May 12, 1881, its charter was amended so as to authorize it to extend its railway from the latter point to a point on the north boundary line of the State, and to construct branch railways; that the Company had built and owned about two hundred and twenty-eight miles of road, namely, from Ross to Albany, and from Garrett to Roberts, and was also the owner of certain town lots, and of equipment as described; that on or about the 15th of September, 1879, said Texas Company executed to the Farmers' Loan and Trust Com-

pany of New York, as trustee, a mortgage to secure the payment of a series of bonds of
173] one thousand dollars each, covering its railroad, built and to be built, from Ross to the centre of Eastland County, payable thirty years after November 1, 1879, with interest payable semi-annually, and bonds to the amount of $2,145,000 had been issued and were outstanding; that on May 16, 1881, the Texas Company executed to the same Trust Company, as trustee, a mortgage to secure the payment of another series of bonds of one thousand dollars each, covering its entire main line of railroad, built and to be built, and also its branch lines as described, payable in thirty years, with interest semi-annually, and bonds to the amount of $1,254,000 had been issued and were outstanding under this mortgage; that on October 1, 1884, the Texas Company executed to the Metropolitan Trust Company of New York, as trustee, a mortgage of all its railway and railway lines, whether constructed or to be constructed, to secure an issue of bonds to be known as "general-mortgage bonds" of said Railway Company, which bonds had been signed and sealed, but not certified by the trustee, because of delay in recording the trust deed in all the counties of the State into which the road had been actually built; that the Texas Company, finding itself in great financial embarrassment, and requiring pecuniary assistance, and being already indebted to the Houston and Texas Central Railway Company in a very large amount, obtained further advances from the latter company, making, "with amounts theretofore loaned to it" by the Houston Company, a total indebtedness from the Texas Company to the Houston Company of $761,992.04; that for the security of "said advances then and theretofore made by said Houston and Texas Central Railway Company to said Texas Central Railway Company," the Texas Company, on the first of November, 1884, made and executed its sixteen certain promissory notes, fifteen thereof for the sum of $50,000 each, and one thereof for the sum of $11,992.04, and for the security of said sixteen notes the Texas Company pledged to the Houston Company all the "general-mortgage bonds" which it was authorized to issue for the length of road already built by it; that all of the notes were dated November 1, 1884, and all due on demand, but the Texas
174] Company, though requested, had refused and failed to pay the same; that in order to make the pledge of the bonds, which were not yet countersigned and certified by the trustee, the Texas Company issued and delivered to the Houston Company its certificates, obligating itself to deliver the bonds as soon as executed and signed by the trustee; that the Houston Company pledged said notes and certificates to complainant, as part security for an indebtedness exceeding one million of dollars due by the Houston Company to complainant, and complainant is now the holder, as pledgee, of all of the notes and certificates; that the deed of trust, with the certificates, constituted a full, complete and perfect equitable mortgage and lien upon the railway and the property therein described; that the advances by the Houston Company to the Texas Company were made at various times for taxes, fuel, supplies, labor, repairs, operating and managing expenses, proper equipment, useful improvements and other necessary expenditures, by which the Texas Company's railway had been kept in running order, and its business and improvements increased, and thereby rendered more beneficial to the bondholders and to all other creditors of the Texas Company; that the indebtedness was contracted by the defendant upon the consideration of its promise to pay the same out of the earnings of its railway, and the same was and is, in equity and good conscience, a first lien upon the income and property of said railway, but the defendant, instead of paying the debt out of the earnings of said railway, had failed to pay any part of it, and had used a large amount, at least $500,000, of said earnings, during the years 1882, 1883 and 1884, for the payment of coupons upon its first-mortgage bonds, although the holders of such coupons were only entitled to receive payment thereof after the defendant had paid the complainant the amounts advanced and expended in the manner and for the purposes in the bill set forth; that unless the relief sought is obtained, the certificates which complainant holds, and the bonds when issued, will be greatly depreciated in value, and any effort to foreclose complainant's pledge would result in imposing a debt of $2,286,000 upon said de-
[1 fendant without any adequate relief to complainant, and defendant has no property upon which to levy an execution save and except the properties mortgaged, and the sale of the property would be ineffectual by reason of the uncertainty as to the rights which would be acquired by the purchaser; that the Texas Company is in embarrassed circumstances, the pay-rolls for January and February, 1885, are unpaid and those for March will not be paid, and the Company will default upon the interest of its bonds due May 1; that it has no money in its treasury and no credit upon which to raise it; that it has no supplies; that many suits are pending against it which will ripen into judgments for large amounts of money; that the receipts have been growing less and there is no hope of their increase in the immediate future; that the road runs through a new and undeveloped country in which great financial depression exists at the present time, "and that unless said railway be administered in such a manner as to maintain it with unimpaired efficiency during this period of depression, its assets will be sacrificed without any adequate benefit to any of its creditors;" that the financial embarrassments of the Texas Company are aggravated by the fact that it was originally built as relying on business connections with the Houston Company; that it has always been managed and operated in connection with the latter; that it has no round-houses or repair shops, and its maintenance and transportation business has always, until recently, been conducted entirely by the officers of the operating department of the Houston Company without any additional expense to the Texas Company.

but that the Houston Company has lately been placed in the hands of receivers by the order of the United States Circuit Court for the Fifth Judicial Circuit and Eastern District of Texas in a suit entitled "*The Southern Development Company* v. *The Houston and Texas Central Railway Company*," and the result of said receivership has been to deprive the Texas Company of its former operating officers and of the benefit of the harmonious business relations formerly existing with the Houston Company, and the interdependence of said two railways upon each other has been such that it is to the vital interests of both companies that that interdependence should be maintained; that the Houston Company owns over one third of the capital stock of the Texas Company, and the Houston Company is also obligated for the indebtedness of $761,992.04, pledged by it to complainant, and it is of vital importance to both of said roads that the management of the two should be under one common head. Complainant prayed for the appointment of one or more receivers of the property of the defendant and for a decree for the payment and satisfaction of its claims out of the rents, revenues, issues and profits coming to the receivers. Copies of the deeds of trust from the Texas Central Railway Company to the Farmers' Loan and Trust Company of September 15, 1879, and of May 16, 1881, and of that to the Metropolitan Trust Company of October 1, 1884, were attached to the bill.

On the 4th of April, 1885, the receivers of the Houston Company were appointed receivers of the Texas Company, the Texas Company appearing and submitting the motion for such action of the court as might seem just and equitable. On the 2d of May complainant filed its amended and supplemental bill against the Farmers' Loan and Trust Company, trustee, and the Metropolitan Trust Company, trustee, as well as the Texas Central Railway Company, which recapitulated the averments of the original bill and insisted that the indebtedness of $762,000 was an equitable lien upon all the property of the Railway Company, and entitled to be paid, in case of sale, out of the proceeds of such sale, before any money is paid to the holders of the said mortgage bonds; that the indebtedness should have been paid by the Railway Company out of its annual earnings, which were sufficient for that purpose, but instead of paying the debts incurred for labor, material, betterments and services necessary to the operation of the railway, and to keep the same in proper condition of repair and running order, the defendant Railway Company expended its revenues in paying the interest on the mortgage bonds, leaving the complainant and others similarly situated unpaid, and they are entitled, in equity and good conscience, to stand in the place and stead of said mortgage creditors for the amounts the latter have respectively received, and to have their claims satisfied out of the property of the Railway Company or out of the proceeds of any sale thereof. The bill prayed, among other things, for a decree of lien by reason of the certificates, an accounting, a sale of the property, if necessary, and the payment of the amounts decreed to be due the complainant, out of the proceeds, in preference to any amounts due on the mortgage bonds, etc.

The Texas Company answered, admitting in general the allegations of the bill, but submitting to the court that the bill was destitute of equity.

The Metropolitan Trust Company filed its answer August 17, 1885, admitting the allegations in respect to the mortgage executed to it as trustee on October 1, 1884, and that it refused to certify bonds thereunder until the completion of the recording of the mortgage. The Farmers' Loan and Trust Company answered September 24, 1885, and denied, on information and belief, the allegations of the bill in respect to the advances by the Houston Company to the Texas Company, and also that the indebtedness stated in the bill was a first lien upon the income or property of the Texas Company, and averred that, if any advances were made, they were payments which, in equity, should be imputed to complainant; that the Houston Company and the complainant are the owners of the Texas Company and of its property, holding the same as a mere appendage to the Houston Road, and the mortgages executed by the Texas Company were in fact mortgages procured to be made by the parties controlling the complainant and the Houston Company; and, in various averments, recited the facts and circumstances attending the formation of the Morgan Company, its ownership of the Houston Company, and the creation of the Texas Company, and of the Southern Development Company, upon whose application receivers had been appointed for the Houston Company in the suit referred to in complainant's bill; it alleged that the complainant in that suit and in this represented practically and substantially the same interests, the two complainant corporations being owned and controlled by the same persons, and that all the proceedings and acts [178 of the defendant, the Texas Company, from its organization, are, in fact and law, those of the complainant, and to be equitably imputed to the complainant: and it denied that the Texas Company had used its earnings for making payment of coupons upon its first-mortgage bonds, and which the holders were not entitled to receive, and asserted that the bill, as framed, was open to demurrer for reasons given.

Subsequently, the Farmers' Loan and Trust Company, upon leave duly granted, filed its cross-bill in the cause against complainant and its co-defendants. This set up the mortgages and averred that the mortgagor had failed to pay the interest on all the bonds secured by the mortgages respectively, which became due and payable May 1, 1885, and all interest since that date; that payment of such interest had been duly demanded; that said default had continued sixty days after such demand, and thereupon the principal of all the bonds was and had become immediately due and payable; that the lien of the deed of trust to the Metropolitan Company was subsequent and subsidiary to the lien of the trust deeds or mortgages made to com

plainant, and that, if the claim of the Morgan Company, as set forth in its bill, was a lien at all on the property, it was subject and inferior to the liens of the mortgages to complainant. The bill alleged the insolvency of the Texas Company, and the insufficiency of its net earnings to pay the floating debt and discharge the interest on the mortgage bonds, and concluded with the usual prayers for the appointment of a receiver, an injunction and an account of the bonds and the amounts due the holders; and for a decree that the amounts so found due shall constitute a first lien on the property; that the Railway Company pay into court the amount found due, together with costs; and that, in default of such payment, the property and franchises of the Railway Company be sold; and for judgment for any deficiency. The fourteenth paragraph of this cross-bill averred that the Texas Company had made default upon the first deed of trust held by it, by failing to pay the interest on the bonds which became due and payable on the first day of May, 1885; that payment of such in-
179] terest had been duly demanded, "and said default had continued sixty days after such demand;" and that "thereupon the principal of the said bonds secured by said last-mentioned mortgage or deed of trust is and has become immediately due and payable, and the same and all said interest so in arrears as aforesaid remains still due and unpaid." Paragraph fifteen made the same averments as to the second mortgage held by the cross-complainant.

The Texas Company, in its answer, admitted the allegations of the bill of the Farmers' Loan and Trust Company as to the execution of the mortgages, and admitted the fourteenth paragraph of the bill to be true, except that it set up, by way of explanation, that its roads and property were placed in the hands of receivers on May 14, 1885, on the bill filed by the Morgan Company. It admitted the allegation in the fifteenth paragraph to be true, as stated.

The Morgan Company, in its answer, reiterated all the averments in its original and amended bills, and claimed that it had a lien upon the property of the Texas Company, and that, in any foreclosure proceedings, it was entitled to be paid out of the proceeds of sale by preference over the mortgage creditors. It admitted that the matters set forth in the fourteenth and fifteenth paragraphs of the cross-bill were true.

The Metropolitan Company admitted the allegations of the cross-bill respecting the mortgage executed to it, as trustee, by the Railway Company, in October, 1884, and alleged that no bonds had, to its knowledge or belief, been issued secured by the lien of the said mortgage.

Replications were filed and proofs were taken.

Evidence was given of the issuing of the bonds under the two mortgages to the Farmers' Loan and Trust Company, and of a request to that Company for the institution of proceedings to foreclose the trust deeds, but not on behalf of the holders of seventy-five per cent of the bonds of either issue. The three trust deeds or mortgages referred to in the original bill, the sixteen notes, amounting to $761,992.04, and the certificates of the Texas Company, were also put in evidence, and a statement from the books of the Texas Company, as follows:

180]

"Texas Central Railway Company.

"*Statement of Gross Earnings, Expense of Operation and Charges against Income from Commencement of Operation to Sept. 30, 1884, Inclusive.*

	Gross earnings.	Operating expenses.	Taxes.	Interest on bonded debt.	Total charge against income.	Deficit.
To Dec. 31, 1880	102,773 76	75,360 25	79 67	54,250 00	129,689 92	26,916 16
" " 1881	247,707 02	115,426 83	3,603 24	140,875 00	259,905 07	12,198 05
" " 1882	205,887 32	157,896 73	9,626 79	218,680 00	386,203 52	180,316 20
" " 1883	290,262 45	248,310 78	13,440 32	237,930 00	499,681 05	209,418 60
" Sept. 30, 1884	210,312 78	177,302 88	14,337 40	237,930 00	429,570 28	219,257 50
Total	$1,056,943 33	774,297 42	41,087 42	889,665 00	1,705,049 84	648,106 51
Interest other than on bonded debt						70,098 85
Total deficit						$718,205 36
						70,098 85
						648,106 51"

The Morgan Company called as a witness E. W. Cave, treasurer for the receivers, and treasurer for the Texas Company in 1880, 1881, 1882, 1883 and 1884, and also of the Houston Company, and produced the resolution of the directors of the Houston Company of December 1, 1884, pledging the notes and certificates to the Morgan Company, and the receipt of the latter therefor. Mr. Cave testified that the notes were given by the Texas Company to the Houston Company in settlement of the indebtedness of the former to the latter, which arose from cash advances and payments made by the Houston Company for the benefit of the Texas Company; that the account between the Houston Company and the Texas Company was adjusted and closed about the last of October, 1884; that there was no year during the five years mentioned when the Texas Company earned enough to pay its operating expenses and fixed charges, including taxes; that the funds advanced were used in paying the operating expenses of the Texas Company

for material and supplies, for maintenance and such things as had to be done to improve or keep the property up, and some portion of it may have been applied to the maintenance of its security by the payment of interest on its bonds; that some of the money necessarily went for that, because whatever
1] money was used by the Company out of its own gross earnings from its general business, for the payment of interest, left a deficit in its operating expenses and maintenance, which had to be covered by advances; that the officers of the Houston Company and of the Texas Company were practically the same; that no salary was paid to the officers of the Texas Company, which was organized in the interest of the Houston Company; that the Houston Company owned about two fifths of the Texas Company's stock and the Morgan Company the other three fifths; that the directors of the two companies were mainly the same, and the Morgan Company owned a majority of the stock of the Houston Company; that the bonds that were issued under the mortgage to the Farmers' Loan and Trust Company were negotiated by the president of the Houston Company; that the Texas Company was practically a part of the Houston Company, and the latter company collected its revenues and accounts; that the money was disbursed from the moneys that were collected, and only as the deficit arose and increased were the advances made by the Houston Company; that the road was operated practically as a division of the Houston Company; that the officers of the Houston Company acted as officers of the Texas Company; that the revenues came in and went into accounts, and then those accounts went onto the books of the Texas Company where matters were not kept direct; that the earnings went into the books of the Houston Company, and, when the Texas Company got into debt, the executive officers of the Houston Company advanced the money; that they were authorized to advance it and the debts of the Texas Company were paid; that the Houston Company collected all the earnings of the Texas Company, and when the latter was short it received help; that that was the way this balance of nearly $762,000 arose, it being the balance of running account beginning from the time the road commenced to be operated as a road; that, when the settlement was made upon which these notes were issued, the account was brought down to date, interest calculated by the auditor of the Houston Company, understood and acknowledged, and a balance of interest struck, and the
2] balance found to be as stated, about $762,000; that interest was computed on both sides; that there was a continual running account; that when the Texas Company had funds and balances, it paid the interest on the bonds, and did not have to call on the Houston Company for funds, and whenever it did not have funds, as in the matter of interest or as in other matters, whatever balance was needed was supplied, but the Texas Company's coupons were paid by Cisco & Son upon separate account, that firm being the fiscal agent of both roads.

The following are questions to and answers of the witness:

"*Q.* The accruing funds, the income of the Central Company, was there any special use of its own funds, of its own earnings, towards paying running expenses rather than interest, or towards paying interest rather than running expenses, or was that all a matter of running account?

"*A.* It was all in one account, so far as the account of the Houston and Texas Central Railway Company was concerned, and whether the advances were made for one purpose or another they were charged so much cash; but the Texas Central Railway Company, of course, took cognizance of what it was used for.

"*Q.* So that whenever it was behindhand on its current indebtedness and needed money the Houston and Texas Central Railway Company paid it, and when it came to pay interest and did not have funds, the Houston and Texas Central Railway Company paid it?

"*A.* The Houston and Texas Central Railway Company let it have the money."

On the 12th of April, 1887, the circuit court entered its decree. The decree finds the execution and delivery to the Farmers' Loan and Trust Company of the two mortgages of September 15, 1879, and May 16, 1881, and of the mortgage of the first day of October, 1884, to the Metropolitan Trust Company; that the liens and claims of the Metropolitan Company and the beneficiaries under its trust are in all respects subsequent, subsidiary and junior to the rights and equities of the Farmers' Company and its beneficiaries, both of the mortgages to the [18
Farmers' Company being prior liens to the mortgage to the Metropolitan Company, the first as to the property therein described and the second as to the entire property of the defendant, the Texas Company; that the Morgan Company has an equitable lien upon all the property of the Texas Company to the amount of $761,992.04, with interest from November 1, 1884, said lien, however, being junior and subordinate in all respects to the liens under the mortgage deeds of trust to the Farmers' Company; that in each of the mortgages it is provided that in case the Texas Company, defendant, shall fail to pay any of the interest on any of the bonds due under the mortgage at any time when the same may become due and payable, and said default shall continue sixty days after said demand, then and thereupon the principal of all of the said bonds shall become immediately due and payable; that the Texas Company was on May 1, 1885, and still is, insolvent and unable to meet or pay its obligations, including the coupons issued on its bonds secured by the said mortgages to the Farmers' Company and maturing upon that date, and that it wholly failed to pay the same, and made default in the payment of all the coupons upon said bonds, and has not paid any of the said coupons which fell due November 1, 1885, or May 1, 1886, nor any coupons which matured since that date; that payment of said interest has been duly demanded and

said default has continued sixty days after such demand; and that the principal of all the bonds under both mortgages is and has become immediately due and payable. It finds the amount of principal and interest due on both sets of bonds, and that by reason of the default of the Texas Company to pay the interest and any of it, and by reason of other matters and things hereinabove alleged, the conditions of the mortgages and of each of them held by the Farmers' Company have been broken, and the said mortgages and deeds of trust, and both of them, have become absolute, and the trustee is entitled to a decree for the sale of all the mortgaged property to satisfy the principal and interest of the said bonds; and the decree then orders, adjudges and decrees that the principal sums have become due and payable, and that unless the defendant, the Texas Company, shall within ten days pay into court the sum found due with interest, and an amount sufficient to defray the costs, the equity of redemption of said defendant and of all the parties to the suit, and of all the holders of bonds or other claims secured by the mortgage to the Metropolitan Company, in or to the mortgage property, shall be barred and foreclosed, and the mortgage premises and property shall be sold to the highest bidder for cash, as provided. It further orders, among other things, that in case the amount of the bid shall be more than sufficient to pay the sums and amounts found and adjudged to the Farmers' Company, the overplus shall be applied to the payment of the sums decreed to be due to the Morgan Company; and provides for deficiency decrees in favor of the Farmers' Company and the Morgan Company.

From this decree separate appeals were prosecuted by the Morgan Company and the Texas Company. On behalf of the Morgan Company it is insisted that the court erred in adjudging that its claim was not in equity a lien and charge upon the property of the Texas Company, prior and superior in right to the lien of the mortgages of the Farmers' Company, and justly entitled to be paid out of the proceeds of the sale of the property in preference to the mortgage bonds, and in granting leave to the Farmers' Company to file the bill of complaint for the foreclosure of the mortgages, and rendering a decree thereon; and that, if it had jurisdiction to entertain the bill of the Farmers' Company, then it erred in proceeding to a decree for foreclosure and sale to pay the principal of the bonds upon a default in the payment of interest, without averring and proving that the bill had been filed for that purpose by the request of the holders of seventy-five per cent in amount of the outstanding bonds.

On behalf of the Texas Company errors are assigned to the action of the court in entertaining the bill of the Farmers' Company and rendering the decree of foreclosure and sale thereon, and also in adjudging the principal sums of the bonds to be due and payable, and in decreeing foreclosure and sale without proof of a request to the trustee, by the holders of seventy-five per cent in amount of the bonds, to foreclose.

Mr. **J. Hubley Ashton,** for the Railroad and Steamship Company, appellant:

The claim of the Morgan Company constitutes, in equity, a lien and charge upon the property of the defendant Railway Company, prior and superior in right to the lien of the mortgages to the Farmers' Loan and Trust Company.

Fosdick v. *Schall*, 99 U. S. 235 (25: 339); *Hale* v. *Frost*, Id. 392 (419); *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 81 (27: 126); *Union Trust Co.* v. *Souther*, 107 U. S. 594 (27: 489); *Union Trust Co.* v. *Walker* Id. 596 (490); *Burnham* v. *Bowen*, 111 U. S. 776 (28: 596); *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U.S. 457 (29:971); *Porter* v. *Pittsburg B. S. Co.* 120 U. S. 649 (30: 830); *Penn* v. *Calhoun*, 121 U. S. 251 (30: 915); *Sage* v. *Memphis & L. R. Co.* 125 U. S. 361 (31: 694); *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C. C. & I. R. Co.* Id. 676 (838); *Union Trust Co.* v. *Morrison*, Id. 591, 609, 612 (825, 830, 831); *Toledo, D. & B. R. Co.* v. *Hamilton*, 134 U. S. 302 (33: 905); *Blair* v. *St. Louis, H. & K. R. Co.* 22 Fed. Rep. 474; *Farmers L. & T. Co.* v. *Vicksburg & M. R. Co.* 33 Fed. Rep. 779.

The mortgage bondholders of a railroad company accept their security with the knowledge that the company is under an obligation to the State to maintain its railroad in a suitable condition for performing the public service.

Barton v. *Barbour*, 104 U. S. 135 (26: 677); *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 454 (29: 970).

The holders of the mortgage bonds are interested in keeping up the property and must be deemed to assent to what is necessary to accomplish that object.

Galveston, H. & H. R. Co. v. *Cowdrey*, 78 U. S. 11 Wall. 459 (20: 199); *Gilman* v. *Illinois & M. Teleg. Co.* 91 U. S. 603 (23: 405); *American Bridge Co.* v. *Heidelbach*, 94 U. S. 798 (24: 144).

The bonded debt incurred for the purpose of construction and equipment is but another form of capital, analogous to preferred stock.

Union Pac. R. Co. v. *United States*, 99 U. S. 420 (25: 282).

Equity may require unsecured claims to be paid in preference to mortgage bonds.

Burnham v. *Bowen*, 111 U. S. 776 (28: 596).

A court of equity is invested with a large discretion in cases of this character, and has the right to extend equitable relief to those whose action and money, while the railroad was in operation, inured to the benefit of the bondholders, by charging the mortgage security with the payment of their just claims in the foreclosure proceedings.

Union Trust Co. v. *Morrison*, 125 U. S. 591 (31: 825).

The corporation is a separate legal or political person, distinct from the stockholders, whose property and rights belong to the legal entity, the artificial being, created by the charter, and not to the individual members.

Bank of Augusta v. *Earle*, 38 U. S. 13 Pet. 587 (10: 307); *Pullman's Palace Car Co.* v. *Missouri Pac. R. Co.* 115 U. S. 587 (29: 499); *Porter* v. *Pittsburg B. S. Co.* 120 U. S. 670 (30: 838).

A stockholder has the right to make these advances for the protection of the property and business of the company, the same as other

persons, and has an equitable claim to reimbursement out of the proceeds of the mortgage security in preference to the holders of the bonds.

Twin-Lick Oil Co. v. *Marbury*, 91 U. S. 589 (23: 330).

The proper time for filing a cross-bill, where such a bill is necessary, is at the time of putting in the answer to the original suit.

2 Daniell, Ch. Pr. 1650.

As an original bill, the court below had no jurisdiction to entertain the cross-bill, as the complainant, the Farmers' Loan and Trust Co., and one of the defendants, the Metropolitan Trust Co., are citizens of the same State.

Brigham v. *Luddington*, 12 Blatchf. 241; *Carpenter* v. *Talbot*, 33 Fed. Rep. 537.

Jurisdiction cannot be gained even by consent of parties; and where a suit cannot be sustained between the complainant and each of the defendants, the court has no jurisdiction.

Strawbridge v. *Curtiss*, 7 U. S. 3 Cranch, 267 (2: 435); *Susquehanna & W. V. R. & C. Co.* v. *Blatchford*, 78 U. S. 11 Wall. 172 (20: 179); *Northern Ind. R. Co* v. *Michigan Cent. R. Co.* 56 U. S. 15 How. 233 (14: 674); *Horn* v. *Lockhart*, 84 U. S. 17 Wall. 570 (21: 657).

The so-called cross-bill is not within the jurisdiction of the circuit court by virtue of its jurisdiction of the original cause.

Story, Eq. Pl. 389; *Shields* v. *Barrow*, 58 U. S. 17 How. 145 (15: 162); *Ayres* v. *Carver*, Id. 591 (179); *Cross* v. *De Valle*, 68 U. S. 1 Wall. 14 (17: 518); *Providence Rubber Co.* v. *Goodyear*, 76 U. S. 9 Wall. 809 (19: 589).

The judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted.

Mansfield, C. & L. M. R. Co. v. *Swan*, 111 U. S. 384 (28: 464).

The right to enforce the payment of the debt was to attach only when the bondholders requested the trustee to proceed to foreclose the mortgages as against the corpus of the mortgaged estate.

Chicago, D. & V. R. Co. v. *Fosdick*, 106 U. S. 77 (27: 58).

Mr. **Charles H. Tweed,** for the Texas Central Railway Company, appellant:

The court below erred in granting leave to the Farmers' Loan and Trust Company to file its bill for the foreclosure of the mortgages on the property of the appellant as a cross-bill in this suit, and was without jurisdiction to entertain the bill and render the decree of foreclosure and sale herein, in accordance with its prayer.

Strawbridge v. *Curtiss*, 7 U. S. 3 Cranch, 267 (2: 435); *Susquehanna & W. V. R. & C. Co.* v. *Blatchford*, 78 U. S. 11 Wall. 175 (20: 180); *Brigham* v. *Luddington*, 12 Blatchf. 241; *Christmas* v. *Russell*, 81 U. S. 14 Wall. 80 (20: 763).

The present bill cannot be said to be a true cross-bill.

Shields v. *Barrow*, 58 U. S. 17 How. 145 (15: 162); *Ayres* v. *Carver*, Id. 591 (179); *Cross* v. *De Valle*, 68 U. S. 1 Wall. 14 (17: 518); *Providence Rubber Co.* v. *Goodyear*, 76 U. S. 9 Wall. 809 (19: 589); *Ayers* v. *Chicago*, 101 U. S. 187 (25: 840).

The principle by which the circuit courts are able to entertain cross-bills in equity, without regard to citizenship, is subject to limitations.

Clarke v. *Mathewson*, 37 U. S. 12 Pet. 172 (9: 1044); *Dunn* v. *Clarke*, 33 U. S. 8 Pet. 1 (8: 845); *First Nat. Bank of Alexandria* v. *Turnbull*, 83 U. S. 16 Wall. 195 (21: 297); *Krippendorf* v. *Hyde*, 110 U. S. 285 (28: 148); *Schenck* v. *Peay*, 1 Woolw. 184.

Mr. **Herbert B. Turner,** for the Farmers' Loan and Trust Company, appellee:

The debt of the original complainant is not of such a nature as to be entitled to any preferences in equity to the lien of the mortgages.

Miltenberger v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286 (27: 117); *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434 (29: 963); *Porter* v. *Pittsburg B. S. Co.* 120 U. S. 649 (30: 830), 122 U. S. 267 (30: 1210); *Kneeland* v. *American L. & T. Co.* 136 U. S. 89 (34: 379).

There is no question as to the jurisdiction.

2 Daniell, Ch. Pr. and Pl. 1548–1550; Foster, Fed. Pr. § 170; Mitf. Ch. Pl. (Tyler's ed.) 178; *Field* v. *Schieffelin*, 7 Johns. Ch. 252, 2 N. Y. Ch. L. ed. 284; *Pattison* v. *Hull*, 9 Cow. 747; *Armstrong* v. *Pratt*, 2 Wis. 299; *Lowenstein* v. *Glidewell*, 5 Dill. 325.

If the court has jurisdiction over the *res* on filing of an original bill, it will take jurisdiction of bills not original growing out of the first suit, without regard to the citizenship of the parties thereto.

Clarke v. *Mathewson*, 37 U. S. 12 Pet. 164 (9: 1041); *Jones* v. *Andrews*, 77 U. S. 10 Wall. 327, 333 (19: 935, 936); *Pacific R. Co.* v. *Missouri Pac. R. Co.* 111 U. S. 505 (28: 498); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609 (17: 886); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28: 145); *Dewey* v. *West Fairmount G. C. Co.* 123 U. S. 329 (31: 179); *Gumbel* v. *Pitkin*, 124 U. S. 131 (31: 374).

It is immaterial whether the cross-bill be regarded as a cross-bill proper, an original bill in the nature of a cross-bill, or as an original bill.

Ragland v. *Broadnax*, 29 Gratt. 401; *Schenck* v. *Peay*, 1 Woolw. 184.

No request of bondholders was necessary.

Jones, Corporate Bonds and Mortg. § 385; *Mercantile Trust Co.* v. *Missouri, K. & T. R. Co.* 36 Fed. Rep. 221; *Central Trust Co.* v. *Texas & St. L. R. Co.* 23 Fed. Rep. 846; *Dow* v. *Memphis & L. R. Co.* 20 Fed. Rep. 265.

Mr. Chief Justice **Fuller** delivered the [19
opinion of the court:

The objection that the Farmers' Company could not proceed to a foreclosure and sale to pay the principal as well as the interest of the bonds upon a default in the payment of interest, without averring and proving that the bill had been filed for that purpose by the request of the holders of seventy-five per cent in amount of the outstanding bonds, rests upon the language of the conditions of the mortgages. Each of them, after providing that it should be void in the event that the Railway Company should pay the principal of the bonds and the several installments of interest as they became due, stipulated as follows:

"But in case the Texas Central Railway Company shall fail to pay the principal, or

any part thereof, or any of the interest on any of the said bonds at any time when the same may become due and payable according to the tenor thereof, and if the said default shall continue sixty days after having been demanded, then and thereupon the principal of all the said bonds hereby secured shall be and become immediately due and payable, and upon the request of the holder or holders of seventy-five per cent of said bonds then outstanding, and written notice of said request being served on the New York agency of the party of the first part, at which said bonds and coupons are made payable, the said trustee (who may act by its president or attorney), or its successor or successors in this trust, may and shall take actual possession (with or without entry or foreclosure) of said railway hereby conveyed, and of all and singular the said mortgaged property, and shall manage and operate the same and receive all the income and profits of the same, together with all the books, papers, records, accounts and money of said Railway Company, first defraying out of the same the expenses of the road and its needful repairs and the management of said trust, and the surplus to pay the interest and principal of all the bonds issued hereunder which may be due and outstanding and hereby secured *pro rata;* and, upon the request of the holder
91] or holders of seventy-five per cent in amount of the bonds so in default which may be at any time outstanding under this deed of trust, it shall be the duty of the said Farmers' Loan and Trust Company of the City of New York, by its president or agent duly appointed in its behalf, to foreclose this mortgage or deed of trust and sell the property herein and hereby conveyed, at the City of Houston, Texas, at public auction, to the highest bidder for cash, after having given at least sixty days' notice of the time, place and terms of sale by advertisement in at least two daily newspapers published in the City of Houston, and two daily newspapers published in the City of New York," etc.

It is contended on behalf of the appellants that by the true construction of the foregoing conditions, the action of the trustee in enforcing the stipulation that, upon the prescribed default in the payment of the interest, the principal of the bonds should become due, is so far subjected to the wishes of the bondholders that the trustee is without right or power to institute proceedings for the collection of the principal sum before the date of payment in course, by foreclosure and sale upon such default on interest, except upon the request of the holders of seventy-five per cent in amount of the bonds outstanding. We do not agree with this view. Whenever default upon the interest should continue sixty days after maturity and demand, then and thereupon it was declared that the principal of all of the bonds should be and become immediately due and payable, and that the trustee, upon the request of the holder or holders of seventy-five per cent of the outstanding bonds, and written notice thereof being served on the New York agency of the mortgagor, where the bonds and coupons were made payable, might take possession and operate the road; and upon like request it was made the duty of the trustee to foreclose the mortgage and, after advertisement, sell the property at public auction to the highest bidder for cash. Hence, although, as to the particular form of foreclosure and sale at public auction by advertisement, and without the aid of the court, the proper construction would be that that course could not be taken without the request prescribed, this not only did not limit the [18
power of the trustee to proceed by application to a court of equity to foreclose, but each of the mortgages contained near its close the following clause: "It is hereby further agreed that nothing herein contained shall be held or construed to prevent or interfere with the foreclosure of this instrument, the appointment of a receiver, or any other act or proceeding appropriate in such cases, by any court of competent jurisdiction."

There was nothing in the mortgages which took away the inherent right of resort to the courts, and this clause did not impart what existed without it, but its insertion, evidently out of abundant caution, made it perfectly clear that the provisions relied on by appellants did not apply to foreclosure by bill in equity, but to the cumulative remedy specified. It is easy to see why taking possession and selling without the intervention of the court should be guarded against, and the trustee not be required or allowed to proceed in that summary manner except on the request of a certain percentage of the holders of the bonds. Such proceedings might result in injury, which could not be predicated of those regularly taken in a court of equity. Arbitrary procedure by the trustee was not deemed desirable, in view of the interests of both mortgagor and the bondholders as a class, while each would find the protection to which it might be entitled at the hands of the court. *Mercantile Trust Co.* v. *Missouri, K. & T. R. Co.* 36 Fed. Rep. 221.

The case of *Chicago, D. & V. R. Co.* v. *Fosdick*, 106 U. S. 47 [27: 47], is so different upon the facts from that in hand as to deprive it of the weight attributed to it by appellants. The mortgage in controversy in that suit contained no provision saving to the trustees the right to resort to the courts for a foreclosure. It provided for a remedy in case of default by entry and sale by the trustees, and also by foreclosure and sale, but it was provided that demand for possession should not be made by the trustees until they were required to take such possession by the holders of at least one half of the outstanding bonds, and that where there was a default on interest, continued for six months after demand, the trustees might declare the principal due and give notice to the mortgagor, and, upon the written request of the holders of a majority of such bonds, proceed to collect both principal and interest by foreclosure and sale, or otherwise, as provided. 106 U. S. 49, 50[27: 48]. This court held that the restriction on the acceleration of the principal did not prevent a foreclosure suit for overdue interest, and that, as the company in that case was in

default on some of the coupons, the trustees or any bondholder, independently of the particular provisions just referred to, on nonpayment of any installment of interest, could file a bill for the enforcement of the security and obtain a decree *nisi*, for such defaulted interest, and if the same were not paid as directed, a sale would be ordered. But as the finding of the amount due was the foundation of the right of the mortgagee to proceed, and the right to redeem would not be taken away except upon a strict compliance with the steps necessary to devest it, it became, said *Mr. Justice* Matthews, speaking for the court, "of the first importance to ascertain whether the decree of foreclosure and sale, in the present case, found due and required to be paid, as the condition of exercising the right to redeem, a larger sum than was then due." The evidence being examined, it was found that there was none to establish that "any coupon, not afterwards funded, was presented and payment thereof refused;" and it was pointed out that, under the eighth article of the mortgage there involved (which provided that if default was made in the payment of any half year's interest on any of said bonds, and the coupons for such interest should have been presented, and such default should have continued for six months after such demand, without the consent of the holder of said coupon or bond, then the principal of all of the said bonds should be and become immediately due and payable, anything in said bonds to the contrary notwithstanding; and that the trustees might so declare the same and notify the party of the first part thereof), the forfeiture must stand or fall upon the fact of such declaration and notice, as it might be justified or not by the circumstances existing when they were made; and that whether the whole debt had become due or not, must rest exclusively upon the alleged default, which had been found insufficient. And it was further held that under the same article which provided for a foreclosure on the written request of the holders of the majority of the outstanding bonds, even if the principal sum of the mortgage deed had been rightfully declared due and the required notice given, nevertheless the foundation for proceeding to foreclosure would fail without proof that the bill had been filed for that purpose upon such written request.

In the case at bar, the proof of the presentation and default upon the coupons was full and was not disputed. The mortgages specifically provided that upon such default continuing for sixty days after demand, the principal of all of the bonds should become immediately due and payable. The Texas Company and the Morgan Company both admitted that the principal had become due and payable. The instruments did not require a written request for a declaration by the trustee that the principal was due, or such a declaration and notification to the defaulting Company, in order to make the principal mature. That was a consequence of a default continuing sixty days after demand. Nor was there any restriction upon the power to proceed by bill in equity, but on the contrary any intention to impose such a restriction was disavowed.

The Morgan Company insisted by its pleadings that it was justly entitled to be paid out of the proceeds of the sale decreed in preference to the first-mortgage bonds, because, as it alleged, the Houston Company under which it claims advanced the amount in question to the Texas Company to be used for taxes, operating expenses, equipment, improvements and other necessary expenditures, by which the Texas Company's railway had been kept in safe running order, its business and importance increased, and it thereby rendered more valuable to the first-mortgage bondholders; that the indebtedness was contracted by the Texas Company upon consideration of its promise to pay the same out of the earnings of its railway; that (as is charged upon information and belief) the Company had used at least $500,000 of said earnings during the years 1882, 1883 and 1884 for the payment of coupons of its first-mortgage bonds, although the holders of the [191 coupons were only entitled to receive payment thereof after the Texas Company had paid the amounts advanced and paid as aforesaid; and that the Morgan Company was entitled to stand in the place and stead of said mortgage creditors for the amounts received. In other words, the contention seemed to be, that the Houston Company should be awarded priority of lien because it advanced the amount in question to be used in the payment of operating expenses and taxes, and it was so used; or upon the promise that it should be so used, which was broken by its diversion to the payment of interest; or, if there were no such promise, express or implied, then that the application of the advances to the payment of interest entitled the Houston Company to preference by way of subrogation, or because by such payment the Texas Company was kept running for five years, which without such payment would have been impossible.

We do not, however, understand it to be claimed upon the evidence, that any express agreement is made out for the application of the advances to any particular purpose, or for the right of subrogation between the Houston Company and either the Texas Company or the first-mortgage bondholders, or that any of the interest coupons upon the first-mortgage bonds, which were paid by the Texas Company, were taken by the Houston Company as security for advances. But it is argued that the advances were for the payment of operating expenses, taxes and interest during five years, whereby the railroad property was preserved as a "going" concern; that at the time the road was constructed the country through which it ran was in a prosperous condition, but afterwards unfavorable conditions supervened and continued throughout the period covered by the advances; that "it was hoped and expected, however, that an improvement in the business of the road would take place, and that the Company would be enabled to reimburse the advances;" that the advances were made to meet the particular deficits as they occurred from time to time, to pay oper-

ating expenses when there was a deficiency in the earnings, and to pay interest on the
3] bonds when there was not enough from the earnings to pay it, and, as a whole, constituted the ways and means of maintaining the good will and integrity of the enterprise, and preserving the property, business and franchises; and that, as all that was done by the Houston Company inured directly for the benefit of the public and of the property, it was just and equitable, "inasmuch as the expectations of the parties in regard to the enterprise were not realized, without any fault of theirs, that the mortgage securities should bear the loss which must be sustained either by the bondholders or the appellant."

From the account stated, it appears that the gross earnings were each year sufficient to pay the operating expenses and taxes, and that the deficit of each year was produced by the payment of interest on the bonded debt. But if the advances could therefore be treated as having been specifically procured for, or specifically applied to, the payment of interest as such (although there is no evidence to that effect), still such payment would afford no basis for the assertion of a preference as against the bondholders. So far as disclosed, the interest coupons were paid, not purchased (*Ketchum* v. *Duncan*, 96 U. S. 659 [24: 868]; *Wood* v. *Guarantee T. & S. D. Co.* 128 U. S. 416 [32: 472]), and cannot be set up as outstanding; and the contention is wholly inadmissible that the bondholders, because they received what was due them, should be held to have assented to the running of the road at the risk of returning the money thus paid, if the Company, by reason of unrealized expectations on the part of those who made the advances, should ultimately turn out to be insolvent and unable to go on. By the payment of interest, the interposition of the bondholders was averted. They could not take possession of the property, and should not be charged with the responsibility of its operation.

It is true that a railroad company is a corporation operating a public highway, but it does not follow that the discharge of its public, excuses it from amenability for its private, obligations. If it cannot keep up and maintain its road in a suitable condition, and perform the public service for which it was endowed with its faculties and franchises, it must give way to those who can. Its bonds cannot be confiscated because it lacks self-sustaining ability. To
7] allow another corporation, which for its own purposes has kept a railroad in operation in the hands of the original company, by enabling it to prevent those who would otherwise be entitled to take it, from doing so, a preference in reimbursement over the latter on the ground of superiority of equity, would be to permit the speculative action of third parties to defeat contract obligations, and to concede a power over the property of others which even governmental sovereignty cannot exercise without limitation. And if all these advances should be considered as applied in payment of the operating expenses only, upon the theory, where such was not literally the fact, that they supplied a deficit created by the payment of interest out of the gross earnings, the same remarks would be applicable.

The doctrine of *Fosdick* v. *Schall*, 99 U. S. 235 [25: 339], is that a court of equity may make it a condition of the issue of an order for the appointment of a receiver, that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver or from the proceeds of sale; that the property being in the hands of the court for administration as a trust fund for the payment of incumbrances, the court, in putting it in condition for sale, may, if needed, recognize the claims of materialmen and laborers, and some few others of similar nature, accruing for a brief period prior to its intervention, where current earnings have been used by the company to pay mortgage debt or improve the property, instead of to pay current expenses, under circumstances raising an equity for their restoration, as, for instance, where the company, being insolvent and in default, is allowed by the mortgage bondholders to remain in possession and operate the road long after that default has become notorious, or where the company has been suddenly deprived of the control of its property, and the pursuit of any other course might lead to cessation of operation. *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286, 311, 312 [27: 117, 126, 127]. If the officers of the company, remarked *Mr. Chief Justice* Waite, in *Fosdick* v. *Schall*, "give to one class of creditors that which properly belongs to another, the court may, upon an adjustment of the accounts, so use the income which comes into its own [I
hands as, if practicable, to restore the parties to their original equitable rights. . . . Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained. It follows that if there has been in reality no diversion, there can be no restoration; and that the amount of restoration should be made to depend upon the amount of the diversion." *Burnham* v. *Bowen*, 111 U. S. 776 [28: 596]; *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434 [29: 963].

In the light of these decisions, the inquiry before us is whether these bondholders are to be postponed in respect to the proceeds of the sale of the *corpus* of the property upon which their lien is first and paramount, to this claim of the Houston Company, upon the ground of the particular application of these moneys, or that they supplied a diversion by the officers of the Texas Company equitably binding as such upon the bondholders. Now, if these advances were made generally, as needed by the Texas Company, it matters not whether they were devoted to the payment of running expenses or not. The relation of debtor and creditor existed, and no equity could arise in favor of the creditor as against other creditors holding security prior in time, by reason of the voluntary application the debtor might make of the money borrowed. We repeat that, so far as appears, the money advanced to one road by the other

was simply a loan. The account between the companies was a running account, and the balance was only a balance for cash advances made from time to time. Moneys received from the operation of the Texas road and moneys received from the Houston Company all went into a common fund, from which payments were made for expenses, taxes, and so on. It is also shown that the Texas Company and the Houston Company had the same fiscal agent in New York, who paid the coupons of both; that the management of the Texas Company was, during its entire existence, in the hands of the same officers and directors who managed the Houston Company; that these officers derived their compensation from the Houston Company; that all receipts from the Texas Company were first received by the Houston Company and then transferred on the books to the treasurer of both companies, as treasurer of the Texas Company; that whenever there was a deficit of funds on the part of the Texas Company, such deficit was made up by the Houston Company; and that the latter company received and disbursed everything. Under such circumstances, it cannot be maintained, against the first-mortgage bondholders, that a balance of such a running account of five years' duration represents money so applied to the current expenses of the road or so diverted therefrom to the payment of interest on the bonds, as to carry with it a superior equity for repayment. *Penn* v. *Calhoun*, 121 U. S. 251 [30: 915]; *Kneeland* v. *American L. & T. Co.* 136 U. S. 89 [34: 379]; *St. Louis, A. & T. H. R. Co.* v. *Cleveland, C. C. & I. R. Co.* 125 U. S. 658 [31: 832].

It is to be observed, also, that the Morgan Company counted upon the certificates of the Texas Company, whereby it bound itself to deliver to the Houston Company the third-mortgage bonds as soon as executed by the Metropolitan Company as trustee, and asked for a decree against all the defendants, declaring the amount found due to complainant, as holder of such certificates, to be "a full, complete, perfect and equitable mortgage and lien upon said railway and upon all of the property, incomes, tolls and profits in said deed of trust of October 1, 1885, described," and prayed "that out of the proceeds of any sale which may be made to satisfy any decree of this honorable court your orator's claim for said amount be paid and satisfied." It is thus seen that the Morgan Company asserted its equities as based on the third-mortgage bonds, which renders it still clearer that upon this record no reason exists for the subordination of the first and second mortgages to this claim. Our conclusion is, that the circuit court, while it decreed a lien to the Morgan Company, rightfully refused to give it preference over the paramount lien of the first and second mortgage bonds.

Notwithstanding the decree was properly rendered upon the merits, we are urged to reverse it upon the further ground that the bill of the Farmers' Company ought not to have been allowed to be filed, because not in time, and not a cross-bill, and that, if treated as an original bill, it cannot be maintained, for want of jurisdiction, the Farmers' and Metropolitan Companies being citizens of New York, the Morgan Company, of Louisiana, and the Texas Company, of Texas.

Under the original bill filed by the Morgan Company, and on its application, the court had taken possession of the property of the Texas Company, through receivers. The Farmers' and Metropolitan Companies were then brought into court by an amended and supplemental bill, which prayed for an account of all liens and incumbrances on the property of the Texas Company and of all its assets, and for a decree adjudging the sums alleged to be due to the Morgan Company liens upon the net earnings of the Texas Company and all its property, superior in rank to the claims of the said trustees and of the holders of the mortgage bonds issued under the various deeds of trust, the giving of which had been set up in the original bill and copies thereto annexed; and that the amount due to it by reason of its advances to the Houston Company should be paid out of the net earnings, and if they proved insufficient, then that a sale be ordered of the property in bulk, and that the amount decreed to the Morgan Company be paid out of the proceeds in preference to the amounts due on the mortgage bonds. It was also specifically prayed, as has been stated, that the rights of the Morgan Company under the certificates given it by the Houston Company in lieu of the bonds issued under the third mortgage should be decreed to be an equitable mortgage upon the property of the Texas Company, and, inferentially at least, superior to the lien of the first two mortgages.

"A cross-bill," says *Mr. Justice* Story (Eq. Pl. § 389), "*ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill." And as illustrative of cross-bills for relief, he says (§ 392): "It also frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill, or cross-bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties, and upon the proper proofs." [20

It seems to us that in order that a decree might be made upon the whole matter in dispute, brought completely before the court, the bill in question was necessary and was correctly styled a cross-bill. In no proper sense were new and distinct matters introduced by it, which were not embraced in the original and amended and supplemental bills, and while it sought equitable relief, it was such as, in point of jurisdiction over the subject matter, the court was competent to administer. It may be that, so far as it sought the further aid of the court beyond the purposes of defense to the original bill, it was not a pure cross-bill, but that is im-

material. The subject matter was the same, although the complainant in the cross-bill asserted rights to the property different from those allowed to it in the original bill, and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained except through a cross-bill, and different relief from that prayed in the original bill would necessarily be sought. This bill was filed, on leave, before the testimony was taken, and though there should be as little delay as possible in filing bills of this kind, yet that was a matter entirely within the discretion of the court, which could have directed it to be filed even at the hearing. And whether this bill be regarded as a pure cross-bill, as an original bill in the nature of a cross-bill, or as an original bill, there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the circuit court did not depend upon the citizenship of the parties, but on the subject matter of the litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control. *Milwaukee & M. R. Co.* v. *Soutter*, 69 U. S. 2 Wall. 609 [17: 886]; [102] *People's Bank* v. *Calhoun*, 102 U. S. 256 [26: 101]; *Krippendorf* v. *Hyde*, 110 U. S. 276 [28: 145].

The decree of the Circuit Court is affirmed.

---

[147] UNITED STATES, *Appt.*,

v.

JOHN GRIMLEY.

(See S. C. Reporter's ed. 147-157.)

Recruits in army—requisite age—status—oath of allegiance—articles of war—court-martial.

1. Where a recruit is forty years of age when he enlists in the army, his age is no bar to his enlistment of which he can take advantage, although his age is more than that required by sec. 1116, U. S. Rev. Stat., which provides that recruits must be between the ages of 16 and 35 years.
2. Enlistment is a contract; but it is one which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves the soldier from its obligations.
3. The taking of the oath of allegiance is the pivotal fact which changes the status of the recruit from that of civilian to that of soldier. The reading of the Articles of War is not essential to his enlistment.
4. Civil courts may inquire into the jurisdiction of a court-martial, and, if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence.

[No. 761.]

Submitted Oct. 21, 1890. Decided Nov. 17, 1890.

APPEAL from a judgment of the Circuit Court of the United States for the District of Massachusetts, affirming a decree of the District Court of the United States for the same District, discharging, on habeas corpus, John Grimley from imprisonment in pursuance of a sentence of a court-martial, for the crime of desertion. *Reversed.*

The facts are stated in the opinion.

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, for appellant:

When Grimley took the oath his enlistment was complete, notwithstanding the fact that he might have been rejected before assignment to a regiment.

Tyler v. *Pomeroy*, 8 Allen, 480; *Lamfield* v. *Abbot*, 9 Law Rep. 510; Articles of War 1776, section III. articles 1 and 2, U. S. Military Laws, 64; Army Regulations of 1881, paragraphs 777, 778, 779.

Army regulations have the force of law.

Gratiot v. *United States*, 45 U. S. 4 How. 93 (11: 890).

Grimley's age did not render his enlistment void.

Re Zimmerman, 30 Fed. Rep. 176.

The restrictions of section 1116 are solely for the benefit of the government.

United States v. *Bainbridge*, 1 Mason, 86; *State* v. *Brearly*, 5 N. J. L. 555.

Section 1116 was directory.

United States v. *Wyngall*, 5 Hill, 16; *United States* v. *Cottingham*, 1 Rob. (Va.) 615; *United States* v. *Bowen*, 100 U. S. 513 (25: 632); 1 Winthrop, Military Law, 769.

The recruiting officer has implied power to decide upon the qualifications of the recruit.

Re Cosenow, 37 Fed. Rep. 668; *Re McVey*, 23 Fed. Rep. 878; *United States* v. *Gibbon*, 24 Fed. Rep. 185.

Even if a contract of enlistment was voidable by Grimley, it is too late to avoid it after sentence by court-martial.

McConologue's Case, 107 Mass. 154; *Re Dew*, 25 Law Rep. 538; *Com.* v. *Gamble*, 11 Serg. & R. 93; *Wilbur* v. *Grace*, 12 Johns. 68.

An enlistment is binding on a minor, is voidable only by his parents, and cannot be avoided even by the parents to oust a court-martial from jurisdiction already assumed over the minor to try him for a military offense.

Re Beswick, 25 How. Pr. 149; *Re Wall*, 8 Fed. Rep. 85; *Re Davison*, 21 Fed. Rep. 618; *Com.* v. *Camac*, 1 Serg. & R. 87; *Re Hearn*, 32 Fed. Rep. 141; *Re Spencer*, 40 Fed. Rep. 149; *Re Kaufman*, 41 Fed. Rep. 870; *Ex parte Anderson*, 16 Iowa, 595; *Re Morrissey* (U. S. C. C. E. D. Mo.) April 17, 18, 1889.

A contrary view has been maintained in—

Com. v. *Fox*, 7 Pa. 336; *United States* v. *Hanchett*, 18 Fed. Rep. 26.

As to this case, see—

1 Winthrop, Military Law, p. 779, *note 2*; *Re Baker*, 28 Fed. Rep. 30; *Re Chapman*, 37 Fed. Rep. 327; *Re Von Dieselskie*, 8 Cent. Rep. 730, 5 Mackey, 485.

Messrs. **Henry W. Putnam** and *William H. Brown*, for appellee:

Grimley's alleged enlistment was void. He was, at the time, over forty years of age, and therefore above the maximum age for enlistment.

See also brief in *Morrissey Case*, *post*, 644.

The courts have expressly declared this as to recruits under the minimum age.

NOTE.—*As to naval courts-martial; jurisdiction of, as to persons and officers; how constituted, etc.,*—see *note to Wilkes* v. *Dinsman*, 12: 618.

Seavey v. *Seymour*, 3 Cliff. 439, 445, 447; *Re McDonald*, 1 Low. 100; *Re Davison*, 21 Fed. Rep. 618; *Re Hearn*, 32 Fed. Rep. 141; *Re Lawler*, 40 Fed Rep. 233, 235; *Beswick's Case*, 25 How. Pr. 147, 152, 153; *Goodson* v. *Caldwell*, 2 Winst. (N. C.) 136; *Chapman* and *Cosenow's Cases*, 2 L. R. A. 332, 37 Fed. Rep. 327, 668, and cases there cited; *Re Ferrens*, 3 Ben. 442, 448.

The Act of 1814 had been repealed by the Act of 1815.

Kimball's Case, 9 Law Rep. 500-502, 503; *Tyler* v. *Pomeroy*, 8 Allen, 480, 492, 493; *McDonald's Case*, 1 Low. 100, 102, 103; *Andrews' Case*, 1 Hask. 87.

Such was evidently the opinion of Congress when it made the maximum thirty-five, in the Revision of 1874.

The Act of 1815, sec. 7, restores the provisions of the Act of 1802, as to the recruiting, and with the same limitations, thus restoring the limitations of age established by the Act of 1802, which made thirty-five the maximum.

Ferrens' Case, 3 Ben. 442.

The cases of *United States* v. *Wyngall*, 5 Hill, 16, and *United States* v. *Cottingham*, 1 Rob. (Va.) 615, hold merely that the enlistment of aliens is not rendered void by the recital, "citizen of the United States," in Stat. 1802, chap. 9, sec. 11, those words being directory. They have since dropped out of the Statute.

Com. v. *Barker*, 5 Bin. 423, 426.

The retention of the age limitation, while citizenship is dropped out, emphasizes its mandatory character.

Sedgwick, Stat. 325.

In *United States* v. *Hanchett*, 18 Fed. Rep. 26, it was held that the enlistment could be avoided after being three days at the rendezvous.

In *Beswick's Case*, 25 How. Pr. 149, the minor delayed a year, and in *Ferrens' Case*, 3 Ben. 442, twenty days, in putting an end to his contract.

See *Wall's Case*, 8 Fed. Rep. 85.

The declaration of the petitioner at the rendezvous as to his age is not conclusive as against the actual fact.

Re McDonald, 1 Low. 100.

A minor's oath that he was of age is not binding on the minor himself.

Com. v. *Blake*, 8 Phila. 523, 527, 528.

Independently of Grimley's age, the proceedings at the rendezvous did not constitute a valid enlistment so completed as to exchange his civil status for the military status.

United States v. *Thompson*, 2 Sprague, 103, 27 Law Rep. 23; *Tyler* v. *Pomeroy*, 8 Allen, 485, 486; *Bamfield* v. *Abbot*, 9 Law Rep. 510.

Regulations not inconsistent with the statutes have, as against the government, the full force of law.

Gratiot v. *United States*, 45 U. S. 4 How. 80, 117, 118 (11: 884, 901); *Ex parte Reed*, 100 U. S. 13, 22 (25: 538, 539).

A court martial has jurisdiction only over soldiers mustered and in pay of the United States, not over civilians.

U. S. Rev. Stat. 1342, arts. 64, 71-121.

The judgment of any tribunal against a person, or for an offense, or imposing a sentence, not within its jurisdiction, is wholly void, and, if it restrains personal liberty, may be reviewed and relieved against collaterally by the appropriate tribunal.

Ex parte Lange, 85 U. S. 18 Wall. 163, 166 (21: 872, 875); *Ex parte Siebold*, 100 U. S. 371 (25: 717); *Ex parte Reed*, 100 U. S. 13, 23 (25: 538, 539); *Ex parte Fisk*, 113 U. S. 713, 726 (28: 1117, 1122); *Ex parte Nielsen*, 131 U. S. 176 (33: 118); *Ex parte Parks*, 93 U. S. 18, 21 (23: 787, 788); *Ex parte Yerger*, 75 U. S. 8 Wall. 85, 99 (19: 332, 337); *Ex parte Yarbrough*, 110 U. S. 651, 653 (28: 274); *Wales* v. *Whitney*, 114 U. S. 564, 570 (29: 277, 278); *Re Coy*, 127 U. S. 731, 758 (32: 274, 280).

The appropriate tribunal in a case like the present is the district or circuit court of the United States.

U. S. Rev. Stat. § 751; *Tarble's Case*, 80 U. S. 13 Wall. 397 (20: 597); *Barrett* v. *Hopkins*, 2 McCrary, 129.

The delegation to the Secretary of War of power to discharge any person illegally enlisted by the Act of 1864, did not devest the federal courts of their jurisdiction on habeas corpus. It was a cumulative remedy, not an exclusive one.

Ex parte Hanchett, 18 Fed. Rep. 26, 28.

A court-martial is an inferior court of limited jurisdiction.

Wise v. *Withers*, 7 U. S. 3 Cranch, 331, 337 (2: 457, 459); *Dynes* v. *Hoover*, 61 U. S. 20 How. 65, 81 (15: 838, 844); *Ex parte Schmeid*, 1 Dill. 587; *Ex parte Kearney*, 20 U. S. 7 Wheat. 38 (5: 391).

Mr. Justice **Brewer** delivered the opinion of the court: [149

John Grimley, the appellee, was, on the 28th day of May, 1888, found guilty by a court-martial of the crime of desertion, and sentenced to be imprisoned six months. While serving out this sentence at Fort Warren, Massachusetts, he sued out a writ of habeas corpus from the District Court of the United States for the District of Massachusetts. That court, on June 25, 1888, discharged him from custody. The United States appealed to the Circuit Court for said District, which, on the 27th day of February, 1889, affirmed the decree of the district court. 38 Fed. Rep. 84. From this decision the United States has brought this appeal. [150

The circuit court found that the petitioner was forty years of age at the time of his alleged enlistment, although he represented himself to be but twenty-eight; and, under section 1116 of the Revised Statutes, ruled that the enlistment was void, and that Grimley never became a soldier, and was not subject to the jurisdiction of the court-martial. That section reads: "Recruits enlisting in the army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment." It cannot be doubted that the civil courts may in any case inquire into the jurisdiction of a court-martial, and if it appears that the party condemned was not amenable to its jurisdiction, may discharge him from the sentence. And, on the other hand, it is equally clear that by habeas corpus the civil courts exercise no supervisory or correcting power over the proceedings of a court-martial; and that no mere errors in their pro-

ceedings are open to consideration. The single inquiry, the test, is jurisdiction. That being established, the habeas corpus must be denied and the petitioner remanded. That wanting, it must be sustained and the petitioner discharged. If Grimley was an enlisted soldier he was amenable to the jurisdiction of the court-martial; and the principal question, the one ruled against the government, is whether Grimley's enlistment was void by reason of the fact that he was over thirty-five years of age. This case involves a matter of contractual relation between the parties; and the law of contracts, as applicable thereto, is worthy of notice. The government, as contracting party, offers contract and service. Grimley accepts such contract, declaring that he possesses all the qualifications prescribed in the government's offer. The contract is duly signed. Grimley has made an untrue statement in regard to [51] his qualifications. The government makes no objection because of the untruth. The qualification is one for the benefit of the government, one of the contracting parties. Who can take advantage of Grimley's lack of qualification? Obviously only the party for whose benefit it was inserted. Such is the ordinary law of contracts. Suppose "A," an individual, were to offer to enter into contract with persons of Anglo-Saxon descent, and "B," representing that he is of such descent, accepts the offer and enters into contract; can he, thereafter, "A" making no objection, repudiate the contract on the ground that he is not of Anglo-Saxon descent? "A" has prescribed the terms. He contracts with "B" upon the strength of his representations that he comes within those terms. Can "B," thereafter, plead his disability in avoidance of the contract? On the other hand, suppose for any reason it could be contended that the proviso as to age was for the benefit of the party enlisting, is Grimley in any better position? The matter of age is merely incidental, and not of the substance of the contract; and can a party by false representations as to such incidental matter obtain a contract, and thereafter disown and repudiate its obligations on the simple ground that the fact in reference to this incidental matter was contrary to his representations? May he utter a falsehood to acquire a contract, and plead the truth to avoid it, when the matter in respect to which the falsehood is stated is for his benefit? It must be noted here, that in the present contract is involved no matter of duress, imposition, ignorance or intoxication. Grimley was sober, and of his own volition went to the recruiting office and enlisted. There was no compulsion, no solicitation, no misrepresentation. A man of mature years, he entered freely into the contract.

But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. *Marriage* is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach [1 of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other—no matter how great their disregard of marital obligations. It is true that courts have power, under the statutes of most States, to terminate those contract obligations, and put an end to the marital relations. But this is never done at the instance of the wrong-doer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. So, also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien, and becomes a citizen, and when that change is once accomplished, no disloyalty on his part, no breach of the obligations of citizenship, of itself destroys his citizenship. In other words, it is a general rule accompanying a change of status, that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof. Especially is he debarred from pleading the existence of facts personal to himself, existing before the change of status, the entrance into new relations, which would have excused him from entering into those relations and making the change, or, if disclosed to the other party, would have led it to decline admission into the relation, or consent to the change.

By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the State not objecting, renounce his relations and destroy his status on the plea that, if he had disclosed truthfully the facts, the other party, the State, would not have entered into the new relations with him, or permitted him to change his status. Of course these considerations may not apply where there is insanity, idiocy, infancy or any other disability which, in its nature, disables a party from changing [1 his status or entering into new relations. But where a party is *sui juris*, without any disability to enter into the new relations, the rule generally applies as stated. A naturalized citizen would not be permitted, as a defense to a charge of treason, to say that he had acquired his citizenship through perjury, that he had not been a resident of the United States for five years, or within the State or Territory where he was naturalized one year, or that he was not a man of good moral character, or that he was not attached to the Constitution. No more can an enlisted soldier avoid a charge of desertion and escape the consequences of such act, by proof that he was over age at the time of enlistment, or that he was not able-bodied, or that he had been convicted of a felony, or that before his enlistment he had been a deserter from the

military service of the United States. These are matters which do not inhere in the substance of the contract, do not prevent a change of status, do not render the new relations assumed absolutely void. And in the case of a soldier, these considerations become of vast public importance. While our regular army is small compared with those of European nations, yet its vigor and efficiency are equally important. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other. So, unless there be in the nature of things some inherent vice in the existence of the relation, or natural wrong in the manner in which it was established, public policy requires that it should not be disturbed. Now, there is no inherent vice in the military sevice of a man forty years of age. The age of thirty-five, as prescribed in the Statute, is one of convenience merely. The government has the right to the military service of all its able-bodied citizens, and may, when emergency arises, justly exact that service from all. And if for its own convenience, and with a view to the selection of the best material, it has fixed the age at thirty-five, it is a matter which in any given case it may waive; and it does not lie in the mouth of anyone above that age, on that account alone, to demand release from an obligation voluntarily assumed, and discharge from a service voluntarily entered into. The government, and the government alone, is the party to the transaction that can raise objections on that ground. We conclude, therefore, that the age of the petitioner was no ground for his discharge.

A minor question arises on these facts as to whether the petitioner was in fact enlisted. It appears that on Saturday, February 18, 1888, the petitioner entered the recruiting rendezvous in Boston, and expressed a desire to enlist. He underwent a physical examination. He took the oath of allegiance before the recuiting officer, signed the clothing rolls, and was placed in charge of the sergeant. The latter took him to the clothing-room, and selected for his uniform a cap, trousers, blanket, shirt and pair of stockings, and laid them before him. He put none of these articles on except the cap, and that in a few minutes he took off. He then asked permission to go away and see his friends, and the sergeant told him to go, and be back on Monday. He went away in his citizens' clothes, returned to his mother's house and told her what he had done. She was very much grieved, and after some conversation with him went to the recruiting office, and finding three men there told them her errand, and was advised substantially that Grimley need not come back, and might go to work. Who these men were is not disclosed. On the strength of that he did not return, but went off and engaged in service as a coachman. He was arrested as a deserter on May 16, 1888, brought before a court-martial and found guilty, as heretofore stated. The oath of allegiance which he took was as follows:

"The United States of America.

"State of Massachusetts, } *ss:*
City or Town of Boston, }

"I, John Grimley, born in Armagh, in the State of Ireland, aged twenty-eight years and ——— months, and by occupation a [151
groom, do hereby acknowledge to have voluntarily enlisted, this eighteenth day of February, 1888, as a soldier in the army of the United States of America, for the period of five years, unless sooner discharged by proper authority; and do also agree to accept from the United States such bounty, pay, rations and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.

"John Grimley. [Seal.]

"Subscribed and duly sworn to before me this 18th day of February, A. D. 1888.

"James Miller,

"Captain, 2d Infantry, Recruiting Officer."

The question presented is, whether the petitioner had, in fact, enlisted and become a soldier. It will be noticed that in this oath of allegiance is an acknowledgment that he had enlisted, and that it was not an agreement to enlist. In this respect this case differs from that of *Tyler* v. *Pomeroy*, 8 Allen, 480, in which the plaintiff, with others, had signed a paper by which, in terms, they agreed to serve for a period of three years "from the date of our being mustered into the United States' service." In that case *Mr. Justice* Gray, then a member of the Supreme Court of Massachusetts, in an opinion reviewing all the authorities in England and in this country, drew a distinction between an agreement to enlist, which, if broken, simply gives a right of action for damages, and an enlistment, which changes the status of the party, transfers him from civil to military life, and renders him amenable to military jurisdiction. Section 1342 of the Revised Statutes provides that the army of the United States shall be governed by certain rules and articles thereafter stated. Article 2 provides: "These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and [15
he shall thereupon take an oath or affirmation," etc. Obviously the oath is the final act in the matter of enlistment. Article 47, respecting desertion, reads: "Any officer or soldier who, having received pay, or having been duly enlisted in the service of the United States, deserts the same," etc. By this, either receipt of pay or enlistment determines the status; and after enlistment the party becomes amenable to military jurisdiction, although no actual service may have been rendered and no pay received.

It is insisted that the Articles of War were

not read to him; but that is not a prerequisite. "Within six days after" is the Statute. The reading of the one hundred and twenty-eight articles, many of which do not concern the duty of a soldier, is not essential to his enlistment. Paragraph No. 766 of the Army Regulations of 1881 is as follows: "The forms of declaration, and of consent in the case of a minor, having been signed and witnessed, the recruit will then be duly examined by the recruiting officer and surgeon, if one be present, and, if accepted, the 47th and 103d Articles of War will be read to him, after which he will be allowed time to consider the subject until his mind appears to be fully made up before the oath is administered to him." That this was complied with is probable, from the testimony.

The petitioner testifies that something was read to him out of a book, though he is unable to say what it was; and Captain Miller, the recruiting officer, testifies that he is under the impression, though not positive, that he read the 47th Article to him. He also says that he had quite a conversation with him, inquiring as to his past life and why he had decided to enlist. No solicitations were used, no advantage taken of him. The enlistment was a deliberate act. No specified amount of time for the purpose of consideration is prescribed by the regulation. The oath is not to be administered until his mind is fully made up, and that is all that is required. There is nothing in the circumstances surrounding the enlistment to vitiate the transaction. We conclude, therefore, upon the whole case, that the age of the petitioner was no bar to his enlistment of which
.57] he can take advantage; that the taking of the oath of allegiance is the pivotal fact which changes the status from that of civilian to that of soldier; that the enlistment was a deliberate act on the part of the petitioner; and that the circumstances surrounding it were not such as would enable him, of his own volition, to ignore it, or justify a court in setting it aside.

The judgment of the Circuit Court will be reversed, and the case remanded with instructions to reverse the decree of the District Court and take such further proceedings as shall be in conformity with the opinion of this court.

160] UNITED STATES, *Appt.*,

v.

TRINIDAD COAL AND COKING COMPANY.

(See S. C. Reporter's ed. 160-171.)

Public lands—fraud in obtaining by corporations—reimbursement.

1. Where members of a corporation, and its employés, were its agents in obtaining from the government, for it, coal lands that could not rightfully have been entered in its own name, such lands were fraudulently obtained, and the patents therefor may be set aside as void, in a suit for that purpose by the United States.
2. Corporations are associations of persons within the meaning of and subject to the restrictions imposed by sections 2347 and 2350 of the United States Revised Statutes.
3. A corporation which has violated a public statute in obtaining public lands can be required to surrender them before it has been reimbursed the amount expended by it in procuring the legal title.

[No. 774.]

Argued Oct. 29, 30, 1890. Decided Nov. 17, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Colorado, dismissing a suit brought by the United States to set aside certain patents, and to declare them void, and of no effect as against it. *Reversed.*

Statement by *Mr. Justice* **Harlan**:

This is a suit in equity by the United States against the Trinidad Coal and Coking Company, a corporation created under the laws of Colorado and engaged in the business of mining coal. The defendant holds the legal title to six tracts of coal land within the Pueblo Land District, in the County of Las Animas, in that State, containing in the aggregate 954 and 34-100 acres, under conveyances executed to it by various individuals to be presently named, and to whom, respectively, patents were issued.

The relief sought by the government is a decree setting aside these patents, and declaring them void and of no effect as against the United States. The defendant demurred to the bill upon the ground that it did not make a case for relief in a court of equity, nor allege that any of the entries were fraudulent or in contravention of law. The demurrer was sustained and the bill dismissed, the opinion of the court being reported in 37 Fed. Rep. 180. The sole question is whether the United States is entitled upon the showing made by the bill to the relief it asks.

Taking the allegations of the bill to be true, the case made by the government is as follows:

On or about the 4th of June, 1883, T. J. Peter and Robert Savage were officers and stockholders, and William H. Leffingwell, Milford N. Wells, Alexander Craigmyle, Charles F. Schuman and Thomas Winsheimer were employés, of the defendant corporation. Peter, Savage and certain other officers and members of that corporation, whose names are unknown to the government, together with Leffingwell, Wells, Craigmyle, Schuman and Winsheimer, formed a scheme to procure patents for these lands "for the benefit and on behalf of said defendant corporation, and for the purpose of enabling said corporation to fraudulently obtain titles" from the United States for its "coal lands in excess of 320 acres, contrary to the statutes of the United States in such cases made and provided." In furtherance of that scheme the persons just named, and those associated with them, or some one of them, or someone acting for them and in their behalf, on or about the day above named, wrote and prepared, or caused to be written and prepared, certain affidavits, one of which was in substance and to the effect that

NOTE.—*That patents for land may be set aside for fraud, see note to Miller v. Kerr, 5: 881.*

"no portion of the tract of land described as the northeast quarter of section six, township thirty-four south, of range sixty-three west, of the sixth principal meridian, and containing one hundred and fifty-two and 53-100ths acres, was in the possession of any other party; that said Robert Savage was twenty-one years of age, a citizen of the United States, and had never held nor purchased, as an individual, or as a member of any association, lands under the laws of the United States relating to the sale of coal lands of the United States; that he, the said Savage, was well acquainted with the character of said land and with every legal subdivision thereof, and had frequently passed over the same; that his knowledge of said land was such as to enable him to testify understandingly in regard thereto; that said land contained large deposits of coal, and was chiefly valuable therefor; that there was not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver or copper; and that there was not within the limits of said land, to his knowledge, any valuable deposits of gold, silver or copper." This affidavit was subscribed and sworn to by Savage on the 4th of June, 1883, before the register of the land office at Pueblo. The other affidavit, subscribed and sworn to before the same officer by Leffingwell and Wells, set forth in substance the same facts as being within their knowledge.

The conspirators, or some one or more of them, or someone acting for them, on or about the same date, filed these affidavits in the land office at Pueblo, and made application, in the name and on behalf of Savage, to enter and purchase, under the statutes of the United States, this tract of one hundred and fifty-two and $\frac{53}{100}$ acres, as vacant coal land; and at the same time there was paid to the receiver of public moneys at that office the sum of three thousand and fifty and $\frac{60}{100}$ dollars as the purchase price of the tract at twenty dollars per acre. Thereupon the register issued in duplicate a certificate to the effect that Savage had on that day purchased this land from that officer at the price stated; that the payment of the price had been made in full as required by law; and that, on the presentation of the certificate to the commissioner of the General Land Office, he would be entitled to receive a patent for the land. Upon the payment of this money and the issuing of the certificate, the receiver delivered to Savage, or to the conspirators, or to some one of them, or to someone for them, in duplicate, a receipt which in effect acknowledged that he had paid the above sum as and for the price of the land at twenty dollars per acre. This being done, the register and receiver forwarded the papers, affidavits, applications and one of the certificates and receipts to the General Land Office at Washington, delivering the other duplicate certificate to the conspirators, or to some one of them, or to someone acting for them, "such delivery purporting to be for and on behalf of the said Robert Savage."

Similar applications and affidavits were prepared and filed, at the instance of the same persons, in behalf of Leffingwell, Wells, Craigmyle, Schuman and Winsheimer, respectively, in reference to the remaining tracts, and they severally procured patents to be issued, as follows: to Savage for 152 and $\frac{53}{100}$ acres; to Leffingwell, Craigmyle, Schuman and Winsheimer, each, for 160 acres; and to Wells for 161 and $\frac{81}{100}$ acres. The government, relying upon such affidavits and certificates, believing that the lands were legally entered by each individual for his own use and benefit, and in ignorance of the conspiracy and its objects, issued patents for the several tracts, purporting thereby to convey all its rights, title, interest and estate therein to the parties, respectively, in whose names the entries were made. The patents were subsequently delivered to the patentees or to someone representing them and acting in their name.

It also appears from the bill that Savage, Leffingwell, Wells, Craigmyle, Schuman and Winsheimer did not enter the lands for their own use and benefit, nor for the use and benefit of any of them, but for the direct use and benefit of the Trinidad Coal and Coking Company; that its officers procured the entrymen to go in a body to the City of Pueblo to file the above papers as stated; that the papers and affidavits were drawn and prepared by its officers; that the expenses of the conspirators in going to that city to make the entries were paid by its officers, acting for it and in its behalf; that the entire purchase money for all the tracts and all land-office fees, costs and expenses were paid by the Company; that immediately after the filing of the affidavits in the land office, and the pretended entries, Savage, Leffingwell, [164
Wells, Craigmyle, Schuman and Winsheimer, and each of them, executed and delivered to the Company warranty deeds conveying to it each of said tracts; that the Company immediately entered into possession, and has possessed and claimed the lands until the present time; that no one of the patentees has ever claimed or asserted any right or interest in them, or in any of them, by virtue of the above fraudulent and illegal entries; that the entries were in reality and effect a purchase of the lands by the Company, and that the entries and purchases by the persons named were only a device to evade the laws of the United States and to procure for the defendant a greater amount of coal lands than it could legally purchase and hold.

The bill further alleges that these entries of coal lands were illegal for the additional reason that, prior to the fourth of June, 1883, Peter, being an officer and stockholder of the Company, had, on the fifth day of August, 1881, entered and purchased under the laws of the United States one hundred and sixty acres of vacant coal land, and other officers and stockholders of the Company, namely, Charles P. Teat, Joseph L. Prentiss, Orlando B. Wheeler and others whose names are unknown to the government, had purchased tracts of coal land of the United States, all of which, entered and purchased by T. J. Peter and by such other officers and stockholders of the Company, were, on the fourth day of June, 1883, held and owned by the defendant, and were in the aggregate in excess of three hundred and twenty acres of coal land; that neither the Company nor any member or officer of it, for its own benefit or in its behalf, could then legally enter or purchase additional coal lands from the

government; and that when said tracts were conveyed to it by the several patentees it had full notice of the alleged fraudulent scheme, as well as of the fact that the lands were being entered and purchased for its benefit exclusively.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.*, for appellant.

Messrs. Geo. R. Peck, **Chas. E. Gast** and **A. B. Brown,** for appellee:

The various Pre-emption Laws permit a pre-emptor to sell his right prior to making his entry.

Thredgill v. *Pintard*, 53 U. S. 12 How. 24 (13: 877); *Marks* v. *Dixon*, 61 U. S. 20 How. 504 (15: 1004); *Myers* v. *Croft*, 80 U. S. 13 Wall. 291 (20: 562); *Lamb* v. *Davenport*, 85 U. S. 18 Wall. 307 (21: 759).

A contract between two persons whereby coal land is to be entered by one for their joint benefit involves no fraud on the government, and is enforceable.

Lipscomb v. *Nichols*, 6 Colo. 290; opinion of the circuit court in this case, 37 Fed. Rep. 180.

The government cannot equitably ask to have these patents vacated without offering to pay back the purchase price.

Fosdick v. *Schall*, 99 U. S. 235, 253 (25: 339, 342); *Matthews* v. *Warner*, 6 Fed. Rep. 461; Daniell, Ch. Pr. and Pl. (5th Am. ed.) 386, 387, 562.

When the sovereign becomes a suitor, he submits his rights to settled judicial notions of morality and good faith, the same as a subject.

Brent v. *Bank of Washington*, 35 U. S. 10 Pet. 596, 614, 615 (9: 547, 554, 555); *The Siren*, 74 U. S. 7 Wall. 152, 154 (19: 129, 130); *United States* v. *Hughes*, 52 U. S. 11 How. 552, 568 (13: 809); *Fifth Nat. Bank* v. *Long*, 7 Biss. 502; *United States* v. *Throckmorton*, 4 Sawy. 42, 43, 59; *United States* v. *Pratt Coal & Coke Co.* 18 Fed. Rep. 708; *Moffat* v. *United States*, 112 U. S. 24 (28: 623); *United States* v. *Minor*, 114 U. S. 233 (29: 110).

165] *Mr. Justice* **Harlan** delivered the opinion of the court:

The patents in question were based upon entries made under sections 2347, 2348, 2350 and 2352 of the Revised Statutes, which embody substantially provisions in an Act of Congress approved March 3, 1873, entitled "An Act to Provide for the Sale of the Lands of the United States Containing Coal." 17 Stat. 607, 608, chap. 279. These sections are as follows:

"Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

"Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements."

"Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights, and pay for the lands filed upon within one year from the time prescribed for filing their respective claims, and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

"Sec. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver or copper."

The restrictions imposed upon the entry and purchase of the vacant coal lands of the United States have been so clearly expressed that no doubt can exist as to the intention of Congress in enacting the above sections. The Statute authorizes an association of persons to enter not exceeding three hundred and twenty acres, and provides that only one entry can be made by the same person or association, and that "no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof."

It is contended that the case made by the bill is not within the prohibitions of the Statute, although the demurrer admits that the Trinidad Coal and Coking Company acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for its benefit, in the name of certain persons, its officers, stockholders and employés—the title, when thus obtained, to be conveyed to the Company, which should, and did, bear all the expenses attending the entries and purchases from the government. This contention cannot be sustained unless the court lends its aid to make successful a mere device to evade the

Statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the Statute. If the scheme described in the bill be upheld as consistent with the Statute, it is easy to see that the prohibition upon an association entering more than three hundred and twenty acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. It is true, in the present case, that some of the persons who made the entries in question were not, strictly speaking, members of the corporation, but only its employés. But as they were parties to the alleged scheme, and were, in fact, agents of the defendant in obtaining from the government coal lands that could not rightfully have been entered in its own name, that circumstance is not controlling. Besides, it appears from the bill that when that scheme was formed and executed, Peter and other officers and stockholders of the association had taken the benefit of the Statute, and that the lands originally entered and purchased by them were then held and owned by the Company, and were in excess of three hundred and twenty acres. There is, consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained because, if the facts admitted by the demurrer had been set out in the papers filed in the land office, the patents sought to be canceled could not have been issued without violating the Statute. The defendant would not have been permitted to do indirectly that which it could not do directly. If the patents could not have been rightfully issued upon papers disclosing the fact that Savage, Leffingwell, Wells, Craigmyle, Schuman and Winsheimer were really acting in behalf of and as the agents of an association which was to meet all the expenses attending the applications, and which already held and owned coal lands formerly belonging to the United States, and under conveyances from some of its members who had previously taken the benefit of the Statute, it is difficult to perceive why the bill does not make a case entitling the government to the relief asked. These views are in accordance with the practice in the Department of the Interior. *Adolph Petersen*, 6 Land Dec. 371; *Northern Pac. Coal Co.* 7 Land Dec. 422.

It is confidently asserted by the Company that the individuals making entries who were citizens of the United States, and not members of an association of persons, had a right under the Statute, and upon their own responsibility, to enter, each, the quantity of coal lands for which they respectively received patents, and that, having obtained patents, they were at liberty to dispose of the lands as they saw proper, even to an association of persons which, or some member of which, had already taken the full benefit of the Statute. Whether this be so or not, nothing else appearing than is just stated, we need not now decide. The case before us is not of that class. It is the case of an association seeking to evade an Act of Congress by using for its own benefit the names of both its members and employés to obtain from the government vacant coal lands which it could not legally obtain upon entries made in its own name, and which it was expressly forbidden to enter by reason of some of its members having previously taken the benefit of the Statute.

In *McKinley* v. *Wheeler*, 130 U. S. 630, 636 [32: 1048, 1050], it was decided that section 2319 of the Revised Statutes, declaring valuable mineral deposits in lands belonging to the United States to be free and open to exploration and purchase, and the lands in which they were found to occupation and purchase by citizens of the United States and those who have declared their intention to become such, did not preclude a private corporation, formed under the laws of a State, whose members were citizens of the United States, from locating a mining claim on the public lands of the United States. Thus far it has been assumed that the defendant, although an incorporated company, is an "association of persons" within the meaning of the Statute relating exclusively to the vacant coal lands of the government, and, as such, is subject to the restriction as to the number of acres of such lands that may be entered in its name. We have seen that the right to enter such lands is given only to persons above the age of twenty-one years who are citizens of the United States, or have declared their intention to become such, and to associations of persons severally so qualified; and each person of the former class is permitted to enter not exceeding one hundred and sixty acres, while "associations of persons," severally qualified as above, may enter not exceeding three hundred and twenty acres. § 2347. The object of these restrictions as to quantity was, manifestly, to prevent monopolies in these coal lands. The reasons that suggested the prohibitions in respect to associations of persons apply equally to incorporated and unincorporated associations. But the purpose of the government would be defeated altogether, if it should be held that corporations were not "associations of persons" within the meaning of the Statute, and subject to the restrictions imposed upon the latter by sections 2347 and 2350. It is unreasonable to suppose that Congress intended to limit the right of entering coal lands to one hundred and sixty acres in the case of an individual, and to three hundred and twenty acres in the case of an unincorporated association, and leave the way open for an incorporated association, by means of entries made for its benefit in the names of its officers, stockholders, employes and agents, to acquire public coal lands without any restriction whatever as to quantity. The language of the Statute, to say nothing of the policy which underlies it, does not require or permit any such interpretation of its provisions. The words "association of persons" are often, and not inaptly, employed to describe a corporation. An incorporated company is an association of individuals acting as a single person, and by their corporate name. As this court has said, "private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common seal, and to change its members

without a dissolution of the association." *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317, 330 [27:739, 744].

One other point discussed at the bar deserves
170] consideration. It is contended by the defendant that the United States is subject, as a suitor, to the same rules that control courts of equity when determining, as between private persons, whether particular relief should be granted; that the government, asking equity, must do equity; and, consequently, that the bill is defective in not containing a distinct offer to refund the moneys which, it is alleged, were furnished by the defendant to the several persons to whom patents were issued. The rule referred to should not be enforced in a case like the present one. In the matter of disposing of the vacant coal lands of the United States, the government should not be regarded as occupying the attitude of a mere seller of real estate for its market value. It is not to be presumed that the small price per acre required from those desiring to obtain a title to such lands had any influence in determining the policy to be adopted in opening them to entry. They were held in trust for all the people; and in making regulations for disposing of them, Congress took no thought of their pecuniary value, but, in the discharge of a high public duty and in the interest of the whole country, sought to develop the material resources of the United States by opening its vacant coal lands to entry by individuals and by associations of persons at prices below their actual value. The controlling object of this and similar suits is to enforce a public statute against those who have violated its provisions. It is not disputed that the Attorney-General may, in virtue of the authority vested in him, institute this suit. According to the allegations of the bill, which are admitted to be true, the defendant is a wrong-doer against whom the government seeks to vindicate its policy in reference to the development of its vacant coal lands. Congress, when establishing that policy, was not bound to assume that individuals or associations of individuals would attempt to defeat it by means of fraudulent schemes or otherwise. If the defendant is entitled, upon a cancellation of the patents fraudently and illegally obtained from the United States, in the name of others, for its benefit, to a return of the moneys furnished to its agents in order to procure such patents, we must assume that Congress will
171] make an appropriation for that purpose, when it becomes necessary to do so. The proposition that the defendant, having violated a public statute in obtaining public lands that were dedicated to other purposes, cannot be required to surrender them until it has been reimbursed the amount expended by it in procuring the legal title, is not within the reason of the ordinary rule that one who seeks equity must do equity; and, if sustained, would interfere with the prompt and efficient administration of the public domain. Let the wrong-doer first restore what it confesses to have obtained from the government by means of a fraudulent scheme formed by its officers, stockholders and employés in violation of law.

The decree is reversed, with directions to overrule the demurrer, and for further proceedings not inconsistent with this opinion.

FRANK MORRISSEY, *Appt.*, [1
v.
MAJOR DAVID PERRY.

(See S. C. Reporter's ed. 157-160.)

Enlistments in the army by minors—not voidable by infant—infant, when punishable for desertion.

1. Sec. 1117, U. S. Rev. Stat., that no person under the age of twenty-one years shall be enlisted into the military service of the United States without the written consent of his parents or guardians, is for the benefit of the parent or guardian, but it gives no privilege to the minor.
2. An enlistment is not a contract only, but effects a change of status. It is not, therefore, like an ordinary contract, voidable by an infant.
3. An infant, who has a parent, having enlisted, is amenable to military jurisdiction, and, if his parent does not interfere, is bound to remain in the service, and is punishable for desertion.

[No. 931.]

Submitted Oct. 21, 1890. Decided Nov. 17, 1890.

APPEAL from an order of the Circuit Court of the United States for the Eastern District of Missouri, remanding the petitioner, Frank Morrissey, to the custody of the military authorities, by whom he was held on the charge of desertion. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Henry W. Putnam** and *Daniel Noyes Kirby*, for appellant:

Morrissey had not become legally a soldier.

The consent of parents, of the mother if the father is not living, as well as of the infant and of the government, is a condition precedent to the government's right to the custody of the infant's person.

Ex parte Mason, 1 Murphey (N. C.) 336; *Shorner's Case*, 1 Law Repos. (N. C.) 55, 59; *United States* v. *Anderson*, 1 Cooke (Tenn.) 143; *Com.* v. *Harrison*, 11 Mass. 64, 65; *Com.* v. *Cushing*, Id. 67, 70, 71; *Com.* v. *Callan*, 6 Binn. 255; *Lewis' Case*, 2 Law Repos. (N. C.) 47, 53, 54; *Carlton's Case*, 7 Cow. 471; *Com.* v. *Downes*, 24 Pick. 227, 229, 230; *Keeler's Case*, Hempst. 306, 310; *Com.* v. *Fox*, 7 Pa. 336; *Kimball's Case*, 9 Law Rep. 500; *United States* v. *Wright*, 5 Phila. 296, 298; *Re McDonald*, 1 Low. 100, 105; *Re Andrews*, 1 Hask. 87; *Re McLave*, 8 Blatchf. 67; *Com.* v. *Blake*, 8 Phila. 523; *Re McNulty*, 2 Low. 270; *United States* v. *Hanchett*, 18 Fed. Rep. 26; *Re Baker*, 23 Fed. Rep. 30; *Re Chapman*, 2 L. R. A. 332, 37 Fed. Rep. 327.

An infant's contract for military service, like any other of his contracts, can, at common law, be effectively ratified by him only after his majority.

State v. *Dimick*, 12 N. H. 194, 199; *Western U. Teleg. Co.* v. *Davenport*, 97 U. S. 369, 373 (24: 1074, 1050).

The additional remedy for minors by appeal to the Secretary of War, given by Stat. 1864, chap. 13, sec. 20, and chap. 237, sec. 5 (13 Stat. at L. 380), was not exclusive of, or a substitute for, the remedy by habeas corpus.

NOTE.—*As to naval courts-martial; jurisdiction of, as to persons and officers; how constituted, etc.,*—see *note* to Wilkes v. Dinsman, 12: 618.

Seavey v. *Seymour*, 3 Cliff. 439, 450–453; U. Rev. Stat. § 5596; Winthrop, Military Law, 8.

The statement at the time of the enlistment, at he was twenty-one years old, does not top him from obtaining his discharge.

Re Tarble, 25 Wis. 390, 412, 413; *Tucker* v. *'oreland*, 35 U. S. 10 Pet. 58, 77 (9: 345, 353); *mroe* v. *Birdsall*, 1 Johns. Cas. 127, 128; *Mer-am* v. *Cunningham*, 11 Cush. 40.

His departure from the barracks without ave did not deprive him of his right to be dis-arged on habeas corpus.

Dew's Case, 25 Law Rep. 538, 540; *McNul-'s Case*, 2 Low. 270.

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, for ap-ellee:

The enlistment was binding on Morrissey ithout his mother's consent. It was not void, at voidable, and she alone could avoid it.

United States v. *Wyngall*, 5 Hill, 16; *United tates* v. *Cottingham*, 1 Rob. (Va.) 615; *Rex* . *Rotherford Greys*, 1 Barn. & C. 348; *United tates* v. *Blakeney*, 3 Gratt. 411; *United States* . *Lipscomb*, 4 Gratt. 41; *Com.* v. *Morris*, 1 hila. 381; *Ex parte Roberts*, 2 Hall, Am. Law our. 192; *Com.* v. *Barker*, 5 Binn. 426; *Lana-an* v. *Birge*, 30 Conn. 438; *Re Disinger*, 12 hio St. 256.

Morrissey was estopped to avoid his contract f enlistment.

Re Cosenow, 37 Fed. Rep. 668, and cases ited; *United States* v. *Gibbon*, 24 Fed. Rep. 135; *'s McVey*, 23 Fed. Rep. 878; *Re Beswick*, 25 low. Pr. 149, 152.

Even if Morrissey could have avoided the ontract, he did not do so, and it remains bind-ig.

Re Kaufman, 41 Fed. Rep. 876; *Wilbur* v. *'race*, 12 Johns. 68; *Re Davison*, 21 Fed. Rep. 18; *Com.* v. *Camac*, 1 Serg. & R. 87; *Com.* v. *'amble*, 11 Serg. & R. 93; *Re Dew*, 25 Law ep. 538; *McConologue's Case*, 107 Mass. 154; *'s Dohrendorf*, 40 Fed. Rep. 148; *Re Graham*, Jones L. (N. C.) 416.

Mr. Justice **Brewer** delivered the opinion f the court:

This case, appealed from the Circuit Court or the Eastern District of Missouri, presents, ke that of *United States* v. *Grimley* [*ante*, 36], just decided, a question arising on habeas orpus as to the right of the petitioner, an en-sted soldier, to be discharged from military ustody. An effort was made to bring this case ere by writ of error; but that was abandoned, nd an appeal rightfully substituted. *Re 'eagle*, 135 U. S. 42 [34: 63]. The facts differ om those in that case, in this: The petitioner as seventeen years of age, and had a mother ving who did not consent to his enlistment. pon his enlistment he drew from the United tates his uniform and equipments, and con-nued in actual service from the 23d day of ugust to the 18th day of September, 1888, hen he deserted. He remained in conceal-ent until February, 1889, at which time he ad become of age, and then appeared at a re-ruiting office and demanded his discharge om the army on the ground that he was a inor when enlisted. In his oath of allegiance e swore that he was twenty-one years and five onths old. It will be seen that the petitioner was within the ages prescribed by section 1116 of the Revised Statutes, to wit, sixteen and thirty-five years. Section 1117 provides that "no person under the age of twenty-one years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians: *Provided*, That such minor has such parents or guardians entitled to his custody and control." But this provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor.

The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the Legislature. *United States* v. *Bainbridge*, 1 Mason, 71; *Wassum* v. *Feeney*, 121 Mass. 93, 95. Congress has declared that minors over the age of sixteen are capable of entering the military service, and undertaking and performing its duties.

An enlistment is not a contract only, but effects a change of status. *Grimley's Case*, *supra*. It is not, therefore, like an ordinary contract, voidable by the infant. At common law an enlistment was not voidable either by the infant or by his parents or guardians. *Rex* v. *The Rotherford Greys*, 2 Dow. & Ry. 628, 634, 1 Barn. & C. 345, 350; *Rex* v. *Lytchet Matravers*, 1 Man. & Ry. 25, 31, 7 Barn. & C. 226, 231; *Com.* v. *Gamble*, 11 Serg & R. 93; *United States* v. *Blakeney*, 3 Gratt. 405, 411–413.

In this case the parent never insisted upon her right of custody and control; and the fact that he had a mother living at the time is therefore immaterial. The contract of enlistment was good so far as the petitioner is concerned. He was not only *de facto*, but *de jure*, a soldier—amenable to military jurisdiction. His mother not interfering, he was bound to remain in the service. His desertion and concealment for five years did not relieve him from [16(
his obligations as a soldier, or his liability to military control. *The order of the Circuit Court remanding him to the custody of the appellee was correct and must be affirmed.*

GUSTAV FALK ET AL., *Plffs. in Errr.*, [22
v.
WILLIAM H. ROBERTSON, Late Collector.

(See S. C. Reporter's ed. 225-234.)

Duty on tobacco—mixed tobacco.

1. Under sec. 2502, tit. 33, Rev. Stat., which imposes a duty upon leaf tobacco of which 85 per cent is of the requisite size and fineness to be suitable for wrappers, and a less duty upon all other tobacco, the addition to a bale of fine tobacco suitable for wrappers, of enough inferior tobacco to reduce

NOTE.—*As to action to recover back duties paid under protest; protest, how made, and its effect,* —see *note* to Greely v. Thompson, 12: 397.

the proportion in the entire bale of the fine wrapper tobacco below 85 per cent, does not make the whole bale of tobacco dutiable at the less duty, where the inferior tobacco is separated in the bale from the wrapper tobacco, so that one kind is readily distinguishable and separable from the other when the bale is open.

2. Secs. 2901, 2911, 2912, 2915, Rev. Stat., do not, nor does the Act of May 1, 1876, require that a bale of tobacco, thus constituted, must be considered as a unit for the purpose of imposing the duty; but the contents of the bale containing separable and separated quantities of leaf tobacco of two different qualities are subject to two different duties.

[No. 35.]

Argued Oct. 30, 31, 1890. Decided Nov. 24, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment for the defendant in an action to recover back duties paid under protest on importations of leaf tobacco. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Joseph H. Choate** and *Charles C. Beaman*, for plaintiffs in error:

The Act of March 3, 1883, clearly requires, in any case, that only one rate of duty shall be imposed upon the leaf tobacco in question, considered and appraised bale by bale, each bale being taken as a unit.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 419, 437-438 (6: 678, 685).

It is a cardinal rule to be applied in the construction of statutes imposing duties upon imports, that, in the case of doubtful or ambiguous phraseology, that construction will be adopted which will be most favorable to the importer.

Powers v. *Barney*, 5 Blatchf. 202; *Adams* v. *Bancroft*, 3 Sumn. 384; *United States* v. *Wigglesworth*, 2 Story, 369; *United States* v. *Ullman*, 4 Ben. 547; *Hartranft* v. *Wiegmann*, 121 U. S. 609 (30: 1012); *Merritt* v. *Welsh*, 104 U. S. 694, 702 (26: 896, 898).

All Acts levying duties on imports are, as regulations of commerce, to be construed in accordance with commercial usages and the understanding of men engaged in the particular trade in question. The language of the statutes will be presumed to have been used in an ordinary commercial and popular sense.

Two Hundred Chests of Tea, 22 U. S. 9 Wheat. 430 (6: 128); *Barlow* v. *United States*, 32 U. S. 7 Pet. 404 (8: 728); *United States* v. *112 Casks of Sugar*, 33 U. S. 8 Pet. 277 (8: 944); *Elliott* v. *Swartwout*, 35 U. S. 10 Pet. 137 (9: 373); *Curtis* v. *Martin*, 44 U. S. 3 How. 106 (11: 516); *Arthur* v. *Cumming*, 91 U. S. 362 (23: 438); *Tyng* v. *Grinnell*, 92 U. S. 467 (23: 733); *Arthur* v. *Morrison*, 96 U. S. 108 (24: 764); *Arthur* v. *Lahey*, 96 U. S. 112 (24: 766); *Greenleaf* v. *Goodrich*, 101 U. S. 278 (25: 845); *Recknagel* v. *Murphy*, 102 U. S. 197 (26: 130); *Robertson* v. *Salomon*, 130 U. S. 412, 415 (32: 995, 996).

A construction of a Tariff Act adopted by the Treasury Department, while not conclusive upon the courts, is entitled to weight and respectful consideration.

United States v. *Moore*, 95 U. S. 760 (24: 588); *Brown* v. *United States*, 113 U. S. 568 (28: 1079); *United States* v. *Hill*, 120 U. S. 169 (30: 627); *United States* v. *Johnston*, 124 U. S. 236 (31: 389); *McCall* v. *Lawrence*, 3 Blatchf. 360, 363; *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 374, 382 (23: 47, 49); *Merritt* v. *Welsh*, 104 U. S. 694, 702 (26: 896, 898); *Blake* v. *National City Bank of New York*, 90 U. S. 23 Wall. 307, 319 (23: 119, 120); *Saxonville Mills* v. *Russell*, 116 U. S. 13, 21 (29: 554, 556).

Each invoice or entry is a separate transaction for purposes of appraisement.

Sampson v. *Peaslee*, 61 U. S. 20 How. 571, 580 (15: 1022, 1027); *Morrill* v. *Jones*, 106 U. S. 466 (27: 267).

There can be no pretense that there was any fraudulent evasion on the part of these plaintiffs in error.

United States v. *112 Casks of Sugar*, 33 U. S. 8 Pet. 277, 280 (8: 944, 945); *United States* v. *Breed*, 1 Sumn. 167.

Mr. **Wm. A. Maury**, *Assistant Atty-Gen.*, for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Supreme Court of the State of New York, by Gustav Falk and Arnold Falk against Willam H. Robertson, Late Collector of the Port of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover back duties paid under protest on certain importations of leaf tobacco into the Port of New York from Hamburg and Holland, in January and April, 1884. The amount of duty exacted by the Collector was $8,408. The plaintiffs contended that the proper duty was only $5,113.85; and they sued to recover back the difference, $3,294.15. They made due protest and appeal.

It was claimed by the government and conceded by the plaintiffs that the tobacco was dutiable under the following provisions of Schedule F of section 2502 of title 33 of the Revised Statutes, as enacted by section 6 of the Act of March 3, 1883, chap. 121 (22 Stat. 503): "Leaf tobacco, of which eighty-five per cent is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound; if stemmed, one dollar per pound. All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound." The question in issue was whether any of the tobacco was dutiable at seventy-five cents a pound: and the court at the trial, before *Judge* Shipman, directed a verdict for the defendant. Judgment was entered accordingly, to review which the plaintiffs have brought a writ of error.

The tobacco in question was imported into the United States in bales. In each bale was a quantity of leaf tobacco answering the description in the Statute of that dutiable at 75 cents per pound, except that it formed only about 83 per cent of the contents of the bale. It was Sumatra tobacco, imported from Sumatra into Europe in the same bale in which it was imported into this country. When the bale arrived in Europe, the entire contents of it were within the description of that dutiable here at 75 cents a pound; but

in Europe the bale was repacked, by taking out of it a quantity of its contents and substituting therefor a sufficient quantity of inferior tobacco, called "fillers," to reduce the proportion of the 75-cent tobacco in the entire bale to less than 85 per cent of the contents of the bale, as imported into the United States. The 75-cent tobacco was separated from the other by strips of paper or cloth, so that the one kind was readily distinguishable and separable from the other when the bale was opened in the United States.

Leaf tobacco consists of three classes, "wrappers," "fillers" and "binders." "Wrappers" are leaves suitable for the outside finish of a cigar. "Fillers" are leaves that make up the main body of the cigar; and "binders" are the secondary or inside wrapper, and hold together the loose material which constitutes the filling. Prior to the passage of the Act of 1883, the various grades of leaf tobacco—wrappers, fillers and binders—were applied to different uses, were bought and sold under their several names and were of different value in the market; and prior to that time bales of leaf tobacco in the trade were, as a rule, homogeneous as to their contents, each one consisting of only one of these three classes.

The plaintiffs claim that, upon the addition to the bale of enough inferior tobacco to reduce the proportion, in the entire bale, of the fine wrapper tobacco below 85 per cent, the whole of the tobacco in the bale was made dutiable at only 35 cents per pound. They contend that the unit upon which the 85 per cent is to be calculated is the entire bale. But we cannot agree with this view. The Statute does not refer to tobacco in bales. It does not say that the 85 per cent is to be 85 per cent of the contents of a bale; but the duty of 75 cents per pound is imposed upon any quantity of leaf tobacco of the specified quality and weight, if not stemmed. In the present case, the carefully separated and distinguishable quantity of tobacco in the bale which was of the specified size, fineness and weight, was the whole of it, that is, 100 per cent, and more than 85 per cent, of that size, fineness and weight; and all of it fell under the description of what was dutiable at 75 cents a pound. The unit is not the bale, but is the separated quantity of such leaf tobacco. That quantity stands, for the purposes of duty, as if it had been imported in a bale which contained nothing but itself. By the method of packing, the wrapper tobacco and the filler tobacco remained entirely distinct. The association of them in the bale was, evidently, only for the purpose of avoiding the higher duty imposed upon the superior tobacco. This association was to be dissolved the moment the bale was opened in the United States, because the two grades of tobacco sold for different prices in the market. It appears from the testimony of one of the plaintiffs that, prior to the Act of 1883, the bale of Sumatra tobacco that was known and dealt in was a bale containing about 160 or 170 pounds of that tobacco, and inferior tobacco was not imported in the same bale with such Sumatra tobacco. The unit of the Statute, therefore, must be held to be leaf tobacco wrappers answering the [231 description which, when reaching the named percentage, is subject to the duty of 75 cents a pound.

It is argued for the plaintiffs that the bale must be considered as the unit, because it is required by section 2901 of the Revised Statutes that, for the purpose of appraisement, the collector shall designate at least one package of every invoice, and at least one package of every ten packages. Reference is made also to sections 2911 and 2912, which provide what shall be done in case the appraisers find in a given package articles of wool or cotton of similar kind but different quality; and to section 2915, which provides for the taking of samples from packages of sugar, to ascertain the quality; and to the Act of May 1, 1876, chap. 89 (19 Stat. 49), providing for the separate entry of one or more packages contained in an importation of packed packages, consigned to one importer or consignee, and of which there is no invoice. But we do not perceive that these statutory provisions affect the question in hand. They refer only to what is to be done as to appraisement, when two articles of different quality are imported in the same package, and to the separate entry of a package packed in a larger package; but there is nothing in these provisions which shows that the 85 per cent in question is to be regarded as meaning 85 per cent of the entire contents of a package containing separable and separated quantities of leaf tobacco of two different qualities, and subject to two different duties.

In the view which we thus take of this case, there is nothing which conflicts with the decision in *Merritt* v. *Welsh*, 104 U. S. 694 [26: 896]. In that case, under Schedule G of section 2504 of the Revised Statutes, the sole test of the dutiable quality of sugars was held to be their actual color, as graded by the Dutch standard; and it was held that if the particular color was given to the sugar in and by the process of manufacture, and was not artificially given to it after it had been manufactured, it was subject only to the duty imposed upon sugar of a specified color. The question there decided was whether, in case the sugar was not artificially colored, for the purpose of avoiding duties, [234 after it was manufactured, its dutiable quality was to be decided by its actual color, graded by the Dutch standard, or by its saccharine strength as ascertained by chemical tests; and it was held that the actual color was the test. So, in the present case, the actual qualites belonging to the given separable quantity of leaf tobacco which is made dutiable at 75 cents a pound determine the rate of duty.

The present case was tried twice. At the first trial, before *Judge* Wheeler, he directed a verdict for the plaintiffs; but he subsequently granted a new trial. In his opinion granting it (25 Fed. Rep. 897) he said: "Justice to the plaintiffs, however, requires that they be entirely acquitted of any attempt to deceive the customs officers by what they did; for it was done with their full knowledge, and partly at their suggestion, and after

a like importation, with the full knowledge of all, had been passed, as a test case, at the lower rate." We concur in this view.

Judgment affirmed.

---

[266] JOHN BROOM ET AL., *Appts.*,
v.
JAMES C. ARMSTRONG.

(See S. C. Reporter's ed. 266-280.)

Foreclosure of mortgage on chattels—Utah law—lis pendens—subsequent mortgage and judgment—purchaser.

1. An action for the foreclosure of a mortgage of personal property, under the Statute of Utah, commenced while the lien of the mortgage is good as against creditors and purchasers, keeps the lien alive and continues it until the decree and sale under it perfects the mortgagee's right with respect to it, and passes the title to the purchaser.
2. Such action is a proceeding *in rem* against the property, and brings the property within the power of the court, until the judgment or decree is entered, so that the lien upon it may be enforced as the Statute requires.
3. Under the Utah Statute, the rule of *lis pendens* applies to an action to foreclose a mortgage of personal property, as well as to a similar action respecting real estate.
4. A purchaser, under a subsequent mortgage or judgment, of mortgaged chattels, who has both actual and constructive notice of the prior mortgage and the pendency of a suit to foreclose it, commenced before the expiration of its statutory lien, though the sale under it be thereafter, takes title to the chattels subject to the rights of the prior mortgagee and to those of a purchaser at the foreclosure sale under the prior mortgage.

[No. 40.]

Argued Oct. 30, 1890. Decided Dec. 1, 1890.

APPEAL from a decree of the Supreme Court of the Territory of Utah, in favor of plaintiff, in an action for the foreclosure of a chattel mortgage. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Samuel Shellabarger** and *Jeremiah M. Wilson*, for appellants:

An absolute bill of sale of goods is fraudulent as to creditors unless possession accompanies and follows the deed.

Hamilton v. *Russel*, 5 U. S. 1 Cranch, 309 (2: 118); *Moore* v. *Ringgold*, 3 Cranch, C. C. 434; *Travers* v. *Ramsay*, 3 Cranch, C. C. 354; *Meeker* v. *Wilson*, 1 Gall. 423, and cases cited in *note; Second Nat. Bank of Leavenworth* v. *Hunt*, 78 U. S. 11 Wall. 391-395 (20: 190, 191).

But where the deed provides for retention of possession by the assignor or vendor, there such retention of possession is simply evidence of fraud, and is not conclusive.

Conard v. *Atlantic Ins. Co.* 26 U. S. 1 Pet. 386, 449 (7: 189, 216); *D'Wolf* v. *Harris*, 4 Mason, 515; *United States* v. *Hooe*, 7 U. S. 3 Cranch, 88 (2: 374); *Brooks* v. *Marbury*, 24 U. S. 11 Wheat. 78 (6: 423); *Warner* v. *Norton*, 61 U. S. 20 How. 456 (15: 952); *People's Sav. Bank* v. *Bates*, 120 U. S. 561 (30: 754), and cases cited.

No statute is to be construed as altering the common law further than its words import.

Shaw v. *Railroad Co.* 101 U. S. 565 (25: 894); *Brown* v. *Barry*, 3 U. S. 3 Dall. 365 (1: 638); *Burnside* v. *Whitney*, 21 N. Y. 148; *Newell* v. *Wheeler*, 48 N. Y. 486; *Com.* v. *Messenger*, 4 Mass. 471; *Gibson* v. *Jenney*, 15 Mass. 205; *Com.* v. *Knapp*, 9 Pick. 496, 513; *Wilbur* v. *Crane*, 13 Pick. 284; *Lord* v. *Parker*, 3 Allen, 127; *Schuyler County* v. *Mercer County*, 9 Ill. 20; *Green* v. *Richards*, 23 N. J. Eq. 33; *Esterley's App.* 54 Pa. 192; *McMullin* v. *McCreary*, Id. 230; *Hotaling* v. *Cronose*, 2 Cal. 60; *Sibley* v. *Smith*, 2 Mich. 486; *Dwelly* v. *Dwelly*, 46 Me. 377; *Sullivan* v. *La Crosse & M. S. P. Co.* 10 Minn. 386; *Warner* v. *Fowler*, 8 Md. 25; *Thistle* v. *Frostburg Coal Co.* 10 Md. 129; *Stewart* v. *Stringer*, 41 Mo. 400.

The privilege of holding a lien on personal property in the possession of the mortgagor is accorded to the mortgagee upon the performance of certain conditions.

Gassner v. *Patterson*, 23 Cal. 299.

The courts have no power to extend the Statute by construction so as to dispense with any of the conditions the Legislature has seen fit to impose.

Chenyworth v. *Daily*, 7 Ind. 284; *Dover* v. *McLaughlin*, 2 Wend. 596; *Clayborn* v. *Hill*, 1 Wash. (Va.) 177; *Meyer* v. *Gorham*, 5 Cal. 322; *Porter* v. *Parmley*, 52 N. Y. 185; *Ely* v. *Carnley*, 19 N. Y. 496.

A statute authorizing chattel mortgages is in derogation of the common law, and must therefore be strictly construed.

Cook v. *Hager*, 3 Colo. 386; *Crane* v. *Chandler*, 5 Colo. 21; *McDowell* v. *Stewart*, 83 Ill. 53[illegible].

Actual notice of the mortgage does not prevent the creditor from asserting his right to subject the property to the payment of his debt.

Frank v. *Miner*, 50 Ill. 444; *Forest* v. *Winkham*, 29 Ill. 141; *Van Pelt* v. *Knight*, 19 Ill. 535; *Sage* v. *Browning*, 51 Ill. 217; Jones, Mortg. § 248.

The mortgagee must take possession within a reasonable time after default in payment of the debt secured by the mortgage. If the possession be not then taken, the mortgage, after such default, is regarded as fraudulent.

Seaman v. *Eager*, 16 Ohio St. 209; *Hanford* v. *Obrecht*, 49 Ill. 146; *Wylder* v. *Crane*, 53 Ill. 490; *Lemen* v. *Robinson*, 59 Ill. 115; *Burnham* v. *Muller*, 61 Ill. 453; *Reese* v. *Mitchell*, 41 Ill. 365-370; *Barbour* v. *White*, 37 Ill. 164; *Arnold* v. *Stock*, 81 Ill. 407; *Reed* v. *Eames*, 19 Ill. 594; *Dunlap* v. *Epler*, 88 Ill. 82; *Travis* v. *McCormick*, 1 Mont. 148; *Chapin* v. *Whitsett*, 8 Colo. 315.

Actual knowledge of the existence of an imperfect or an unrecorded chattel mortgage does not prevent a valid levy by or on behalf of the party having such knowledge.

Travis v. *Bishop*, 13 Met. 304; *Shapleigh* v. *Wentworth*, 13 Met. 362; *Bingham* v. *Jordan*, 1 Allen, 374; *Porter* v. *Dement*, 35 Ill. 478; *Sage* v. *Browning*, 51 Ill. 217; *Forest* v. *Winkham*, 29 Ill. 141; *Gregg* v. *Sanford*, 24 Ill. 17; *Hen-*

NOTE.—*As to chattel mortgage allowing possession and sale of goods; whether void or not,*—see *note* to Robinson v. Elliott, 22: 758.

As to necessity of filing chattel mortgages; against whom they need not be filed,—see *note* to Herryford v. Davis, 26: 160.

derson v. *Morgan*, 26 Ill. 431; *Sheldon* v. *Conner*, 48 Me. 584; *Rich* v. *Roberts*, Id. 548; *Beans* v. *Bolton*, 31 Mo. 437; *Bryson* v. *Penix*, 18 Mo. 13; *Harvey* v. *Crane*, 2 Biss. 49; *Selking* v. *Hebel*, 1 Mo. App. 340; *Henyford* v. *Davis*, 102 U. S. 235 (26: 160); *Harkness* v. *Russell*, 118 U. S. 680 (30: 291).

To allow the mere commencement of a lawsuit by a vendee or mortgagee, for the purpose of foreclosing the mortgage, to be a substitute for open, visible and substantial change of possession, is to abolish the very foundations on which this provision of the Statute of Frauds, requiring change of possession, is based.

Wood v. *Weimar*, 104 U. S. 786 (26: 779).

Messrs. **John B. Goode**, *H. W. Smith*, *J. G. Sutherland* and *J. R. McBride*, for appellee:

The Utah Statute relating to *lis pendens* applies to a foreclosure of a chattel mortgage.

Bennett, Lis Pendens, §§ 81, 86; *Hadden* v. *Spader*, 20 Johns. 553; *Taylor* v. *Jones*, 2 Atk. 600; *Horn* v. *Horn*, Ambl. 79; *Partridge* v. *Gopp*, Ambl. 596; *Scott* v. *Scholey*, 8 East, 467; *Edmeston* v. *Lyde*, 1 Paige, 640, 2 N. Y. Ch. L. ed. 783; *Corning* v. *White*, 2 Paige, 567, 2 N. Y. Ch. L. ed. 1031; *Farnham* v. *Campbell*, 10 Paige, 601, 4 N. Y. Ch. L. ed. 1108; *Brinkerhoff* v. *Brown*, 4 Johns. Ch. 671, 1 N. Y. Ch. L. ed. 975; *Leitch* v. *Wells*, 48 Barb. 649; *Blake* v. *Bigelow*, 5 Ga. 440; *Bank of United States* v. *Burke*, 4 Blackf. 144; *Bolling* v. *Carter*, 9 Ala. 921; *Acuff* v. *Price*, 3 Head, 296.

Lis pendens applies to personal property as well as real estate.

Buford v. *Keokuk N. L. Packet Co.* 3 Mo. App. 159; *Bolling* v. *Carter*, 9 Ala. 921; *Lewis* v. *Mee*, 1 Strobh. Eq. 182; *Scott* v. *M'Millen*, 1 Litt. 309; *Edgell* v. *Haywood*, 3 Atk. 357; *Watson* v. *Wilson*, 2 Dana, 413; *Scudder* v. *Van Amburgh*, 4 Edw. 29; *Newman* v. *Chapman*, 2 Rand. 93; *McCutchen* v. *Miller*, 31 Miss. 88; *Carr* v. *Lewis Coal Co.* 15 Mo. App. 551; *Tyler* v. *Hyde*, 2 Blatchf. 308; *Tabb* v. *Williams*, 4 Jones, Eq. 352; *Fletcher* v. *Ferrel*, 9 Dana, 376; *Diamond* v. *Lawrence Co.* 37 Pa. 353; *Kellogg* v. *Fancher*, 23 Wis. 1; *McIlworath* v. *Hollander*, 73 Mo. 112; *Wills* v. *Whitmore*, 9 Baxt. 198; *Dovey's App.* 97 Pa. 153; *Kimberling* v. *Hartly*, 1 McCrary, 136; *McCauley* v. *Rogers*, 10 Ill. App. 562.

If a mortgage which, under the Statute, should be refiled within a year is not filed until after a year, the lien is restored as against an execution issued after the refiling.

Nixon v. *Stanley*, 33 Hun, 247.

Advertising for sale the chattels mortgaged obviates the necessity of refiling.

Jones, Chat. Mortg. § 296.

This mortgage being made in good faith to secure an actual debt, and the retention of possession by the mortgagor being consistent with its terms and purpose, it is not fraudulent at common law, nor under the Statute of Elizabeth.

Twyne's Case, 1 Smith, Lead. Cas. *52, 53, 54, 56, 57; *Hamilton* v. *Russel*, 5 U. S. 1 Cranch, 309 (2: 118); *Brooks* v. *Marbury*, 23 U. S. 11 Wheat. 78, 82 (6: 423, 424); *D'Wolf* v. *Harris*, 4 Mason, 515; *Head* v. *Ward*, 1 J. J. Marsh. 280; *Vernon* v. *Morton*, 8 Dana, 247, 254; *Jordan* v. *Turner*, 3 Blackf. 309; *Haven* v. *Low*, 2 N. H. 13; *Ash* v. *Savage*, 5 N. H. 545; *Barrow* v. *Paxton*, 5 Johns. 258; *Hall* v. *Carnley*, 2 Duer, 99; *Bissell* v. *Hopkins*, 3 Cow. 166; *Letcher* v. *Norton*, 5 Ill. 575; *Fairbanks* v. *Bloomfield*, 5 Duer, 434; Jones, Chat. Mortg. §§ 320, 323.

Where filing or recording of a chattel mortgage is provided for, such record is a substitute for a change of possession, and retention of possession is no evidence of fraud.

Jones, Chat. Mortg. § 236; *Robinson* v. *Elliott*, 89 U. S. 22 Wall. 513 (22: 758); *Frankhouser* v. *Ellett*, 22 Kan. 127, 31 Am. Rep. 171, and *note*; *Gay* v. *Bidwell*, 7 Mich. 519, 526; *Coles* v. *Clark*, 3 Cush. 399; *Morrill* v. *Sanford*, 49 Me. 566.

The Utah National Bank and appellants are not entitled under section five of the Chattel Mortgage Act to claim protection, as creditors or purchasers, against the continuance of the plaintiff's mortgage lien after expiration of the period mentioned in that section.

Defiance Mach. Works v. *Trisler*, 3 West. Rep. 180, 21 Mo. App. 69, 71; *Worley* v. *Watson*, 4 West. Rep. 919, 22 Mo. App. 553; *Tufts* v. *Thompson*, 4 West. Rep. 917, 22 Mo. App. 565; *Meech* v. *Patchin*, 14 N. Y. 71, 73; *Morrow* v. *Reed*, 30 Wis. 84; *People* v. *Bristol*, 35 Mich. 32; *Fearey* v. *Cummings*, 41 Mich. 383; *Waite* v. *Mathews*, 50 Mich. 392; *Parshall* v. *Eggert*, 54 N. Y. 22; *Stewart* v. *Beale*, 7 Hun, 405, 406; *Zabriskie* v. *Smith*, 13 N. Y. 329; *Hanson* v. *Edgerly*, 29 N. H. 343; *Tryon* v. *Whitmarsh*, 1 Met. 1.

A thing which is within the letter of a statute is not within the statute unless it be within the intention of the makers.

People v. *Utica Ins. Co.* 15 Johns. 358; *Jackson* v. *Collins*, 3 Cow. 89, 96; *M'Dermut* v. *Lorillard*, 1 Edw. Ch. 273, 6 N. Y. Ch. L. ed. 136; *Brown* v. *Thompson*, 14 Bush, 538; *Smith* v. *People*, 47 N. Y. 330; *The Eureka Case*, 4 Sawy. 316, 317; *People* v. *Bristol*, 35 Mich. 32; Jones, Chat. Mortg. § 190.

If the lien is valid when a foreclosure suit is commenced it will not cease or be impaired by lapse of time during the pendency of the suit.

Otis v. *Sill*, 8 Barb. 102; *Case* v. *Jewett*, 13 Wis. 499; *Newman* v. *Tymeson*, 12 Wis. 448; Jones, Chat. Mortg. § 296.

Commencement of a foreclosure suit is equivalent to taking possession.

Thompson v. *Van Vechten*, 5 Abb. Pr. 465.

Mr. Justice **Lamar** delivered the opinion of the court:

This case arose upon a complaint filed in the District Court of Weber County, Utah Territory, on the 22d of July, 1885, by James C. Armstrong, the appellee, against Mills H. Beardsley, to foreclose a mortgage of certain chattels, made January 14, 1885, by Beardsley to Armstrong, as security for the payment of his promissory note of that date to Armstrong, for the sum of $8,000, payable in four months, with interest from date at one per cent per month, payable monthly from date until paid, both before and after judgment, until maturity; and, if not paid at maturity, ten per cent additional, as cost for collection; which mortgage was duly recorded, as provided by the laws of the Territory.

On the 22d of September, thereafter, Armstrong, with leave of the court, filed an

amended complaint, making John Broom and E. A. Whitaker parties defendant, in which he alleged that the two defendants
267] Broom and Whitaker, after the original suit was instituted, had claimed an interest in the mortgaged chattels; that Broom's claim arose from his being a purchaser of the mortgaged property at a sale on August 13, 1885, under an execution issued upon a judgment dated March 18, 1885, against the defendant Beardsley, in favor of the Utah National Bank, for three thousand one hundred and sixty dollars ($3,160); that the property, having been levied upon by the United States marshal and sold, as above stated, was delivered by the marshal to Broom, as purchaser thereof, and put into his possession; that Whitaker's claim arose out of a mortgage upon the same property, made to him by Broom, August 22, 1885, to secure the payment of four thousand one hundred and thirty dollars ($4,130), advanced by him to Broom; that this action on the original complaint had been pending from the date of the filing thereof to that time; that a notice of the pendency thereof was filed in the recorder's office of Weber County, on the 11th of August, 1885; and that the defendants had due notice and actual knowledge of all these facts and proceedings at the time the levy was made on the mortgaged property, and at the time Broom received and took possession of the same. Wherefore, in addition to his prayer for foreclosure against Beardsley, in the original complaint, he prayed that the two defendants Broom and Whitaker, and all persons claiming under them, subsequently to the execution of said chattel mortgage, be foreclosed of all right or claim or equity of redemption in the said property, and every part thereof.

The defendants Broom and Whitaker, and the defendant Beardsley also, filed their respective demurrers to the amended and supplemental complaint, as not stating facts sufficient to constitute a cause of action, both of which demurrers were overruled. Thereupon the defendants Broom and Whitaker filed their separate answer, setting up, among other defenses, the levy upon the property mortgaged, the purchase by Broom at the judicial sale thereof, and the invalidity of the lien of the chattel mortgage after the expiration of ninety days from the maturity of the note which it secured.

The case was submitted to the court on the
68] pleadings and proofs. A decree was rendered for the plaintiff in accordance with the prayer of the amended complaint, finding that Beardsley was liable for the principal and interest due on the note, with ten per cent additional for collection, etc., and that the said amount was a valid lien upon the property described in the amended and supplemental complaint; and directing a sale of the mortgaged property to satisfy the same, with costs, etc. The Supreme Court of the Territory affirmed the decree of the district court, and that decree of affirmance is brought to this court for review by the present appeal.

There seems to be no dispute as to any material fact in the case. The note and chattel mortgage sued upon were executed on the 14th of January, 1885, recorded on the 17th of the same month, and became due on the 14th of May, 1885. The action for foreclosure was commenced and the notice of pendency properly recorded within the ninety days provided by the Statute of Utah for the lien to continue in force after the maturity of the debt secured by the mortgage. By the terms of the mortgage it was provided that the mortgaged property should remain in the possession of the mortgagor, who, in accordance therewith, retained such possession until the property was levied on and sold under execution against the mortgagor. This levy, therefore, was made after the ninety days from the maturity of the debt secured by the mortgage had expired, and [275
while the property was in the possession of the mortgagor.

The main contention of the appellants is, that the district and supreme courts erred in holding that the appellee, by virtue of his mortgage and the pendency of the foreclosure suit, had a lien upon the property as against the levy and sale on the 13th of August, under which the appellant Broom made his purchase. This presents the question which really controls this case, viz.: Did the appellee, on the day of sale, have any right or interest in the property superior to that of the appellant Broom?

To sustain their contention, the appellants rely upon sections 2805 and 2837 of the Compiled Laws of Utah.

The former of these sections provides tha "any mortgage of personal property, acknowl edged and filed as hereinbefore provided shall, thereupon, if made in good faith, b good and valid as against the creditors the mortgagor and subsequent purchasers an mortgagees, from the time it is so filed f record until the maturity of the entire de or obligation for the security of which t same was given, and for a period of nine days thereafter, provided the entire time sh not exceed one year." Section 2837 provid that "every sale made by a vendor of goo and chattels in his possession or under b control, and every assignment of goods a chattels, unless the same be accompanied by a delivery within a reasonable time, and followed by an actual and continued cha of the possession of the thing sold or as- signed, shall be conclusive evidence of fr against the creditors of the vendor or as- signor, or subsequent purchasers in go faith," etc.

It is contended with great earnestness t these two sections taken together constit an express and mandatory enactment that sale or assignment of goods and chatte whether in the form of a chattel mortgag otherwise, when unaccompanied by deliv of possession to the vendee, assignee mortgagee, shall be absolutely void as creditors of the latter or subsequent b fide purchasers, after the expiration of nin days from the maturity of the debt secu by the mortgage.

As opposed to the holding of the dis [27
and supreme courts that the commence of the suit to foreclose keeps alive the lien

of the mortgage, and continues it in force up to the foreclosure decree, it is insisted that the sections above quoted expressly limit the duration of the lien to the expiration of ninety days from the maturity of the debt; that to this clear and imperative limitation the Statute makes no exception; that such a holding adds a condition which is not only not in the sections quoted, but is absolutely prohibited by them; and that said ruling is in contravention of the principle established by the courts that statutes authorizing chattel mortgages are to be strictly adhered to, and are never to be extended by construction beyond their letter. We cannot accept this view without coming in conflict with the manifest intent, and, in some cases, the express provisions, of other sections of the Utah statutes applicable to this case, which should be construed *in pari materia* with those above quoted. Section 2801 in substance enacts that a mortgage of personal property executed, acknowledged and recorded according to law shall be valid as to all parties, even though the possession of the property be not delivered to, and retained by, the mortgagee, if the mortgage itself provides that the property may remain in the possession of the mortgagor and be accompanied by an affidavit required by that section. The section reads as follows:

"No mortgage of personal property shall be valid against the rights and interests of any person (other than parties thereto), unless the possession of such personal property be delivered to, and retained by, the mortgagee, or unless the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of the parties thereto, or, in case any party is absent, an affidavit of the parties present and of the agent or attorney of such absent party, that the same is made in good faith to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagor."

As the equivalent of the mortgagee's taking possession of the mortgaged property upon default of payment and within ninety days thereafter, a remedy in case of such default is provided by express statutory enactment. Section 3460 of the Compiled Laws above mentioned provides that "there can be but one action for the recovery of any debt, or the enforcement of any right, secured by mortgage upon real estate or personal property; which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property, or so much thereof as may be necessary, and the application of the proceeds of the sale to the payment of the costs of the court and the expenses of the sale and the amount due to the plaintiff; and sales of real estate under judgment of foreclosure of mortgages and liens are not subject to redemption as in case of sales under execution."

This remedy of a suit for foreclosure of a chattel mortgage has been adopted in most of the States, and has been much commended by the courts and text-writers as a safer and more adequate remedy for recovering debts secured by chattel mortgages, and enforcing the lien of the mortgagee, than that of actual seizure and sale of the property by the mortgagee, or than the action of replevin, detinue or trover. A judicial sale of the property and the application of the proceeds as directed by the decree make a record which will protect the mortgagee from the embarrassments and charges of unfairness in the conduct of the sale which attend the actual taking possession and sale of the property by the mortgagee without a decree of the court. So "that if it falls short of satisfying the debt, the mortgagee may have a decree for the residue; or, if there should be a surplus, that it may be awarded to the mortgagor, and so put an end to litigation. If the mortgagee himself should sell, there would be, in case of deficiency, an action at law to recover the remainder of the debt; or, if there should be a surplus, the mortgagor might sue for it. Equity makes an end of these matters." *Bryan* v. *Robert*, 1 Strobh. Eq. 334, 342, *per Chancellor* Harper. We think a construction of the above-quoted sections of the Statute should be in furtherance of these objects. But what avail would be such a remedy, as a means of enforcing the mortgagee's right, if his mortgage, valid and in full force at the commencement of his foreclosure suit, is extinguished before a decree for the sale of the specific property can be rendered? [278

We are of opinion that the supreme court is correct in its conclusion that the foreclosure "action having been commenced by plaintiff while the lien of the mortgage was good as against creditors [and purchasers], it kept the lien alive, and continued it until the decree and sale under it perfected his right with respect to it, and passed the title to the purchaser." We think this conclusion follows, necessarily, from the very nature of the proceeding directed by the Utah Statute. It is, in its primary and controlling character, an action brought by the creditor against the specific property which has been mortgaged to him by his debtor, to have it seized and sold for the payment of his debt. Its object is to reach the property to which the lien attaches, and dispose of it by sale, in whatever hands it may be found, whether in the mortgagor's, in those of third persons or in those of the mortgagee himself. The special prayer of the original complaint is that a receiver may be appointed immediately by the court to take charge of, and hold possession of, said mortgaged property, and preserve the same until it can be sold on the judgment, order or decree of the court. It is therefore a proceeding *in rem*, as much so as an attachment suit against the property of an absent debtor, or a suit instituted to partition real estate. And the property is within the power of the court until the judgment or decree is entered, so that the lien upon it may be enforced, as the Statute requires. *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565]. The section with regard to foreclosure, which we have cited, is imperative. It expressly limits the mortgagee to that one action. Its language is: "There can be but

one action for the . . . enforcement of any right . . . secured by mortgage upon. . . . personal property." Of course the mortgagee cannot institute his foreclosure suit until after the debt secured by it becomes due, and after the ninety days following begin to run. It is admitted that when this foreclosure suit was commenced the mortgage was good against creditors and subsequent purchasers, and that it was superior to the bank judgment when it was obtained, after the suit was commenced. If we accept the construction contended for by the appellants, it must follow that unless the decree of the court shall be rendered within the remainder of the ninety days, such decree cannot enforce the lien of the mortgage; and the effect would be not only to render futile the action which the Statute authorized the party to bring, but to take from the court the power to give effect to its decree, which, under the Statute, it is bound to render.

It was found by the court below, and we think the finding is fully sustained by the evidence,—in fact, it is not disputed,—that the defendants Broom and Whitaker had actual notice and full knowledge of the mortgage of Armstrong, and of the institution and pendency of the foreclosure proceedings, before their claim of interest or right in the property had arisen. The notice of the pendency of the suit was recorded before the ninety days from the maturity of the debt had expired. Under the Utah statutes the rule of *lis pendens* applies to an action to foreclose a mortgage of personal property, as well as to a similar action respecting real estate. Section 3206 of the Compiled Laws of Utah provides: "In an action affecting the title, or the right of possession, of real property, the plaintiff at the time of filing the complaint, and the defendant at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may file for record, with the recorder of the county in which the property, or some part thereof, is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names."

Section 2809 provides: "An action for the foreclosure of a mortgage on personal property, or the enforcement of any lien thereon, of whatever nature, may be commenced, conducted and concluded in the same manner as provided by law for the foreclosure of a mortgage or lien on real property and without the right of redemption."

We think, therefore, that the appellants Broom and Whitaker, having had full notice, actual and constructive, of the mortgage and the pendency of the suit commenced before the expiration of the ninety days, acquired no valid title to the property in question, and that the purchase of the property by the appellant Broom was subject to the rights of the appellee under his mortgage. His mortgagee, with like notice, can have no superior rights in the premises. That appellee's mortgage was executed to secure a bona fide debt, and in good faith, is not disputed.

The decree of the Supreme Court of the Territory of Utah is affirmed.

JOHN DOBSON ET AL., *Appts.*, [258]
v.
JAMES LEES ET AL.

(See S. C. Reporter's ed. 258-266.)

Letters-patent—re-issue—accident or mistake.

1. A re-issue of a patent is an amendment, and cannot be allowed unless the imperfections in the original patent arose without fraud, and from inadvertence, accident or mistake.
2. The re-issue of a patent cannot be permitted to enlarge the claims of the original patent by including matter once intentionally omitted.
3. Where the claim of a re-issued patent is not covered by the original patent, and before the issue of the latter it was passed upon and rejected, and withdrawn, and an interference dissolved upon condition of the amendment, and the issue of the original patent was predicated upon its abandonment, there was no inadvertence, accident or mistake in its omission therefrom.

[No. 43.]
Argued Oct. 31, 1890. Decided Dec. 1, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania, dismissing a suit for infringement of re-issued letters-patent. *Affirmed.*

The facts are stated in the opinion.

Mr. **Francis T. Chambers**, for appellants:

The original specification clearly indicates that the device covered by the re-issue claim was intended to be patented. Therefore this case is not governed by the decision in *Parker & W. Co.* v. *Yale Clock Co.*, 123 U. S. 87 (31:100).

There was no laches in filing the application for a re-issue. The original patent was surrendered practically as soon as granted. Therefore this case is distinguished from *Miller* v. *Bridgeport Brass Co.*, 104 U. S. 350 (26:783); *Mahn* v. *Harwood*, 112 U. S. 354 (28:665), and *Ives* v. *Sergeant*, 119 U. S. 652 (30:544).

There was no disclaimer filed in this case, as in the cases of *Leggett* v. *Avery*, 101 U. S. 256 (25:865), and *Union Metallic Cartridge Co.* v. *United States Cartridge Co.*, 112 U. S. 624 (28:828).

The circumstances under which this patentee received his original patent in its defective form are such as are within the meaning of the word "accident," and, as such, relieved against in courts of equity.

Bisph. Eq. § 174.

There is invention in this case.

Smith v. *Goodyear Dental Vulcanite Co.* 93 U. S. 486 (23:952), and cases there cited.

NOTE.—*As to what a re-issue of a patent may cover*, see *note* to O'Reilly v. Morse, 14: 601.

The right to amend the specification and claims of an application is undoubted.

Singer v. *Braunsdorf*, 7 Blatchf. 421; *Railway Register Mfg. Co.* v. *North Hudson R. Co.* 33 Pat. Off. Gaz. 355; *Howes* v. *McNeal*, 15 Blatchf. 103; *Jones* v. *Sewall*, 3 Pat. Off. Gaz. 630; *Henry* v. *Francestown Soapstone Stove Co.* 9 Pat. Off. Gaz. 408, 2 Bann. & Ard. 223; *Chicago & N. W. R. Co.* v. *Sayles*, 97 U. S. 554 (24:1053).

Forfeiture by public use is a mode of defense not favored by the courts.

Godfrey v. *Eames*, 68 U. S. 1 Wall. 317 (17:684); *Graham* v. *McCormick*, 10 Biss. 39; *Blandy* v. *Griffith*, 3 Fish. Pat. Cas. 609; *Goodyear Dental Vulcanite Co.* v. *Willis*, 1 Flipp. 388; *Birdsell* v. *McDonald*, 6 Pat. Off. Gaz. 682; *Elizabeth* v. *Nicholson Pave. Co.* 97 U. S. 126 (24:1000); *Pitts* v. *Hall*, 2 Blatchf. 229; *Innis* v. *Oil City Boiler Works*, 30 Pat. Off. Gaz. 998; *Graham* v. *McCormick*, 5 Bann. & Ard. 244.

Mr. **Hector T. Fenton**, for appellees:

A mere change of form in a piece of mechanism, or an application to a new use without change of form of an old and well-known piece of mechanism, without producing thereby anything more than difference in degree of result, does not amount to invention, and is not sufficient to sustain a patent.

Gardner v. *Herz*, 118 U. S. 191 (30:163); *Thompson* v. *Boisselier*, 114 U. S. 1 (29:76); *Vinton* v. *Hamilton*, 104 U. S. 485 (26:807); *Hall* v. *Macneale*, 107 U. S. 90 (27:367); *Hollister* v. *Benedict*, 113 U. S. 59 (28:901); *Saxby* v. *Gloucester Waggon Co.* L. R. 7 Q. B. Div. 305; *Pennsylvania R. Co.* v. *Locomotive Engine S. T. Co.* 110 U. S. 490 (28:222); *Smith* v. *Goodyear Dental Vulcanite Co.* 93 U. S. 494 (23:954); *Blake* v. *San Francisco*, 113 U. S. 683 (28:1072); *Harwood* v. *Great Northern R. Co.* 2 Best & S. 194, 11 H. L. Cas. 654; *Leggett* v. *Avery*, 101 U. S. 256 (25:865).

Where the re-issued patent is not for the same invention as that embraced and secured in the original patent, the re-issue is valid.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 516 (20:33); *Gill* v. *Wells*, 89 U. S. 22 Wall. 1 (22:699); *Giant Powder Co.* v. *California Powder Works*, 98 U. S. 126 (25:77).

Re-issues cannot be made for matters disclaimed or abandoned in the original application.

Union Metallic Cartridge Co. v. *United States Cartridge Co.* 112 U. S. 624 (28:828); *Atwater Mfg. Co.* v. *Beecher Mfg. Co.* 8 Fed. Rep. 608; *Putnam* v. *Hutchinson*, 12 Fed. Rep. 127; *Edgarton* v. *Furst & B. Mfg. Co.* 9 Fed. Rep. 450; *Streit* v. *Lauter*, 11 Fed. Rep. 309; *Doland* v. *Thompson*, 26 Fed. Rep. 634.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill exhibited by John Dobson, James Dobson and James Greaves against James Lees and others, for infringement of re-issued letters-patent No. 10,054, Division A, dated March 7, 1882, in the Circuit Court of the United States for the Eastern District of Pennsylvania, and upon hearing on pleadings and proofs dismissed by the court. The opinion will be found reported in 30 Fed. Rep. 625.

It appears from the record that James Greaves applied September 30, 1872, for a patent for an "improvement in condensing cylinders for carding engines," the proposed claim being: "The application, as described, of cast-iron spindles to the condensing cylinders of carding engines." He stated in the specification: "The object of my invention is to furnish the condensing cylinders of carding engines with spindles of a more durable character than those in common use, and this object I attain by making such spindles of cast iron instead of wrought iron or steel. . . . It is not essential that the spindle, when it passes through the wheel, should in all cases be round. It may, for instance, be square, in which case the feather may be dispensed with."

This application was rejected October 29, 1872, and again rejected December 7, 1872. On the 7th of December, 1874, the following was substituted for the claim: "A spindle for carding-machine rollers, rectangular in form, for the purpose set forth." This amendment was followed by a redrawn specification, the claim of which was as follows: "The combination, substantially as described, of the condensing cylinder of a carding engine, the driving wheel A, the hub of which has a square or angular aperture, and the spindle X, having a corresponding shape imparted to that portion of it which slides through the said hub, all as set forth." This specification was accompanied by a new sheet of drawings marked "sheet 2," the drawings originally filed being marked "sheet 1," and by a new model. A new oath of invention was required and made, dated January 22, 1875. On the 27th of January the claim of the amended specification was rejected upon reference to Davison and Crowther's English patent No. 2,885 of 1856, and others; again rejected on the 26th of February in view of that reference, and also of the patents of Harraday, of May 30, 1854, No. 10,986, and of Warth, of August 6, 1872, Nos. 130,343 and 130,344; again, on March 31, 1875; again, on appeal to the board of examiners-in-chief, August 7, 1875; and again, by the commissioner on appeal to him, November 11, 1875. There having been a change of attorneys, on the 12th of October, 1876, an amended specification was filed, and rejection again followed, November 27, 1876. The specification was again amended November 29, so as to set up these two claims:

"1st. The combination, in a carding engine, of a condensing or rubber cylinder, a driving wheel and a polygonally-shaped horizontal shaft or spindle, the latter being adapted to be revolved and at the same time to be continuously reciprocated in a correspondingly polygonally-shaped bearing, and a continuously reciprocating rubber, substantially as and for the purposes described.

"2d. In a carding engine, the combination of a continuously reciprocating rubber, a driving wheel to turn said rubber, and a horizontal shaft or spindle connecting the two together, said shaft or spindle and the bearing in which it reciprocates being both made of cast iron, or both of metal having the same crystalline structure, whereby in the reciprocating action the tendency of the crystalline particles of cast metal in the bearing to wear the spindle will be resisted by the crystalline particles of the latter, substantially as and for the purposes described."

This application was rejected December 1. The applicant appealed, and on December 2 the examiner reported that he had rejected the first claim, which did not then require that the spindle and bearing should be of cast iron, [31] upon the ground that its non-patentability was *res adjudicata* so far as the examiner was concerned; and that the second claim was rejected because the substitution of the cast-metal shaft for the wrought metal or steel shaft, before employed, required no invention. The examiners-in-chief, on the 15th of December, reversed the examiner's decision as to the second claim, but affirmed it as to the first, holding, however, that if the first claim were amended so as to include "cast iron or metal of the same crystalline structure" for bearing and spindle, they thought it would be admissible. The first claim was accordingly amended by the insertion, after the word "bearing," of the words "said bearing and said shaft or spindle being of cast iron or of metal of the same crystalline structure."

On the 11th of January, 1877, an interference was declared between these claims and the application of one Stone, and on the 8th of February, 1877, the examiner refused a motion to dissolve the interference, upon the ground that the feature which Greaves relied on as not shown in the Stone invention was that Greaves' shaft and bearing were made of cast iron or metal having the same crystalline structure, while Stone's were of cast brass, which would come within the scope of Greaves' claims. It was held by the assistant commissioner, on appeal, on the 9th of February, that "as cast brass has not the same crystalline structure as cast iron, the application of Greaves, if so amended in its claims as to restrict him to the use of metal having the same crystalline structure 'as cast iron,' will not interfere with an application showing and describing 'cast brass,' if the material is of the essence of the invention." Applicant accordingly so amended, February 9, the interference was dissolved February 10, and the patent was issued February 20, 1877.

The result of all this was that, after repeated attempts and repeated rejections, the patent was allowed, containing two claims, limited strictly to a shaft and bearing of cast iron or of metal of the same crystalline structure as cast iron. These claims were as follows:

"1. The combination, in a carding engine, of a condensing or rubber cylinder, a driving wheel and a polygonally-shaped horizontal shaft [32] or spindle, the latter being adapted to be revolved, and at the same time to be continuously reciprocated in a correspondingly polygonally-shaped bearing, said bearing and said shaft or spindle being of cast iron or of metal of the same crystalline structure as cast iron, and a continuously reciprocating rubber, substantially as and for the purposes described.

"2. In a carding engine, the combination of a continuously-reciprocating rubber, a driving wheel to turn said rubber and a horizontal shaft or spindle connecting the two together, said shaft or spindle and the bearing in which it reciprocates being both made of cast iron, or both of metal having the same crystalline structure as cast iron, whereby in the reciprocating action the tendency of the crystalline particles of cast metal in the bearing to wear the spindle will be resisted by the crystalline particles of the latter, substantially as and for the purposes described."

Applications were then filed for a re-issue in two divisions, A and B—for division A on March 23, 1877, and for division B on March 15, 1877.

Division B contained both of the claims of the original patent, and re-issued letters-patent No. 9,477 were granted therefor under date of November 23, 1880.

The claim in Division A was as follows:

"In a carding engine, a condensing or rubber cylinder mounted on a polygonally-shaped horizontal shaft, in combination with a driving gear, A, having a sleeve-shaped bearing, *b*, said shaft and cylinder being adapted to be revolved by the drive-wheel A, and at the same time to be rapidly and continuously reciprocated by suitable mechanism, substantially as and for the purposes described."

And for this, re-issued letters-patent No. 10,055 were granted March 7, 1882, and this is the patent in controversy. Before it was passed for issue, various proceedings were had in the Patent Office, including rejections, appeals and disposal of an interference between this application and that of Stone, and it appears by the statement of Examiner Appleton, under date of December 5, 1881, that after the determination of the interference the application [26 was returned to the examiner "with instructions to consider whether or not, in view of certain recent decisions of the Supreme Court of the United States, the same in its present form can properly be allowed." The examiner was clearly of opinion that under the decisions of this court in *Giant Powder Co.* v. *California Powder Works*, 98 U. S. 126 [25:77]; *Leggett* v. *Avery*, 101 U. S. 256 [25: 865]; *Swain Turbine & Mfg. Co.* v. *Ladd*, 102 U. S. 408 [26: 184], and *Goodyear Dental Vulcanite Co.* v. *Davis*, Id. 222 [149], the applicant was not entitled to the claim presented, "said applicant having withdrawn a similar claim in his original application in order to obtain his original patent, and the present claim being for a different invention from that covered by the original patent." And in his statement of grounds of decision, under date of January 27, 1882, the examiner gave as his reasons: "In the first place, this claim, being for a combination of parts of peculiar construction, while the original is for a combination of parts when some of the same are constructed of particular metals, the metals being the gist of the claim thereof, is for a different invention from that covered by the original patent. In the second place, the claim now in controversy having been withdrawn from the application upon which the original patent was granted, with a full knowledge of all the facts in the case, it cannot be urged that such withdrawal of the claim, or any other change that the appellant now desires to make, was the result of or necessitated by any inadvertence, accident or mistake, for which alone corrections by re-issue can be made." The letter of allowance bears date February 15, 1882.

The circuit court held that the only claim in the re-issue was for a combination not claimed in or covered by the original patent, and hence not for the same invention; that the claim in the re issue was before the commissioner and its allowance urged by the patentee through his solicitor, but was not allowed, and was therefore stricken out, and the patent accepted without this claim; that the court could not distinguish between the patentee and his counsel as to what occurred during the pendency [4] of the application for the patent, and, as to its acceptance by the latter, the patentee must be regarded as bound by the acts of his counsel; and that, under the circumstances, the case fell clearly within *Leggett* v. *Avery*, 101 U. S. 256 [25: 865].

In *Leggett* v. *Avery*, thus referred to, *Mr. Justice* Bradley, speaking for the court, said: "We think it was a manifest error of the commissioner, in the re-issue, to allow to the patentee a claim for an invention different from that which was described in the surrendered letters, and which he had thus expressly disclaimed. The pretense that an 'error had arisen by inadvertence, accident or mistake,' within the meaning of the Patent Law, was too bald for consideration. The very question of the validity of these claims had just been considered and decided with the acquiescence and the express disclaimer of the patentee. If, in any case, where an applicant for letters-patent, in order to obtain the issue thereof, disclaims a particular invention, or acquiesces in the rejection of a claim thereto, a re-issue containing such claim is valid (which we greatly doubt), it certainly cannot be sustained in this case. The allowance of claims once formally abandoned by the applicant, in order to get his letters-patent through, is the occasion of immense frauds against the public. It not unfrequently happens that, after an application has been carefully examined and compared with previous inventions, and after the claims which such an examination renders admissible have been settled with the acquiescence of the applicant, he, or his assignee, when that investigation is forgotten and perhaps new officers have been appointed, comes back to the Patent Office, and, under the pretense of inadvertence and mistake in the first specification, gets inserted into re-issued letters all that had been previously rejected. In this manner, without an appeal, he gets the first decision of the office reversed, steals a march on the public, and on those who before opposed his pretensions (if, indeed, the latter have not been silenced by purchase), and procures a valuable monopoly to which he has not the slightest title. We have more than once expressed our disapprobation of this practice. As before remarked, we consider it extremely doubtful whether re-issued letters can be sustained in any case where they contain claims that have once been formally disclaimed by the patentee, or rejected with his acquiescence, and he has consented to such rejection in order to obtain his letters-patent. Under such circumstances, the rejection of the claim can in no just sense be regarded as a matter of inadvertence or mistake. Even though it were such, the applicant should seem to be estopped from setting it up on an application for a re-issue." See also *Swain Turbine Mfg. Co.* v. *Ladd*, 102 U. S. 408 [26: 184].

A re-issue is an amendment, and cannot be allowed unless the imperfections in the original patent arose without fraud, and from inadvertence, accident or mistake. Rev. Stat. § 4916. Hence the re-issue cannot be permitted to enlarge the claims of the original patent by including matter once intentionally omitted. Acquiescence in the rejection of a claim; its withdrawal by amendment, either to save the application or to escape an interference; the acceptance of a patent containing limitations imposed by the Patent Office, which narrow the scope of the invention as at first described and claimed,—are instances of such omission. *Union Metallic Cartridge Co.* v. *United States Cartridge Co.*, 112 U. S. 624 [28: 828]; *Shepard* v. *Carrigan*, 116 U. S. 593 [29: 723]; *Roemer* v. *Peddie*, 132 U. S. 313 [33: 382]; *Yale Lock Mfg. Co.* v. *Berkshire Nat. Bank*, 135 U. S. 342, 379 [34: 168, 183], and cases cited.

It is clear that the claim of this re-issue is not covered by the original patent, and it appears that before the issue of the latter it was passed upon and rejected; was withdrawn and erased; an interference was dissolved upon condition of the amendment; and the issue of the original letters was predicated upon its abandonment. There is no room for the contention that there was any inadvertence, accident or mistake in the premises. Nor, in the light of these protracted proceedings in the Patent Office, can the applicant be permitted to treat the deliberate acts of his attorney as the result of inadvertence, accident or mistake. The repeated official decisions and orders, and the repeated efforts to maintain this claim without success, during this long struggle, indicate anything but negligence or inadvertence on the part of [266] the solicitors employed.

The decree of the Circuit Court was right, and it is affirmed.

FOURTH NATIONAL BANK OF THE CITY OF NEW YORK, *Appt.*, [234]
v.
AMERICAN MILLS COMPANY ET AL.

(See S. C. Reporter's ed. 234-239.)

Transfer, when not void for insolvency—New York Statute of April 16, 1830—rights of pledgee.

1. A transfer by a corporation is not void as made in contemplation of insolvency, under sec. 4, tit.

NOTE.—*As to power of consignee, factor or pledgee to sell goods*, see *note* to Brown v. M'Gran, 10: 550.

As to power of master to sell vessel, see *note* to Post v. Jones, 15: 618.

As to factor's lien, see *note* to United States v. Villalonga, 23: 64.

Factors and brokers; powers; duties; liabilities; commissions.

The Factors' Act (N. Y. Laws 1830, chap. 179) has no application to a case where protection would secure to a wrong-doer the fruits of fraud. Dorrance v. Dean, 7 Cent. Rep. 695, 106 N. Y. 208.

A factor cannot bind the principal by a disposition of his property out of the ordinary course of business. Authorities cited in Commercial Nat.

4, chap. 18, pt. I., New York Rev. Stat., where the corporation only transferred the legal title of goods to one who already had possession of them, and also had a lien upon them for more than their value.

2. Under the New York Statute of April 16, 1830, a factor or agent intrusted with the possession of goods as security for his advances thereon has a right to treat the goods as his own, so long as his lien thereon is unsatisfied.

3. Where a person accepts, for the benefit of a corporation, drafts drawn on him by it, and receives from the corporation goods as security against his acceptances, a person to whom the acceptances are subsequently transferred by the corporation cannot take the goods from the former or his vendee without discharging his obligations on the acceptances.

[No. 62.]

Argued Nov. 10, 1890. Decided Nov. 24, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a suit to procure the application, upon judgments recovered by plaintiff, of proceeds of goods sold by defendant Albert J. Graeffe. *Affirmed.*

The facts are stated in the opinion.

Messrs. William S. Opdyke and **David Willcox**, for appellant:

A creditor having judgment and unsatisfied execution in a state court, may resort to the national courts of the same locality for aid in reaching the debtor's equitable assets.

Ogilvie v. *Knox Ins. Co.* 67 U. S. 2 Black, 539 (17: 349), cited in 4 Biss. 371; *Wilkinson* v. *Yale*, 6 McLean, 17; *Putnam* v. *New Albany*, 4 Biss. 365; *Scottish American Mortg. Co.* v. *Follansbee*, 9 Biss. 482, 14 Fed. Rep. 125; *Owens* v. *Gotzian*, 4 Dill. 436; *Gorrell* v. *Dickson*, 26 Fed. Rep. 454; *Shields* v. *Thomas*, 59 U. S. 18 How. 253 (15: 368); *Barber* v. *Barber*, 62 U. S. 21 How. 583 (16: 226); *The Holladay Case*, 27 Fed. Rep. 830.

In case of the utter insolvency of the debtor, judgment and execution at law were probably unnecessary.

Terry v. *Tubman*, 92 U. S. 156 (23: 537); *Case* v. *Beauregard*, 101 U. S. 688 (25: 1004).

An execution creditor of a corporation may maintain in the national courts a bill in his own name against any of its debtors to subject such assets to payment of his judgment.

Hatch v. *Dana*, 101 U. S. 205 (25: 885).

The equity jurisdiction and remedies conferred by the laws of the United States upon its courts cannot be limited or restrained by state legislation, and are uniform throughout the different States of the Union.

Bank v. Heilbronner, 11 Cent. Rep. 275, 108 N. Y. 439.

Factors cannot pledge goods for their own debt. *Id.*

A factor to whom wheat is consigned for storage in an elevator and for sale may, in the absence of particular instructions, stow it in a mass with other wheat of the same grade and quality. Davis v. Kobe, 36 Minn. 214.

A cotton factor in Galveston, to whom cotton has been consigned for sale, has no right, in the absence of direct authority from the consignor, to ship it to a foreign market for disposition; and one who receives it from the factor for that purpose is responsible to the owner for its value. Wootters v. Kauffman, 67 Tex. 488.

A factor is not responsible to his principal by reason of the established grades of grain being different in the market where he is to sell from the grades at other places. Davis v. Kobe, 36 Minn. 214.

On consignment of goods for sale without a special limit as to price, the consignee may exercise his own judgment in sale. Conway v. Lewis, 12 Cent. Rep. 495, 120 Pa. 215.

Independently of the Statute in regard to factors, the bare possession of goods by a dealer in that class of goods does not clothe him with power to dispose of the goods as owner. If he sells as owner, there must be some other *indicia* of property than mere possession. Levi v. Booth, 58 Md. 305, 315, 42 Am. Rep. 332, 337; Covill v. Hill, 4 Denio, 323; Barstow v. Savage Min. Co. 64 Cal. 388, 49 Am. Rep. 705.

A factor who has the possession and control of personal property has, under the California Statute, power to pledge the same as collateral security for a loan made to him by the pledgee, in good faith, in the ordinary course of business, and without notice of the principal's title. Wisp v. Hazard, 66 Cal. 489.

A principal may assert his right in property against one who had received it from a factor with notice of a trust, either by independent suit or by way of defense. Allen v. St. Louis Nat. Bank, 125 U. S. 20 (30: 573).

By common laws a factor or agent for sale has no power to pledge, whether intrusted with possession of the goods themselves or with the symbol of them, as a bill of lading. *Id.*

A broker's commission on the sale of real estate is earned when the terms of the contract as to the sale were specific, and everything was done that could be done by the purchaser to carry out the contract, although the vendor, without any reason refused to complete it. Kock v. Emmerling, 68 U. S. 22 How. 69 (16: 292).

A broker who brings parties together for the very purpose of entering into an illegal agreement, such as a wager contract, cannot recover for services rendered or losses incurred on behalf of either in forwarding the transaction. Irwin v. Williar, 110 U. S. 499 (28: 225).

It being within the ordinary scope of a factor's authority to sell his principal's goods in his own name, a purchaser who has no knowledge of the agency is entitled to set off against the price of the goods a debt due to him from the factor personally. *Ex parte* Dixon and *Re* Henley, 46 L. J. N. S. Bankr. 20, L. R. 4 Ch. Div. 133, 35 L. T. N. S. 644, 25 Week. Rep. 105.

A factor could not pledge, unless the owner of the goods armed him with such *indicia* of property as to enable him to deal with them as his own. Boyson v. Coles, 6 Maule & S. 14.

Where a factor pledged the goods of his principal the latter might recover the value of them from the pawnee, on tendering to the factor what was due to him, without any tender to the pawnee. Daubigny v. Duval, 5 T. R. 604.

One who sells goods for another for a commission, having the goods in his possession at the time, and giving credit to the vendee, is a factor. Edgerton v. Michels, 66 Wis. 124.

A purchaser is responsible for the negligence of his broker in the transmission of instructions to the seller. Schlesinger v. Texas & St. L. R. Co. 2 West. Rep. 112, 87 Mo. 146.

A factor who has a lien on a consignment for advances to the principal is not liable for loss from a falling market, caused by his holding the consignment, against which a time draft was drawn, after the maturity of the draft. Lockett v. Baxter, 8 Wash. Ter. 350.

Ridings v. *Johnson*, 128 U. S. 217 (32: 403); *Suydam* v. *Broadnax*, 39 U. S. 14 Pet. 67 (10: 357); *Union Bank* v. *Vaiden*, 59 U. S. 18 How. 503 (15: 472); *Hyde* v. *Stone*, 61 U. S. 20 How. 175 (15: 875); *Hess* v. *Reynolds*, 113 U. S. 73 (28: 928); *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98 (32: 630, 634).

One who is unable to meet his debts as they mature is insolvent.

Tracy v. *Tuffly*, 134 U. S. 221 (33: 884); *Cunningham* v. *Norton*, 125 U. S. 90 (31: 628).

A corporation, like an individual, is insolvent when it is not able to pay its debts.

Brouwer v. *Harbeck*, 9 N. Y. 589; *Denike* v. *New York & R. L. & C. Co.* 80 N. Y. 608; *Curtis* v. *Leavitt*, 15 N. Y. 9, 199.

A factor cannot pledge or transfer his principal's goods on account of his own debt.

Warner v. *Martin*, 52 U. S. 11 How. 209 (13: 667); *Allen* v. *St. Louis Bank*, 120 U. S. 20 (30: 578); *Evans* v. *Potter*, 2 Gall. 13; *Wickham* v. *Morehouse*, 16 Fed. Rep. 324; *Commercial Nat. Bank* v. *Heilbronner*, 11 Cent. Rep. 275, 108 N. Y. 439; *First Nat. Bank* v. *Boyce*, 78 Ky. 42; *DeBouchout* v. *Goldsmid*, 5 Ves. Jr. 211; *Graham* v. *Dyster*, 2 Starkie, 21; *Queiroz* v. *Trueman*, 3 Barn. & C. 342; *Jarvis* v. *Rogers*, 15 Mass. 389; *Jones* v. *Sinclair*, 2 N. H. 321; *Smith* v. *Smith*, 9 Abb. Pr. N. S. 420; *Lehigh Coal & Nav. Co.* v. *Central R. Co.* 29 N. J. Eq. 252; *Cairo & V. R. Co.* v. *Fackney*, 78 Ill. 116; *Moshier* v. *Meek*, 80 Ill. 79; *Daubigny* v. *Duval*, 5 T. R. 606; *Legg* v. *Evans*, 6 Mees. & W. 42; *Donald* v. *Suckling*, L. R. 1 Q. B. 595, 605; Story, Agency, § 372.

The transfer to Mrs. Graeffe on account of the antecedent debt due from Graeffe to her did not constitute her a purchaser for value.

Barnard v. *Campbell*, 58 N. Y. 73; *Robinson* v. *Bank of Attica*, 21 N. Y. 406; *Erie R. Co.* v. *Vanderbilt*, 5 Hun, 123, 133; *Re Antisdel*, 18 Nat. Bankr. Reg. 289; *Moyer* v. *Adams*, 2 Fed. Rep. 182; *Knowlton* v. *Mish*, 17 Fed. Rep. 198; *Platt* v. *Schreyer*, 25 Fed. Rep. 83.

Mr. **Alex. Thain**, for appellees:

A factor has a lien upon the property of the principal in his possession for his commission, advances and expenses.

Willard, Eq. 124; *Kruger* v. *Wilcox*, Ambl. 252; *Bryce* v. *Brooks*, 26 Wend. 367; *United States* v. *Villalonga*, 90 U. S. 23 Wall. 35 (23: 64); *Ohio & M. R. Co.* v. *Kasson*, 37 N. Y. 218; Story, Agency, § 34; Whart. Agency, § 766; *Winter* v. *Coit*, 7 N. Y. 288; *Nagle* v. *McFeeters*, 97 N. Y. 196.

He must first sell the goods before he can call upon his principal to pay any deficiency.

Gihon v. *Stanton*, 9 N. Y. 476; *Mottram* v. *Mills*, 2 Sandf. 189.

It was neither illegal, inequitable nor fraudulent for the defendant Albert J. Graeffe to prefer his wife as a creditor, to the amount of his conceded indebtedness to her of over $100,000.

Metsker v. *Bonebrake*, 108 U. S. 66 (27: 654); *Atlantic Nat. Bank* v. *Tavener*, 130 Mass. 409.

Right to prefer among creditors is a consequence of ownership.

Lampson v. *Arnold*, 19 Iowa, 479; *Wilson* v. *Forsyth*, 24 Barb. 105; *Grover* v. *Wakeman*, 11 Wend. 187; *Lupton* v. *Cutter*, 8 Pick. 298.

And such preferences are not fraudulent.

Waterbury v. *Sturevant*, 18 Wend. 353; *M'Menomy* v. *Roosevelt*, 3 Johns. Ch. 446, 1 N. Y. Ch. L. ed. 679; *Lewis* v. *Whittemore*, 5 N. H. 364; Bump, Fraudulent Sales, 217.

A preference is not fraudulent, though others lose their debts, which are equally meritorious (*Kuykendall* v. *McDonald*, 15 Mo. 418; *Hall* v. *Arnold*, 15 Barb. 599; *Ewing* v. *Runkle*, 20 Ill. 448; *Waddams* v. *Humphrey*, 22 Ill. 661); or though the debtor be insolvent (*Auburn Exch. Bank* v. *Fitch*, 48 Barb. 344); or though the creditor knew of the insolvency of the debtor (*Walsh* v. *Kelly*, 42 Barb. 98; *Fromme* v. *Jones*, 13 Iowa, 474; *Hessing* v. *McCloskey*, 37 Ill. 341; *Johnson* v. *McGrew*, 11 Iowa, 151; *Young* v. *Dumas*, 39 Ala. 60); nor by the fact that the debtor wishes to defeat some execution; nor that the preference includes all property not exempt from execution.

Holbird v. *Anderson*, 5 T. R. 235; *Hall* v. *Arnold*, 15 Barb. 599; *Weller* v. *Wayland*, 17 Johns. 102; *Wilder* v. *Winne*, 6 Cow. 284; *Barr* v. *Hatch*, 3 Ohio, 527.

An existing indebtedness is a good consideration, within the proviso which saves the right of a bona fide purchaser.

Seymour v. *Wilson*, 19 N. Y. 417; *Adams* v. *Wheeler*, 10 Pick. 199; *Gibson* v. *Seymour*, 4 Vt. 518; *Gleason* v. *Day*, 9 Wis. 498; *Seymour* v. *Briggs*, 11 Wis. 198.

And the preference may be given to a debt to a wife or attorney.

Syracuse Chilled Plow Co. v. *Wing*, 85 N. Y. 421; *Mayfield* v. *Kilgour*, 31 Md. 240; *Hill* v. *Rogers*, Rice, Eq. 7; *Jaycox* v. *Caldwell*, 51 N. Y. 395; *McCartney* v. *Welch*, 51 N. Y. 626; *Woodworth* v. *Sweet*, 51 N. Y. 8; *Sherman* v. *Parish*, 53 N. Y. 483; *Seymour* v. *Fellows*, 77 N. Y. 178.

Mr. Justice **Blatchford** delivered the [235
opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by the Fourth National Bank of the City of New York, a national banking association, against the American Mills Company (a New York corporation), Albert J. Graeffe, Mary J. Graeffe (his wife), William H. Garner and William H. Bowen. Its object was to procure the application upon judgments recovered by the plaintiff against the American Mills Company and Albert J. Graeffe, of the proceeds of certain merchandise which had been transferred by Albert J. Graeffe to Garner, as trustee for Mary J. Graeffe, to be applied upon debts due by Albert J. Graeffe to Mary J. Graeffe. After issue joined, proofs were taken, and the case was heard by *Judge* Coxe, who entered a decree dismissing the bill as to Albert J. Graeffe, Mary J. Graeffe, Garner and Bowen. Albert J. Graeffe, Bowen and the American Mills Company had joined in an answer to the bill, and Garner and Mary J. Graeffe had each put in a separate answer. The opinion of the circuit court is reported in 29 Fed. Rep. 611. An application for a rehearing was made by the plaintiff and denied, the opinion on the same being reported in 30 Fed. Rep. 420. The plaintiff has appealed from the decree. The suit was brought in December, 1881, before the passage of the Act of July 12,

1882 (22 Stat. 163, chap. 290, § 4). *Charlotte First Nat. Bank* v. *Morgan*, 132 U. S. 141 [33: 282].

236] The facts of the case are as follows, as stated by the circuit court in its opinion: The American Mills Company was a manufacturing corporation, having its principal office in the City of New York, and its manufactory at Warwick, Rhode Island. Albert J. Graeffe was the treasurer of the Company and one of its trustees, and the commission merchant in the City of New York to whom its goods were consigned for sale. On February 28, 1881, he had in his possession merchandise of the Company of the value of about $45,000. Prior to that time, he had accepted for the benefit of the Company twenty-three drafts drawn upon him by the Company, against the consignments, for $57,600.40. Of these twenty-three drafts, eleven, amounting to $27,600.40, were, after acceptance, returned by Graeffe to the Company and used by it. The remaining twelve drafts, amounting to $30,000, were, after acceptance, discounted by Graeffe, and the proceeds were remitted by him to the Company. Eleven other drafts, amounting to $32,500, drawn by the Company upon Graeffe, were accepted by him, but the Company did not have the benefit of any of them, because they were retained by Graeffe and used by him in his own business. None of these thirty-four drafts were due on the 28th of February, 1881. On that day, the Company transferred to Graeffe, as absolute owner, the goods which he so had in his possession, he taking them in discharge *pro tanto* of the Company's indebtedness to him. On the following day, he sold the goods to Garner, as trustee for Mary J. Graeffe, for $45,064.30, in part payment of debts due from him to her. They were afterwards sold through Bowen, and the proceeds were paid to Mrs. Graeffe, or to Garner for her. On the 3d of March, 1881, Graeffe made a general assignment for the benefit of his creditors, and the American Mills Company failed at the same time. On the 30th of March, 1881, the plaintiff recovered a judgment against the Mills Company and Graeffe, in the supreme court of the State of New York, on one of the acceptances for $2,500, which formed part of the $30,000 of acceptances; and on the 22d of June, 1881, it recovered another judgment against the same parties, in the Court of Common Pleas for the City and County of New

237] York, on six others of the acceptances, being one for $2,500 and one for $3,000, forming part of the $30,000 of acceptances, and four for $3,000 each, forming part of the $32,500 of acceptances. Executions upon these judgments were returned unsatisfied in September, 1881. Subsequently to the failure of the Company, and before July 1, 1881, other judgments were obtained against it in New York and Rhode Island, for over $70,000.

The theory of the bill is, that Mary J. Graeffe is indebted to the American Mills Company for the value of the goods embraced in the transfer to her, on the ground that such transfer was without consideration and constructively fraudulent. No allegation of *actual fraud* is made against any person, and it is clear that there was a bona fide indebtedness from Graeffe to his wife of over $100,000, created by loans to him of her own money.

It is contended by the plaintiff that the transfer of the goods by the Company to Graeffe was made in contemplation of insolvency, and therefore was void by virtue of the provisions of section 4, title 4, chapter 18, part 1, of the Revised Statutes of New York (1 Rev. Stat. 603), which declares that it shall not be lawful for any incorporated company to "make any transfer or assignment in contemplation of the insolvency of such company, to any person or persons whatever"; that Graeffe had no right in the goods which he could transfer in payment of his debt to his wife, and to the exclusion of the debt of the Company and himself to the plaintiff; that Mrs. Graeffe acquired no right in the goods by virtue of the transfer, and was liable for their value; and that, at all events, as to the three acceptances amounting to $8,000, and forming part of the $30,000 of acceptances, of which the Company had the benefit, the sole right of Graeffe in the goods was to apply their proceeds to the payment of those three acceptances.

But it appears in evidence that, by the 28th of February, 1881, at which time Graeffe had in his possession the goods in question, of about the value of $45,000, he had advanced as against those goods, by cash and accept- [23
ances, the sum of about $54,000. The acceptances were negotiable securities, which had passed in the market into the hands of bona fide holders, and on which Graeffe was primarily liable. He had a valid lien on the goods for the $54,000. The legal title to them, which the American Mills Company held when it gave the bill of sale to Graeffe, on the 28th of February, 1881, was therefore of no value, because the goods were then incumbered for more than they were worth. That Company, in transferring the goods to Graeffe, as absolute owner of them, on the 28th of February, 1881, recognized the lien and admitted that its liability to Graeffe exceeded the value of the goods; and the transaction was in effect a foreclosure of the lien. The interest of the American Mills Company in the goods was only contingent, and no court of equity, in a case like the present, can declare that Graeffe could not transfer the goods to Mrs. Graeffe, as against his other creditors and those of the Company.

Under the Statute of New York of April 16, 1830 (Laws of 1830, chap. 179, p. 203), Graeffe had a right to treat the goods as his own, so long as his negotiable acceptances, of which the Company had had the benefit, were outstanding, not taken up by it, and his lien on the goods was unsatisfied. *Cartwright* v. *Wilmerding*, 24 N. Y. 521, 530.

The cases cited by the plaintiff are cases where the question as to the right of property in the goods, as between the consignor and the factor, was raised by the consignor, or where the consignor had not conveyed all his title in them to the factor.

It is contended by the plaintiff that the lien of Graeffe did not exceed $21,715.58. Graeffe at that time claimed a lien for ad-

vances, which was conceded by the Company, for the amount of, at least, $54,215.58. The plaintiff claims that the $32,500 of acceptances outstanding, of which Graeffe had had the benefit, and from which the Company had derived no benefit, should be deducted from the $54,215.58, leaving a balance of $21,715.58. But it appears that the items composing the $32,500, and which were accommodation drafts of the Company on Graeffe, accepted and used by him, were neither charged on the one side of his account with the Company nor credited on the other. These accommodation acceptances were not due on the 28th of February, 1881, and have never been paid by the Company. Graeffe was not bound to give credit for them to the Company until the Company had paid them and surrendered them to him.

As to the three acceptances, amounting to $8,000, they formed part of the acceptances of which the Company had the benefit, and, while the plaintiff holds those acceptances against Graeffe, it cannot take from him, or from Mrs. Graeffe, the property which he held as security against them. Its position is no better than that of the Company would have been, and the Company could not have deprived Graeffe of the goods without discharging his obligation on those particular acceptances. Moreover, even regardihg the $8,000 of acceptances as surrendered and canceled, and deducted from the $54,215.58, there is left $46,215.58, which amount exceeds the value of the goods transferred to Mrs. Graeffe.

Decree affirmed.

GEORGE S. WHEELER, *Plff. in Errr.*,

v.

THEODORE F. JACKSON, as Registrar of Arrears of the CITY OF BROOKLYN.

(See S. C. Reporter's ed. 245-258.)

New York Act—Statutes of Limitations—constitutionality of.

1. Section 15 of the New York Act of 1885, amending the charter of Brooklyn, is not repugnant to the clause of the United States Constitution protecting the obligation of contracts against impairment by state legislation.
2. The Legislature may shorten the time within which suits to enforce existing causes of action may be commenced, provided a reasonable time be given by the new law for the commencement of such suits before the bar takes effect.
3. A Statute of Limitation does not impair the obligation of a contract, nor deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit.

[No. 65.]

Argued Nov. 11, 1890. Decided Nov. 24, 1890.

IN ERROR to the Supreme Court of the State of New York, to review a judgment of that court in General Term affirming a judgment of Special Term, dismissing on demurrer a complaint seeking to enjoin the Registrar of Brooklyn from canceling certain sales of property for taxes, or the record thereof in his office, which judgment was affirmed by the New York Court of Appeals. *Affirmed.*

The facts are stated in the opinion.

Mr. **John J. Townsend,** for plaintiff in error:

The plaintiff's rights under the tax sale constitute a contract.

Clementi v. *Jackson*, 92 N. Y. 591; *Curtis* v. *Whitney*, 80 U. S. 13 Wall. 68 (20: 513); *Corbin* v. *Washington County Comrs.* 3 Fed. Rep. 356, 1 McCrary, 521.

The operation of the Statute (sec. 15, chap. 405, New York Laws of 1885), impairs the validity of the purchaser's contract, and it is therefore unconstitutional.

Sturges v. *Crowninshield*, 17 U. S. 4 Wheat. 207 (4: 551); *Winter* v. *Jones*, 10 Ga. 190; *Waltermire* v. *Westover*, 14 N. Y. 16; *Haight* v. *New York*, 99 N. Y. 280.

By the obligation of a contract is meant the means which at the time of its creation the law affords for its enforcement.

Louisiana v. *St. Martin's Parish*, 111 U. S. 716, 720 (28: 574, 576); *Gunn* v. *Barry*, 82 U. S. 15 Wall. 611 (21: 212); *Edwards* v. *Kearzey*, 96 U. S. 595 (24: 793); *Green* v. *Biddle*, 21 U. S. 8 Wheat. 1 (5: 547); *Dikeman* v. *Dikeman*, 11 Paige, 484, 5 N. Y. Ch. L. ed. 207; *Robin-*

NOTE.—*As to what Statute of Limitations governs; effect of new Statutes;* lex fori, *and not* lex loci, *governs,*—see *note* to Townsend v. Jemison, 13: 194.

As to contracts limiting the time within which action must be brought; waiver of; estoppel as to,—see *note* to Southern Exp. Co. v. Caldwell, 22: 556.

As to when Statute of Limitations, or change in Statute, impairs obligation of contracts, see *note* to Koshkonong v. Burton, 26: 886.

That neither time nor Statute of Limitations runs against the State, see *note* to Gibson v. Chouteau, 20: 534.

Statutes of Limitation; constitutionality of; effect of; power of Legislature to change the period of limitations.

The Legislature has power to change the period of limitations as to all claims not already barred, allowing a reasonable time for bringing actions thereon. Hyman v. Bayne, 83 Ill. 256; Dyer v. Gill, 33 Ark. 410; Pearsall v. Kenan, 79 N. C. 472; People v. Wayne County Judge, 37 Mich. 287; Sampson v. Sampson, 63 Me. 328; Krone v. Krone, 37 Mich. 308; Johnson v. Albany & S. R. Co. 54 N. Y. 416; Dale v. Frisbie, 59 Ind. 530; Bratton v. Guy, 12 S. C. 42.

The Legislature has power to change the period of limitations as to actions *ex delicto* (Guillotel v. New York, 55 How. Pr. 114); and the same is also true as to all rights created by statute. DeMoss v. Newton, 31 Ind. 219; Read v. Frankfort Bank, 23 Me. 318; Woods v. Buie, 6 Miss. 285; Evans v. Montgomery, 4 Watts & S. 218; Ralston v. Lothain, 18 Ind. 303; Tucker v. Harris, 13 Ga. 1.

The period of limitation may be shortened. Ludwig v. Stewart, 32 Mich. 27; Thompson v. Read, 41 Iowa, 48; Pitman v. Bump, 5 Or. 17; Memphis v. United States, 97 U. S. 293 (24: 920); Pearsall v. Kenan, 79 N. C. 472; Dyer v. Gill, 33 Ark. 410; Terry v. Anderson, 95 U. S. 628 (24: 365).

Until the statutory bar has become complete, the period of limitation may be extended or lessened by the Legislature without becoming obnoxious to any constitutional objection. Edwards v. McCad-

son v. *Howe*, 13 Wis. 341, 343; *Bruce* v. *Schuyler*, 9 Ill. 221, 274; *State* v. *Commissioners of S. & U. Lands*, 4 Wis. 414; *Robinson* v. *Magee*, 9 Cal. 81.

The second clause of sec. 15 destroys and cuts off the tax-sale purchaser's rights without a hearing or opportunity to defend.

Stuart v. *Palmer*, 74 N. Y. 183, 190; *State* v. *Staten*, 6 Coldw. 233-244.

Mr. **Almet F. Jenks**, for defendant in error:

Irrespective of sec. 15, chap. 405, Laws of 1873, there was a limitation of the remedy of plaintiff.

New York v. *Colgate*, 12 N. Y. 140; *Fisher* v. *New York*, 67 N. Y. 73; *Bruce* v. *Tilson*, 25 N. Y. 194; *White* v. *Brooklyn*, 33 N. Y. S. R. 307.

This Statute is one of limitation, which acts on the remedy and does not affect the contract, so long as it leaves a reasonable time for action before interposing the barrier of limitation.

Sturges v. *Crowninshield*, 17 U. S. 4 Wheat. 122, 154 (4: 529, 538); *Terry* v. *Anderson*, 95 U. S. 628 (24: 365); *Koshkonong* v. *Burton*, 104 U. S. 668, 675, 676 (26: 886, 889); *Gilfillan* v. *Union Canal Co.* 109 U. S. 401 (27: 977); Cooley, Const. Lim. 451; *Barrett* v. *Holmes*, 102 U. S. 651 (26: 291); *Acker* v. *Acker*, 81 N. Y. 144.

250] *Mr. Justice* **Harlan** delivered the opinion of the court:

The question upon this writ of error is, whether certain provisions of a Statute of New York passed in 1885, and relating to sales of land in the City of Brooklyn for taxes, assessments and water rates, are repugnant to the Constitution of the United States. It arose upon a demurrer to the complaint filed by Wheeler against Jackson, as Registrar of Arrears of that City. The demurrer was sustained by the supreme court of the State, and the complaint dismissed. That judgment was affirmed in general term, and the latter judgment was affirmed by the Court of Appeals of New York. 105 N. Y. 681.

Upon examining the legislation of New York prior to the passage of the Act of 1885, we find that the charter of Brooklyn, passed in 1854, provided that if any tax or assessment remained unpaid on the day specified in the published notice given by the collector of taxes, that officer should sell at public auction the property on which the tax or assessment was imposed "for the lowest term of years for which any person will take the same, and pay the amount of such tax or assessment, with the interest and expenses;" the purchaser to receive a certificate of sale, which should be noted on the original tax or assessment rolls, as well as on the abstracts kept in the collector's office. The Statute directed this certificate to be recorded in the collector's office, and declared that it should constitute "a lien upon the lands and premises therein described after the same shall have been so recorded;" and that no assign-

---

don, 20 Iowa, 520; Beal v. Nason, 14 Me. 344; Newkirk v. Chapron, 17 Ill. 344; Wright v. Oakley, 5 Met. 400; Battles v. Fobes, 18 Pick. 532.

The repeal or amendment of a Statute of Limitations does not apply to a claim already barred by the Statute, because by the lapse of the statutory period the rights of the parties have become vested, and the Legislature cannot detract from or enlarge them. Seymour v. Deming, 9 Cush. 529; Willard v. Clarke, 7 Met. 435; Darling v. Wells, 1 Cush. 508; Brigham v. Bigelow, 12 Met. 268; Garfield v. Bemis, 3 Allen, 445.

Thus, the Legislature cannot give a remedy on a claim already barred by the Statute. Loring v. Boston, 12 Gray, 209; Kinsman v. Cambridge, 121 Mass. 558.

A new Statute of Limitations cannot limit existing claims without allowing a reasonable time after its passage for parties to bring an action. Horbach v. Miller, 4 Neb. 31; Holcombe v. Tracy, 2 Minn. 241; Lockhart v. Yeiser, 2 Bush (Ky.) 231; West Feliciana R. Co. v. Stockett, 13 Smedes & M. 395; Call v. Hagger, 8 Mass. 430.

A Statute that bars a past right of action, without any provision for a period within which an action may be brought, is unreasonable and obnoxious to the objection that it impairs the rights of private property; but subject to this exception such laws are valid, and applying to the remedy merely their retrospective operation is no objection to them. Hope v. Johnson, 2 Yerg. 123; United States v. Samperyac, 1 Hempst. 118; Cutts v. Hardee, 38 Ga. 350; Rathbone v. Bradford, 1 Ala. 312; Coosa River S. Co. v. Barclay, 30 Ala. 120; Holcombe v. Tracy, 2 Minn. 241; Cook v. Wood, 1 McCord, L. 139; Beltzhoover v. Yewell, 11 Gill & J. 212; Cox v. Berry, 13 Ga. 306; Billings v. Hall, 7 Cal. 1; Blackford v. Peltier, 1 Blackf. 36; Griffin v. McKenzie, 7 Ga. 163; Ward v. Kilts, 12 Wend. 137; Eckstein v. Shoemaker, 8 Whart. 15; Frey v. Kirk, 4 Gill & J. 509; Hawkins v. Barney, 30 U. S. 5 Pet. 458 (8: 190); Charles River Bridge v. Warren Bridge, 36 U. S. 11 Pet. 420 (9: 773); Satterlee v. Matthewson, 16 Serg. & R. 169; Weister v. Hade, 52 Pa. 474.

The Legislature cannot remove a bar or limitation which has already become complete, and no new limitation can be made to take effect on existing claims without allowing a reasonable time for parties to bring actions before their claims are absolutely barred by the new enactment. Dillon v. Dougherty, 2 Grant, Cas. 99; Morford v. Cook, 24 Pa. 92; Call v. Hagger, 8 Mass. 423; Smith v. Morrison, 22 Pick. 430.

The Legislature may change the Statute even as to existing claims, if a reasonable time is allowed for the bringing of actions thereon. Nash v. Fletcher, 44 Miss. 609; Patterson v. Gaines, 47 U. S. 6 How. 550 (12: 553); Elliott v. Lochnane, 1 Kan. 126; Peirce v. Tobey, 5 Met. 168; State v. Clark, 7 Ind. 465; Beesley v. Spencer, 25 Ill. 216; Root v. Bradley, 1 Kan. 437; Wright v. Keithler, 7 Iowa, 92; Cox v. Brown, 6 Jones, L. 100; Pearce v. Patton, 7 B. Mon. 162; Callaway County v. Nolley, 31 Mo. 393; Sleeth v. Murphy, Morris (Iowa) 321; Howell v. Howell, 15 Wis. 55; Gilman v. Cutts, 23 N. H. 376; Martin v. Martin, 35 Ala. 560; Willard v. Harvey, 24 N. H. 344; Webster v. Cooper, 55 U. S. 14 How. 488 (14: 510); West Feliciana R. Co. v. Stockett, 13 Smedes & M. 395; Fiske v. Briggs, 6 R. I. 557; Bank of Alabama v. Dalton, 50 U. S. 9 How. 522 (13: 242); Kilbourne v. Lockman, 8 Iowa, 330; Winston v. McCormick, 1 Ind. 56; Pritchard v. Spencer, 2 Ind. 486; Briscoe v. Anketell, 28 Miss. 361; Slater v. Cave, 8 Ohio St. 30; Holcombe v. Tracy, 2 Minn. 241; De Cordova v. Galveston, 4 Tex. 470.

Unless the Statute expressly so provides, a change in the law does not operate upon claims then existing, but only upon those subsequently arising. Gibbons v. Goodrich, 3 Ill. App. 590; Van Hook v. Whitlock, 3 Paige, 409, 3 N. Y. Ch. L. ed. 209; Deal v. Patterson, 12 La. Ann. 728; Calvert v. Lowell, 19 Ark. 147; Didier v. Davison, 2 Barb. Ch. 477, 5 N. Y. Ch. L. ed. 721; Ashbrook v. Quarles, 15 B. Mon. 20;

ment of a certificate should have any effect until the notice of the same, with the name and residence of the assignee, was filed in the office of the collector of the district in which the lands were situated. The owner, mortgagee, occupant or other person interested in the land, was given the right to redeem "at any time within two years after the sale for either tax or assessment," by paying to the collector, for the use of the purchaser, "the said purchase-money, together with any other tax or assessment which the said purchaser may have paid, chargeable on said land, and which he is hereby author-
1] ized to do, provided a notice thereof has been filed in the office of such collector, with fifteen per cent per annum in addition thereto, and the certificate of such collector, stating the payment and showing what land such payment is intended to redeem, shall be evidence of such redemption." Upon receipt of the moneys it became the duty of the collector to cause them to be refunded to the purchaser, his legal representatives or assigns, and all proceedings in relation to the sale were to cease. If the moneys were not paid according to the exigency of the notice, the collector was required to execute a conveyance of the property so sold. The Statute contained this further provision: "§ 33. The collector of the district, where the land sold for any tax or assessment shall not have been redeemed, as by this Act provided, shall execute to the purchaser or his assigns, pursuant to the terms of sale, a proper conveyance of the lands so sold by him, which shall contain a brief statement of the proceedings had for the sale of said lands, and shall be evidence that such sale and other proceedings were regularly made and had according to the provisions of this Act. He shall also forthwith note the same on the assessment rolls and abstract kept in his office. The grantee shall be entitled as against all persons whomsoever to the possession of said premises, and to the rents, issues and profits thereof, pursuant to the terms of his conveyance, and shall be entitled to obtain possession of his lands by summary proceedings, in the same manner as is provided by law for the removal of persons who hold over or continue in possession of real estate sold by virtue of an execution against them." Laws of New York 1854, pp. 874, 878 to 881, chap. 384, §§ 24, 26, 29, 30, 33, title V. *Of the Collection of Taxes and Assessments.*

An amended charter of Brooklyn, passed June 28, 1873, repealed all former Acts inconsistent with its provisions, and created for that City the department of arrears, with a chief officer named the registrar of arrears, upon whom were imposed all the duties theretofore required to be performed by any city officer or department in relation to advertising, selling and leasing property for assessments, taxes and water rates, and for the redemption of property sold therefor. Laws of New York 1873, p. 1818, chap. 863, title VIII. § 1. Sections 24, 26, 29, 30 and 33 of the Act of 1854 were substantially re-enacted in sections 1, 3, 5, 6, 8 and 10 of that of 1873. The differences between the two Acts do not affect the present controversy. [252

An Act of June 6, 1885, amended that of

Calkins v. Calkins, 3 Barb. 305; Lucas v. Tunstall, 6 Ark. 443; Ridgley v. Steamboat Reindeer, 27 Mo. 442; People v. Columbia County Supra. 10 Wend. 363; Clemens v. Wilkinson, 10 Mo. 97; Gordon v. Mounts, 2 Greene (Iowa) 243; McKinney v. McKinney, 8 Ohio St. 423; Williamson v. Field, 2 Sandf. Ch. 533, 7 N. Y. Ch. L. ed. 602; Thompson v. Alexander, 11 Ill. 54; Dickerson v. Morrison, 5 Ark. 316; Scarborough v. Dugan, 10 Cal. 305; Brown v. Wilcox, 14 Smedes & M. 127; Paddleford v. Dunn, 14 Mo. 517; Hinch v. Weatherford, 2 Greene (Iowa) 244; Boyd v. Barrenger, 23 Miss. 269.

A Statute may extend the time of limitation upon existing claims, but it cannot, and does not, revive those already barred (Bradford v. Shine, 13 Fla. 398; Royce v. Hurd, 24 Vt. 620; Winston v. McCormick, 1 Smith (Ind.) 8; Wright v. Oakley, 5 Met. 400; Garfield v. Bemis, 2 Allen, 445; Baldro v. Tolmie, 1 Or. 176; Joy v. Thompson, 1 Doug. (Mich.) 373; Hill v. Krieke, 11 Wis. 442; Sprecher v. Wakeley, Id. 432; Hawkins v. Campbell, 6 Ark. 512; Couch v. McKee, Id. 484; Wires v. Farr, 25 Vt. 41; Walker v. Bank of Mississippi, 7 Ark. 500; Davis v. Minor, 1 How. (Miss.) 153; Robb v. Harlan, 7 Pa. 292; Stipp v. Brown, 2 Ind. 647; Clarke v. Bank of Mississippi, 10 Ark. 516; Brown v. Wilcox, 14 Smedes & M. 127; M'Kinney v. Springer, 8 Blackf. 506; Forsythe v. Ripley, 2 Greene (Iowa) 181; Knox v. Cleveland, 13 Wis. 245; Yancy v. Yancy, 5 Heisk. 353), but acts only on existing rights. Cox v. Davis, 17 Ala. 714; Chandler v. Chandler, 21 Ark. 95; Henry v. Thorpe, 14 Ala. 103; Coady v. Reins, 1 Mont. 424.

The Statute in force at the time the action is brought controls, unless the time limited by the old Statute for commencing an action has elapsed while the old Statute was in force and before the suit is brought, in which case the suit is barred, and no subsequent Statute can renew the right or take away the bar. Marsdon v. Seabury, 3 N. J. L. 275; Pritchard v. Spencer, 2 Ind. 486; Root v. Bradley, 1 Kan. 437; Walker v. Bank of Mississippi, 7 Ark. 500; Phares v. Walters, 6 Iowa, 106; Moore v. Lobbin, 28 Miss. 394; Gilman v. Cutts, 23 N. H. 376; Baldro v. Tolmie, 1 Or. 176; Bradford v. Brooks, 2 Aik. (Vt.) 284; M'Kinney v. Springer, 8 Blackf. 506; Woart v. Winnick, 3 N. H. 473; Lewis v. Webb, 3 Me. 326; Holden v. James, 11 Mass. 396; Piatt v. Vattier, 1 McLean, 146; Davis v. Minor, 1 How. (Miss.) 153; Stipp v. Brown, 2 Ind. 647.

Instances in which it has been held that a Statute of Limitation does not apply to causes of action which existed before its passage: Weber v. Manning, 4 Mo. 229; Thompson v. Alexander, 11 Ill. 54; Hull v. Minor, 2 Root, 223; Central Bank v. Solomon, 20 Ga. 408; Paddleford v. Dunn, 14 Mo. 517; Ashbrook v. Quarles, 15 B. Mon. 20; Moore v. McLendon, 10 Ark. 512; Calvert v. Lowell, Id. 147; Deal v. Patterson, 12 La. Ann. 728; Stine v. Bennett, 13 Minn. 153; Whitworth v. Ferguson, 18 La. Ann. 602; Carpenter v. Shimer, 24 Hun, 464; Williams v. Oswego, 25 Hun, 36.

After the statute bar has become complete, the debtor has acquired a vested right under these Statutes, which the Legislature cannot defeat or take away by subsequent legislation. Atkinson v. Dunlap, 50 Me. 111; Bagg's App. 43 Pa. 512; Ryder v. Wilson, 41 N. J. L. 9; Sprecher v. Wakeley, 11 Wis. 432; Holden v. James, 11 Mass. 396; Lewis v. Webb, 3 Me. 326; Woodman v. Fulton, 47 Miss. 682; Naught v. Oneal, Breese (Ill.) App. 29; Girdner v. Stephens, 1 Heisk. 280; Parish v. Eager, 15 Wis. 532; Martin v. Martin, 35 Ala. 560.

In New York, Statutes extending the limitations are held not to apply to crimes committed before the Statute was changed, unless expressly included therein. People v. Lord, 12 Hun, 282. See Knox v. Cleveland, 13 Wis. 245.

1873. The constitutionality of the 15th section of the former Act is questioned in this case. That section is as follows:

"§ 15. None of the provisions of this Act hereinbefore contained shall affect any sale for taxes, assessments or water rates heretofore made in said City, or the rights of the parties or the proceedings thereunder, but the same shall remain the same as though this Act had not been passed; provided, however, that no action or special proceeding shall hereafter be brought or maintained against the City of Brooklyn, or the registrar of arrears of said City, to compel the execution or delivery of a lease upon any sale for taxes, assessments or water rates, made more than eight years prior to the passage of this Act, unless such action or special proceeding is commenced within six months after the passage of this Act, and notice thereof filed in the office of registrar of arrears, but this provision shall not operate to extend any Statute of Limitations now applicable in such cases. And after the expiration of six months from the passage of this Act, it shall be the duty of the registrar of arrears to cancel in his office all such sales made more than eight years prior to the passage of this Act, upon which no lease shall have been given, and no action commenced, and notice thereof filed as aforesaid, within the period hereinbefore limited therefor, and thereupon the lien of all such certificates of sale shall cease and determine." Laws of New York 1885, chap. 405, § 15, p. 702.

The complaint shows that at divers times between September 22, 1856, and May 25, 1873, inclusive, at public auction held by the proper officer of Brooklyn, pursuant to the above Act of 1854, and the Acts amendatory thereof, the plaintiff Wheeler purchased, each for a term of years, 1,253 different lots that were sold for the nonpayment of taxes, assessments and water rates, and paid for each the amount set opposite its number, as [53] specified in a schedule filed with the complaint, receiving from the collector a certificate of sale of each lot. Each certificate declared that he was entitled, after the expiration of two years from its date, to a lease of the lot mentioned for a named term of years, unless the premises were sooner redeemed. The total amount of those purchases was $28,516.69.

The complaint also shows that at divers times, from September 29, 1874, to February 23, 1875, inclusive, at public auction held by the registrar of arrears of Brooklyn for like purposes, pursuant to the Act of 1873, and the Acts amendatory thereof, the plaintiff purchased, each for a term of years, 61 different lots sold for the nonpayment of taxes, assessments and water rates, paying for each the sum specified in a schedule filed with the complaint, and receiving from the registrar similar certificates of sale. Each certificate was recorded in the defendant's office. The total amount of the purchases named in that schedule was $3,611.17.

None of the lots purchased by Wheeler were redeemed from sale: he is still the legal owner and holder of the certificates; nevertheless, the defendant was about to cancel the sales, pursuant to the 15th section of the Act of 1885, whereby, the complaint alleges, "all public notice of the rights and lien of the plaintiff will be wholly destroyed," and he will sustain irreparable injury and damage. Alleging that such section is unconstitutional and void, the plaintiff prays that the defendant, his successors, agents, clerks and servants, be perpetually enjoined from canceling the sales or the record thereof. Such is the case made by the complaint.

Is the above section of the Act of 1885 repugnant to the clause of the Constitution protecting the obligation of contracts against impairment by state legislation? On behalf of the plaintiff it is insisted that, under the Statutes of 1854 and 1873, the purchaser, in consideration of his advancing the amount of the unpaid taxes and interest, together with the expenses of sale, became entitled to something more than a conveyance or lease for a stated number of years, with the right to maintain ejectment or summary proceedings to obtain possession of the land purchased. He acquired, it is contended, the further right "to bide his time, not to take out a lease and engage in litigation to secure the land itself, but, as the easier course, to wait and rely on securing, through the operation of the record of sale in the office of the registrar, the very profitable return on his money, provided by the percentage of fifteen per cent, which, along with the amount of the purchase money, the owner of the land is, by the Statutes, compelled to pay, on redeeming the property, in order to clear his title." The latter right, we are informed by the plaintiff, is the one usually exercised by purchasers at tax sales in Brooklyn. Any interference with it, he contends, impairs the obligation of his contract with the City.

We cannot assent to this view. The plaintiff was entitled, by the contract, to a return of the amount paid by him, together with any other tax or assessment chargeable on the land and paid by him, with fifteen per cent per annum in addition thereto; and, if such amounts were not paid to the collector for him within two years after the sale, he could demand a conveyance, according to the terms of his purchase, and obtain possession by summary proceedings. As none of the lots purchased were redeemed, the plaintiff became entitled, when the time for redemption passed, to a lease of each lot for the term of years specified in the respective certificates of sale. Now, the right to such leases was not taken away by the Act of 1885. Nothing in that Act prevented the plaintiff from obtaining them on the day after its passage. But, as we have seen, it did provide that no action or special proceeding should be brought or maintained to compel the execution of conveyances or leases in respect to any sale for taxes, assessments or water rates made more than eight years prior to June 6, 1885, unless instituted within six months after that date, and notice thereof filed in the office of the registrar of arrears.

Whatever was the period prescribed by the laws of New York prior to June 6, 1885, for such actions or special proceedings,—and it

is not disputed that there was a limitation under the local law for suits of that character,—the time was reduced by the Act of that date. Can this enactment be assailed simply upon the ground that it prescribes a shorter time for the bringing of actions to compel the execution of such conveyances than was given when the contracts therefor were made? Clearly not. It is the settled doctrine of this court that the Legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect. *Terry* v. *Anderson*, 95 U. S. 628, 632 [24: 365, 366]; *Koshkonong* v. *Burton*, 104 U. S. 668, 675 [26: 886, 889]; *Mitchell* v. *Clark*, 110 U. S. 633, 643 [28: 279, 282]. The latest case upon the subject in this court is *McGahey* v. *Virginia* (*Re Brown*), 135 U. S. 662, 701, 705, 706 [34: 303, 316, 317], in which the above principle is affirmed, the court saying: "No one rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another." We cannot say that the limitation prescribed by the Act of 1885 is unreasonable when applied to those who neglected for eight years prior to its passage to demand the conveyances or leases to which they were entitled. On the contrary, considerations of public policy required that the records of the sale of real property in Brooklyn for taxes, assessments and water rates should no longer remain in the condition to which they had been brought in 1885 by reason of purchasers having forborne, for an unreasonably long period, to obtain leases, that they might realize interest upon their investments in tax titles, at the rate of fifteen per cent per annum. By not taking a lease when entitled to it the purchaser put the taxpayer in a position where the latter would be compelled, if he desired to sell or mortgage the property to another, to pay, not only the amount advanced by the former, but interest at the above rate for the whole time subsequent to the sale. The Legislature did not intend, by the Acts of 1854 and 1873, to establish any such relations between the taxpayer and the purchaser, or to put the former at the mercy of the latter for an indefinite period; for both Acts contemplated the execution by the collector of a lease immediately upon the expiration of the time for redemption—giving the purchaser, in that way, precisely what he bought. But whatever may have been the reasons that induced the enactment of the Statute of 1885, the period within which actions must be brought was a matter resting primarily with the legislative department of the state government; and as Statutes of Limitation have for their object, and are deemed necessary to, the repose and security of society, the determination of that department should not be interfered with by the courts, unless the time allowed to bring suits upon existing causes of action is, in view of all the circumstances, so short as not to give parties affected by it a reasonable opportunity to protect their rights under the new law.

It is further contended that, even if the Statute is sufficient to bar an action to compel the execution of a conveyance to the purchaser, unless brought within the time prescribed, it is unconstitutional in that it requires the registrar—after the expiration of six months from its passage without any such action being commenced and notice thereof given within that period—to cancel in his office all sales made more than eight years prior to June 6, 1885, and provides that "thereupon the lien of all such certificates of sale shall cease and determine." That provision, it is said, destroys the security upon which the purchaser relied when he advanced his money, namely, the lien of the record after sale. This position is untenable. The substantial right acquired by the purchaser was a return of his money, with interest, *or*, after a certain time, a lease of the premises for the term named in the certificate of sale. The lien created by the certificate of sale protected him during the period within which the owner of the property was permitted to redeem; and if the latter redeemed, he could only do so, of strict right, within a given time, and then only by reimbursing the purchaser all he had paid, with the addition of fifteen per cent per annum. If there was no redemption, the purchaser was entitled to a lease that would give him all for which he bargained. The lien, consequently, would cease upon the execution and delivery to the purchaser of a lease. If the lien was of such character that the purchaser, not having received a conveyance, could enforce it by suit or special proceeding commenced for that specific purpose, the power of the Legislature to prescribe a period within which such a suit or proceeding must be commenced, or the lien be lost, is as clear as its power to fix the time within which the purchaser must sue to compel the execution of a conveyance or lease. If, on the other hand, the lien was given only to protect the purchaser, in respect to his outlay, with interest, until he was entitled to demand a conveyance, or until a conveyance was actually made, the power of the Legislature to require the record of sale to be canceled and the lien to cease, when the purchaser, by not suing within the prescribed time, had lost his right to a conveyance or lease, cannot be questioned. The limitation prescribed by the Statute applies equally to a suit to compel a conveyance, and to a proceeding (if a separate suit for that purpose could be maintained) to enforce the alleged lien. It declares, in effect, that the right to the lien and the right to a conveyance shall, in the cases specified, depend upon a suit being brought within a certain time to compel the execution of a conveyance in accordance with the terms of sale. In other words, that the record of a sale, including the certificate of

sale, shall not remain a cloud upon the title, after the purchaser has failed, for six months after the passage of the Act, to obtain, or to demand by suit—the time for redemption having passed—what, in view of the Statute, must be regarded as the principal object of his purchase, namely, a conveyance or lease, with the right, by means of summary proceedings, to obtain possession of the premises sold to him for a term of years. We are of opinion that such legislation did not impair the obligation of the plaintiff's contract.

What has been said is sufficient to dispose of the additional suggestion to the effect that the cancellation of the record of sales at which the plaintiff purchased deprived him of his property without due process of law, in violation of the Fourteenth Amendment. He asserts a proprietary right in such record for what it was worth. But, if the observa-
258] tions made by us in respect to the first point be sound, he had no such right, after permitting the period to elapse within which he could bring suit to compel the execution of a conveyance or lease. A Statute of Limitation cannot be said to impair the obligation of a contract, or to deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce that right by suit.

Judgment affirmed.

258] WILLIAM M. MAC FARLAND, *Plff. in Err.*,

v.

THEODORE F. JACKSON, as Registrar of Arrears of the CITY OF BROOKLYN.

(See S. C. Reporter's ed. 258, *note.*)

Wheeler v. *Jackson, ante*, p. 659, followed.

[No. 66.]

Argued Nov. 11, 1890. Decided Nov. 24, 1890.

IN ERROR to the Supreme Court of the State of New York, to review a judgment of that court in General Term affirming a judgment of Special Term, dismissing on demurrer a complaint seeking to enjoin the Registrar of Brooklyn from canceling certain sales of property for taxes, or the record thereof in his office, which judgment was affirmed by the New York Court of Appeals. *Affirmed.*

Mr. **John J. Townsend** for plaintiff in error.

Mr. **Almet F. Jenks** for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This case presents the same questions that are disposed of in the above opinion [in *Wheeler* v. *Jackson, ante*, p. 659]. For the reasons therein stated *the judgment is affirmed.*

HAMLINE Q. FRENCH, *Appt.*, [23

v.

OLIVER S. CARTER ET AL.

(See S. C. Reporter's ed. 239-245.)

Patent right—state of the art—foreign publication.

1. In view of the existing knowledge in regard to structures of the same kind, there was no invention in the device patented by letters-patent No. 244,224, granted to Hamline Q. French, July 12, 1881, for an improvement in roofs for vaults.
2. In view of such existing knowledge, the customary skill of the worker in stone neither needed nor received any aid from the inventive faculty, in order to produce that device.
3. A foreign publication is competent as evidence in regard to the state of the art, and as a foundation for the inquiry whether the patented structure required invention.

[No. 68.]

Argued Nov. 12, 1890. Decided Nov. 24, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a suit in equity for the infringement of letters-patent. *Affirmed.*

The facts are stated in the opinion.

Messrs. **George H. Fletcher** and *L. B. Bunnell*, for appellant:

The court below erred in its construction of the Statutes applicable to the proofs under the allegations of foreign publication, as made in the answer.

Seymour v. *Osborne*, 78 U. S. 11 Wall. 555 (20: 42); *Eames* v. *Andrews*, 122 U. S. 40 (30:

NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 433.

As to patentability of inventions, see *note* to Thompson v. Boisselier, 29: 76, and *note* to Corning v. Burden, 14: 683.

As to abandonment of invention, see *note* to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see *note* to Corning v. Burden, 14: 683.

Prior use or sale of invention renders the patent void.

Under the Act of 1839, as well as under United States Rev. Stat., sec. 4886, public use for more than two years prior to the application renders the patent void, whether such use was or was not with the knowledge or consent of the applicant. Andrews v. Hovey, 123 U. S. 267 (31: 160); Smith & G. Mfg. Co. v. Sprague, 123 U. S. 249 (31: 141); Pennock v. Dialogue, 27 U. S. 2 Pet. 1 (7: 327); Shaw v. Cooper, 32 U. S. 7 Pet. 292 (8: 689); McClurg v. Kingsland, 42 U. S. 1 How. 202 (11: 102); Elizabeth v. American Nicholson Pave. Co. 97 U. S. 126 (24: 1000); Egbert v. Lippmann, 104 U. S. 333 (26: 755); Worley v. Loker Tobacco Co. 104 U. S. 340 (26: 821).

Under the Act of 1839 public use or sale of the invention with the consent of the inventor, for more than two years prior to application for a patent, renders the patent void. Agawam Woolen Co. v. Jordan, 74 U. S. 7 Wall. 583 (19: 177); Consolidated Fruit Jar Co. v. Wright, 94 U. S. 92 (24: 68); Bates v. Coe, 98 U. S. 31 (25: 68); Manning v. Cape Ann I. & G. Co. 108 U. S. 462 (27: 798).

A single instance of public use or sale of the invention more than two years before application is sufficient to constitute public use. Coffin v. Ogden, 85 U. S. 18 Wall. 120 (21: 821).

1064); *Downton* v. *Yeager Mill Co.* 108 U. S. 466 (27: 789); *Sewall* v. *Jones*, 91 U. S. 194 (23: 280).

The great utility of the patented vault is strong evidence of invention.

Smith v. *Goodyear D. V. Co.* 93 U. S. 492 (23: 953); *Goodyear D. V. Co.* v. *Davis*, 102 U. S. 224, 228, 229 (26: 149); *Lehnbeuter* v. *Holthaus*, 105 U. S. 94 (26: 939).

Messrs. **James W. Perry** and *Philip J. O'Reilly*, for appellees:

The patent is void on its face for the want of patentable novelty.

Brown v. *Piper*, 91 U. S. 37 (23: 200); *Slawson* v. *Grand St. P. P. & F. R. Co.* 107 U. S. 649 (27: 576); *Dunbar* v. *Myers*, 94 U. S. 187 (24: 34); *Atlantic Works* v. *Brady*, 107 U. S. 192 (27: 438); *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *Gardner* v. *Herz*, 118 U. S. 180 (30: 158).

The patent is void by reason of an insufficient and misleading specification.

O'Reilly v. *Morse*, 56 U. S. 15 How. 62 (14: 601); *Western Electric Mfg. Co.* v. *Ansonia B. & C. Co.* 114 U. S. 447 (29: 210); *Seymour* v. *Osborne*, 78 U. S. 11 Wall. 516 (20: 33); *Grant* v. *Raymond*, 31 U. S. 6 Pet. 218 (8: 376).

In view of the state of the art, as disclosed by the French book, "Revue Générale," etc., there is nothing patentable disclosed in the appellant's patent.

Smith v. *Nichols*, 88 U. S. 21 Wall. 119 (22: 56); *Roberts* v. *Ryer*, 91 U. S. 150 (23: 267); *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59 (28: 901); *Thompson* v. *Boisselier*, 114 U. S. 1 (29: 76); *Pattee Plow Co.* v. *Kingman*, 129 U. S. 294 (32: 700); *Aron* v. *Manhattan R. Co.* 132 U. S. 89 (33: 274); *Stephenson* v. *Brooklyn C. T. R. Co.* 114 U. S. 149 (29: 58); *Yale Lock Co.* v. *Greenleaf*, 117 U. S. 554 (29: 952); *Clark Pomace Holder Co.* v. *Ferguson*, 119 U. S. 335 (30: 406); *Hendy* v. *Golden State & M. I. Works*, 127 U. S. 370 (32: 207); *Holland* v. *Shipley*, Id. 396 (185); *Brown* v. *District of Columbia*, 130 U. S. 87 (32: 863); *Day* v. *Fair Haven Co.* 132 U. S. 98 (33: 265); *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* Id. 161 (295); *Marchand* v. *Emken*, Id. 195 (332); *Royer* v. *Roth*, Id. 201 (322); *Burt* v. *Evory*, 133 U. S. 349 (33: 647); *Howe Machine Co.* v. *National Needle Co.* 134 U. S. 388 (33: 963); *St. Germain* v. *Brunswick*, 135 U. S. 227 (34: 122).

[240] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Southern District of New York, by Hamline Q. French against Oliver S. Carter, George Mark and Milton H. St. John, to recover for the infringement of letters-patent No. 244,224, granted to the plaintiff July 12, 1881, for an improvement in "roofs for vaults." Issue was joined, proofs were taken and the case was heard by *Judge* Shipman, resulting in a decree dismissing the bill, from which the plaintiff has appealed. The opinion of *Judge* Shipman is reported in 25 Fed. Rep. 41.

The specification, claims and drawings of the patent are as follows: "My improvements relate to the construction of roofs for vaults, mausoleums and structures of similar character, built of stone and intended for burial purposes; and the object of my invention is to obtain a building without vertical joints, and one held together and locked at the roof, so that by the locking and the weight of the roof the structure shall be made as enduring as the material of which it is built. My improved roof consists of the front and rear gable-stones, the roof-stones, which are continuous from one gable-stone to the other at each side, and held to the gable-stones by mortise and tenon or equivalent connections, and the cap-stone, which is formed with a rabbet to lap upon the roof-stones and rests upon the gables, by which construction the stones forming the complete roof are securely locked, and without possibility of dislocation without being raised bodily upward.

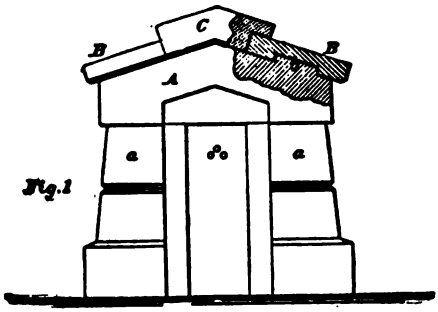
"My invention is shown in the accompanying drawings, forming part of this specification, wherein figure 1 is a front elevation, partially in section, of a vault constructed in accordance with my invention. Fig. 2 is a plan view of the same, with the cap-stone partially removed. Similar letters of reference indicate corresponding parts. The side walls, *a a*, of the vault are laid up in the usual manner. A A are the gable-stones, B B the roof-stones and C the cap-stone. The gables A are each a single stone of any required shape and size, and of a length sufficient to connect the roof-stones. They are formed, upon each of their upper surfaces, with tenons *b*. The roof-stones B are also each of a single piece in length, or continuous from one gable-stone to the other. These are formed with mortises for receiving the tenons. The cap-stone C is a single piece, and of a length to rest upon the gable-stones A at its ends. It is formed to lap at each side upon the stones B, on the whole or any portion of its length. The stone C is to be lowered to place after the stones B are set, and, as will be seen, completes the roof and locks the parts together. This stone C is in practice of great weight, which weight tends entirely to hold the structure together, and, there being no vertical joints to spread open, there can be no disruption or displacement by ordinary means. The space at the sides, between the stones A, is filled out by stones *c* set upon the side walls. The roof at each side of the cap-stone is to be formed of one or more roof-stones B, each being continuous from one gable-stone to the other, and locked, as described. The roof may also be made flat, curved or inclined. In place of using the mortises and tenons shown, dowel-pins or other equivalent devices can be used for locking the roof-stones. I do not limit myself in that respect. Having thus described my invention, I claim as new and desire to secure by letters-patent—

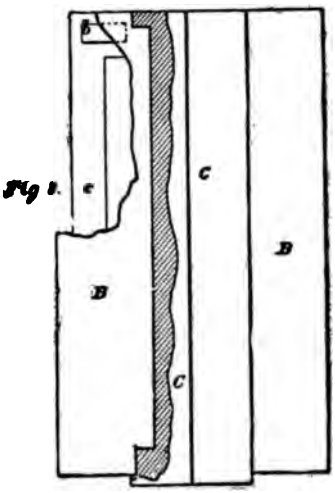
"1. A roof for vaults and similar structures, consisting of the continuous roof-stones B B, gable-stones A, connecting and locked to the roof-stones, and the cap-stone C, lapping upon the roof-stones, substantially as shown and described.

"2. In roofs for vaults and similar structures, the combination of continuous roof-stones B B and gable-stones A A, connected

and locked by mortises and tenons, or equivalent devices, substantially as shown and described."

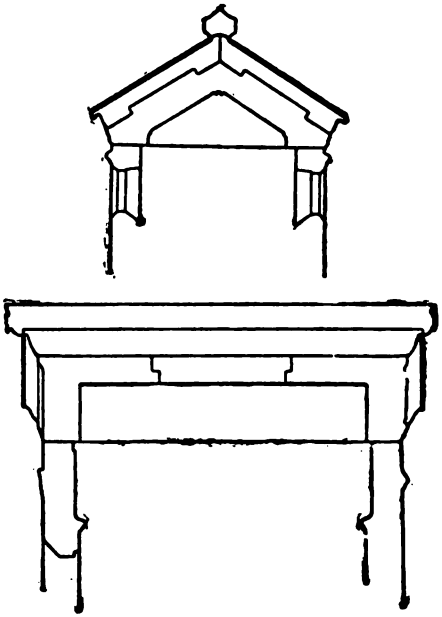
41]





There was put in evidence in the case volume 18, with plates 39 to 44, both inclusive, of a public work, published in France, in 1855, called "Revue Générale de l'Architecture et de Travaux Publics," containing a description and illustration of a monument erected in 1847, as a place of burial for the family of Alc. Billaud. This very imperfect translation of the text is found in the record: 243] "Above this ordonnance extends an entablature, on which is supported the two sloping sides of the roof, which finish the edifice. . . . The entablature is composed of three stones, hollowed out so as to form a species of vault, which masks the size (édicule); and these stones, jointed together by rebates, are bound and, as it were, tied (hooped) together by the two thick slabs of stone which cover their sloping sides, by means of the hollow made on the lower sides of the former (the slabs), in order to clamp the projections retained on the stones of the vault. These stones are, in their turn, tied together by the ridge which surmounts the building."

Two drawings on one of the plates are as follows, one being a cross-section and the other a longitudinal section:



The opinion of the circuit court proceeds upon the ground that, in view of the description of the Billaud tomb, there was no invention in the patented device, and that in order to produce that device the customary skill of the worker in stone neither needed nor received any aid from the inventive faculty. The opinion says: "The difficulty in vault-stone roofs which was to be remedied was the exposed or open seams between the stones, into which water can enter and become frozen, and thus, by the action of frost, the stones are separated. Freedom from vertical joints and the locking of roof-stones and cap-stones to the gable-stones are the features of the improvement. . . . By the invention described in the second claim, the difficulty is remedied by connecting, in the ordinary way, to gable-stones, made of one piece, roof-stones which are long enough to extend from one gable-stone to the other, and protecting the seams by rebates, if more than one roof-stone upon one side of a roof is used, and then filling the space or ridge near the top of the roof in such manner as ingenuity or taste may dictate. By the invention described in the first claim, the space between the roof-stones is filled by a single massive cap-stone, the edges of which lapped over the roof-stones, and which rested upon the gables."

In reference to the description and drawings of the Billaud tomb, the opinion says: "The plates which are attached to the description show that the Billaud roof consists of two sloping roof-stones, each being a single piece, fastened by projections and cavities to gable-stones, each being in one piece, and a single ridge-stone, covering the joint where

the upper edges of the roof-stones meet, and not resting on the gable-stones. The difference between the Billaud roof and the roof of the patent is that the roof-stones of the former are so wide that only a ridge-stone is needed to cover the joint, while the roof-stones of the latter are narrower, and a wider ridge-stone or cap-stone is needed, which must, of course, be interposed between the roof-stones, and must rest upon the gable. The ridge-stone of the Billaud tomb is a small cap-stone, which bound the roof-stones together, and which covered the joint made by their edges. The cap-stone of the patent is a larger and wider ridge-stone than that of Billaud, and, by its great weight, is more efficient in holding the structure together."

We concur with the circuit court in its views. Where the roof-stones are wider, as in the Billaud roof, there need be only a narrow ridge-stone, while where the roof-stones are narrower, as in the patented device, a wider ridge-stone or cap-stone is necessary. In the latter case, the cap-stone must rest upon the gable-stones. In the former case, it need not do so. But, in each case, the vertical seam into which water could enter is covered, and the structure is held together and locked at the roof, so as to be made enduring by the locking and the weight of the roof. The question is one of degree only, as to the size of the ridge-stone or cap-stone and the corresponding width of the roof-stones. The difference between mechanical skill and the exercise of the inventive faculty has been pointed out in many decisions of this court. *Burt* v. *Evory*, 133 U. S. 349 [33: 647], and cases there cited.

The foreign publication is competent as evidence in regard to the state of the art, and as a foundation for the inquiry whether it required invention to pass from the Billaud structure to the patented structure.

Decree affirmed.

A. S. SOLOMONS, *Appt.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 342-348.)

Government's right to use invention patented by its employé—rights of assignee.

1. The government cannot appropriate a man's property invested in a patent, without compensation, although the inventor is, at the time of his invention, in the employ of the government.
2. Where one was in the employ of the government as chief of the bureau of engraving and printing, when he invented a stamp, and his experiments were wholly at the expense of the government, and he was consulted as to the proper stamp to be used and it was adopted upon his recommendation, and he notified the government that he would make no charge if it adopted and used his stamp, for the express reason that he was in its employ and had used its machinery in perfecting his stamp, and he never pretended to make a charge against the government for its use, his assignee, to whom a patent was issued for the invention, cannot recover against the government for its use of the patented stamp.

[No. 64.]

Argued Nov. 10, 11, 1890. Decided Dec. 8, 1890.

APPEAL from a judgment of the Court of Claims in favor of the government in an action against it to recover for the use of a patented stamp. *Affirmed.*

Statement by *Mr. Justice* **Brewer**:

During the years 1867 and 1868 Spencer M. Clark was in the employ of the government as chief of the Bureau of Engraving and Printing. That bureau was not one created by any special Act of Congress, but was established by order of the Secretary of [343 the Treasury, under the general powers conferred by the second section of the Act of July 11, 1862 (12 Stat. 532), now section 3577, Revised Statutes, which provides as follows:

"That the Secretary of the Treasury be, and is hereby, authorized, in case he shall think it inexpedient to procure said notes, or any part thereof, to be engraved and printed by contract, to cause the said notes, or any part thereof, to be engraved, printed and executed, in such form as he shall prescribe, at the Treasury Department and under his directions; and he is hereby empowered to purchase and provide all the machinery and materials, and to employ such persons and appoint such officers as may be necessary for this purpose."

While so employed he conceived the idea of a self-canceling stamp, and under his direction the employés of that bureau, in the Fall of 1867, using government property, prepared a die or plate, and put into being the conception of Mr. Clark. On February 10, 1868, Clark filed a caveat in the Patent Office, and on September 1 an application for a patent. While this application was pending, and on December 6, 1869, he assigned, by deed duly recorded, his rights to the appellant, in payment of a long-standing account of appellant against him. On December 21, 1869, the patent was issued to appellant, as the assignee of Clark, antedated to June 21, 1869. On December 27, 1869, appellant notified the commissioner of internal revenue that he was the owner of the patent, and sought an arrangement for proper compensation for the use of this patented stamp by the government on whiskey barrels. No answer was made to this communication, and on September 17, 1875, appellant brought this suit in the Court of Claims to recover from the government for such use. In addition to the matters heretofore stated, the following facts were found by the Court of Claims:

"I. In the latter part of 1867, or early part of 1868, while the subject of revising the methods for collecting internal revenue was being considered by the Committee on Ways and Means of the House of Representatives, a subcommittee was given special charge of [34 the tax on whiskey and distilled spirits. A room was assigned by the Secretary of the Treasury in the Treasury Building to this subcommittee, which immediately proceeded to hold official consultations with the Secretary of the Treasury and commissioner and deputy commissioner of internal revenue. Into these consultations Spencer M. Clark,

the chief of the Bureau of Engraving and Printing, was called officially, and to him was assigned the duty of devising a stamp, and it was early determined and understood by all, including Mr. Clark, that the scheme would proceed upon the assumption that the best stamp which he could devise would be adopted and made a part of the revised scheme. In these consultations it was mutually understood that Mr. Clark was acting in his official capacity, as chief of the Bureau of Engraving and Printing, and it was not understood or intimated that the stamp which he was to devise would be patented or become his personal property.

"II. In the course of the consultations referred to in the first finding, Mr. Clark laid before the commissioner and subcommittee a self-canceling revenue stamp as being, in his opinion, a very desirable stamp for the prevention of fraud. This stamp was satisfactory to the Committee on Ways and Means and to the commissioner of internal revenue. It was of the same design and construction as the stamp subsequently adopted by the commissioner and manufactured and used by the government, as hereinafter set forth, and was the same device as that set forth and described in the specifications of Clark's patent annexed to and forming part of the petition.

"III. No bargain, agreement, contract or understanding was ever entered into or reached between the officers of the government and Mr. Clark concerning the right of the government to use the invention, or concerning the remuneration, if any, which should be paid for it. Neither did Mr. Clark give notice or intimate that he intended to protect the same by letters-patent, or that he would expect to be paid a royalty if the government should manufacture and use stamps of his invention. Before the final adoption of the stamp by the commissioner of internal revenue he stated to him that the 345] design was his own, but that he should make no charge to the government therefor, as he was employed on a salary by the government and had used the machinery and other property of the government in the perfection of the stamp. No express license to use the invention was ever given by Mr. Clark to the government, nor any notice prohibiting its use or intimating that he would demand a royalty.

"IV. Immediately after the enactment of the Act 20th July, 1868 (15 Stat. L. p. 125), and before Mr. Clark had filed an application for a patent, the commissioner of internal revenue adopted the stamp as the one to be used in the collection of the tax on whiskey and distilled spirits. It was adopted by the commissioner on the recommendation of Mr. Clark. The commissioner's selection referred to the completed and perfected stamp which had been devised by the claimant and engraved and made in the Bureau of Engraving and Printing and approved by the Committee of Ways and Means, as set forth in the second finding. The government then proceeded to manufacture at the Bureau of Engraving and Printing large quantities of *these* stamps. The first so manufactured were delivered to the commissioner of internal revenue on the 25th August, 1868, and the 2d November following was fixed by the Secretary of the Treasury as the day for commencing the use thereof. Their manufacture and use were continued until some time in the year 1872, the last issue to the collection districts being on February 15, 1872."

And upon these facts judgment was entered in favor of the government. 21 Ct. Cl. 479, and 22 Ct. Cl. 335. From such judgment an appeal has been brought to this court.

Messrs. **Lewis Abraham** and **B. F. Butler**, for appellant:

The fact that the inventor of the patented stamp was at the time he invented the same an employé of the United States, did not deprive him of the right to receive letters-patent for said invention.

Brooks v. *Jenkins*, 3 McLean, 437; *Parker* v. *Haworth*, 4 McLean, 372; *Parker* v. *Stiles*, 5 McLean, 54; *Wilson* v. *Rousseau*, 45 U. S. 4 How. 708 (11: 1169); *Goodyear* v. *The Railroad*, 2 Wall. Jr. 363.

The United States, having issued a patent to the claimant, as the assignor of the inventor of the said stamp, had no right to use the same in its public service without making compensation for such use.

United States v. *Burns*, 79 U. S. 12 Wall. 246 (20: 388); *Cammeyer* v. *Newton*, 94 U. S. 235 (24: 75); *United States* v. *Palmer*, 128 U. S. 262 (32: 442); Walker, Pat. § 157; *McKeever* v. *United States*, 14 Ct. Cl. 396.

The assignment transferred all title to the claimant.

Swift v. *Whisen*, 3 Fish. Pat. Cas. 343; *Hendrie* v. *Sayles*, 98 U. S. 546 (25: 176); *Littlefield* v. *Perry*, 88 U. S. 21 Wall. 203 (22: 577); *Hammond* v. *Mason & H. O. Co.* 92 U. S. 724 (23: 767); *Hurt* v. *Wilson*, 38 Cal. 263; *Painter* v. *Harding*, 3 Phila. 449; *Waller* v. *Tate*, 4 B. Mon. 529; *Thompson* v. *Banks*, 43 N. H. 540; *Nichols* v. *Luce*, 24 Pick. 102.

The parties to the conversations could not bind the government by a verbal contract.

The Floyd Acceptances, 74 U. S. 7 Wall. 676 (19: 173); *Moffat* v. *United States*, 112 U. S. 24 (28: 623).

A consideration is the necessary element of a contract.

Brink v. *Gould*, 7 Lans. 425, 43 How. Pr. 289; *Shower* v. *Pilck*, 4 Exch. 478; *Kidder* v. *Kidder*, 33 Pa. 268; *Bourne* v. *Fosbrooke*, 18 C. B. N. S. 515; *Blandale* v. *Locke*, 52 N. H. 238.

If any colorable permission for the government to use the prior invention could be adduced from the conversation with the commissioner, it utterly failed when Clark left its employ.

Smith v. *McCluskey*, 45 Barb. 610; *Treat* v. *Orono*, 26 Me. 217; *Spring* v. *Coffin*, 10 Mass. 34; *Sanford* v. *Dodd*, 2 Day, 437; *Murray* v. *Carret*, 3 Call (Va.) 323; *Charleston* v. *Day*, 5 Humph. 496; *Colville* v. *Besly*, 2 Denio, 189.

Mr. **Wm. H. Taft**, *Solicitor-Gen.*, for appellee:

Clark was estopped to demand compensation from the government for the use of his stamp.

Robinson, Pat. § 834; *Gear* v. *Grosvenor*, 6 Fish. Pat. Cas. 314

The circumstances of this case implied an irrevocable license to the government.

Chabot v. *American B. H. & O. S. Co.* 9 Phila. 378, 6 Fish. Pat. Cas. 71; *Slemmer's App.* 58 Pa. 155; *Herman* v. *Herman*, 29 Fed. Rep. 92; *Bensley* v. *Northwestern H. N. Co.* 26 Fed. Rep. 250; *Barry* v. *Crane Bros. Mfg. Co.* 22 Fed. Rep. 396; *Hapgood* v. *Hewitt*, 119 U. S. 233 (30: 372); *Wade* v. *Metcalf*, 16 Fed. Rep. 130; Walker, Pat. §§ 312, 313; *Davis* v. *United States*, 28 Ct. Cl. 329.

Solomons' right against] the government is no greater than Clark's.

Re Brosnahan, 18 Fed. Rep. 62; *Hammond* v. *Mason & H. O. Co.* 92 U. S. 724 (23: 767); *Brooks* v. *Byam*, 2 Story, 525; *Hamilton* v. *Kingsbury*, 17 Blatchf. 264; *Gottfried* v. *Miller*, 10 Fed. Rep. 471; *Farrington* v. *Gregory*, 4 Fish. Pat. Cas. 221; *Continental Windmill Co.* v. *Empire Windmill Co.* 8 Blatchf. 295.

Mr. Justice **Brewer** delivered the opinion of the court:

The case presented by the foregoing facts is one not free from difficulties. The government has used the invention of Mr. Clark and has profited by such use. It was an invention of value. The claimant and appellant is the owner of such patent, and has never consented to its use by the government. From these facts, standing alone, an obligation on the part of the government to pay naturally arises. The government has no more power to appropriate a man's property invested in a patent than it has to take his property invested in real estate; nor does the mere fact that an inventor is at the time of his invention in the employ of the government transfer to it any title to or interest therein. An employé, performing all the duties assigned to him in his department of service, may exercise his inventive faculties in any direction he chooses, with the assurance that whatever invention he may thus conceive and perfect is his individual property. There is no difference between the government and any other employer in this respect. But this general rule is subject to these limitations: If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer. So, also, when one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury, or a court trying the facts, is warranted in finding that he has so far recognized the obligations of service flowing from his employment and the benefits resulting from his use of the property, and the assistance of the co-employés of his employer, as to have given to such employer an irrevocable license to use such invention. The case of *McClurg* v. *Kingsland*, 42 U. S. 1 How. 202 [11: 102], is in point. In that case was presented the question as to the right of defendants to use an invention made and patented by one Harley. The facts as stated and the rulings of the court are these: "That Harley was employed by the defendants at their foundry in Pittsburgh, receiving wages from them by the week; while so employed, he claimed to have invented the improvement patented, and, after several unsuccessful experiments, made a successful one in October, 1834; the experiments were made in the defendants' foundry, and wholly at their expense, while Harley was receiving his wages, which were increased on account of the useful result. Harley continued in their employment on wages until January or February, 1835, during all which time he made rollers for them; he often spoke about procuring a patent, and prepared more than one set of papers for the purpose; made his application the 17th February, 1835, for a patent; it was granted on the 3d of March, assigned to the plaintiffs on the 16th of March, pursuant to an agreement made in January. While Harley continued in the defendants' employment he proposed that they should take out a patent and purchase his right, which they declined; he made no demand on them for any compensation for using his improvement, nor gave them any notice not to use it, till, on some misunderstanding on another subject, he gave them such notice, about the time of his leaving their foundry, and after making the agreement with the plaintiffs, who owned a foundry in Pittsburgh, for an assignment to them of his right. The defendants continuing to make rollers on Harley's plan, the present action was brought in October, 1835, without any previous notice by them. The court left it to the jury to decide what the facts of the case were; but, if they were as testified, charged that they would fully justify the presumption of license, a special privilege or grant to the defendants to use the invention; and the facts amounted to 'a consent and allowance of such use,' and show such a consideration as would support an express license or grant, or call for the presumption of one to meet the justice of the case, by exempting them from liability, having equal effect with a license, and giving the defendants a right to the continued use of the invention." On review in this court, the rulings of the trial court were sustained. That case is decisive of this. Clark was in the employ of the government when he made this invention. His experiments were wholly at the expense of the government. He was consulted as to the proper stamp to be used, and it was adopted on his recommendation. He notified the government that he would make no charge if it adopted his recommendation and used his stamp; and for the express reason that he was in the government employ, and had used the government machinery in perfecting his stamp. He never pretended, personally, to make any charge against the government.

[34 [34

Indeed, there is but one difference between that case and this: in that, Harley's wages were increased on account of his invention; in this, Clark's were not; but such difference does not seem vital. We think, therefore, the rulings of the Court of Claims were correct, and its *judgment is affirmed.*

---

[287] GROVER AND BAKER SEWING MACHINE COMPANY, *Plff. in Err.*,
v.
WILLIAM P. RADCLIFFE.

(See S. C. Reporter's ed. 287-299).

Jurisdiction of foreign court, or court of another State, open to inquiry—jurisdiction over person—when may be pleaded.

1. The jurisdiction of a foreign court, over the person or the subject matter embraced in the judgment or decree of such court, is always open to inquiry; and in this respect a court of another State is to be regarded as a foreign court.
2. A personal judgment is without validity if rendered by a state court in an action upon a money demand against a nonresident of the State, upon whom no personal service of process within the State was made, and who did not appear.
3. It is competent for a defendant in an action on a judgment of a sister State, as in an action on a foreign judgment, to set up, as a defense, want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment and had not been served with process, and did not enter his appearance.

[No. 72.]

Argued Nov. 13, 14, 1890. Decided Dec. 8, 1890.

IN ERROR to the Court of Appeals of the State of Maryland, to review a judgment of that court affirming a judgment of the Circuit Court of Cecil County, Maryland, for defendant, in an action on a judgment rendered in the State of Pennsylvania. *Affirmed.*

[288] Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought in the Circuit Court of Cecil County, Maryland, by the Grover and Baker Sewing Machine Company against James Benge and John Benge, who were then citizens of Delaware, by summons and attachment on warrant, which was served on William P. Radcliffe as garnishee. Radcliffe filed pleas on behalf of the Benges according to the Maryland practice, putting the validity of the judgment in issue.

The declaration was in these words:

"This suit is instituted to recover the sum of twenty-three hundred dollars from the defendants, due and owing from the defendants to the plaintiff on and by virtue of a certain judgment which the plaintiff, on the third day of January, in the year eighteen hundred and seventy-four, in the Court of Common Pleas in and for the County of Chester, in the State of Pennsylvania, one of the United States of America, by the judgment of the said court, recovered against the defendants, for the sum of three thousand dollars; which said judgment is still in force and unsatisfied."

Upon the trial, a record from the Court of Common Pleas in and for the County of Chester, in the State of Pennsylvania, was read in evidence, as follows:

"I do hereby enter judgment against the defendants and in favor of the plaintiff in this cause for the sum of three thousand dollars, lawful money, debt, besides costs, etc., on a bond and warrant of attorney to confess judgment, dated March sixteenth, A. D. one thousand eight hundred and seventy-two, conditioned that if the above-named James Benge, his heirs, executors or administrators, shall well and truly pay or cause to be paid to the said Grover & Baker Sewing Machine Company the full amount of each and every liability incurred or to be incurred by him, the said James Benge, to or with the said Grover & Baker Sewing Machine Company, for and on account of all sewing-machines and all sewing-machine findings, silks and threads or other articles, including promissory notes and other property, that may from time to time hereafter be sold, consigned, supplied or otherwise intrusted to him, the said James Benge, by the said Grover & Baker Sewing Machine Company, upon his orders or by his acceptance, with or without notice to the said John Benge, at the time or times when each and every liability shall become due and payable or at such time and times for which payment of the same may hereafter, with or without notice to the said John Benge, be extended, then this obligation to be void. This obligation is intended to operate as a continuing security for the payment, when the same shall become due and be demanded, of all and every liability incurred to and with the said Grover & Baker Sewing Machine Company by the said James Benge aforesaid, to the amount not exceeding the limit of this bond.

"January 3d, 1874.—Judgment, $3,000.00.
"John A. Rupert, Prot."

The bond referred to was executed March 16, 1872, by James Benge, then a citizen of Pennsylvania, and John Benge, then a citizen of Maryland, and was as follows:

"Know all men by these presents that James Benge, of West Chester, Pa.; John Benge, of Kimbleville, Cecil County, Md., are hereby held and firmly bound unto the Grover

---

NOTE.—*As to conclusiveness of judgment*, see *note* to Bank of United States v. Beverly, 11: 75.

As to judgment in admiralty, when conclusive, and when may be re-examined,—see *note* to Williams v. Armroyd, 3: 392.

As to effect of judgment beyond territorial limits of jurisdiction, see *note* to Darby v. Mayer, 6: 387.

Judgments of state court, when conclusive, and when not, in another State. See *note* to Mills v. Duryee, 3: 411.

Record evidence of jurisdictional facts; plea of nil debet. *Idem.*

Conclusiveness of record as to jurisdiction in suit on judgment of another State; fraud as plea to judgment of another State. See *note* to Christmas v. Russell, 12: 475.

& Baker Sewing Machine Company, a corporation duly established by law in the City of Boston, State of Massachusetts, also doing business at Philadelphia, State of Pennsylvania, in the sum of three thousand dollars, lawful money of the United States of America, to be paid to the said Grover & Baker Sewing Machine Company, its legal representatives or assigns; for which payment. well and truly to be made, we bind ourselves, heirs, executors and administrators, jointly and severally; firmly by these presents. Sealed with our seals. Dated the 16th day of March, one thousand eight hundred and seventy-two; and we hereby authorize any attorney of any court of record in the State of New York or any other State to confess judgment against us for the said sum, with release of errors, etc.

"Whereas the above-named James Benge, at the special instance and request of the above-bound John Benge, has obtained a credit with the said Grover & Baker Sewing Machine Company for machines of their manufacture and for sewing-machine findings, silks and threads manufactured and dealt in by said Grover & Baker Sewing Machine Company, and for other articles, including promissory notes and other property, to be hereafter supplied to him, the said James Benge:

"Now, the condition of this obligation is such that if the above-bound James Benge, his heirs, executors or administrators, shall well and truly pay or cause to be paid to the said Grover & Baker Sewing Machine Company the full amount of each and every liability incurred by him, the said James Benge, to or with the said Grover & Baker Sewing Machine Company, for and on account of all sewing-machines and all sewing-machine findings, silks and threads or other articles, including promissory notes and other property, that may from time to time hereafter be sold, consigned, supplied or otherwise intrusted to him, the said James Benge, by the said Grover & Baker Sewing Machine Company, upon his orders or by his acceptance, with or without notice to the said John Benge, at the time or times when each and every liability shall become due and payable, or at such time and times for which payment of the same may hereafter, with or without notice to the said John Benge, be extended, then this obligation to be void.

"This obligation is intended to operate as a continuing security for the payment, when the same shall become due and be demanded, of all and every liability incurred to and with the said Grover & Baker Sewing Machine Company by the said James Benge, as aforesaid, to the amount not exceeding the limit of this bond, three thousand dollars.

"James Benge. [Seal.]
"John Benge. [Seal.]"

Plaintiff read in evidence a Statute of the State of Pennsylvania, enacted February 24, 1806, as follows:

"It shall be the duty of the prothonotary of any court of record within this Commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney-at-law or other person to confess judgment, to enter judgment against the person or persons who executed the same, for the amount which, from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect as if a declaration had been filed, and judgment confessed, by an attorney, or judgment obtained in open court and in term time; and the defendant shall not be compelled to pay any costs or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid."

It was stipulated that "the common law of Pennsylvania, the practice of her courts and the construction placed by her courts upon any statutes in force in that State may be proved by the decisions of the Pennsylvania courts, as reported in the printed volumes of Pennsylvania Reports." The other evidence adduced tended to establish or disprove that the property in controversy in the attachment and garnishment belonged to John Benge.

The court instructed the jury "that the Statute Law of the State of Pennsylvania, offered in evidence by the plaintiff and admitted by the defendant to be the law under which the judgment offered in evidence by [292] the plaintiff was entered, did not authorize the prothonotary of the Court of Common Pleas in and for the County of Chester, in the State of Pennsylvania, to enter the said judgment, and their verdict should be for the defendant."

The verdict was accordingly returned for the defendant and judgment entered thereon, and an appeal prosecuted therefrom to the Court of Appeals of the State of Maryland, by which the judgment was affirmed, and a writ of error was thereupon allowed to this court. The opinion of the court of appeals will be found reported in 66 Md. 511.

Messrs. **Albert Constable** and *William T. Warburton* for plaintiff in error.

Mr. **Jno. A. J. Creswell** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Maryland circuit court arrived at its conclusion upon the ground that the Statute of Pennsylvania relied on did not authorize the prothonotary of the court of common pleas of that State to enter the judgment; and the Court of Appeals of Maryland reached the same result upon the ground that the judgment was void as against John Benge, because the court rendering it had acquired no jurisdiction over his person.

It is settled that notwithstanding the provision of the Constitution of the United States, which declares that "full faith and

credit shall be given in each State to the public acts, records and judicial proceedings of every other State" (art. IV. sec. 1), and the Act of Congress passed in pursuance thereof (1 Stat. 22; Rev. Stat. § 905), and notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding; that the jurisdiction of a foreign court over the person or the subject matter, embraced in the judgment or decree of such court, is always open to inquiry; that in this respect a court of another State is to be regarded as a foreign court; and that a personal judgment is without validity if rendered by a state court in an action upon a money [295] demand against a nonresident of the State, upon whom no personal service of process within the State was made, and who did not appear. *D'Arcy* v. *Ketchum*, 52 U. S. 11 How. 165 [13: 648]; *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 [21: 897]; *Hall* v. *Lanning*, 91 U. S. 160 [23: 271]; *Pennoyer* v. *Neff*, 95 U. S. 714 [24: 565].

The rule is not otherwise in the State of Pennsylvania, where the judgment in question was rendered (*Guthrie* v. *Lowry*, 84 Pa. 533; *Scott* v. *Noble*, 72 Pa. 115; *Noble* v. *Thompson Oil Co.* 79 Pa. 354; *Steel* v. *Smith*, 7 Watts & S. 447); nor in the State of Maryland, where the action under review was brought upon it. *Bank of United States* v. *Merchants Bank*, 7 Gill, 415; *Clark* v. *Bryan*, 16 Md. 171; *Weaver* v. *Boggs*, 38 Md. 255. And the distinction between the validity of a judgment rendered in one State, under its local laws upon the subject, and its validity in another State, is recognized by the highest tribunals of each of these States.

Thus, in *Steel* v. *Smith*, 7 Watts & S. 447, it was decided, in 1844, that a judgment of a court of another State does not bind the person of the defendant, in another jurisdiction, though it might do so under the laws of the State in which the action was brought, and that the Act of Congress does not preclude inquiry into the jurisdiction, or the right of the State to confer it. The action was brought on a judgment rendered in Louisiana, and *Mr. Chief Justice* Gibson, in delivering the opinion of the court, said: "The record shows that there was service on one of the joint owners, which, in the estimation of the law of the court, is service on all; for it is affirmed in *Hill* v. *Bowman*, already quoted [14 La. 445], that the State of Louisiana holds all persons amenable to the process of her courts, whether citizens or aliens, and whether present or absent. It was ruled in *George* v. *Fitzgerald*, 12 La. 604, that a defendant, though he reside in another State, having neither domicil, interest nor agent in Louisiana, and having never been within its territorial limits, may yet be sued in its courts by the instrumentality of a curator appointed by the court to represent and defend him. All this is clear enough, as well as that there was in this instance a general appearance by attorney, and a judg- [296] ment against all the defendants, which would have full faith and credit given to it in the courts of the State. But that a judgment is always regular when there has been an appearance by attorney, with or without warrant, and that it cannot be impeached collaterally for anything but fraud or collusion, is a municipal principle, and not an international one having place in a question of state jurisdiction or sovereignty. Now, though the courts of Louisiana would enforce this judgment against the persons of the defendants, if found within reach of their process, yet, where there is an attempt to enforce it by the process of another State, it behooves the court whose assistance is invoked to look narrowly into the constitutional injunction, and give the statute to carry it out a reasonable interpretation."

Referring to § 1307 of *Mr. Justice* Story's Commentaries on the Constitution, and the cases cited, to which he adds *Benton* v. *Burgot*, 10 Serg. & R. 240, the learned judge inquires: "What, then, is the right of a State to exercise authority over the persons of those who belong to another jurisdiction, and who have perhaps not been out of the boundaries of it?" and quotes from Vattel, Burge, and from *Mr. Justice* Story (Confl. chap. 14, § 539), that "'no sovereignty can extend its process beyond its own territorial limits, to subject other persons or property to its judicial decisions. Every exertion of authority beyond these limits is a mere nullity, and incapable of binding such persons or property in other tribunals;'" and thus continues: "Such is the familar, reasonable and just principle of the law of nations; and it is scarce supposable that the framers of the Constitution designed to abrogate it between States which were to remain as independent of each other, for all but national purposes, as they were before the Revolution. Certainly it was not intended to legitimate an assumption of extraterritorial jurisdiction which would confound all distinctive principles of separate sovereignty; and there evidently was such an assumption in the proceedings under consideration. . . . . But I would perhaps do the jurisprudence of Louisiana injustice, did I treat its cognizance of the defendants as an act of usurpation. It makes no claim to extraterritorial authority, but merely concludes the party in its own courts, and leaves the rest to the Constitution as carried out by the Act of Congress. When, however, a creditor asks us to give such a judgment what is in truth an extraterritorial effect, he asks us to do what we will not, till we are compelled by a mandate of the court in the last resort."

In *Weaver* v. *Boggs*, 38 Md. 255, it was held that suit could not be maintained in the courts of Maryland upon a judgment of a court of Pennsylvania rendered upon returns of *nihil* to two successive writs of *scire facias* issued to revive a Pennsylvania judgment of more than twenty years' standing, where the defendant had for more than twenty years next before the issuing of the writs resided in Maryland and out of the jurisdiction of the court that rendered the judgment. The court said: "It is well settled that a judgment obtained in a court of one State cannot be enforced in the courts and against a citizen

of another, unless the court rendering the judgment has acquired jurisdiction over the defendant by actual service of process upon him, or by his voluntary appearance to the suit and submission to that jurisdiction. Such a judgment may be perfectly valid in the jurisdiction where rendered and enforced there even against the property, effects and credits of a nonresident defendant there situated, but it cannot be enforced or made the foundation of an action in another State. A law which substitutes constructive for actual notice is binding upon persons domiciled within the State where such law prevails, and as respects the property of others there situated, but can bind neither person nor property beyond its limits. This rule is based upon international law, and upon that natural protection which every country owes to its own citizens. It concedes the jurisdiction of the court to the extent of the State where the judgment is rendered, but, upon the principle that it would be unjust to its own citizens to give effect to the judgments of a foreign tribunal against them when they had no opportunity of being heard, its validity is denied."

Publicists concur that domicil generally determines the particular territorial jurisprudence to which every individual is subjected. As correctly said by Mr. Wharton, the nationality of our citizens is that of the United States, and by the laws of the United States they are bound in all matters in which the United States are sovereign; but in other matters their domicil is in the particular State, and that determines the applicatory territorial jurisprudence. A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment, and it is competent for a defendant in an action on a judgment of a sister State, as in an action on a foreign judgment, to set up as a defense want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment and had not been served with process, and did not enter his appearance. Whart. Confl. Laws, §§ 82, 654, 660; Story, Confl. Laws, §§ 539, 540, 586.

John Benge was a citizen of Maryland when he executed this obligation. The subject matter of the suit against him in Pennsylvania was merely the determination of his personal liability, and it was necessary to the validity of the judgment at least elsewhere that it should appear from the record that he had been brought within the jurisdiction of the Pennsylvania court by service of process, or his voluntary appearance, or that he had in some manner authorized the proceeding. By the bond in question he authorized "any attorney of any court of record in the State of New York, or any other State, to confess judgment against him (us) for the said sum, with release of errors, etc." But the record did not show, nor is it contended, that he was served with process, or voluntarily appeared, or that judgment was confessed by an attorney of any court of record of Pennsylvania. Upon its face, then, the judgment was invalid, and to be treated as such when offered in evidence in the Maryland court.

It is said, however, that the judgment was entered against Benge by a prothonotary, and that the prothonotary had power to do this under the Statute of Pennsylvania of February 24, 1806. Laws Pa. 1805, 1806, p. 347. This Statute was proved as a fact upon the [299] trial in Maryland, and may be assumed to have authorized the action taken, though under *Connay* v. *Halstead*, 78 Pa. 354, that may, perhaps, be doubtful. And it is argued that the Statute, being in force at the time this instrument was executed, should be read into it and considered as forming a part of it, and therefore that John Benge had consented that judgment might be thus entered up against him without service of process, or appearance in person, or by attorney.

But we do not think that a citizen of another State than Pennsylvania can be thus presumptively held to knowledge and acceptance of particular statutes of the latter State. What Benge authorized was a confession of judgment by any attorney of any court of record in the State of New York or any other State, and he had a right to insist upon the letter of the authority conferred. By its terms he did not consent to be bound by the local laws of every State in the Union relating to the rendition of judgment against their own citizens without service or appearance, but on the contrary made such appearance a condition of judgment. And even if judgment could have been entered against him, not being served and not appearing, in each of the States of the Union, in accordance with the laws therein existing upon the subject, he could not be held liable upon such judgment in any other State than that in which it was so rendered, contrary to the laws and policy of such State.

The courts of Maryland were not bound to hold this judgment as obligatory either on the ground of comity or of duty, thereby permitting the law of another State to override their own.

No color to any other view is given by our decisions in *Johnson* v. *Chicago and Pacific Elevator Co.*, 119 U. S. 388, 400 [30: 447, 451], and *Hopkins* v. *Orr*, 124 U. S. 510 [31: 523], cited for plaintiff in error. Those cases involved the rendition of judgments against sureties on restitution and appeal bonds if judgment went against their principals, and the sureties signed with reference to the particular statute under which each bond was given, nor did, nor could, any such question arise therein as that presented in the case at bar.

Judgment affirmed.

[310] CLEMENT A. AUFFMORDT ET AL., *Plffs. in Err.*,
v.
EDWARD L. HEDDEN, Collector of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 310-330.)

Statute as to Duties—appraisal—is final—merchant appraiser—sec. 2930, Rev. Stat.

1. Under the Statute as to Duties the question of the dutiable value of the merchandise is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal; the proceedings for appraisal are of a summary character.
2. The determination of appraisers as to the dutiable value of goods is conclusive and not re-examinable in a suit at law, provided the appraisers are selected in conformity with the Statute, and, in appraising, act within the scope of the powers conferred upon them.
3. It is not allowable, in a suit to recover back duties, for the plaintiff to try before the jury the question as to the actual value of the goods, and whether the appraisers followed the evidence before them or disregarded it.
4. A merchant appraiser is not an officer of the United States, required, under art. 2, sec. 2, U. S. Const., to be appointed by the president, or a court of law, or the head of a department.
5. Section 2930 of the Revised Statutes is not unconstitutional in making the decision of the appraisers final, and in taking away the right to have the question of the dutiable value of the goods passed upon by a jury.

[No. 78.]

Argued Nov. 14 17, 1890. Decided Dec. 8, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment for plaintiffs for an excess of duties paid under protest on imported goods. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Henry Edwin Tremain,** *Mason W. Tyler* and *Alexander P. Ketchum* for plaintiffs in error.

Messrs. **A. X. Parker,** *Assistant Atty-Gen.*, and **Wm. A. Maury,** *Assistant Atty-Gen.*, for defendant in error.

[311] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an action at law, brought by Clement A. Auffmordt, John F. Degener, William Degener and Adolph William von Kessler, composing the firm of C. A. Auffmordt & Co., against Edward L. Hedden, Collector of the Port of New York, in the Superior Court of the City of New York, and removed by the defendant into the Circuit Court of the United States for the Southern District of New York, to recover an alleged excess of duties, paid under protest, on goods imported into the Port of New York from Bremen by the steamer Main and entered at the custom-house at New York on March 13, 1886. After issue joined, the case was, on the application of the plaintiffs, separated into two causes of action, the present one covering all questions of law and fact involved in the importation, except those which concerned the rates of duty affecting it; and the trial involved in the case now before us proceeded on that basis. It was had before *Judge* Wheeler and a jury, and resulted in a verdict for the plaintiffs for $10, for which amount, with interest and costs, judgment was entered in July, 1887. The plaintiffs brought a writ of error, claiming that the verdict should have been for a larger sum.

The valuation of the goods on entry was 7,070 francs, on which a duty of 50 per cent was paid. Afterwards the appraisers raised the valuation by adding 440 francs 10 centimes to the 7,070 francs, making a total valuation of 7,510 francs 10 centimes. On a re-appraisement by a merchant appraiser and a general appraiser, under section 2930 of the Revised Statutes, the same result was reached; and on this valuation of 440 francs 10 centimes a duty of 50 per cent was paid, amounting to $42. The controversy in the case relates to this $42.

There is no foundation for the suggestion made in the brief for the plaintiffs that they paid any duty upon non-dutiable charges.

Various assignments of error are made which are not especially referred to in the brief for the plaintiffs; and those which are discussed in that brief may be classified under distinct heads.

Section 2930 of the Revised Statutes, under which the principal question in the case arose, was as follows: "If the importer, owner, agent or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly."

At the trial, the plaintiffs put in evidence the following-named parts of the general regulations under the Customs and Navigation Laws, published by the Treasury Department in 1884, namely: chapter 3, part 3, articles 447 to 506, both inclusive; chapter 5, part 8, articles 1399 to 1410, both inclusive, and articles 1415 to 1417, both inclusive; also, extracts from instructions issued for the guidance of officers of the customs and others concerned, by the Secretary of the Treasury, under date of July 1, 1885, known as Treasury Department Document No. 712, being instruction of June 9, 1885, p. 245, No. 6957; instruction of June 10, 1885, p. 249, No. 6959, and instruction of July 20, 1885, p. 305, No. 7029.

Of the general regulations of 1884, above referred to, those which are material in this case are set out in the margin.*

* "Art. 459. It is lawful for the appraisers, or the collector and naval officer, as the case may be, to call before them and examine, upon oath or affirmation, any owner, importer, consignee or other per-

In the present case, the plaintiffs filed protests and appeals to the Secretary of the Treasury on the 29th of April, 1886. There was no decision by the Secretary on the appeals, and this suit was brought. The notice of dissatisfaction with the first appraisement was dated March 22, 1886, and contained a request for a re-appraisement. Mr. M'Creery was selected by the collector to be the merchant appraiser, but the notice to him of his selection was not put in evidence. The oath signed by him and sworn to before a deputy collector, on the 8th of April, 1886, was put in evidence, and was in the following terms: "I, the undersigned, appointed by the Collector of the District of New York to appraise a lot of manufactures of silk and cotton imported per steamship Main from Bremen, the importer having requested a new appraisement thereof in accordance with law, do hereby solemnly swear diligently and faithfully to examine and inspect said lot of manufactures of silk and cotton, and truly to report, to the best of my knowledge and belief, the actual market value or wholesale price thereof, at the period of the exportation of the same to the United States, in the principal markets of the country from which the same was imported into the United States, in conformity with the provisions of the several Acts of Congress providing for and regulating the appraisement of imported merchandise. So help me God." The plaintiffs were notified by the Collector, on the 20th of April, 1886, to pay the additional duty. This was after the re-appraisement, and the additional duty was paid, they having previously paid $10 for the merchant appraiser's compensation.

In the course of the trial, the plaintiff proposed to show by Mr. M'Creery that, at the time he acted as merchant appraiser in the present case, he acted as such at the same time in other cases. This testimony being objected to by the defendant as irrelevant, it was excluded, and plaintiffs excepted. The court, however, admitted in evidence the fact that some other appraisals were going on at the same time with the one in the present case, although it excluded, under the exception of the plaintiffs, testimony as to how many of them there were. [319

The plaintiffs also, for the purpose of raising the point that the merchant appraiser should have been selected by virtue of the classification of employés in the classified customs service, as certified to by the Secretary of the Treasury under section 882 of the Revised Statutes, being the classification provided for by section 6 of the Act of January 16, 1883, chap. 27 (22 Stat. 405), offered such classification in evidence, but it was excluded by the court under the objection of the defendant, as incompetent, immaterial and irrelevant, and the plaintiffs excepted.

They also offered to show that the merchant appraiser was not appointed under the civil service rules under the said Act of 1883, but the court excluded the evidence and the plaintiffs excepted.

They also offered in evidence sundry depositions of witnesses taken before the re-apprais-

---

son, touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of merchandise imported, and to require the production, on oath or affirmation, to the collector or to any permanent appraiser, of any letters, accounts or invoices in his possession relating to the same, for which purpose they are authorized to administer oaths and affirmations. Such persons are not entitled to compensation. S. 835. And all testimony in writing or depositions thus taken will be filed in the collector's office, preserved for future use or reference, and transmitted to the Secretary of the Treasury whenever he may require the same."

Article 462 provides for the giving of a written notice by the collector to the importer of any addition to value made and certified by the appraisers, and provides for the form of such notice.

"Art. 463. If the importer be dissatisfied with the appraisement he may if he has complied with the legal requirement, give notice of such dissatisfaction in writing to the collector. This notice must be given in all cases within twenty-four hours, or before the end of the official day after the day on which the collector gave the notice prescribed in the foregoing article, and may be in the following form (R. S. 2930):

"Form No. 102.

"Importer's Notice to Collector Claiming Re-appraisment.

"——, —— —, 18—.

"Sir: As I consider the appraisement made by the United States appraisers too high on ——, imported by — — ——, in the ——, form ——, I have to request that the same may be re-appraised pursuant to law with as little delay as your convenience will permit.

—— ——.

—— ——, collector of the customs."

Articles 464 and 465 provide for a special report of the local appraisers to be made after such notice claiming a re-appraisement is given.

"Merchant Appraisers.

"Art. 466. On the receipt of this report the collector will select one discreet and experienced merchant, a citizen of the United States, familiar with the character and value of the goods in question, to be associated with an appraiser at large, if the attendance of such officer be practicable, to examine and appraise the same according to law. R. S. 2930. The selection of merchant appraisers should not be confined exclusively to those connected with foreign imports, but when the requisite knowledge exists should be extended so as to embrace domestic manufacturers and producers and other citizens acting as merchants, although not dealing in foreign merchandise. S. 6111. The merchant thus selected will be notified by the collector of his appointment and of the time and place of the re-examination. The appraiser at large will be notified of the appeal, of the time fixed for re-appraisment and of the name of the merchant appraiser. The importer will be notified of the time and place, but not of the name of the merchant selected to assist in the re-appraisement. If the attendance of an appraiser at large be impracticable, the collector will select an additional merchant, qualified as aforesaid, for the performance of the service.

"Art. 467. The notice of the appointment of the merchant appraiser will be in the following form:

"Form No. 104.

"Appointment of Merchant Appraiser.

"Custom House, ——,

"Collector's Office, —— —, 18—.

"Sir: You are hereby appointed to appraise ——, which has been entered at this port, the importer having requested a new appraisement thereof in accordance with the provisions of the several Acts of Congress providing for and regulating the appraisement of imported merchandise, and you are requested to appear at ——, at — o'clock on the — day of ——, 18—, to appraise the said goods pursuant to law.

"Before entering upon the duty indicated in the above appointment you will please call at this office to take the requisite oath.

"Very respectfully, —— —— Collector.

"To —— ——, merchant.

"Art. 468. The oath to be taken by the merchant appraiser will be in the following form:

"Form No. 105.

"Oath of Merchant Appraiser.

"I, the undersigned, appointed by the collector of —— to appraise ——, imported per ——, from ——,

ers in this case, in regard to market value; but they were excluded by the court on the objection of the defendant, and the plaintiffs excepted.

They also offered to show by a witness the true and actual market value and wholesale price of the goods in question, and of goods identical with them, in the principal markets of the country from which they were exported, at the time of their exportation, in March, 1886; but, on the objection of the defendant that the testimony was immaterial, incompetent and irrelevant, it was excluded, and the plaintiffs excepted.

The court directed a verdict for the plaintiffs for the $10 merchant appraiser's fees. The defendant asked for a direction for a verdict for him except as to such $10. The plaintiffs requested the court to submit to the jury, for their finding, the question whether or not there was any lawful appraisement or re-appraisement in the case. The court refused so to do, but directed a verdict for the defendant except as to the $10, to which action of the court the plaintiffs excepted.

The plaintiffs then asked the court to direct a verdict for the plaintiffs for the sum claimed beyond the $10, on the ground that the Statute under which the merchant appraiser was appointed was unconstitutional and void, under that provision of article 2, section 2, of the Constitution of the United States, which reads as follows: "The Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law or in the heads of departments,"—claiming that the merchant appraiser was an inferior officer, within the meaning of that provision, and was not appointed in accordance therewith. The court denied the motion and the plaintiffs excepted.

They then requested the court to submit all of the testimony to the jury, with proper instructions as to what constituted an appraisement or a re-appraisement, which request was refused, and the plaintiffs excepted.

They also requested the court to submit all of the evidence to the jury touching the value upon which the duty was assessed, and the value declared on entry, on the ground that section 2930 of the Revised Statutes was unconstitutional; that the plaintiffs had the right to have submitted to the jury, under proper instructions, on the evidence, all questions touching the imposition of duty; and that, by withholding the evidence from the jury, by virtue of an unconstitutional statute which declared the conclusions of the re-appraisers to be final, the plaintiffs were deprived of their constitutional right to a trial by jury, in a case where, by the common law, it obtained, under article 7 of the Amendments of the Constitution. This request was denied and the plaintiffs excepted.

It is provided, by section 2902 of the Revised Statutes, that it shall be the duty of the appraisers of the United States, "and every person who shall act as such appraiser," "by all reasonable ways and means in his or their power, to ascertain, estimate and appraise the true and actual market value and wholesale price" of the merchandise under appraisal, "at

---

the importer having requested a new appraisement thereof in accordance with law, do hereby solemnly swear diligently and faithfully to examine and inspect said lot of —, and truly to report, to the best of my knowledge and belief, the actual market value or wholesale price thereof at the period of the exportation of the same to the United States, in the principal markets of the country from which the same was imported into the United States, in conformity with the provisions of the several Acts of Congress providing for and regulating the appraisement of imported merchandise.

——— ———.

"Port of —.

"Sworn to and subscribed before me this — day of —, 18—.

"——— ———, Collector.

"Samples, etc., to be Sent to Re-appraisers.

"Art. 469. At the time fixed for re-appraisement the collector will send to the appraiser at large and merchant appraiser the invoice or invoices of the merchandise to be examined and appraised. The storekeeper or other officer having charge will deliver to them the samples or packages ordered for examination, and they will proceed to examine and appraise in the manner pointed out by law. The importer or his agent will be allowed to be present and to offer such explanations and statements as may be pertinent to the case. The valuation having been determined, the appraisers will report the same to the collector."

Article 472 provides for a compensation of $5 a day to the merchant appraiser while so employed, to be paid by the party taking the appeal.

"Art. 474. Merchants' appraisements should not assume the nature of a judicial inquiry where judgment is rendered in accordance with the preponderance of testimony on either side, but should be conducted as an investigation by experts, to ascertain whether the local appraiser has reported the true and proper market value of the merchandise in question. S. 2655. Application for copies of proceedings on re-appraisements should be made to the general appraiser, who will exercise his discretion in regard to furnishing the same.

"Art. 475. It shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector and naval officer, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise at the time of exportation and in the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels or quantities, and such actual market value or wholesale price of every of them, as the case may require."

"Art. 479. The appraisers or the collector and naval officer, as the case may be, may call before them and examine upon oath any owner, importer, consignee or other person touching any matter or thing which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported, and require the production, on oath, to the collector or to any permanent appraiser, of any letters, accounts or invoices in his possession relating to the same. All testimony in writing or depositions taken by virtue of this section shall be filed in the collector's office and preserved for future use or reference, to be transmitted to the Secretary of the Treasury when he shall require the same. R. S. 2922."

"Art. 1407. In cases of appeal general appraisers shall pursue their inquiry into the question of the actual character and dutiable value of the goods under re-examination in such manner as they may deem most conducive to a just and equitable determination of the question. It is expected that they will arrive at that conclusion from their own knowledge and judgments as experts, in substantially the same manner as in the case of original appraisements. See article 474. S. 2655."

"Art. 1409. As the examinations of appraisers are made the basis of the general classification of importations for the imposition and assessment of duty, it becomes necessary that appraisers shall closely inspect the articles ordered for appraisement, and where they retain doubts concerning the quality or denomination of articles they shall submit samples thereof, with their opinions, to col-

the time of exportation, and in the principal markets of the country whence the same has been imported into the United States;" and by section 2930 it is made the duty of the general appraiser and the merchant appraiser to examine and appraise the goods "agreeably to the foregoing provisions."

While the general appraiser, Mr. Brower, who acted with the merchant appraiser in the present case, was under examination as a witness on the trial, he was asked whether he proceeded on the appraisement in accordance with the instructions of the Secretary of the Treasury of June 9, 1885, and prior thereto, in respect to the method of procedure. This question was objected to by the defendant as incompetent, irrelevant and immaterial, the court sustained the objection and the plaintiffs excepted. The exclusion of this evidence is assigned for error. The question was too general, and was incompetent in that respect, because it called upon the witness to institute a comparison between the method pursued and the entire instructions of the Secretary of the Treasury, whereas the proper course was for the witness to give the particulars of the method pursued, leaving it to the court and the jury to make the comparison with the instructions, which were in evidence. But, inasmuch as the court directed a verdict for the defendant, the plaintiffs properly raise the question as to whether what was done by the appraisers, as shown by the evidence, shows that the re-appraisers proceeded "by all reasonable ways and means" to ascertain the value of the goods. In other words, the instructions of the Treasury Department being in evidence, and it being presumed that they were followed, the question is raised, whether those instructions give the importer all the rights to which he is entitled, and whether they are, or are not, repugnant to the provision of the Statute which requires the use of "all reasonable ways and means," and whether the proper rights of the importers were accorded to them in this case. The views of the circuit court in regard to this case, as stated at the trial, are set forth in the report of it in 30 Fed. Rep. 360, and are contained also in the record. Mr. Robinson, the agent of the plaintiffs, employed to attend to their custom-house business, and who acted in the present case, gave his testimony as to what took place in regard to the re-appraisement, so far as he was cognizant of it. The court commented on his testimony and that of other witnesses, and said: "I do not gather from the testimony, as given here, that the plaintiffs or their agent understood that they were in any way excluded from their goods, which were in the adjoining room. I understand him to say that when his appraisal was going on he was at perfect liberty to be in the room where the goods were, and point them out to the appraisers, but not to the witnesses. I understand him that there was a notice on the door that led into that room that nobody would be allowed in there when the witnesses were examining the goods. When this case was up and the merchant appraiser and the general appraiser were there, if he had wanted to, he could have gone into the room and pointed out any of the goods he had a mind to. He [32

lectors, for transmission, in case of disagreement, to the Secretary of the Treasury. R. S. 2949."

"Art. 1410. Appraisers must rigidly exclude unauthorized persons from the rooms where goods are awaiting or are under examination for appraisement, and forbid their subordinates to hold communication with interested persons concerning the goods under appraisement. R. S. 2949."

"Art. 1416. Appraisers are, in cases of re-appraisement, to give courteous and due attention to explanations and statements of importers, in person or by representative, relating to the subject matter under examination, but they are to limit the privilege so accorded to one person in each single case of re-appraisement, to receive only statements of fact, to require all facts to be stated concisely and not argumentatively, and to pursue their inquiry into the question of the actual character and dutiable value of the goods under re-examination in such manner as they deem most conducive to a just and equitable determination of the question. Merchant appraisers appointed in cases of appeal from the decisions of the customs appraisers are also to be governed by this article."

From the instructions of June 9, 1885: "The law of re-appraisement is precisely the same as that of original appraisement, and there is no authority or justification for the system, which it appears has grown up in your office, of treating a re-appraisement as in the nature of a trial in a court of law, wherein the re-appraising officers sit as judges and render decisions according to the preponderance of testimony adduced. The law provides that the merchant appraiser shall be familiar with the character and value of the goods in question, and it is presumed that the general appraiser will have or will acquire such expert knowledge of the goods he is to appraise as to enable him to intelligently perform his official duty with a due regard for the rights of all parties and independently of the testimony of interested witnesses. The functions of the re-appraising board are the same as those of the original appraisers. They are themselves to appraise the goods, and not to depend for their information upon the appraisement of so-called experts in the line of the goods in question. I am informed that it is the practice to hold re-appraisements on certain days of the week, within the hours of twelve and three, and that, owing to the number of appeals pending, two or more cases are often heard at the same time by different merchant appraisers, all acting in conjunction with the general appraiser; that importers and witnesses are permitted to throng the general appraiser's office, in whose presence the conclusions of the appraising board are often announced, and that, if such conclusions are not satisfactory to the importer, he is allowed to protest and re-argue the case, with a view to a modification of the finding, in which he is often successful. It is plain that all this is a wide departure from the methods of re-appraisement contemplated by the law and regulations, and must necessarily result in injury to the revenue and general demoralization among officials and importers. The local appraisers are expected to do their full duty in ascertaining, estimating and appraising the true and actual market value or wholesale price of imported merchandise at the time of exportation, and in the principal markets of the country whence the same has been imported. When appeals are taken from the valuation so found, it is expected that the general appraiser and merchant appraiser selected to act with him will re-appraise the merchandise in substantially the same manner as is pursued on original appraisement. Section 2922 of the Revised Statutes authorizes appraisers to call before them and examine under oath any owner, importer, consignee or other person, touching anything which they may deem material in ascertaining the true market value or wholesale price of any merchandise imported. It is by this law that appraisers are authorized to summon witnesses, but there is no authority for the public examination of such witnesses, or their cross-examination, by importers, or counsel employed by such importers. The appraising officers are entitled to all information obtainable concerning the foreign market value of goods under consideration, but such information is not public property. It is due to merchants and others called to give such information that their statements shall be taken in the presence of official persons only. It must often occur that persons in possession of facts which would be of value to the appraisers in de-

was asked to make his statement and understood that he had the right. He didn't question but that the samples they had were the right ones. He stayed there as long as he wanted to, to do anything about pointing out his goods. I think the importer was entitled to that—to be there when the appraisal was made; to point out his goods; to know they were his goods; to illustrate them and exhibit them in any manner he saw fit; and to present to the appraisers any views he had. I think he had that right; but I am not able to say from this evidence that there was anything tending to show that he was denied that right. There is one other point upon which I am not clear; that is, when this board takes testimony (and, whether they will take it all or not, they are to decide themselves), whether they are bound to let the importer know that they are taking it; or if they do let the importer know they have taken it, whether they are bound to let him know what it is, so he may answer it. But my impression is that that is discretionary with the board; that they may make inquiry by what they deem to be proper ways and means; and that the importer must rely on their fairness and judgment as to what testimony they do take, and the weight they give
323] to it: that the fact that the importer was not informed who the witnesses were, and what they testified to, and given an opportunity to cross-examine them, and an opportunity to meet it, does not constitute a valid objection against the re-appraisement."

The contention of the plaintiffs is that, under the instructions of the Treasury Department and the evidence, the question in issue as to the dutiable value of the merchandise could not be reasonably heard at all on the re-appraisement, because (1) the importer, or his agent, was practically excluded from the re-appraisement; (2) was not afforded opportunity to support his oath on entry, or, within proper limits, to confront the opposing witnesses by testimony in his own behalf; (3) or to sift evidence secretly or openly heard in opposition to him; (4) or to have the aid of counsel, if he desired; and particularly, that the rule of "reasonable ways and means" could not exist in a tribunal which proceeded to examine an issuable matter under a rule which excluded lawyers.

We are of opinion that, under the Statute, the question of the dutiable value of the merchandise is not to be tried before the appraisers as if it were an issue in a suit in a judicial tribunal. Such is not the intention of the Statute, and the practice has been to the contrary from the earliest history of the government. No government could collect its revenues, or perform its necessary functions, if the system contended for by the plaintiffs were to prevail. The regulations prescribed in the instructions from the Treasury Department are reasonable and proper. By section 2949 of the Revised Statutes, the Secretary of the Treasury has power to establish "rules and regulations, not inconsistent with the laws of the United States, to secure a just, faithful and impartial appraisement of all merchandise imported into the United States;" and by section 2652 it is made "the duty of all officers of the customs to execute and carry into effect all instructions of the Secretary of the Treasury relative to the execution of the Revenue Laws; and in case any difficulty shall arise as to the true construction or meaning of any part of the Revenue Laws, the decision of the Secretary of the Treasury" is made conclusive and binding.

The proceedings for appraisal must necessarily be, to some extent, of a summary character. In *Cheatham* v. *United States*, 92 U. S. 85, 88 [23: 561, 563] it was said by this court, speaking by *Mr. Justice* Miller: "All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them. These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose. The revenue measures of every civilized government constitute a system which provides for its enforcement by officers commissioned for that purpose. In this country this system for each State, or for the federal government, provides safeguards of its own against mistake, injustice or oppression in the administration of its Revenue Laws. Such appeals are allowed to specified tribunals as the law-makers deem expedient. Such remedies, also, for recover-

---

termining market values are deterred from appearing or testifying, by the publicity given to re-appraisement proceedings. Article 1416 of the regulations enjoins appraisers to give courteous and due attention to the explanations and statements of importers, in person or by representative, relating to the subject matter under investigation, but they are to limit the privilege so accorded to one person in each single case of re-appraisement, to receive only statements of fact, and to require all facts to be stated concisely and not argumentatively. This regulation has been so construed that attorneys-at-law and custom-house brokers have appeared and acted as representatives of the importer on re-appraisement. Such a construction is erroneous. The representative of the importer in such cases should be his employé or salesman—some person belonging to his house familiar with the facts touching the subject matter under consideration. There is no office here for the lawyer or custom-house broker, and such persons, as well as all others not officially called before the appraiser, should be excluded. This Department expects that all appraising officers, including the general appraisers, will co-operate in all proper measures for the suppression of undervaluations, and be just and uniform in the appraisement of imported merchandise, to the end that the Tariff Laws may be strictly enforced, and fair and honorable merchants protected from loss by the dishonest practices of unscrupulous importers."

From the instructions of June 10, 1885: "Experts have been employed at several of the foreign consulates, for the purpose of enabling the consul to obtain and transmit to appraisers information as to cost of producing silks and other merchandise, so that these officers would have the means of ascertaining the cost or value of the materials composing such merchandise, together with the expense of manufacturing, preparing and putting up such merchandise for shipment. . . . The law (section 2902, Revised Statutes) makes it your duty to ascertain, estimate and appraise the true and actual market value and wholesale price of the merchandise at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States, and when it appears that such true and actual market value cannot be ascertained to your satisfaction, you are to ascertain the cost of production, pursuant to the ninth section of the Act of 1883, referred to, and in no case to appraise the goods at less than the cost so ascertained. These Statutes are plain, and the appraising officers must comply with and enforce them."

ing back taxes, illegally exacted, as may seem wise, are provided. In these respects the United States have, as was said by this court in *Nichols* v. *United States*, 74 U. S. 7 Wall. 122 [19: 125], enacted a system of corrective justice, as well as a system of taxation, in both its customs and internal revenue branches. That system is intended to be complete. In the customs department it permits appeals from appraisers to other appraisers, and in proper cases to the Secretary of the Treasury; and, if dissatisfied with this highest decision of the executive department of the government, the law permits the party, on paying the money required, with a protest embodying the grounds of his objection to the tax, to sue the government through its collector, and test in the courts the validity of the tax." It was said also in that case (p. 89 [568]) that the government "has the right to prescribe the conditions on which it will subject itself to the judgment of the courts in the collection of its revenues." One of those conditions is, and always has been, that the determination of appraisers as to the dutiable value of goods shall be conclusive and not re-examinable in a suit at law, provided the appraisers are selected in conformity with the statute, and, in appraising, act within the scope of the powers conferred upon them. See also *State Railroad Tax Cases*, 92 U. S. 575, 613 [23: 663, 673]; *Snyder* v. *Marks*, 109 U. S. 189, 193, 194 [27: 901, 903]; *Hilton* v. *Merritt*, 110 U. S. 97 [28: 83]; *Arnson* v. *Murphy*, 115 U. S. 579, 585, 586 [29: 491, 493, 494]; *Oelbermann* v. *Merritt*, 123 U. S. 356, 361 [31: 164, 166].

In *Hilton* v. *Merritt* it was distinctly held that the valuation of merchandise made by the appraisers was, in the absence of fraud, conclusive on the importer; that the right of appeal to the Secretary of the Treasury, when duties were alleged to have been illegally or erroneously exacted, and the right to a trial by jury in case of an adverse decision by the Secretary of the Treasury, did not relate to alleged errors in the appraisement of goods, whether by a merchant appraiser or otherwise; and that it was not allowable, in a suit to recover back duties, for the plaintiff to put in evidence the records of the proceedings before the merchant appraiser and the general appraiser, including the testimony and the various documents before the appraisers, or to try before the jury the question as to the actual value of the goods and whether the appraisers followed the evidence before them or disregarded it. The evidence ruled out in that case was evidence which tended only to show carelessness and irregularity in the discharge of their duties by the appraisers, but not that they had assumed powers not conferred by the Statute.

Although by section 29 of the Act of June 10, 1890, chap. 470, entitled "An Act to Simplify the Laws in Relation to the Collection of the Revenues," sections 2902 and 2930 of the Revised Statutes are expressely repealed, section 10 of that Act provides that it shall be the duty of the appraisers of the United States, "by all reasonable ways and means," to appraise the actual market value and wholesale price of imported goods in the principal markets of the country whence the same have been imported; and section 13 of that Act provides that the decision of the appraiser, or that of the general appraiser in cases of re-appraisement, or that of the board of general appraisers on review, shall be final and conclusive as to the dutiable value of the merchandise, against all parties interested therein.

There is nothing in the instructions of the Secretary of the Treasury, or in any of the regulations prescribed, or in the evidence in this case, which shows that the appraisers were not free to perform their duties properly, [326 as required by the Statute. The re-appraisers appraised the goods in the appraisers' room in the public store. On the day before the re-appraisement took place, the agent of the plaintiffs received due notice of it, and he attended and was called by the re-appraisers before them. The merchant appraiser had then and there samples of the plaintiff's goods, and the general appraiser asked the agent for his statement in the case, and it was made. The samples were on the table before the merchant appraiser, and the cases of goods were in the adjoining room. The agent made no objection as to the proceedings, and testifies that he was allowed to make a full statement concerning the value of the plaintiffs' goods; and the evidence fails to show that any request was made on behalf of the plaintiffs which was refused, except the request to find the value which the plaintiffs desired to be found.

It is contended for the plaintiffs that the merchant appraiser is an officer, and an inferior officer, who, under article 2, section 2, of the Constitution, could be appointed only by the President, or by a court of law, or by the head of a department. In the present case, the selection of the merchant appraiser, his oath, and the manner in which he and the general appraiser discharged their duties, were in compliance with the Statute and with the treasury regulations; but it is urged that the manner of appointing the merchant appraiser was illegal. The merchant appraiser is an expert, selected as an emergency arises, upon the request of the importer for a re-appraisal. His appointment is not one to be classified under the Civil Service Law, he is not to be appointed on a competitive examination, nor does he fall within the provisions of the Civil Service Law. He is not a "clerk," nor an "agent," nor a "person employed," in the customs department, within the meaning of section 6 of the Civil Service Act; nor is he an officer of the United States, required to be appointed by the President, or a court of law, or the head of a department. He is an expert, selected as such. Section 2930 requires that he shall be a "discreet and experienced merchant," "familiar with the character and value of the goods in question." He is selected for the special case. He has no general functions, [327 nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. He is an executive agent, as an expert assistant to aid in ascertaining the value of the goods, selected for the particular case on the request of the importer, and selected for his special knowledge in regard to the character and value of the particular goods in question. He has no claim or right to be desig-

nated, or to act except as he may be designated. The Statute does not use the word "appoint," but uses the word "select." His position is without tenure, duration, continuing emolument or continuous duties, and he acts only occasionally and temporarily. Therefore he is not an "officer," within the meaning of the clause of the Constitution referred to. *United States* v. *Maurice*, 2 Brock. 96, 102, 103; *United States* v. *Hartwell*, 73 U. S. 6 Wall. 385, 393 [18: 830, 832]; *United States* v. *Germaine*, 99 U. S. 508, 510, 511, [25: 482, 483]; *Hall* v. *Wisconsin*, 103 U. S. 5, 8, 9 [26: 302, 303, 304]; *United States* v. *Mouat*, 124 U. S. 303, 307 [31: 463, 464]; *United States* v. *Smith*, Id. 525, 532 [534, 536].

The present question is very much like that considered in *United States* v. *Germaine*. In that case, under section 4777 of the Revised Satutes, the commissioner of pensions was empowered to appoint civil surgeons to make a periodical examination of pensioners and to examine applicants for pensions. The question arose whether a surgeon so appointed was an officer of the United States, whose appointment was required to be made by the President, or a court of law, or the head of a department. This court held that he was not, and said, referring to the case of *United States* v. *Hartwell*: "If we look to the nature of defendant's employment, we think it equally clear that he is not an officer. In that case the court said, the term embraces the ideas of tenure, duration, emolument and duties, and that the latter were continuing and permanent, not occasional or temporary. In the case before us the duties are *not* continuing and permanent, and they *are* occasional and intermittent. The surgeon is only to act when called on by the commissioner of pensions in some special case, as when some pensioner, or claimant of a pension, presents himself for examination. He may make fifty of these examinations in a year, or none. He is required to keep no place of business for the public use. He gives no bond and takes no oath, unless by some order of the commissioner of pensions of which we are not advised. No regular appropriation is made to pay his compensation, which is two dollars for every certificate of examination, but it is paid out of money appropriated for paying pensions in his district, under regulations to be prescribed by the commissioner. He is but an agent of the commissioner, appointed by him, and removable by him at his pleasure, to procure information needed to aid in the performance of his own official duties. He may appoint one or a dozen persons to do the same thing. The compensation may amount to five dollars or five hundred dollars per annum. There is no penalty for his absence from duty or refusal to perform, except his loss of the fee in the given case. If Congress had passed a law requiring the commissioner to appoint a man to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeons appointed under this Statute."

328]

This case does not present any question like that of substituting a new merchant appraiser for one already selected, as in *Greely* v. *Thompson*, 51 U. S. 10 How. 225 [13: 397]; nor is it a case where the appraiser did not see the original packages, as in *Greely's Adminstrator* v. *Burgess*, 59 U. S. 18 How. 413 [15: 455]; nor a case where it was offered to show that the merchant appraiser was not a person having the qualification prescribed by the statute, as in *Oelbermann* v. *Merritt*, 123 U. S. 356 [31: 164], and in *Mustin* v. *Cadwalader*, Id. 369 [169]; nor a case where it was contended that the appraisers did not open, examine and appraise the packages designated by the collector, as in *Oelbermann* v. *Merritt*; nor a case where to the admitted market value of an importation there was added such additional value as was equal to a reduction made in the valuation of the cases containing the goods, as in *Badger* v. *Cusimano*, 130 U. S. 39 [32: 851]. Those were instances of errors outside of the valuation itself and outside of the appraisement prescribed by the statute.

Nor is there anything in the objection that section 2930 of the Revised Statutes is unconstitutional in making the decision of the appraisers final, and that the plaintiffs had a right to have the question of the dutiable value of the goods passed upon by a jury. As said before, the government has the right to prescribe the conditions attending the importation of goods, upon which it will permit the collector to be sued. One of those conditions is that the appraisal shall be regarded as final; and it has been held by this court, in *Arnson* v. *Murphy*, 109 U. S. 238 [27: 920], that the right to bring such a suit is exclusively statutory, and is substituted for any and every common-law right. The action is, to all intents and purposes, with the provisions for refunding the money if the importer is successful in the suit, an action against the government for moneys in the treasury. The provision as to the finality of the appraisement is virtually a rule of evidence to be observed in the trial of the suit brought against the collector.

The uniform course of legislation and practice, in regard both to the mode of selection of the merchant appraiser and as to the conclusive effect of the appraisal, are entitled to great weight. *Stuart* v. *Laird*, 5 U. S. 1 Cranch, 299, 309 [2: 115, 118]; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 352 [4: 97, 109]; *Cohens* v. *Virginia*, 19 U. S. 6 Wheat. 264, 418, 421 [5: 257, 294, 295]; *Cooley* v. *Board of Wardens*, 53 U. S. 12 How. 299, 315 [13: 996, 1003]; *Burrow-Giles Lith. Co.* v. *Sarony*, 111 U. S. 53, 57 [28: 349, 351]; *The Laura*, 114 U. S. 411, 416 [29: 147, 149].

The plaintiffs complain of the exclusion, as evidence, of a paper, Exhibit No. 14, being a report received by the collector at New York from the United States consul at Horgen, in Switzerland, dated February 25, 1886, and purporting to be a memorandum made by one Schmid, a government silk expert, concerning certain undervaluations of merchandise covered by invoices of goods to C. A. Auffmordt & Co., which embraced the goods in question. The paper was excluded by the court on the objection of the defendant that it was immaterial and irrelevant, and the plaintiffs excepted. It does not appear that the paper was used upon either of the appraisals, and, if it had been, it would have been proper to use it, as advising the officers of the government of the cost of

& Baker Sewing Machine Company, a corporation duly established by law in the City of Boston, State of Massachusetts, also doing business at Philadelphia, State of Pennsylvania, in the sum of three thousand dollars, lawful money of the United States of America, to be paid to the said Grover & Baker Sewing Machine Company, its legal representatives or assigns; for which payment. [1] well and truly to be made, we bind ourselves, heirs, executors and administrators, jointly and severally; firmly by these presents. Sealed with our seals. Dated the 16th day of March, one thousand eight hundred and seventy-two; and we hereby authorize any attorney of any court of record in the State of New York or any other State to confess judgment against us for the said sum, with release of errors, etc.

"Whereas the above-named James Benge, at the special instance and request of the above-bound John Benge, has obtained a credit with the said Grover & Baker Sewing Machine Company for machines of their manufacture and for sewing-machine findings, silks and threads manufactured and dealt in by said Grover & Baker Sewing Machine Company, and for other articles, including promissory notes and other property, to be hereafter supplied to him, the said James Benge:

"Now, the condition of this obligation is such that if the above-bound James Benge, his heirs, executors or administrators, shall well and truly pay or cause to be paid to the said Grover & Baker Sewing Machine Company the full amount of each and every liability incurred by him, the said James Benge, to or with the said Grover & Baker Sewing Machine Company, for and on account of all sewing-machines and all sewing-machine findings, silks and threads or other articles, including promissory notes and other property, that may from time to time hereafter be sold, consigned, supplied or otherwise intrusted to him, the said James Benge, by the said Grover & Baker Sewing Machine Company, upon his orders or by his acceptance, with or without notice to the said John Benge, at the time or times when each and every liability shall become due and payable, or at such time and times for which payment of the same may hereafter, with or without notice to the said John Benge, be extended, then this obligation to be void.

"This obligation is intended to operate as a continuing security for the payment, when the same shall become due and be demanded, of all and every liability incurred to and with the said Grover & Baker Sewing Machine Company by the said James Benge, as aforesaid, to the amount not exceeding the limit of this bond, three thousand dollars.

"James Benge. [Seal.]
"John Benge. [Seal.]"

Plaintiff read in evidence a Statute of the State of Pennsylvania, enacted February 24, 1806, as follows:

"It shall be the duty of the prothonotary of any court of record within this Commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney-at-law or other person to confess judgment, to enter judgment against the person or persons who executed the same, for the amount which, from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing on which the judgment may be founded, which shall have the same force and effect as if a declaration had been filed, and judgment confessed, by an attorney, or judgment obtained in open court and in term time; and the defendant shall not be compelled to pay any costs or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid."

It was stipulated that "the common law of Pennsylvania, the practice of her courts and the construction placed by her courts upon any statutes in force in that State may be proved by the decisions of the Pennsylvania courts, as reported in the printed volumes of Pennsylvania Reports." The other evidence adduced tended to establish or disprove that the property in controversy in the attachment and garnishment belonged to John Benge.

The court instructed the jury "that the Statute Law of the State of Pennsylvania, offered in evidence by the plaintiff and admitted by the defendant to be the law under which the judgment offered in evidence by [292] the plaintiff was entered, did not authorize the prothonotary of the Court of Common Pleas in and for the County of Chester, in the State of Pennsylvania, to enter the said judgment, and their verdict should be for the defendant."

The verdict was accordingly returned for the defendant and judgment entered thereon, and an appeal prosecuted therefrom to the Court of Appeals of the State of Maryland, by which the judgment was affirmed, and a writ of error was thereupon allowed to this court. The opinion of the court of appeals will be found reported in 66 Md. 511.

Messrs. **Albert Constable** and *William T. Warburton* for plaintiff in error.

Mr. **Jno. A. J. Creswell** for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Maryland circuit court arrived at its conclusion upon the ground that the Statute of Pennsylvania relied on did not authorize the prothonotary of the court of common pleas of that State to enter the judgment; and the Court of Appeals of Maryland reached the same result upon the ground that the judgment was void as against John Benge, because the court rendering it had acquired no jurisdiction over his person.

It is settled that notwithstanding the provision of the Constitution of the United States, which declares that "full faith and

of a right of way. The appraisers assessed the damages at $1,552. From such appraisement the defendants appealed to the district court; and on trial there the jury found the damages to be $7,000, for which, with costs, judgment was entered against the Railroad Company. 350] An appeal was taken to the Supreme Court of the Territory, which affirmed this judgment; which judgment of affirmance has been brought before us for consideration. The opinion of that court will be found in 6 Mont. 275.

A preliminary question is presented by the defendants in error: They insist that no bill of exceptions was taken at the trial, and that therefore no rulings of the trial court are before us for consideration, citing as authority the case of *Kerr* v. *Clampitt*, 95 U. S. 188 [24: 493]. In that case, as in this, after the trial a statement of the errors alleged, upon which a motion for a new trial was based, was prepared and filed; but, although signed by counsel, it was held by this court to be not the equivalent of a bill of exceptions, and to be available only for the purpose expressed, to wit, the motion for a new trial. There was in that case no stipulation that the statement should be treated as a bill of exceptions, or be available for other purposes than that of a new trial. It was not authenticated by the trial judge. Lacking that authentication, it was adjudged available only for the purpose named; and that it did not bring into the record, for review in this court, the questions presented. In this case the proceedings on the trial are embodied in a statement prepared like that for the purpose of a motion for a new trial; but, in addition, it is authenticated by the trial judge as a correct statement of the proceedings. Further than that, at the trial a bill of exceptions was prepared in respect to the rulings of the court on instructions, signed by the trial judge and filed at the time, which bill of exceptions was incorporated in the statement. So that we have a separate and perfect bill of exceptions as to the ruling of the court on the matter of instructions; and a statement of all the proceedings in the trial, approved by counsel and authenticated by the trial judge. This proceeding was authorized by the statutes of Montana, and must be adjudged as sufficient for the purposes of review here.

When the case was brought to the Supreme Court of Montana, no new assignments of error were made. The only specifications of error 351] were in the statement prepared for the motion for a new trial in the district court. Perhaps nothing more was necessary; and all the questions arising on the trial may have been open to consideration. Be that as it may, the opinion of the supreme court opens by saying: "There are assignments of error in the statement which are not referred to in appellant's brief, and which will therefore not be considered by this court. Those relied upon are as follows." It then discusses them, and closes with the statement that "these are all the errors complained of and relied upon in appellant's brief." The court also comments upon the character of the record, and says: "It is certainly apparent that it is not such a record as should be filed in this court." The question now arises whether our inquiry is limited to the matters presented to and considered by that court, or should be broadened to all matters that transpired at the trial. Obviously, the former. Error is alleged in the judgment of the Supreme Court of the Territory; and if in all matters presented to it, its rulings were correct, it cannot be affirmed that its judgment was erroneous, because there were in the record matters not vital to the question of jurisdiction or the foundation of right, but simply of procedure, to which its attention was not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party. It would be an anomaly if a party feeling himself aggrieved by the rulings of a trial court could appeal to the Supreme Court of his Territory, and invoke its judgment on certain alleged errors; and when defeated there, could transfer the judgment of that Territorial Supreme Court to this, and ask a reversal here of its judgment on grounds involving mere matters of procedure in the prior trial, to which its attention was not directed. It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them. Our conclusion, therefore, is that our [3 inquiry in this case is only in relation to the matters presented to and reviewed by the Supreme Court of the Territory.

They are three in number: first, that the verdict indicates passion and prejudice. Obviously there is no foundation for this. If the testimony admitted by the trial court was competent, there was ample foundation for the verdict. If the witnesses were to be believed and their testimony was competent, the verdict was not excessive; and the second of the three points presented to the supreme court, which was that the evidence was not sufficient to justify the verdict, thus fails. There remains for consideration but a single point—that there was admitted in evidence on the trial the opinions of witnesses as to the value of the land, which were not based upon the sale of the same or similar property, and were not, therefore, the opinions of persons competent to so testify. It appears that the land taken was a strip running through a mining claim, which had been patented and belonged to the defendants in error. The claim adjoined the Anaconda mining claim, which had been developed and worked, and demonstrated to contain a vein of great value. The claim in controversy had been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip taken ran lengthwise through the claim; and, upon the trial, witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony; but it is the best of which, in the nature of things, the case was susceptible. That this mining claim, which may be called "only a prospect," had a value

fairly denominated a market value, may, as the Supreme Court of Montana well says, be affirmed from the fact that such "prospects" are the constant subject of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, uncertain and speculative as it is, such "prospect" has a market 3] value; and the absence of certainty is not a matter of which the Railroad Company can take advantage, when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the Railroad Company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities. In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is largely a matter of opinion, especially as to real estate. True, in large cities, where articles of personal property are subject to frequent sales, and where market quotations are daily published, the value of such personal property can ordinarily be determined with accuracy; but even there, where real estate in lots is frequently sold, where prices are generally known, where the possibility of rental and other circumstances affecting values are readily ascertainable, common experience discloses that witnesses the most competent often widely differ as to the value of any particular lot; and there is no fixed or certain standard by which the real value can be ascertained. The jury is compelled to reach its conclusion by comparison of various estimates. Much more so is this true when the effort is to ascertain the value of real estate in the country, where sales are few, and where the elements which enter into and determine the value are so varied in character. And this uncertainty increases as we go out into the newer portions of our land, where settlements are recent and values formative and speculative. Here, as elsewhere, we are driven to ask the opinions of those having superior knowledge in respect thereto. It is not questioned by the counsel for plaintiff in error that the general rule is that value may be proved by the opinion of any witness who possesses sufficient knowledge on the subject; but their contention is, that the witnesses permitted to testify had no such sufficient knowledge. It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge. *Stillwell & B. Mfg. Co.* v. *Phelps*, 130 4] U. S. 520 [32: 1035]; *Lawrence* v. *Boston*, 119 Mass. 126; *Chandler* v. *Jamaica Pond Aqueduct Corp.* 125 Mass. 544. The witnesses whose testimony is complained of, all testified that they knew the land and its surroundings; and many of them that they had dealt in mining claims situated in the district, and had opinions as to the value of the property. It is true, some of them did not claim to be familiar with sales of other property in the immediate vicinity; and the want of that means of knowledge is the specific objection made in the Supreme Court of the Territory to the competency of those witnesses. But the possession of that means of knowledge is not essential. It has often been held that farmers living in the vicinity of a farm whose value is in question, may testify as to its value, although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. After a witness has testified that he knows the property and its value, he may be called upon to state such value. The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination. And it is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence.

We think the Supreme Court of Montana was right in holding that no error was committed in permitting the testimony of these witnesses. These are all the questions submitted to that court; and its ruling in respect thereto being correct, its *judgment is affirmed.*

JOHN JOHNSON, *Plff. in Err.*, [30
v.
THOMAS L. RISK ET AL.

(See S. C. Reporter's ed. 300-309.)

Review of state judgments—federal question—defense resting on local statutes—two grounds—Statute of Limitations.

1. To give this court jurisdiction to review a judgment of a state court, it must appear affirmatively, not only that a federal question was presented therein for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.
2. Where in a suit from a state court there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case.
3. Where a defense in a state court is distinctly made, resting on local statutes, this court will not, in order to reach a federal question, resort to

NOTE.—*As to review, by United States Supreme Court, of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see *note* to Miners Bank of Dubuque v. Iowa, 13: 867.

As to exception, when must be taken, to be available on review,—see *note* to Phelps v. Mayer, 14: 643.

As to what particularity in exceptions is necessary in order to a review in appellate court, see *note* to Moore v. Bank of the Metropolis, 10: 172.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions,—see *note* to Parks v. Turner, 13: 883.

The supreme court will not review the discretionary action of the court below. See *note* to Barrow v. Hill, 14: 48.

critical conjecture as to the action of the court in the disposition of such defense.

4. Where in a suit in a state court there is a federal question, and also a ground under the State Statute of Limitations on which the judgment is sustainable, and it does not appear on which of the two grounds the judgment was based, this court has no jurisdiction to review the judgment.

[No. 81.]

Submitted Nov. 18, 1890. Decided Dec. 8, 1890.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment of that court affirming a decree of the Chancery Court of Shelby County, Tennessee, dismissing a suit to recover of an administrator and the sureties and others the amount of a debt. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill filed in the Chancery Court of Shelby County, Tennessee, on October 28, 1885, by John Johnson against Thomas L. Risk, L. Tiff Risk, John D. Milburn, H. C. Warriner, Eben L. Risk, a minor, and his guardian, Alice H. Risk, all residing in Shelby County, and Frank L. Duncan, and Jennie, his wife, residing in Cincinnati, Ohio. The bill averred that the complainant and one E. F. Risk, since deceased, were copartners in the City of Memphis, under the styles of Johnson, Risk & Co. and Risk & Johnson, doing a foundry and also a mercantile business; and that on the first day of February, 1875, the firms were dissolved, and, for ten thousand dollars paid to complainant, he sold and conveyed to Risk his undivided half of the real estate, and also his interest in the machinery, tools and stock of every kind, belonging to said firms, reserving their bills receivable, book accounts and debts due them, which were to remain the joint property of Risk and complainant, but were to be collected by Risk and by him accounted for to complainant in the proportion of one half to complainant and the other to Risk, "in the manner set forth in the deed of bargain and sale executed at the time, and a copy of which is filed with and is a part of this bill, and marked Exhibit 'A.'" It was further averred that "one condition of the said sale was that the said E. F. Risk assumed the payment of each and all the debts and liabilities of every kind whatever of each and both of the said firms of Johnson, Risk & Co. and Risk & Johnson, and bound and obligated himself to pay the same and protect and keep the said Johnson harmless from the payment of any part thereof."

301]

The bill then stated that among the liabilities of the firms so assumed by Risk, was one to his son, L. Tiff Risk, who declined to sue his father for the debt, notwithstanding he knew of the contract "by which his father had gotten all the assets of the said firms and had agreed to pay all their debts and liabilities," but brought suit therefor against the complainant alone in the Circuit Court of Shelby County, and recovered a judgment therein, April 22, 1878, for $1,260.87 and costs; that E. F. Risk never at any time paid any part of this judgment, and on the 27th of August, 1885, the complainant paid L. Tiff Risk $1,000 in satisfaction thereof, by giving him his note for $150, due at four months, and another of the same date for $850, due at six months, with indorsers; and that no part of said sum had been repaid complainant, but the whole remained due and unpaid. Complainant further stated that on the 11th of July, 1878, E. F. Risk filed his petition in bankruptcy in the District Court of the United States for the District of West Tennessee under and in compliance with the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States," approved on the third day of March, 1867, and in such petition asked to be discharged from all his debts and liabilities then existing; that subsequently, on the 20th of December, 1878, a discharge was granted him by the court aforesaid in manner and form as declared in said Act; that E. F. Risk died intestate in Shelby County, Tennessee, on the 20th of June, 1882, without ever having paid any part of the debt to L. Tiff Risk, on which the latter had recovered judgment against complainant; that on the 27th of June, 1882, letters of administration on his estate were granted by the Probate Court of Shelby County to the defendant Thomas L. Risk, who was qualified and became the administrator and executed a bond as such, conditioned according to law, with the defendants John D. Milburn and L. Tiff Risk as his sureties; that the administrator, on the 21st of August, 1882, filed an inventory of the assets of the estate, showing certain cash on hand, and giving a list of personal property, on which no value was set; that on the 27th of September, 1882, the said Thomas L. Risk, as such administrator, filed in the probate court his final settlement of the estate of E. F. Risk, without giving the prescribed statutory notice to creditors and others interested in said estate; and that on the same day an order was entered confirming the settlement and discharging Thomas L. Risk as administrator, canceling his bond and releasing his sureties from further liability. Upon this settlement it was shown by the administrator that the personalty had been disposed of, and that the whole amount with which he should be charged was $1,028.49; and he also showed the debts paid, the expenses of administration and the sum remaining for distribution, and credited himself with the sums paid the distributees of E. F. Risk, deceased, being as follows: to Mrs. Jennie Duncan, to L. Tiff Risk, to Alice H. Risk, as guardian of Eben L. Risk, grandson of E. F. Risk, deceased, and himself, $202.56 each.

Complainant averred that Thomas L. Risk made the payments to the distributees without taking any refunding bond as required by the statute, and in his own wrong and without the authority of law, and that he and his sureties on his administration bond are now liable to complainant on account of the matters set out in the bill for the full amount of said payments and interest thereon until paid. Complainant further showed that on December 1, 1883, Thomas L. Risk was appointed by the probate court administrator *de bonis non* of the estate of E. F. Risk, deceased, and at that time gave a bond as such administrator, with defendants L. Tiff Risk and H. C. Warriner as sureties, and thereupon qualified and had since continued to be such administrator, but had filed no inventory of the assets of said estate since his appointment, and had taken no steps in the

administration so far as the complainant knew or believed.

The bill then proceeded: "Upon the state of facts aforesaid the plaintiff submits that the discharge in bankruptcy of the said E. F. Risk did not discharge him or his estate from liability to the plaintiff on the contract of indemnity, a copy of which is marked Exhibit 'A,' and a part of this bill, but such liability remains upon his estate, and the said Thomas L. Risk, as administrator thereof, personally, as if no discharge in bankruptcy had been granted; and the plaintiff further submits that the said distributees to whom the said Thomas L. Risk distributed the sums aforesaid in the manner aforesaid, to wit (naming them), are liable and are bound by law to refund and pay the said sums so distributed to them, respectively, in order that the same may be applied towards the payment of the demand herein set up by the plaintiff against the estate of the said E. F. Risk, deceased, and the said Thomas L. Risk, as administrator." The bill prayed process, and that on the final hearing complainant might have a decree against the defendants and each of them, or such of them as were liable, jointly or severally, for the sums they respectively owed him, and for general relief.

Exhibit "A" attached to the bill bore date February 1, 1875, and recited that in consideration of ten thousand dollars, the receipt of which was thereby acknowledged, and the further consideration thereinafter mentioned, Johnson had that day bargained, sold and conveyed to E. F. Risk his undivided half or moiety of a certain parcel of land as described (upon which the firm's foundry building was located), together with all the tools and machinery of every sort and kind whatever, then on said lot or in said foundry, and then continued: "This instrument further witnesseth that the firms of Johnson, Risk & Co. and of Risk & Johnson are this day dissolved, the said Johnson selling all his interest in the machinery, tools and stock of every kind on hand belonging to both firms, to the said E. F. Risk, and part of the consideration for said sale and the above conveyance is that the said Risk assumes payment of each and all the debts and liabilities, of every kind whatsoever, of each and both of said firms, and binds and obligates himself to pay the same, and protect and keep said Johnson harmless from the payment of any part thereof;" and it is then provided that the bills receivable, etc., shall be collected by E. F. Risk and divided, as fast as practicable, between himself and Johnson, less necessary costs and charges, one half to each; that $150 shall be paid to Johnson in cash at the end of each and every month, and whenever the monthly collections amount to $1,000 or more in excess of the monthly payment of $150 to Johnson and a like amount retained by Risk, then Risk was to execute his note to Johnson for one half of said collections, payable eight months after date, with interest. It was further provided that Johnson should retain a lien upon the real estate and machinery conveyed, Risk acknowledging the same, "together with a lien equal to and like a mortgage upon his other undivided half of said foundry property, both land and machinery, to secure to Johnson the faithful performance of the undertakings herein made by the said Risk, which are that he will pay over to Johnson at the end of each month $150, one half of all other collections eight months after they are made, with interest thereon at eight per cent per annum, and pay all the debts outstanding, owing by the said two firms or either of them." And: "In the event that Johnson should have to pay any of said debts or be sued thereon, or should not be paid his half of the collections made as stipulated above, then he may proceed forthwith to enforce the liens herein retained and granted, by proper proceeding therefor."

To this bill Thomas L. Risk, in his own right and as administrator *de bonis non* of E. F. Risk, deceased, John D. Milburn and H. C. Warriner demurred, assigning as grounds that E. F. Risk was released from the debt sued for by his discharge in bankruptcy, granted on the 20th of December, 1878, on his petition in bankruptcy filed on the 11th of July, 1878; and also that the supposed cause of action was barred by the Statute of Limitations of two years and six months from the grant of letters of administration, June 27, 1882; and also that the cause of action did not accrue within six years next before the bringing of the suit, and was therefore barred; and a special ground as to Warriner. L. Tiff Risk filed his separate demurrer, assigning the same causes. The chancellor sustained the demurrers and dismissed the bill, and complainant prayed an appeal to the Supreme Court of the State, which, on the 28th of April, 1887, affirmed the decree. Complainant then sued out this writ of error.

The following are sections of the Code of Tennessee of 1884, the numbers being given of that and the preceding edition:

"3087-2249. That all creditors may be duly apprised of the death of any person indebted to them, the executor or administrator of the deceased shall, within two months after qualification, advertise at the court-house of the county where the deceased usually dwelt at the time of his death, and other public places in the county, for all persons to bring to him their accounts and demands."

"3112-2274. Executors and administrators shall have six months from the date of their qualification to ascertain the situation of the deceased's estate, and to arrange and settle it without being liable to suit and costs; and all suits commenced within that period may be abated and dismissed at the plaintiff's cost, except suits brought by sureties of the deceased, which may be brought without delay."

"3117-2279. The creditors of deceased persons, if they reside within this State, shall within two years, and, if without, shall within three years, from the qualification of the executor or administrator, exhibit to them their accounts, debts and claims, and make demand and bring suit for the recovery thereof, or be forever barred in law and equity."

"3222-2377. Creditors whose debts are not due shall be under the same obligation to present their claims as those whose debts are due, and upon failure to do so shall be barred in like manner; but a creditor shall not be bound to present his claim before due except where

the estate is represented to be insolvent, as herein provided."

"3454-2760. The time between the death of a person and the grant of letters testamentary or of administration on his estate, not exceeding six months, and the six months within which a personal representative is exempt from suit, is not to be taken as a part of the time limited for commencing actions which lie against the personal representative."

"3466-2769. All civil actions, other than [306] those for causes embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided."

"3472-2775. Actions for the use and occupation of land, and for rent, actions against the sureties of guardians, executors and administrators, sheriffs, clerks and other public officers for nonfeasance, misfeasance and malfeasance in office, actions on contracts not otherwise expressly provided for, within six years after the cause of action accrued."

"3481-2784. Actions against the personal representatives of a deceased person shall be commenced by a resident of the State within two years, and by a nonresident within three years, after the qualification of the personal representative, if the cause of action accrued in the lifetime of the deceased, or, otherwise, from the time the cause of action accrued."

Mr. **Wm. M. Randolph** for plaintiff in error.

Messrs. **B. M. Estes** and *Estes & Warriner* for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The defendants below demurred upon two general grounds, one of which involved the construction of the provisions of the Bankrupt Act of March 2, 1867, and the other the bar of the Statutes of Limitation of the State of Tennessee. So far as we are advised, no opinion was given by the Supreme Court of that State, upon rendering the judgment of affirmance, and the record discloses no specific statement of the ground upon which the court proceeded. Inasmuch as one of the defenses called for the construction and application of a state statute, in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the decisions of the highest court of the State (*Gormley* v. *Clark*, 134 U. S. 338, 348 [33: 909, 914]), the plaintiff in error, if he [307] wished to claim that this cause was disposed of by the decision of a federal question, should have obtained the certificate of the supreme court to that effect, or the assertion in the judgment that such was the fact.

In *De Saussure* v. *Gaillard*, 127 U. S. 216 [32: 125], the general rule is stated that to give this court jurisdiction of a writ of error to a state court, "it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on ground clearly untenable. *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257 [20: 635]. But where a defense is distinctly made, resting on local statutes, we should not, in order to reach a federal question, resort to critical conjecture as to the action of the court in the disposition of such defense.

Was the defense of the Statute of Limitations so palpably unfounded that we must presume that the state court overruled it?

The decisions of the Supreme Court of Tennessee seem to establish, as to the sections of the Code of that State given above, that section 3117 relates to demands arising against deceased persons in their lifetime, and applies alike to solvent and insolvent estates (*Brown* v. *Porter*, 7 Humph. 373; *Miller* v. *Taylor*, 6 Heisk. 465); that under section 3481, where the estate is solvent, the Statute of Limitations does not begin to run until the demand falls due or right of action accrues (*Trott* v. *West*, 9 Yerg. 433; *Hearn* v. *Roberts*, 9 Lea, 365); that the omission of the advertisement for claims prescribed by section 3087 does not prevent the running of the Statute (*Todd* v. *Wright*, 12 Heisk. 442); that under section 3454, construed with section 3117, the resident creditor has two years and a half after qualification of the personal representative, in which to sue on demands not barred by the General Statute (*Maynard* v. *May*, 2 Coldw. 44; *Todd* v. *Wright*, 12 Heisk. 442); and that when the General Statute has commenced to run in the debtor's lifetime, death suspends its operation for not exceeding six months after that event, and prior to the grant of letters testamentary or of administration, and suit cannot be commenced against the administrator for the six months following such grant. *Bright* v. *Moore*, 87 Tenn. 186; *Boyd* v. *Lee*, 12 Lea, 77.

The bill counted upon the liability of E. F. Risk under the agreement attached as an exhibit, and not otherwise. By that agreement Risk contracted to pay all the debts and liabilities of every kind of the firms, to assume the liabilities and to save Johnson harmless. This was broken by a failure to pay the parties to whom the firms were liable, and it was not necessary to a breach that Johnson should show that he had first paid those parties. It was not an agreement merely to indemnify Johnson from damage, but to assume the indebtedness and discharge him from liability. *Mills* v. *Dow's Adms.* 133 U. S. 423, 432 [33: 717, 721]; *Wicker* v. *Hoppock*, 73 U. S. 6 Wall. 94 [18: 752]; *Locke* v. *Homer*, 131 Mass. 93. In the latter case, *Mr. Justice* Gray, then chief justice of Massachusetts, reviews the authorities, and cites, among others, *Robinson* v. *Robinson*, 24 L. T. Rep. 112. There, by an indenture of dissolution of a partnership between the plaintiff and defendant, the defendant, to whom all the partnership property was transferred, covenanted to pay and satisfy within eighteen

months all the debts of the partnership, and also to indemnify and save harmless the plaintiff against all costs, losses, charges, damages, claims and demands which he might incur or become liable to in respect to the partnership debts. In an action on the defendant's covenant to pay the debts of the partnership, *Lord* Campbell and *Justices* Wightman and Erle held that the measure of damages was the whole amount of the debts which he had not paid, whether they had been paid by the plaintiff, or he had given promissory notes for them, or not. The ruling of the Supreme Court of Tennessee in *Gray* v. *Williams*, 9 Humph. 502, 505, is to the same effect. See also *Atkins* v. *Scarborough's Admr.* Id. 517.

This bill does not show when the debt to L. Tiff Risk became due, nor when suit for its recovery was commenced against Johnson, but it was of course prior to April 22, 1878, when judgment was recovered. The contract of E. F. Risk had therefore been broken prior to that time, and this action was commenced on the 28th of October, 1885, more than seven years and six months after the breach, and more than three years and four months after June 27, 1882, the date of the letters of administration to Thomas L. Risk.

Johnson was a resident of Tennessee, and should have exhibited his claim to the administrator and commenced his action within two and a half years after the letters were issued. Moreover, the cause of action on the agreement would have been barred as early as April 22, 1884, against E. F. Risk, if he had lived, and, so far as his death operated to give further time, that had also expired.

Inasmuch, therefore, as, if the Supreme Court of the State had sustained the defense of the Statutes of Limitation, we cannot perceive that such decision would have been erroneous, it does not appear that the judgment as rendered could not have been given without deciding the federal question, or that its decision was necessary to the determination of the cause and that it was actually decided.

The writ of error must therefore be dismissed.

THE STEAMSHIP NACOOCHEE, *Appt.*,
v.
EDWARD S. MOSELEY ET AL.

EDWARD S. MOSELEY ET AL., *Appts.*,
v.
THE STEAMSHIP NACOOCHEE.

(See S. C. *The Nacoochee*, Reporter's ed. 330-342.)

Maritime law—collision—duty of steam-vessel—change of course—steamer's speed—speed in fog—duty of sail-vessel—sufficient lookout—exceptions.

1. A steam-vessel is bound to keep out of the way of a schooner, and, if a collision occurs, the steamer must be held wholly responsible, unless she shows a fault on the part of the schooner which contributed to the collision, or that it was due to unavoidable accident.
2. If a steamer, after passing a schooner in a fog, changes her course, so that she must know that she is likely to encounter the schooner, she is bound to observe unusual caution, and to maintain only such a rate of speed that she could come to a standstill before she should collide with a vessel which she should see through the fog.
3. At whatever rate a steamer is going, if she is going at such a rate as makes it dangerous to any craft which she ought to see, and might see, she has no right to go at that rate.
4. Every vessel must, in a fog, mist, falling snow or heavy rain-storm, go at a moderate speed, having careful regard to the existing circumstances and conditions.
5. Where there is danger of a collision between a steamer and a schooner, it is the primary duty of the schooner to keep her course; and even if it is an error of judgment in the schooner to hold her course under the special circumstances of the case, it is not a fault, being an act resolved upon *in extremis*, and a compliance with the statute.
6. It is no fault in a schooner, in a fog, that she had only one lookout, where the absence of another lookout did not contribute to the collision, and where the one lookout properly discharged the duties of a lookout and blowing the fog-horn.
7. Exceptions to the refusal of the circuit court to find certain facts cannot be considered, where the testimony is not before this court.

[Nos. 87, 88.]

Argued Nov. 24, 1890. *Decided Dec. 8, 1890.*

APPEALS from a decree of the Circuit Court of the United States for the Southern District of New York, affirming a decree of the District Court in favor of libelants for one half of their damages, for the loss of the schooner Lizzie Thompson, in consequence of her being sunk by a collision with the steamer Nacoochee. *Reversed, and case remanded with a direction to enter a decree for the libelants for the full amount of their damages, with interest and costs.*

The facts are stated in the opinion.

Mr. **Nathan Bijur**, for the Nacoochee:

The Nacoochee was not guilty of any neglect in going at the rate of speed testified to.

The Boston, 1 Sumn. 328-335; *Sturtevant* v. *The George Nicholaus*, Newb. Adm. 449-451; *The Edwin Hawley*, 41 Fed. Rep. 606; *The Leland*, 19 Fed. Rep. 771.

The schooner Lizzie Thompson was at fault.

The Eleanora, 17 Blatchf. 88; *Peck* v. *Sanderson*, 58 U. S. 17 How. 178-182 (15: 205, 207).

Messrs. **Wilhelmus Mynderse** and *Butler, Stillman & Hubbard*, for Moseley *et al.*:

The steamer was bound to keep out of the way of the schooner, and the burden rests upon her to show sufficient reason for not doing so.

NOTE.—*As to collision, rules for avoiding; steamer meeting steamer,*—see *note* to Williamson v. Barrett, 14: 68.

As to rights of steam and sailing vessels with references to each other and in passing and meeting, see *note* to St. John v. Paine, 13: 537.

As to vessel overtaking another, see *note* to The Abbotsford v. Johnson, 25: 168.

As to measure of damages for collision, see *note* to Smith v. Condry, 11: 35; also *note* to The Amiable Nancy, 4: 456.

As to damages, where two vessels are at fault, for injury to another, see *note* to City of Hartford v. Rideout, 24: 930.

The Fannie, 78 U. S. 11 Wall. 238, 240 (20: 114, 115); *The Java*, 14 Blatchf. 524, 527; *New York & L. U. S. M. S. Co.* v. *Rumball*, 62 U. S. 21 How. 372, 383 (16: 144, 148); *The Wenona*, 86 U. S. 19 Wall. 41, 52 (22: 52, 58); *The Colorado*, 91 U. S. 692 (23: 379).

The steamer was not proceeding at a moderate rate of speed in the fog which prevailed, and, in this respect, was violating the statutory requirement.

The Europa, 2 Eng. L. & Eq. 564; Jenkins, Rule of the Road, 52; *The Pennsylvania*, 86 U. S. 19 Wall. 125, 134 (22: 148, 150).

An act done *in extremis* cannot be held a fault.

Haney v. *Baltimore S. Packet Co.* 64 U. S. 23 How. 287, 293 (16: 562, 563); *The Lucille*, 82 U. S. 15 Wall. 676, 681 (21: 247, 249); *The Sea Gull*, 90 U. S. 23 Wall. 165, 181 (23: 90, 94).

There was no dereliction on the part of the schooner in respect to her lookout which contributed to the collision.

The Sunnyside, 91 U. S. 208, 223 (23: 302, 308); *Crockett* v. *The Isaac Newton*, 59 U. S. 18 How. 581, 583 (15: 492, 493).

The schooner was not sailing too fast.

The Colorado, 91 U. S. 692 (23: 379).

[331] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is a libel in admiralty filed in the District Court of the United States for the Southern District of New York, by Edward S. Moseley and others, as owners of the fishing schooner Lizzie Thompson, against the steamer Nacoochee, to recover damages for the loss of the schooner and her outfit and the property on board of her, in consequence of her being sunk by a collision with the steamer, in March, 1883, in the Atlantic Ocean, off Cape May in the State of New Jersey.

The libel alleges negligence on the part of the steamer and absence of fault on the part of the schooner. The collision took place in the daytime in a fog. The answer of the steamer alleges that she was not in fault, and that the collision was due to negligence on the part of those on board of the schooner, in not having the fog-horn properly sounded and in not putting the helm of the schooner hard a-port when the steamer was seen to be within forty or fifty feet from her. After issue joined, the libel was amended by joining as libelants the master and crew of the schooner, for the loss of their personal effects. The case was heard by *Judge* Brown, and he made an interlocutory decree that the libelants recover one half of their damages, his opinion being reported in 22 Fed. Rep. 855. On the report of a commissioner, a decree was entered in the district court, May 19, 1885, in favor of the libelants, for $5,379.14, being one half of their damages, namely, $5,110.57, and their costs, $256.65, and $11.92 interest.

Both parties appealed to the circuit court, where the case was heard before *Judge* Wallace. His opinion is reported in 24 Blatchf. 99, and 28 Fed. Rep. 462. He filed the following findings of fact and conclusions of law, which [332] are contained in the report in 24 Blatchf., but not in the report in 28 Fed. Rep.:

"*Findings of Facts*:

"1. The steamship Nacoochee, belonging to the claimants, is a propeller of about 3,000 tons burden and about 310 feet long. Her propeller is a right-handed propeller, and her engines are compound and reversed by steam, and can be so reversed in 12 seconds. At full speed her propeller makes 62 revolutions a minute, and the speed attained is between 13 and 14 knots an hour. When running at half speed she would forge ahead 600 to 800 feet, after reversing her engines, before beginning to go backwards.

"2. On the 16th of April, 1883, she was bound on her regular voyage from Savannah, Georgia, to the City of New York. She was in all respects in good order, well and sufficiently equipped and manned with competent officers and men, and was blowing her fog-whistle at least once a minute. The wind was moderate and the sea calm, but a dense fog hung low down over the water. At about half-past one or two o'clock in the afternoon of that day, as she was on her usual course, north half east, off Cape May, about 10 miles to the southeast of the Five Fathom light-ship proper, and going at half speed, between six and seven knots an hour, and making 30 revolutions of the propeller to the minute, she overhauled and sighted the schooner Lizzie Thompson, and passed to the eastward of her, at a distance of about two or three hundred yards. The Lizzie Thompson, owned by the libelants, was a fishing schooner, returning from the fishing grounds with a full fare of fish, and bound for New York, having on board sixteen men at the time the Nacoochee passed her. She was going about four knots an hour, with all sails set, upon a course of north-northeast, with the wind south-southeast, blowing at the rate of 8 to 10 miles an hour. But two men were on the schooner's deck, A. J. Small, one of them, acting as a lookout and blowing the fog-horn, and Samuel Kimball, aged twenty, at the wheel. The other fourteen men were all below deck.

"3. At this time, when the Nacoochee was passing the Lizzie Thompson, the fog-horn of the schooner was heard upon the steamer and the steamer's whistle was heard by those on the schooner. Most of the schooner's crew [3 came on deck and saw the steamer till she disappeared ahead in the fog, and then went below. The steamer continued her course north half east until those on board heard what they supposed to be cries of distress on their starboard beam. This was about half-past two o'clock. These cries were heard by the captain and others on board the steamer. After some conference with respect to these cries, and several persons agreeing as to their apparent character, the steamer's helm was put hard to port, and she swung around until she headed a south-southeast course, when her helm was steadied. Very soon afterwards the schooner Lizzie Thompson was suddenly sighted, looming up in the fog on the steamer's starboard bow, about 500 feet away.

"4. The captain of the steamer immediately ordered the engines reversed full speed astern, which orders were immediately obeyed and put

into execution within about 12 seconds, but a collision occurred between her and the Lizzie Thompson, the schooner's port quarter aft of the main chains and about ten feet from the taffrail colliding with the bow of the Nacoochee, which penetrated two or three feet into the schooner, causing the schooner to sink in a very few moments. All her crew were saved and taken on board the steamer, which then resumed her former course N. ¼ E., and pursued her way to New York, arriving there the next morning.

"5. The Lizzie Thompson had continued on her course of north-northeast, after the steamer passed her for the first time, without change up to the moment of collision. The fog continued and was dense, and the same men were on deck, Samuel Kimball at the wheel and A. J. Small on the watch and blowing the horn, and all the others were below deck, including her captain, sitting around. All the sails were set, and she was sailing at the rate of about four miles an hour.

"6. Just before the collision Lookout Small, on the schooner's deck, saw the steamer appearing through the fog and bearing down on them on their port side, about 400 to 500 feet off. He then shouted, 'A steamer is coming into us,' and the men below then came upon deck. Florence McKown, her captain, who sat in the cabin when he heard the watch sing out, 'A steamer is coming into us,' told the man at the wheel to keep his course, and jumped on deck, and saw the steamer approaching on the port quarter. No change was made in the schooner's helm, and she continued her north-northeast course up to the very moment of collision.

"7. After the steamer had turned to go to the supposed cries of distress the captain took his position in front of the pilot-house. A seaman, Andrew Johnson, was on the lookout, standing right up forward as far as he could get, the second officer was on watch in the pilot-house and the quartermaster was at the wheel. All of them heard the fog-horn of the schooner and immediately after saw the schooner appearing through the fog on the starboard bow, about 500 feet away. The captain gave his orders to back full speed astern, and took his position at the stem of the steamer and called out to those on board the schooner, 'Port the helm.'

"8. That, when a screw vessel like the Nacoochee is going through the water at the rate of six miles an hour, and the engines are reversed 'full speed astern,' porting the helm or starboarding the helm has no effect at all on the vessel while she is still going ahead. The Nacoochee had not attained backward motion when she struck the schooner.

"9. That, immediately before the collision, the two vessels did not sight each other through the fog at the same moment, but that the Nacoochee first sighted the Lizzie Thompson when the latter was about 500 feet distant, and the Lizzie Thompson first sighted the Nacoochee when 400 to 500 feet distant.

"*Conclusions of Law:*

"1. That the steamship Nacoochee was in fault, contributing to this collision, for not going at moderate speed in a fog.

"2. That the schooner was in fault, and in this respect, namely, that she was sailing too short-handed in the fog, and was guilty of negligent navigation in having but one man forward charged with the double duties of a lookout and blowing the horn, and one man astern, who was a youth of 20 only, at the wheel, all the other fourteen men, including the captain, being below deck.

"8. The decree of the district court is affirmed, without costs of this court to either party." [335]

The claimant of the steamer filed six exceptions to the refusal of the court to find certain facts as prayed by the claimant, such exceptions being based on the ground that the facts so requested to be found were proved by the evidence and not contradicted by any material evidence in the case, and that therefore the refusal of the court to find the same was an error of law, as a finding against the evidence. The claimant also excepted to the first conclusion of law and to certain findings of fact as being unsupported by any evidence; also to the refusal of the court to make four several conclusions of law, as prayed for—(1) that the steamer was not in fault as contributing to the collision; (2) that the schooner was in fault, because she was sailing at the rate of five miles an hour before the wind, with every sail set, in a dense fog; (3) that the schooner was guilty of negligent navigation, because, immediately before the collision, she did not port her helm in order to avoid immediate danger, when by so doing she could have escaped the collision, and that Rule 24 required her to depart from Rule 23 on the occasion, and that she was not justified in keeping her course up to the moment of collision; (4) that the libel should be dismissed, with costs of the district and circuit courts. There is a bill of exceptions setting forth the foregoing exceptions, but none of the testimony is embodied in the transcript of the record.

A final decree was made by the circuit court, that the libelants recover one half of the damages sustained by them, amounting to $5,110.57, with interest from May 19, 1885, being $421.60, and their costs in the district court, taxed at $256.65, amounting in all to $5,788.82. As both parties had appealed, no costs of the circuit court were given to either of them. From the decree of the circuit court both parties have appealed to this court.

It is contended for the steamer that she was not guilty of any neglect in going at the rate of speed found. Her full rate of speed was between thirteen and fourteen knots an hour. When she first overhauled the schooner her speed was between six and seven knots an hour, and she kept up the latter speed until she reversed her engines on suddenly sighting the schooner in the fog, about five hundred feet away. At the time this collision took place the rules of navigation found in section 4233 of the Revised Statutes were in force. By Rule 15, whenever there was a fog or thick weather, whether by day or night, a sail-vessel under way was required to sound a fog-horn at intervals of not more than five minutes. By Rule 20: "If two vessels, one of which is a sail-vessel and the other a steam vessel, are [336] proceeding in such directions as to involve risk

of collision, the steam-vessel shall keep out of the way of the sail-vessel." By Rule 21: "Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at a moderate speed." By Rule 23: "Where by Rules seventeen, nineteen, twenty and twenty-two, one of two vessels shall keep out of the way, the other shall keep her course, subject to the qualifications of Rule twenty-four." By Rule 24: "In construing and obeying these rules, due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid immediate danger."

It is urged, on the part of the steamer, that, in determining the question whether her speed was a moderate one in the fog, it is to be considered that she supposed she was on a life-saving errand, and was hastening towards what she thought were cries of distress, which required her to move as promptly as possible. It is found as a fact that, when running at half speed, as she was, she would forge ahead 600 to 800 feet, after reversing her engines, before beginning to go backwards; and that she had not attained backward motion when she struck the schooner. This, it is contended, was a moderate speed. It is urged that, if the master of the steamer thought that the fog was of such a character that he could see a vessel at a distance of about 800 feet, and it turned out that the fog was more dense than he thought it to be, he committed merely an excusable error of judgment, and was not guilty of negligence. But we cannot regard these views as controlling. The steamer was bound to keep out of the way of the schooner, and the burden rests upon her to show a sufficient reason for not doing so. She must be held wholly responsible, unless she shows a fault on the part of the schooner which contributed to the collision, or that it was due to unavoidable accident. The latter is not shown, and it is shown that the steamer was not going at a moderate speed in the fog. It is found that the steamer first sighted the schooner when the latter was about 500 feet distant, and that the fog was dense and hung low down over the water. The steamer, from her own course and that of the schooner, when the former overhauled and passed the latter, must have known, by the lapse of time before she heard the supposed sounds of distress, that, when she changed her course, by porting, 13½ points, to south-southeast, it was quite likely she would encounter the schooner. She was bound, therefore, to observe unusual caution, and to maintain only such a rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she should collide with a vessel which she should see through the fog. This is the rule laid down by this court in the case of *The Colorado*, 91 U. S. 692, 702 [23: 379, 383], citing *The Europa*, 2 Eng. L. & Eq. 557, 564, 14 Jur. N. S. 627, and *The Batavier*, 40 Eng. L. & Eq. 19, 25, 9 Moore, P. C. 286. The rule laid down in the last-named case is that, at whatever rate a steamer was going, if she was going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate. See also *The Pennsylvania*, 86 U. S. 19 Wall. 125, 134 [22: 148, 150].

339]

The rule is still maintained, and is expressed as follows, in article 16 of section 1 of the Act of August 19, 1890, chap. 802, entitled "An Act to Adopt Regulations for Preventing Collisions at Sea:" "Art. 16. Every vessel shall, in a fog, mist, falling snow or heavy rain-storm, go at a moderate speed, having careful regard to the existing circumstances and conditions."

In the present case, the steamer discovered the schooner on her starboard bow, about 500 feet away, looming up in the fog. The speed of the schooner was about four knots an hour and that of the steamer between six and seven knots, the combined rate being over ten knots an hour, or over 1,000 feet a minute; so that, at a distance apart of 500 feet, the vessels, at the combined speed, were not over half a minute apart. The steamer's engines could be reversed in twelve seconds; but, although they were reversed at full speed astern, she had not attained backward motion when she struck the schooner. This was not the moderate speed required by the Statute. During the twelve seconds necessary to reverse the engines the steamer would progress ahead 200 feet, leaving the distance between the vessels at the time the steamer commenced to back only 300 feet.

Both of the courts below found the schooner to be in fault. The fault found by the circuit court was that the schooner was sailing too short-handed in the fog, and was guilty of negligent navigation in having but one man forward, charged with the double duties of a lookout and blowing the fog-horn, and one person astern, a youth of only twenty, at the wheel, while all the other fourteen men, including the master, were below deck. In addition, it is contended here for the steamer, that the schooner was sailing too fast in the fog, and that she kept her course, instead of porting, when she sighted the steamer.

It is alleged, in the answer of the steamer, that the schooner was in fault in not putting her helm hard a-port when the steamer was seen to be within forty or fifty feet from her; but it is not averred in the answer that the schooner was sailing too fast in the fog. It is, however, alleged in the answer that the schooner was in fault in not having her fog-horn properly sounded; but this latter defense cannot be maintained, because it is found by the circuit court that the officers of the steamer all of them heard the fog-horn of the schooner before they saw her.

It is contended that the schooner could have avoided the collision by porting her helm when she saw the steamer. But it was the primary duty of the schooner, under Rule 23, to keep her course; and, when her master was notified of the approach of the steamer, he told the man at the wheel of the schooner to keep his course, and no change was made in her helm up to the very moment of her collision. Even if it was an error of judgment in the schooner to hold her course, it was not a fault, being an act resolved upon *in extremis*, a compliance with the statute, and a manœuvre produced by

the fault of the steamer. *New York & L. N. S. M. S. Co.* v. *Rumball*, 62 U. S. 21 How. 372, 383 [16: 144, 148]; *The Nichols*, 74 U. S. 7 Wall. 656, 666 [19: 157, 160]; *The Carroll*, 75 U S. 8 Wall. 302, 305 [19: 392, 393]; *The Elizabeth Jones*, 112 U. S. 514, 526 [28: 812, 816]; *The Bywell Castle*, L. R. 4 Prob. Div. 219.

In regard to the alleged fault of the schooner in sailing too short-handed in the fog, and having only two men on deck, one of them forward, charged with the double duties of a lookout and blowing the horn, and one astern at the wheel, it is not found by the circuit court as a fact that the absence of another lookout contributed to the collision, nor are any facts found which can justify that conclusion, either as fact or law. So far as the findings are concerned, the man forward properly discharged his double duties. He blew the foghorn and it was heard on board the steamer, and it is not found that he did not blow it properly or in accordance with the statute. Nor is it found that he could have performed the duties of a lookout better than he did, or that any different manner of performing those duties, either by him or an additional lookout, could or would have made any difference in the result, or that the steamer would or could have been seen by the schooner any sooner than she was seen. The finding is that the steamer first sighted the schooner when the latter was about 500 feet distant, and the schooner first sighted the steamer when 400 to 500 feet distant. The schooner being low in the water and the fog hanging low down over the water, it was, of course, denser on the deck of the schooner than it was on the higher deck of the steamer, and those on the steamer naturally would see the masts and sails of the schooner up in the lighter fog before the vision of the lookout on the schooner would penetrate the denser fog which enveloped him. Under all these circumstances, and in view of the actual findings, it cannot be held that there was any lack of vigilance on the part of the schooner in the matter of a lookout. *The Farragut*, 77 U. S. 10 Wall. 334 [19: 946]; *The Fannie*, 78 U. S. 11 Wall. 238, 243 [20: 114, 116]; *The Annie Lindsley*, 104 U. S. 185, 191 [26: 716, 719].

Nor is there anything in the suggestion that the schooner was sailing too fast. It is not so averred in the answer or found by the circuit court.

The exceptions to the refusals of the circuit court to find certain facts cannot be considered, because the testimony is not before us. *The Francis Wright*, 105 U. S. 381 [26: 1100]. The exceptions to the refusal to find certain conclusions of law are considered sufficiently in what has been said already.

The decree of the Circuit Court is reversed, and the case is remanded, with a direction to enter a decree for the libelants for the full amount of their damages, with interest from the date of the report of the commissioner in the District Court, and for their costs in the District Court and in the Circuit Court, and in this court, on both appeals.

HENRY JONES, *Plff. in Err.*, v. UNITED STATES.

(See S. C. Reporter's ed. 202-224.)

The Guano Islands Act—jurisdiction to try for murder committed at Navassa Island—new territory, how acquired—political question—judicial notice—facts, how ascertained.

1. The Guano Islands Act of August 18, 1856, 164, re-enacted in title 72 of the Revised Statutes, is constitutional and valid; and the Island of Navassa must be considered as appertaining to the United States.
2. The Circuit Court of the United States for the District of Maryland had jurisdiction to try an indictment for murder committed at Navassa Island, that being the district into which the offender was first brought from such island.
3. By the law of nations, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest.
4. Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects, of that government.
5. All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the Legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings.
6. In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy.

[No. 1143.]

Argued Oct. 29, 1890. Decided Nov. 24, 1890.

IN ERROR to the Circuit Court of the United States for the District of Maryland, to review a judgment convicting plaintiff in error, Henry Jones, of murder, committed at Navassa Island. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Archibald Stirling, John Henry Keene, Jr., E. J. Waring,** *Joseph S. Davis* and *J. Edward Stirling*, for plaintiff in error:

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see *note* to Emory v. Greenough, 1: 640.

As to jurisdiction of United States courts over common-law offenses, see *note* to United States v. Coolidge, 4: 124.

As to the jurisdiction of state and United States courts, as to territory and offense, see *note* to United States v. Bevans, 4: 404.

That dominion acquired over conquered or ceded territory does not devest the vested rights of individuals to property; former laws continue until altered by new sovereign,—see *note* to Delassus v. United States, 9: 71.

The Guano Law under which it is sought to punish the plaintiff in error is unconstitutional.

State v. *Springfield*, 6 Ind. 84; *Beebe* v. *State*, Id. 501; *Oakley* v. *Aspinwall*, 3 N. Y. 547-568; Wheat. Int. Law, § 161.

The Guano Act expressly provides that the *locus in quo* should not become part of the territorial domain of the United States.

Grafflin v. *Nevassa Phosphate Co.* 35 Fed. Rep. 474, 476.

Penal statutes are always strictly construed, and there can be no constructional crimes.

State v. *Lovell*, 23 Iowa, 304; *Lair* v. *Killmer*, 25 N. J. L. 524; Sedgwick, Stat. and Const. Constr. 280, 281: 1 Story, Const. §§ 413, 419, 424, 426; *United States* v. *Wiltberger*, 18 U. S. 5 Wheat. 94, 95 (5: 42).

The jurisdiction of federal courts in criminal cases is expressly confined to the punishment of treason, piracies, offenses on the high seas, offenses against the law of nations and against the postal system.

U. S. Const. art. 1, § 8, art. 3, § 2; *Allen* v. *Newbury*, 62 U. S. 21 How. 246 (16: 111).

The Constitution confers admiralty and maritime jurisdiction according to the nature, extent and modifications of the common law.

Story, Const. § 1673; 1 Kent, Com. 361, *note*.

In cases fully dependent upon locality, admiralty jurisdiction is limited to the sea.

United States v. *Coombs*, 37 U. S. 12 Pet. 72 (9: 1004).

Neither Congress nor court can make causes cases of admiralty which are not so by the Constitution.

United States v. *Bevans*, 16 U. S. 3 Wheat. 362 (4: 410); *United States* v. *La Vengeance*, 3 U. S. 3 Dall. 297 (1: 610).

An act to come under admiralty must arise wholly upon the sea. The power to punish felonies on the high seas means water.

United States v. *Furlong*, 18 U. S. 5 Wheat. 184 (5: 64); *Waring* v. *Clarke*, 46 U. S. 5 How. 463 (12: 237); *The Belfast*, 74 U. S. 7 Wall. 636 (19: 269).

English maritime law is our maritime law.

The Siren, 80 U. S. 13 Wall. 389 (20: 505); *The Lottawanna*, 88 U. S. 21 Wall. 558 (22: 654).

No single nation can change the law of the sea.

The Scotia, 81 U. S. 14 Wall. 170 (20: 822); *The St. Lawrence*, 66 U. S. 1 Black, 526, 527 (17: 182); Cooley, Const. § 1717.

Where a blow is given on sea, and death results on land, such a case does not come under admiralty and maritime jurisdiction.

United States v. *M'Gill*, 4 U. S. 4 Dall. 426 (1: 894).

A tort committed on shore or in a foreign port does not come under admiralty jurisdiction.

Adams v. *Haffards*, 20 Pick. 127; *United States* v. *Davis*, 2 Sumn. 482.

Admiralty has not and never claimed jurisdiction over any torts but those on the high seas.

Thomas v. *Lane*, 2 Sumn. 9, 10.

Mr. **W. H. H. Miller**, *Atty-Gen.*, for defendant in error:

Nothing is better established in international law than national title to territory, whether island or continental, by discovery and occupation, or by occupation alone.

Lawrence's Wheat. Int. Law (2d ed.) 305; Whart. Int. Law, chap. 14, §§ 310-314; Whart. Int. Law Dig. §§ 2, 3, 200.

For Congress to prescribe a punishment for a crime on the high seas, for which a definition may be found in international law, is a sufficient compliance with the clause of the Constitution of the United States authorizing Congress to define and punish piracies.

United States v. *Smith*, 18 U. S. 5 Wheat. 153 (5: 57); *United States* v. *Pirates*, Id. 184 (64).

The title by discovery or occupation is a title in the government and not in the individual.

American Guano Co. v. *United States Guano Co.* 44 Barb. 23; *Grafflin* v. *Nevassa Phosphate Co.* 35 Fed. Rep. 474; *Thirty Hogsheads of Sugar* v. *Boyle*, 13 U. S. 9 Cranch, 191 (3: 701).

Any nation has the inherent right everywhere to supervise the conduct and try and punish its citizens or subjects for crimes, wherever committed, provided only that in so doing it does not contravene the laws, sovereignty or jurisdiction of any other nation.

Dainese v. *Hale*, 91 U. S. 13 (23: 190).

The question submitted to the President in this matter is purely political—one with which the courts have nothing to do.

Georgia v. *Stanton*, 73 U. S. 6 Wall. 50 (18: 721); *Luther* v. *Borden*, 48 U. S. 7 How. 1, 43, 45 (12: 581, 599, 600); *Martin* v. *Mott*, 25 U. S. 12 Wheat. 19 (6: 537); *Kennett* v. *Chambers*, 55 U. S. 12 How. 38 (14: 316); *Dorsheimer* v. *United States*, 74 U. S. 7 Wall. 166 (19: 187); *United States* v. *Speed*, 75 U. S. 8 Wall. 83 (19: 451); *Re Day*, 27 Fed. Rep. 678; *United States* v. *Doherty*, Id. 730; *Dequindre* v. *Williams*, 31 Ind. 444; *United States* v. *Arredondo*, 31 U. S. 6 Pet. 729 (8: 561); *Whiton* v. *Albany C. Ins. Co.* 109 Mass. 24.

It would not have been proper to have alleged that there was a deposit of guano upon this island.

Martin v. *Mott*, 25 U. S. 12 Wheat. 19 (6: 537).

Mr. Justice **Gray** delivered the opinion of the court: [2

This was an indictment, found in the District Court of the United States for the District of Maryland, and remitted to the circuit court under Rev. Stat., § 1039, alleging that Henry Jones, late of that district, on September 14, 1889, "at Navassa Island, a place which then and there was under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any particular State or district of the United States, the same being, at the time of the committing of the offenses in the manner and form as hereinafter stated by the persons hereinafter named, an island situated in the Caribbean Sea, and named Navassa Island, and which was then and there recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and which was then and there recognized and considered by the United States as appertaining to the United States, and which was also then and there in the possession of the United States, under the laws of [2

the United States then and there in force relating to such islands," murdered one Thomas N. Foster, by giving him three mortal blows with an axe, of which he there died on the same day; and that other persons named aided and abetted in the murder. The indictment, after charging the murder in usual form, alleged that the District of Maryland was the district of the United States into which the defendant was afterwards first brought from the Island of Navassa.

The defendant filed a general demurrer, which was overruled, and he then pleaded not guilty. The jury returned a verdict of guilty; and a bill of exceptions was tendered by the defendant, and allowed by the court, in substance as follows:

At the trial, the United States, to prove that Navassa Island was recognized and considered by the United States as appertaining to the United States, and in the possession of the United States, under the provisions of the laws of the United States in force with regard to such islands, offered in evidence certified copies of papers, from the records of the State Department of the United States, as follows:

A copy of a memorial addressed to the Secretary of State by Peter Duncan, signed and sworn to by him on November 18, 1857, before a commissioner of the Circuit Court of the United States for the District of Maryland, and certified by the present Secretary of State to be "a true copy from Senate Executive Document No. 37, 36th Congress, 1st session, filed in this Department with papers relating to the discovery of guano on the Island of Navassa," which was in these words:

"To the Honorable the Secretary of State of the United States:

"Peter Duncan, a citizen of the United States, respectfully represents to the Department of State of the United States that on the first day of July in the year 1857 he did discover a deposit of guano on an island or key in the Caribbean Sea, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, which said island or key is called Navassa, and lies in latitude 18° 10′ north, longitude 75° west, forty-five miles or thereabouts from the Island of St. Domingo, and seventy miles or thereabouts from the Island of Jamaica. The said Island of Navassa is about two miles in length and a mile and a half in width, apparently of volcanic origin, and elevated about three hundred feet above the surface of the sea, presenting a rocky, perpendicular cliff or shore on all sides, except for a small space to the north. It is covered with small shrubs upon the surface, beneath which is a deposit of phosphatic guano, varying in depth from one to six feet, and estimated in quantity at one million of tons.

"And said claimant further represents that on the 19th day of September, 1857, he did take peaceable possession of and occupy said island or key of Navassa in the name of the United States, and continues so to occupy the same, and is prepared to furnish satisfactory evidence thereof, and of all others the requisites and facts prescribed by the Act of Congress in such case made and provided.

"Wherefore he prays that said key or island of Navassa may be considered and declared as appertaining to the United States, and that he, the said claimant, may have the rights and advantages allowed and secured to him as such discoverer, which are by the Act of Congress aforesaid provided.

"Peter Duncan."

Also a copy of a proclamation, certified by the present Secretary of State to be "a copy of a proclamation issued by this Department on the 8th day of December, 1859 in respect to the discovery of guano on the Island of Navassa by Peter Duncan," which was in these words: [206

"Lewis Cass, Secretary of State of the United States, to all to whom these presents shall come, greeting:

"Know ye that Peter Duncan, a citizen of the United States, has filed in this Department the required notice of the discovery of guano on and of the occupation of the Island of Navassa, in the Caribbean Sea, in the name of the United States of America, the same being in north latitude eighteen degrees and ten minutes and in longitude seventy-five degrees west; and that Edward K. Cooper, also a citizen of the United States, and the assignee of the said Peter Duncan, has entered into sufficient bonds under and according to the provisions of the Act of the Congress of the United States passed on the eighteenth day of August in the year eighteen hundred and fifty-six; wherefore the said Edward K. Cooper is entitled, in respect to the guano on the said island, to all the privileges and advantages intended by that Act to be secured to citizens of the United States who may have discovered deposits of guano; provided always, that the said Edward K. Cooper shall abide by the conditions and requirements imposed by the Act of Congress aforesaid.

"In witness whereof I, Lewis Cass, Secretary of State of the United States of America, have hereunto set my hand and caused the seal of the Department of State to be affixed at Washington this eighth day of December, 1859.

"[Seal] Lewis Cass."

The United States further proved that on September 14, 1889, the Island of Navassa was in the possession of the Navassa Phosphate Company, incorporated by the State of New York, and which held the island as assignees of Duncan and Cooper, mentioned in the foregoing papers; that the persons then "on the island consisted of 137 colored laborers of said company and 11 white officers or superintendents, all residents of the United States, appointed by the company, the laborers, including the defendant, being employed in digging the phosphate or guano [20' and transporting by railroad propelled by man power and handling the phosphate or guano found on the island and putting it on shipboard, which digging and mining is carried on by digging and blasting with

dynamite and working with picks and other iron tools, and which phosphate or guano so mined is the article called Navassa phosphate in the market, and is the only substance on the island which is dug, mined, worked, transported or sold, the said laborers being shipped at Baltimore under shipping articles," a copy of which is in the margin*; that on that day a riot took place there, in which a large number of laborers was engaged against the officers, and the defendant killed Thomas N. Foster, one of the officers, under circumstances which the jury found amounted to murder, as charged in the indictment; and that afterwards the defendant was first brought into the District of Maryland, as therein charged.

Evidence offered by the defendant that on April 16, 1889, a foreign vessel was loading at Navassa with a cargo of this phosphate of lime, intended for the use of persons other than citizens or residents of the United States, and finished such loading a few days afterwards, was excluded by the court as immaterial; and the defendant excepted to its exclusion.

After verdict, the defendant moved in arrest of judgment, for various reasons, the only one of which relied on in argument was this: "Because the Act of August 18, 1856, chap. 164, now codified with amendments as title 72 of the Revised Statutes of the United States, is unconstitutional and void, and the court was without jurisdiction to try the defendant under the indictment found against him."

The motion was overruled, and the defendant sentenced to death; and he sued out this writ of error under the Act of February 6, 1889, chap. 113, § 6 (25 Stat. 656).

The provisions of the Act of Congress of August 18, 1856, chap. 164, entitled "An Act to Authorize Protection to be Given to Citizens of the United States Who may Discover Deposits of Guano" (11 Stat. 119), since re-enacted in title 72, §§ 5570-5578, of the Revised Statutes, are as follows:

By section 1, when any citizen of the United States shall "discover a deposit of guano on any island, rock or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and shall take peaceable possession thereof, and occupy the same, said island, rock or key may, at the discretion of the President of the United States, be considered as appertaining to the United States;" provided that the discoverer, as soon as practicable, shall give notice, on oath, to the State Department of the United States, of such discovery, occupation and possession, describing the island, its latitude and longitude, and showing that such possession was taken in the name of the United States, and shall furnish to the State Department satisfactory evidence that the island was not, at the time of his discovery, possession or occupation, in the possession or occupation of any other government or its citizens. All the facts and conditions thus specified must appear to the satisfaction of the President, in order to enable him to exercise the discretionary power conferred upon him of determining that the island shall be considered as appertaining to the United States. [210]

When the President determines that the island shall be considered as appertaining to the United States, and not before, section 2 of the Statute authorizes him to allow the discoverer or his assigns the exclusive right, subject to be terminated by Congress at any time, of occupying the island for the purpose of obtaining and selling the guano, first giving bond, with such penalties and securities as may be required by the President, "to deliver the said guano to citizens of the United States, for the purpose of being used therein, and to none others," "and to provide all necessary facilities for that purpose within a time to be fixed in said bond." And, by the same section, any breach of the conditions of the bond "shall be taken and deemed a forfeiture of all rights accruing under and by virtue of this Act."

The scope and effect of the first two sections, as above stated, clearly appear on the

*Navassa Phosphate Company, 20 & 22 South Street, Baltimore.

This agreement, made at Baltimore the 12th day of January, 1889, by and between the Navassa Phosphate Company, of the first part, and the undersigned laborers of the United States, of the second part, as follows: Said laborers agree to proceed, under the orders and instructions of said Navassa Phosphate Company, or its agents, on board such vessel as shall be provided for the purpose, to Navassa Island, for the business of assisting in loading of vessels with cargo, either by working on shore or in boats; and for this purpose the parties of the second part hereby covenant and agree to devote their whole time and services in such labor as they may be directed to do by said Navassa Phosphate Company, or its agents, and for as many months as the said Navassa Phosphate Company may desire, not exceeding in all fifteen months from the time of arriving at Navassa Island, until discharged therefrom, at which time their wages are to commence and cease. And the said Navassa Phosphate Company agrees on its part to pay said undersigned the monthly wages set opposite their respective names, and to furnish a free passage to and from said Island of Navassa, and further to find said undersigned laborers in the usual provisions furnished to such laborers, free of all expense to the parties of the second part.

Payment of wages to be made on the return of the parties of second part to Baltimore. And should they fail to obey the orders and instructions of said Navassa Phosphate Company, or its agents, or refuse at any time to labor, they shall forfeit all claim for wages and compensation which may be due them.

If said Navassa Phosphate Company fails to comply with this agreement on its part, it shall forfeit the sum of twenty dollars, in addition to full monthly wages and free passage, to the parties of the second part to this contract. The parties of the second part further agree, in case of sickness or lost time, to pay the said Navassa Phosphate Company fifty cents per day board, and said Navassa Phosphate Company not to be liable for any wages or compensation for time lost by the parties of the second part by sickness or otherwise.

The parties of the second part agree, upon signing the contract, to obey and abide by all the rules, regulations and laws that may now be in operation or hereafter put in force on the Island of Navassa, West Indies, for the better protection of life and property, and that may be deemed necessary for police protection and discipline of the island; and release said Navassa Phosphate Company from any and all liability for any injury arising from accident, or from any acts of any officer or employé on the Island of Navassa.

It is further understood and agreed to by the parties of the second part that, in case they are not

face of the Act, and were pointed out in opinions given by Attorney-General Black to the Secretary of State on June 2, 1857, and July 12, 1859. 9 Ops. Atty-Gen. 30, 364. See also a letter of the Secretary of State of July 1, 1857, in 3 Wharton's International Law Digest, § 311.

The other sections of the Act manifestly apply only to islands which the President has determined shall be considered as appertaining to the United States.

By section 3, "the introduction of guano from such islands, rocks or keys shall be regulated as in the coasting trade between different ports of the United States, and the same laws shall govern the vessels concerned therein." By section 4, "nothing in this Act contained shall be construed obligatory on the United States to retain possession of the islands, rocks or keys as aforesaid, after the guano shall have been removed from the same." And by section 5, "the President of the United States is hereby authorized, at his discretion, to employ the land and naval forces of the United States to protect the rights of the said discoverer or discoverers, or their assigns, as aforesaid."

By section 6 of the same Act, re-enacted in section 5576 of the Revised Statutes, all acts done, and offenses or crimes committed, on any such island, rock or key, by persons who may land thereon, or in the waters adjacent thereto, "shall be held and deemed to have been done or committed on the high seas, on board a merchant ship or vessel belonging to the United States, and be punished according to the laws of the United States relating to such ships or vessels and offenses on the high seas; which laws, for the purposes aforesaid, are hereby extended to and over such islands, rocks or keys."

This section does not (as argued for the defendant) assume to extend the admiralty jurisdiction over land; but, in the exercise of the power of the United States to preserve peace and punish crime in all regions over which they exercise jurisdiction, it unequivocally extends the provisions of the statutes of the United States for the punishment of offenses committed upon the high seas to like offenses committed upon guano islands which have been determined by the President to appertain to the United States. In either case, the crime, the punishment and the procedure are statutory, the whole criminal jurisdiction of the courts of the United States being derived from Acts of Congress. *United States* v. *Hudson*, 11 U. S. 7 Cranch, 32 [3: 259]; *United States* v. *Britton*, 108 U. S. 199, 206 [27: 698, 700).

By the Constitution of the United States, while a crime committed within any State must be tried in that State and in a district previously ascertained by law, yet a crime not committed within any State of the Union may be tried at such place as Congress may by law have directed. Constitution, art. 3, § 2; Amendments, art. 6; *United States* v. *Dawson*, 56 U. S. 15 How. 467, 488 [14: 775, 784]. Congress has directed that "the trial of all offenses committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." Rev. Stat. § 730. And Congress has awarded the punishment of death to the crime of murder, whether committed upon the high seas or other tide waters out of the jurisdiction of any particular State, or "within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the exclusive jurisdiction of the United States." Rev. Stat. § 5339. Both these Acts of Congress clearly include murder committed on any land within the exclusive jurisdiction of the United States and not within any judicial district, as well as murder committed on the high seas. *Ex parte Bollman*, 8 U. S. 4 Cranch, 75, 136 [2: 554, 574]; *United States* v. *Bevans*, 16 U. S. 3 Wheat. 336, 390, 391 [4: 404, 417]; *United States* v. *Arwo*, 86 U. S. 19 Wall. 486 [22: 67].

|212

By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and when citizens or subjects of one nation, in its name, and by its authority or with its assent, take and hold actual, continuous and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such juris-

---

competent to perform the duties as herein stated, they to pay their passage back to the United States, and the party of the first part not to be liable for any wages whatsoever. It is also understood that fifty cents per month shall be deducted from the wages of the parties of the second part for medicines and medical attention.

Navassa Phosphate Company,
Per John H. Haskell, for the Company.

In consideration to the foregoing, and the advance wages set opposite our names, the receipt whereof is hereby acknowledged, we have signed this contract, in duplicate, as witness our hands:

We hereby certify that we, the undersigned, were present on board the brig Romance, in the harbor of Baltimore, Md., when the above-named men acknowledged that they had signed the above contract, and that they were willing to go to Navassa Island, W. I., and obey all orders, rules and regulations; that the advance set opposite their respective names was correct, and that they had received the money.

Charles Brown, Master.
Frederick Abbott, Mate.
John W. Peed, Shipper.

Baltimore, January 12th, 1889.

Signatures.	Monthly wages.	Advance paid.	Witness to signature and payment.	Age.	Place of Birth.
No. 14. Henry Jones	$8.00	$10.00	4—1	22	Baltimore.
* * * * * *	* *	* *	* * *	* *	* * *
* * * * * *	* *	* *	* * *	* *	* * *

diction and for such period as it sees fit over territory so acquired. This principle affords ample warrant for the legislation of Congress concerning guano islands. Vattel, lib. 1, chap. 18; Wheaton on International Law (8th ed.) §§ 161, 165, 176, *note 104;* Halleck on International Law, chap. 6, §§ 7, 15; 1 Phillimore on International Law (3d ed.) §§ 227, 229, 230, 232, 242; 1 Calvo, Droit International (4th ed.) §§ 266, 277, 300; *Whiton* v. *Albany C. Ins. Co.* 109 Mass. 24, 31.

Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects, of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances. *Gelston* v. *Hoyt*, 16 U. S. 3 Wheat. 246, 324 [4: 381, 401]; *United States* v. *Palmer*, Id. 610 [471]; *The Divina Pastora*, 17 U. S. 4 Wheat. 52 [4: 512]; *Foster* v. *Neilson*, 27 U. S. 2 Pet. 253, 307, 309 [7: 415, 433, 434]; *Keene* v. *M'Donough*, 33 U. S. 8 Pet. 308 [8: 955]; *Garcia* v. *Lee*, 37 U. S. 12 Pet. 511, 520 [9: 1176]; *Williams* v. *Suffolk Ins. Co.* 38 U. S. 13 Pet. 415 [10: 226]; *United States* v. *Yorba*, 68 U. S. 1 Wall. 412, 423 [17: 635, 637]; *United States* v. *Lynde*, 78 U. S. 11 Wall. 632, 638 [20: 230, 232]. It is equally well settled in England. *The Pelican*, Edw. Adm. Appx. D; [213] *Taylor* v. *Barclay*, 2 Sim. 213; *Emperor of Austria* v. *Day*, 3 DeG. F. & J. 217, 221, 233; *Republic of Peru* v. *Peruvian Guano Co.* L. R. 36 Ch. Div. 489, 497; *Republic of Peru* v. *Dreyfus*, L. R. 38 Ch. Div. 348, 356, 359.

In *Williams* v. *Suffolk Ins. Co.*, in an action on a policy of insurance, the following question arose in the circuit court, and was brought up by a certificate of division of opinion between the judges thereof:

"Whether, inasmuch as the American government has insisted and does still insist, through its regular executive authority, that the Falkland Islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayrean government to regulate, prohibit or punish, it is competent for the circuit court in this cause to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of the said Falkland Islands, and, if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject; or whether the action of the American government on this subject is binding and conclusive on this court as to whom the sovereignty of those islands belongs." 38 U. S. 13 Pet. 417 [10: 227].

This court held that the action of the executive department, on the question to whom the sovereignty of those islands belonged, was binding and conclusive upon the courts of the United States, saying: "Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that, in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union." "In the present case, [214] as the executive in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands, the fact must be taken and acted on by this court as thus asserted and maintained." 38 U. S. 13 Pet. 420 [10: 228].

All courts of justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the government whose laws they administer, or of its recognition or denial of the sovereignty of a foreign power, as appearing from the public acts of the Legislature and executive, although those acts are not formally put in evidence, nor in accord with the pleadings. *United States* v. *Reynes*, 50 U. S. 9 How. 127 [13: 74]; *Kennett* v. *Chambers*, 55 U. S. 14 How. 38 [14: 316]; *Hoyt* v. *Russell*, 117 U. S. 401, 404 [29: 914]; *Coffee* v. *Groover*, 123 U. S. 1 [31: 51]; *State* v. *Dunwell*, 3 R. I. 127; *State* v. *Wagner*, 61 Me. 178; *Taylor* v. *Barclay* and *Emperor of Austria* v. *Day*, above cited; 1 Greenl. Ev. § 6.

In *United States* v. *Reynes*, upon the question whether a Spanish grant of land in Louisiana was protected, either by the Treaty of Retrocession from Spain to France, or by the Treaty of Paris, by which the Territory of Louisiana was ceded to the United States, this court held: "The Treaties above mentioned, the public acts and proclamations of the Spanish and French governments, and those of their publicly recognized agents, in carrying into effect those Treaties, though not made exhibits in this cause, are historical and notorious facts, of which the court can take regular judicial notice, and reference to which is implied in the investigation before us." 50 U. S. 9 How. 147, 148 [13: 82].

In *Kennett* v. *Chambers*, a bill to compel specific performance of a contract made in the United States in September, 1836, by which a general in the Texan army agreed to convey lands in Texas, in consideration of money paid him to aid in raising and equipping troops against Mexico, was dismissed on demurrer, because the independence of Texas, though previously declared by that State, had not then been acknowledged by the government of the United States; and the court established this conclusion by referring to messages of the President of the [215] United States to the Senate, a letter from the President to the Governor of Tennessee and a note from the Secretary of State to the Mexican minister, none of which were stated

in the record before the court. 55 U. S. 14 How. 47, 48 [14: 44, 45].

So in *Coffee* v. *Groover*, upon writ of error to the Supreme Court of Florida, in a case involving a title to land, claimed under conflicting grants from the State of Florida and the State of Georgia, and depending upon a disputed boundary between those States, this court ascertained the true boundary by consulting public documents, some of which had not been given in evidence at the trial, nor referred to in the opinion of the court below. 123 U. S. 11 [31: 56], *et seq.*

In *Taylor* v. *Barclay*, a bill in equity, based on an agreement which it alleged had been made in 1825 by agents of "the government of the Federal Republic of Central America, which was a sovereign and independent state, recognized and treated as such by His Majesty the King of these Realms," was dismissed on demurrer by *Vice-Chancellor* Shadwell, who said: "I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized as an independent government by the government of this country." "Inasmuch as I conceive it is the duty of the judge in every court to take notice of public matters which affect the government of this country, I conceive that, notwithstanding there is this averment in the bill, I am bound to take the fact as it really exists, not as it is averred to be." "Nothing is taken to be true, except that which is properly pleaded; and I am of opinion that when you plead that which is historically false, and which the judges are bound to take notice of as being false, it cannot be said you have properly pleaded, merely because it is averred in plain terms; and that I must take it just as if there was no such averment on the record." 2 Sim. 220, 221, 223.

That case is in harmony with decisions made in the time of *Lord* Coke, and in which he took part, that against an allegation of a public Act of Parliament, of which the judges ought to take notice, the other party cannot plead *nul tiel record*, but, if the Act be misrecited, ought to demur in law upon it. *The Prince's Case*, 8 Coke, Rep. 14*a*, 28*a*; *Woolsey's Case*, Godb. 178.

In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. Gresley, Eq. Ev. pt. 3, chap. 1; *Fremont* v. *United States*, 58 U. S. 17 How. 542, 557 [15: 241, 245]; *Brown* v. *Piper*, 91 U. S. 37, 42 [23: 200, 202]; *State* v. *Wagner*, 61 Me. 178. Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll or other official records. *Spring* v. *Eve*, 2 Mod. 240; 1 Hale's Hist. Com. Law (5th ed.) 19-21; *Gardner* v. *Collector*, 73 U. S. 6 Wall. 499 [18: 890]; *South Ottawa* v. *Perkins*, 94 U. S. 260, 267-269, 277 [24: 154, 157, 158, 161]; *Post* v. *Supervisors*, 105 U. S. 667 [26: 1204]. As to international affairs, such as the recognition of a foreign government, or of the diplomatic character of a person claiming to be its representative, they may inquire of the Foreign Office or the Department of State. *Taylor* v. *Barclay*, above quoted; *The Charkieh*, L. R. 4 Adm. & Eccl. 59, 74, 86; *Ex parte Hitz*, 111 U. S. 766 [28: 592]; *Re Baiz*, 135 U. S. 403 [34: 222].

In the case at bar, the indictment alleges that the Island of Navassa, on which the murder is charged to have been committed, was at the time under the sole and exclusive jurisdiction of the United States and out of the jurisdiction of any particular State or district of the United States, and recognized and considered by the United States as containing a deposit of guano within the meaning and terms of the laws of the United States relating to such islands, and recognized and considered by the United States as appertaining to the United States, and in the possession of the United States, under those laws.

These allegations, indeed, if inconsistent with facts of which the court is bound to take judicial notice, could not be treated as conclusively supporting the verdict and judgment. But, on full consideration of the matter, we are of opinion that those facts are quite in accord with the allegations of the indictment.

The power, conferred on the President of the United States by section 1 of the Act of Congress of 1856, to determine that a guano island shall be considered as appertaining to the United States, being a strictly executive power, affecting foreign relations, and the manner in which his determination shall be made known not having been prescribed by statute, there can be no doubt that it may be declared through the Department of State, whose acts in this regard are in legal contemplation the acts of the President. *Wolsey* v. *Chapman*, 101 U. S. 755, 770 [25: 915, 920]; *Runkle* v. *United States*, 122 U. S. 543, 557 [30: 1167, 1171]; 11 Ops. Atty-Gen. 397, 399. [217

On referring to the memorial sworn to by Peter Duncan on November 18, 1857, and to the Proclamation of the Secretary of State of December 8, 1859 (copies of both of which, verified by the present Secretary of State, were given in evidence at the trial of this case), and to other papers of intermediate dates, filed in the Department of State, communicated by the President to the Senate on April 12, 1860, and printed by order of the Senate in Executive Document No. 37 of the first session of the Thirty-sixth Congress, the following facts appear in regard to the Island of Navassa:

Duncan's memorial on oath was presented to the Secretary of State on December 3, 1857. In that memorial Duncan represented that on July 1, 1857, he discovered a deposit of guano on an island called Navassa, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government; described the island, its latitude and longitude, and the deposit of guano thereon; and further represented that on September 19, 1857, he took peaceable possession of and occupied the island in the name of the United States and

continued so to occupy it, and was prepared to furnish satisfactory evidence thereof, and of all other requisites and facts prescribed by the Act of Congress of 1856; and prayed that the island "may be considered and declared as appertaining to the United States, and that he, the said claimant, may have the rights and advantages allowed and secured to him as such discoverer, which are by the Act of Congress aforesaid provided."

18] On April 23, 1858, Cooper, the assignee of Duncan, addressed a letter to the Secretary of State, requesting protection of his vessels lying and men working at the Island of Navassa against an apprehended interference by a vessel of war of the Haytian government.

On April 24, 1858, Cooper presented to the Secretary of State an affidavit, sworn to March 15, 1858, before the United States consul at Kingston in the Island of Jamaica, of John B. Lewis, that, as Duncan's agent, he had been since September 18, 1857, "in peaceable possession of the said island, taking and shipping guano therefrom, and that said island was not, when he so took possession thereof, in the possession or occupation of any other government or its citizens, and that the possession of said Duncan through said Lewis and the said Duncan's other agents has not been in any wise interrupted or sought to be interrupted by any person whatsoever."

In June, 1858, Cooper, by letters addressed to the President and to the Secretary of State, informed them that the Haytian government, upon the pretense that the Island of Navassa was a dependency of St. Domingo, had sent two vessels of war there, and forcibly interrupted and prohibited the digging of guano by Cooper's men; and solicited the interposition of the United States for the protection of his interests.

On July 7, 1858, the Secretary of State addressed a letter to the Secretary of the Navy, in which, after stating the substance of Duncan's memorial and of Cooper's application, he said: "The President being of the opinion that any claim of the Haytian government to prevent citizens of the United States from removing guano from the Island of Navassa is unfounded, and that in this case it is advisable to exercise the authority vested in him by the fifth section of the Act of Congress, approved August 18, 1856, entitled 'An Act to Authorize Protection to be Given to Citizens of the United States Who may Discover Deposits of Guano,' directs that you will cause a competent force to repair to that island, and will order the officer in command thereof to protect citizens of the United States in removing guano therefrom against any interference from authorities of the government of Hayti, or of

19] any other government. If any persons in the employment of that government should be found upon the island, an offer may be made to land them at Port au Prince, or at any other point which they may designate, and their superiors may be informed of the occasion for this proceeding, and of the determination of this government not to allow the removal of guano from that island by citizens of the United States to be interfered with in any manner by the citizens or authorities of Hayti, or by persons claiming to act under them. It is hoped that the President's object may, by firmness and discretion, be accomplished, not only without any effusion of blood, but without giving reasonable cause for offense in any quarter."

The Secretary of State, on July 8, sent to Cooper a copy of this letter; on July 12, demanded of Cooper a bond as required by the Act of 1856, and on September 10, 1858, accepted such a bond; and on September 16 sent him a copy of dispatches received by the Navy Department from the commander of the vessel ordered to Navassa, including letters written by him at Port au Prince on August 16, 1858, to the Haytian minister of foreign relations, to the United States consul at that port and to Cooper's agent on the Island of Navassa, informing each of them of the object of his mission.

In the letter to the Haytian minister of foreign relations, the commander said: "I am authorized to say to you that the President of the United States is of opinion that, in this case, it is advisable to exercise the authority vested in him by the fifth section of this Act, and I am directed by him to repair to that island to protect our citizens in removing guano therefrom against any interference from the authorities of any government whatever, which he hopes I may be able to do without giving reasonable cause of offense in any quarter."

On November 13, 1858, Mr. B. C. Clark, the commercial agent of Hayti at Boston, in behalf of the Haytian government (intercourse between that government and the United States being at that time conducted through consuls or commercial agents only*), addressed to the Secretary of State a letter [2 in relation to the occupancy of the Island of Navassa by citizens of the United States, in which he said: "The territory over which Hayti now claims sovereignty was once the property of Spain, who, in the exercise of an undisputed right, ceded said territory to France. France, in 1825, through her chief, Charles X., acknowledged the independence of Hayti, and thereby vested her with a perfect title to the 'French part' (popularly termed) and all its dependencies, among which dependencies the Islands of Tortugas, La Vache, Cayemete, Navassa and Gonaive Island are declared to be. The government of Hayti, although frequently importuned, has never ceded, sold or leased either of these dependencies to any nation, company or individual. I therefore most respectfully ask, in behalf of the government of Hayti, the attention of the government of the United States to the infringement on the rights of Hayti, involved in the unauthorized occupancy of Navassa Island by citizens of the United States."

On November 17, 1858, the assistant secretary of state replied to Mr. Clark, saying: "I am directed to inform you that a citizen of the United States having exhibited to this

*Acts of August 18, 1856, chap. 127 (11 Stat. 52, 54); June 5, 1862, chap. 96, and July 11, 1862, chap. 142, § 1 (12 Stat. 421, 534).

Department proofs which were deemed sufficient that that island was derelict and abandoned, with guano of good quality, and having applied for the protection of this government in removing the guano therefrom, pursuant to the Act of Congress of the 18th of August, 1856, a copy of which is inclosed, that application has been granted. You will notice, however, that the Act does not make it obligatory upon the government to retain permanent possession of the island."

On December 8, 1859, the Secretary of State issued a proclamation, addressed "to all to whom these presents shall come," declaring that Duncan, a citizen of the United States, had filed in the Department of State the required notice of the discovery of guano on, and of the occupation of, the Island of Navassa, in the name of the United States; and that Cooper, his assignee, also a citizen of the United States, had entered into sufficient bonds under and according to the Act of Congress of August 18, 1856; and therefore that Cooper was "entitled, in respect to the guano on the said island, to all the [1] privileges and advantages intended by that Act to be secured to citizens of the United States who may have discovered deposits of guano," provided that he should abide by the conditions and requirements of that Act.

The opinion submitted by Attorney-General Black to the Secretary of State on December 14, 1859 (9 Ops. Atty-Gen. 406), to the effect that the President has no right under the law to annex a guano island to the United States, or to put American citizens in possession of it, while a diplomatic question as to the jurisdiction over it is pending between the United States and a foreign nation, cannot influence our decision in this case, for several reasons. In the first place, that opinion was given six days after the proclamation regarding the Island of Navassa, and concerned only a distinct island, Cayo Verde, claimed by the British government as within its jurisdiction and belonging to the Bahamas. In the next place, no diplomatic question was then pending as to the jurisdiction over the Island of Navassa; on the contrary, the President had repeatedly declared that the claim of Hayti was unfounded. Lastly, the office of the Attorney-General was to advise the President what he ought to do; the duty of the judiciary is to decide in accordance with what the President, in the exercise of a discretionary power confided to him by the Constitution and laws, has actually done. As was adjudged, under like circumstances, in *Williams* v. *Suffolk Ins. Co.*, 38 U. S. 13 Pet. 415, 420 [10: 226, 228], before quoted, if the executive, in his correspondence with the government of Hayti, has denied the jurisdiction which it claimed over the Island of Navassa, the fact must be taken and acted on by this court as thus asserted and maintained; it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.

The documents from the State Department, above mentioned, show the following action of the President, through the Secretary of State, with regard to the Island of Navassa:

In the order of July 7, 1858, sending out an armed vessel under § 5 of the Act of 1856 to protect Cooper in removing the guano, [221 the President unequivocally declared his "opinion that any claim of the Haytian government to prevent citizens of the United States from removing guano from the Island of Navassa is unfounded," and "the determination of this government not to allow the removal of guano from that island by citizens of the United States to be interfered with in any manner by the citizens or authorities of Hayti."

In the response of November 17, 1858, to the letter of the Haytian government, through its commercial agent, claiming the Island of Navassa as a dependency of Hayti, the President declared that a citizen of the United States had exhibited proofs which were deemed sufficient that "that island was derelict and abandoned, with guano of good quality;" and that his application for the protection of the government in removing the guano therefrom, pursuant to the Act of Congress of 1856, had been granted. The reference, at the close of this response, to the provision in section 4 of that Act, reserving the right of the United States to discontinue its possession of the island after, by the removal of the guano, it shall have ceased to be of any value, has, to say the least, no tendency to show that the United States had not for the time being assumed dominion over the island.

In the proclamation of December 8, 1859, after reciting the discovery and occupation of the island by Duncan, and the giving of a bond by his assignee, Cooper, pursuant to the Act of 1856, Cooper was declared to be "entitled, in respect to the guano on the said island, to all the privileges and advantages intended by that Act to be secured to citizens of the United States who may have discovered deposits of guano." Although this proclamation does not in terms follow the first clause of the prayer of Duncan's memorial, "that said key or island of Navassa may be considered and declared as appertaining to the United States," the declaration of the President, in accordance with the conclusion of that prayer, that Cooper, as Duncan's assignee, was entitled, in respect to the guano upon that island, to the privileges and advantages secured by the Act of Congress to citizens of the United States discovering deposits of guano, is equivalent to a declaration that the President considered the [222 island as appertaining to the United States.

Seeing that the Act of Congress had not authorized any rights or privileges to be allowed to the discoverer of a guano island, or any bond to be required of him, or any protection to be given to him, by the United States, unless the President was of opinion that the island should be considered as appertaining to the United States, the terms of the order of the President of July 7, 1858, of his response of November 17, 1858, to the protest of the official representative of Hayti, and of his proclamation of December 8, 1859, clearly show, or necessarily imply, that the

President, exercising the discretionary power conferred upon him by the Constitution and laws, was satisfied that the Island of Navassa was not within the jurisdiction of Hayti, or of any foreign government, and that it should be considered as appertaining to the United States.

But the case does not rest here. The subsequent action of the President, through the appropriate departments, has put the matter beyond all question.

In a circular of the Treasury Department of February 12, 1869, "relative to the guano islands appertaining to the United States," and addressed "to collectors of customs," the Secretary of the Treasury said: "You will find hereto annexed a corrected list of the guano islands, bonded under the Act of August 18, 1856, as appears by the bonds and papers, transmitted from the Department of State, now on file in the office of the first comptroller of the treasury. The several islands named and described in said list having been duly bonded, and considered by the President of the United States 'as appertaining to the United States,' in manner and form prescribed by said Act, and, as a consequence thereof, brought under the laws regulating the coasting trade, your attention is directed to the same with a view to the proper enforcement of the laws regulating intercourse with said islands." The list, annexed to that circular, of "guano islands pertaining to the United States and bonded under the Act of August 18, 1856," included the Island of Navassa.

[24] Finally, by letters from the Secretary of State to the Haytian minister on December 31, 1872, and on June 10, 1873 (mentioned, under mistaken dates, in 3 Wharton's International Law Digest, § 312, and copies of which have been obtained from the Department of State), it appears that, upon the Haytian government renewing its claim to the Island of Navassa, the United States utterly and finally denied the validity of the claim, and re-asserted and maintained their exclusive jurisdiction of that island, by reason of its discovery and occupation by Duncan and Cooper, and under the Act of Congress of 1856.

The only other point presented by the record and argued in behalf of the defendant is his exception to the exclusion of evidence that in April, 1889, a foreign vessel was loaded at Navassa with guano intended for the use of persons other than citizens or residents of the United States. It was argued that this evidence was admissible, as showing a breach of condition of Cooper's bond, and a consequent forfeiture of his rights, under the provision of section 2 of the Act of 1856, re-enacted in Rev. Stat., § 5574. It does not distinctly appear whether such breach took place before or after April 16, 1889. If it took place before, it was within the period of five years, during which the operation of that provision of the Statute was suspended by the Act of April 18, 1884, chap. 24 (23 Stat. 11). But, whenever the breach took place, it affected the private rights only of the delinquent, and did not impair the dominion of the United States or the jurisdiction of their courts.

For the reasons above stated, our conclusion is that the Guano Islands Act of August 18, 1856, chap. 164, re-enacted in title 72 of the Revised Statutes, is constitutional and valid; that the Island of Navassa must be considered as appertaining to the United States; that the Circuit Court of the United States for the District of Maryland had jurisdiction to try this indictment, and that there is no error in the proceedings.

Judgment affirmed.

No. 1142, *Edward Smith* v *United States*, and No. 1144, *George S. Key* v. *United States*, argued and decided at the same time, are substantially similar, and in those cases also *the judgments are affirmed.*

UNITED STATES, *ex rel.* R. MASON LISLE, [24
Plff. in Errr.,
v.
JOHN R. LYNCH, Fourth Auditor, and BENJAMIN F. GILKESON, Second Comptroller, of the TREASURY OF THE UNITED STATES.

(See S. C. Reporter's ed. 280-287.)

Jurisdiction of this court—when the validity of an authority exercised under the United States is drawn in question—second comptroller and fourth auditor.

1. The validity of an authority exercised under the United States is not drawn in question, so as to give this court jurisdiction of the case, every time an act done by such authority is disputed.
2. The validity of an authority is drawn in question when the existence, or constitutionality, or legality of such authority is denied, and the denial forms the subject of direct inquiry.
3. The authority of the second comptroller and the fourth auditor of the Treasury of the United States is not denied, nor the validity of that authority questioned, when it is claimed that, in the exercise of a valid authority, they erred in the disallowance of fees or milage to an officer to which he is entitled, and refused to pay him the same.

[No. 1195.]

Argued Nov. 20, 1890. Decided Dec. 8, 1890.

IN ERROR to the Supreme Court of the District of Columbia, to review a judgment dismissing a petition for mandamus to command the Fourth Auditor and Second Comptroller of the United States Treasury to audit an account and issue a warrant to pay the same. *Dismissed.*

NOTE.—*As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution,* see *notes* to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws,—see *notes* to Jackson v. Lamphire, 7: 679; Commercial Bank of Cincinnati v. Buckingham, 12: 169.

Statement by *Mr. Chief Justice* **Fuller:**

On the 6th day of December, 1889, R. Mason Lisle filed a petition for a writ of mandamus in the Supreme Court of the District of Columbia against John R. Lynch, Fourth Auditor, and Benjamin F. Gilkeson, Second Comptroller, of the Treasury of the United States, and their successors, in the name of the United States, upon his relation, couched in these words:

"1. The petitioner avers that he was an officer of the navy from March 19, 1872, to May 6, 1872, of the rank of lieutenant; that on March 19, 1872, he was ordered by his superior officer to proceed from Philadelphia, Pennsylvania, *via* New York and the Pacific mail steamer from New York, on March 30th, to Aspinwall, across the Isthmus of Panama, and thence to the navy-yard, Mare Island, California, and report for duty on board the U. S. S. 'Lackawanna;' that he proceeded by the said route, in accordance with said orders, completing the journey on May 6, 1872.

"2. That in obeying the said orders he traveled 6,222 miles, viz., from Philadelphia to New York, 88 miles; from New York to Mare Island, 6,134 miles. For his traveling expenses from Philadelphia to New York he was paid $8.80, being at the rate of ten cents per mile; but for his traveling expenses from New York to Mare Island he was only credited with milage for the distance between the extreme points by the overland route—a route he was not ordered to travel and did not travel—3,248 miles, at ten cents per mile, amounting to $324.80, whereas, by the law in force at the time of the travel (Act of March 3, 1835, 4 Stat. at L. 755), he should have been credited with milage for the distance actually traveled, 6,134 miles, at ten cents per mile, amounting to $613.40; thus the petitioner has received $288.60 less than he should have received under the said Act of Congress, which was the Act which governed the compensation to be paid for milage at that time.

"3. That the respondents have refused, and still do continue to refuse, to pay the petitioner, or to credit him with, the sum of $288.60, that being the amount remaining unpaid on the said travel under the said Act of Congress.

"4. That there is no application of the Statute of Limitations, for the claim was adjusted and disallowed by Comptroller Maynard on February 2, 1887, the said disallowance being a clear violation of the said Act of Congress.

"Therefore, the said travel having been performed, the distance having been correctly computed, the application of the said Act of Congress to the said travel—under the Acts of Congress, Rev. Stat. 1878, sections 273, 277, prescribing the duties of the accounting officers—is a mere ministerial duty, the exercise of a discretion being invalid under the said sections.

"Wherefore the petitioner prays that a writ of mandamus may be issued to the said respondents, commanding them to audit the petitioner's account for the said travel and allow the same, and to issue a warrant in the manner it is the custom of the Treasury to issue warrants for the payment of milage under the said Act of Congress of March 3, 1835, the same being mandatory upon the accounting officers."

A rule to show cause was thereupon entered, and, the defendants appearing, it was agreed that the petition and rule to show cause should be considered and treated as an alternative writ of mandamus, to which the respondents might make answer or demur as they might be advised. The respondents accordingly demurred, their demurrer being accompanied by the following:

"Note.—Among the matters of law relied upon and to be argued in support of the above demurrer are—

"1st. That mandamus will not lie against an officer of the Treasury Department for refusal to allow and pay a claim against the United States, for, however obviously without legal justification his refusal may be, a mandamus against him to compel such allowance and payment is none the less in effect a suit against the United States.

"2d. That, it appearing that the relator's claim had been disallowed by the predecessor in office of the respondent Gilkeson (to wit, Second Comptroller Maynard), and there being no allegation of the production before the respondents of newly discovered material evidence, or that the original disallowance involved errors of computation, it is not competent for these respondents to reopen the settlement involving such disallowance."

The cause was heard by the Supreme Court of the District sitting in general term, and judgment rendered denying the relief sought, and dismissing the petition. The pending writ of error was thereupon sued out.

Messrs. **R. Mason Lisle** and *J. Edward Carpenter* for plaintiff in error.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.,* [283 for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

As the matter in dispute does not reach the jurisdictional sum or value, it is contended that this court has jurisdiction to entertain the writ of error because "the validity of an authority exercised under the United States" was drawn in question in the case. 23 Stat. 443, chap. 355.

The claim of the relator arises under the last clause of section 2 of the Act of March 3, 1835, entitled "An Act to Regulate the Pay of the Navy of the United States" (4 Stat. 755, 757, chap. 27), which reads: "It is hereby expressly declared that the yearly allowance provided in this Act is all the pay, compensation and allowance that shall be received under any circumstances whatever, by any such officer or person, except for traveling expenses when under orders, for which ten cents per mile shall be allowed."

By section 273 of the Revised Statutes it is provided that: "It shall be the duty of the second comptroller: First. To examine all accounts settled by the second, third and fourth auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred. Second. To countersign all warrants drawn by the Secretaries of War and of the Navy which shall be warranted by law."

And by section 277: "The duties of the auditors shall be as follows: . . . Fifth. The fourth auditor shall receive and examine all accounts accruing in the Navy Department or relative thereto, and all accounts relating to navy pensions; and, after examination of such accounts, he shall certify the balances, and shall transmit such accounts, with the vouchers and certificate, to the second comptroller for his decision thereon."

Section 286 provides: "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury."

284]

By the Act establishing the offices of comptroller and auditor the former was authorized and required "to superintend the adjustment and preservation of the public accounts," and "to examine all accounts settled by the auditor;" and it was made the duty of the latter "to receive all public accounts, and after examination to certify the balance and transmit the accounts, with the vouchers and certificate, to the comptroller for his decision thereon." 1 Stat. 66.

Considering the accepted definition of an auditor, with the language used in these provisions, the fourth auditor may be correctly said to be authorized to examine accounts accruing in the Navy Department, compare the items with the vouchers, allow or reject charges, and state the balance; and the comptroller has authority to revise the action of the auditor and certify the balances finally found by him.

It is stated in the opinion delivered by *Mr. Chief Justice* Waite in *United States* v. *Graham*, 110 U. S. 219, 220 [28: 126], cited on behalf of relator, that it was found as a fact in that case "that on the 6th of April, 1835, which was only a little more than a month after the Act of 1835 passed, circular instructions were issued from the Treasury Department to the effect that milage at the rate of ten cents a mile was fixed by law, and should be paid for traveling expenses within the United States, but that the usual and necessary passage money actually paid by officers returning from foreign service, under orders or on sick ticket, when they could not return in a public vessel, would be paid as theretofore, as well as the like expenses of officers going out. The Navy Regulations adopted in 1865, and in force in 1872, when the claim of Graham, the appellee, accrued, provided that 'for traveling out of the United States the actual expenses only are allowed.' It is also found that from the time of the passage of the Act of 1835 until the decision of *Temple's Case* in this court, the Navy and Treasury Departments had, with a single exception, always held that the ten cents a mile did not apply to travel to, from or in foreign countries, but only to travel in the United States. In *Temple's Case*, the long continued practice in the Departments was relied on to justify the decision of the accounting officers of the treasury against him, but the fact of the actual existence of the practice was not found, as it has been now."

285]

The decision in *United States* v. *Temple*, 105 *U. S.* 97 [26: 967], was announced at October Term, 1881. That case brought under consideration the Act of Congress of June 30, 1876, relating to the milage of officers of the navy, while *Graham's Case* arose under the Act of March 3, 1835, and it was held that, as the language of the Statute in each instance was clear and precise and its meaning evident, there was no room for construction, and that eight cents a mile in the one case and ten cents in the other was properly allowed the claimants by the Court of Claims, from whose judgments in their favor appeals were prosecuted to this court.

It is now argued that the duty of the Fourth Auditor and of the Second Comptroller, under the last clause of section 2 of the Act of 1835, and the decision of this court in relation to it, was merely ministerial, and that by the disallowance of relator's claim for milage these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question. In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied and the denial forms the subject of direct inquiry.

We think that the authority of the Second Comptroller and the Fourth Auditor is not thus denied here, nor the validity of that authority questioned, but that what is claimed is that, in the exercise of a valid authority, the Auditor and Comptroller erred in respect to an allowance, in view of the decision of this court in another case.

In *Decatur* v. *Paulding*, 38 U. S. 14 Pet. 497, 515 [10: 559, 568], it was remarked by *Mr. Chief Justice* Taney that the duties to be performed by the head of an executive department of the government, whether imposed by Act of Congress or by resolution, are not, in general, mere ministerial duties; that departmental duties are executive in their nature; that the laws and resolutions of Congress, under which the departments are required to act, have to be expounded in the exercise of judgment; and that, while the court would not be bound to adopt the construction given, when departmental decisions are under review in a proper case the court would not by mandamus control the exposition of statutes, by direct action upon executive officers. In relation to the interpretation of a Pension Law by the commissioner of pensions and the Secretary of the Interior, in *United States, ex rel. Dunlap*, v. *Black, Commissioner*, 128 U. S. 40, 48 [32: 354, 357], *Mr. Justice* Bradley said: "Whether, if the law were properly before us for consideration, we should be of the same opinion, or of a different opinion, is of no consequence in the decision of this case."

The contention of the relator is that the interpretation he puts upon the Act is too obviously correct to admit of dispute, and that

this court has so decided; but it does not follow, because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. What the relator sought was an order coercing these officers to proceed in a particular way, and this order the Supreme Court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account, and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority. *Snow* v. *United States*, 118 U. S. 346, 553 [30: 207, 209]; *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 210 [32: 608]. In *Clayton* v. *Utah Territory*, 132 U. S. 632 [33: 455], the power vested in the governor of the Territory of Utah, by the Organic Act, to appoint an auditor of public accounts was drawn in question; and in *Clough* v. *Curtis*, 134 U. S. 361, 369 [33: 945, 948], the lawful existence, as the Legislative Assembly of the Territory of Idaho, of a body of persons claiming to exercise as such the legislative power conferred by Congress, was controverted. In *Neilson* v. *Lagow*, 48 U. S. 7 How. 772, 775 [12: 908, 909], and 53 U. S. 12 How. 98 [13: 909], the plaintiff in error claimed the land in dispute, through an authority exercised by the Secretary of the Treasury, and the state court decided against its validity. The existence or validity of the authority was primarily involved in these cases, and they contain nothing to the contrary of our present conclusion.

Why the relator did not bring suit in the Court of Claims does not appear, nor does the record show the reasons of the Second Comptroller for rejecting this claim in 1887, nor for the action of the present Auditor and Comptroller, other than as indicated in the demurrer. These matters are, however, immaterial in the view which we take of the case.

The writ of error must be dismissed, and it is so ordered.

---

[355] CENTRAL NATIONAL BANK, *Plff. in Err.*,

v.

UNITED STATES.

(See S. C. Reporter's ed. 355-365.)

Taxation of national banks—liability of bank—mistake in dividends—proof of no earnings.

1. A national bank has no right to omit from its return for the purposes of taxation, required by sec. 120 of the Act of June 30, 1864, a statement of the sums retained by it for the State out of dividends to stockholders.
2. The liability of the bank for a tax on its dividends under section 120 depends solely upon the question whether dividends were, in fact, declared due and payable to stockholders.
3. If the bank, in good faith and by mistake, made a declaration of dividends, when it was not in a good condition to do so, the mistake cannot be corrected by the courts in an action brought to recover the tax.
4. No proof that no earnings by the bank had in fact been made is admissible in such action, for the purpose of avoiding the tax; the law conclusively assumes, in such a case, that a dividend declared and paid is a dividend earned.

[No. 90.]

Argued Nov. 24, 25, 1890. Decided Dec. 8, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment affirming a judgment of the District Court of the same District, in favor of the United States against a National Bank for the recovery of a tax. *Affirmed.*

The facts are stated in the opinion.

Messrs. Martin & Smith, **M. W. Divine** and **Aaron Pennington Whitehead** for plaintiff in error.

Mr. **A. X. Parker**, *Assistant Atty-Gen.*, for defendant in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought in the District Court of the United States for the Southern District of New York to recover certain amounts alleged to be due the United States for taxes on "profits" made and realized by the Central National Bank from its business for the years 1866, 1867, 1868 and 1870,—namely, $56,555.69 for 1866, $79,003.22 for 1867, $79,800 for 1868 and $33,750 for 1870—of which no return was made to the assessor or assistant assessor of the district in which the Bank was located, and on which no tax was paid to the collector, as required by law. A demurrer to various counts of the answer was overruled, with leave to the government to amend its complaint. 10 Fed. Rep. 612.

An amended complaint was filed, which proceeded upon the ground that the Bank in each of the above years "declared a dividend or dividends in money due to its stockholders" of the above amounts, for the years named, respectively, of which no return was made, and on which no tax was paid. [356]

The action was based, chiefly, upon section 120 of the Act of Congress of June 30, 1864, entitled "An Act to Provide Internal Revenue to Support the Government, to Pay Interest on the Public Debt, and for Other Purposes" (13 Stat. 223, 283, chap. 173), as amended by the Act of July 13, 1866 (14 Stat. 98, 138, chap. 184). That section provided: "That there shall be levied and collected a tax of five per centum on all dividends in all scrip or money thereafter declared due, wherever and whenever the same shall be payable, to stockholders, policy-holders or depositors, or parties whatsoever, including nonresidents, whether citizens or aliens, as part of the earnings, income or gains of any bank, trust company, savings institution, and of any fire, marine, life, inland insurance company, either stock or mutual, under whatever name or style known or called, in the United States or Territories, whether

NOTE.—*That taxation of stock or shares in corporation does not impair obligations of contracts; taxation of shares of national banks and other corporations,*—see *note* to Providence Bank v. Billings, 7:989.

:ially incorporated or existing under general s, and on all undistributed sums, or sums de or added during the year to their surplus contingent funds; and said banks, trust mpanies, saving institutions and insurance mpanies shall pay the said tax, and are here- / authorized to deduct and withhold from all ayments made on account of any dividends r sums of money that may be due and pay- ıble as aforesaid the said tax of five per centum. And a list or return shall be made and rendered to the assessor or assistant assessor on or before the tenth day of the month following that in which any dividends or sums of money became due or payable as aforesaid; and said list or return shall contain a true and faithful account of the amount of taxes as aforesaid; and there shall be annexed thereto a declaration of the president, cashier or treasurer of the bank, trust company, savings institution or insurance company, under oath or affirmation, in form and manner as may be prescribed by the commissioner of internal revenue, that the same contains a true and faithful account of the taxes as aforesaid. And for any default in the making or rendering of such list or return, with such declaration annexed, the bank, trust company, savings institution or insurance company making such default shall forfeit, as a penalty, the sum of one thousand dollars; and, in case of any default in making or rendering said list or return, or any default in the payment of the tax as required, or any part thereof, the assessment and collection of the tax and penalty shall be in accordance with the general provisions of law in other cases of neglect and refusal: *Provided*, That the tax upon the dividends of life insurance companies shall not be deemed due until such dividends are payable, nor shall the portion of premiums returned by the mutual life insurance companies to their policy-holders, nor the annual or semi-annual interest allowed or paid to the depositors in savings banks or savings institutions, be considered as dividends."

Section 121 of the same Act is as follows: "That any bank legally authorized to issue notes as circulation, which shall neglect or omit to make dividends or additions to its surplus or contingent fund as often as once in six months, shall make a list or return in duplicate, under oath or affirmation of the president or cashier, to the assessor or assistant assessor of the district in which it is located, on the first day of January and July in each year, or within thirty days thereafter, of the amount of profits which have accrued or been earned and received by said bank during the six months next preceding said first days of January and July; and shall present one of said lists or returns and pay to the collector of the district a duty of five per centum on such profits, and in case of default to make such list or return and payment within the thirty days as aforesaid, shall be subject to the provisions of the foregoing section of this Act: *Provided*, That when any dividend is made which includes any part of the surplus or contingent fund of any bank, trust company, savings institution, insurance or railroad company, which has been assessed, and the duty paid thereon, the amount of duty so paid on that portion of the surplus or contingent fund may be deducted from the duty on such dividend." 14 Stat. 284, chap. 284.

The answer to the amended complaint denies, on information and belief, that during the period from the 1st of January, 1866, to the 31st day of December, 1866, the defendant declared a dividend or dividends in money due to its [358] stockholders of the amount of $56,555.69, whereof no return was made, and on which no tax was paid; and denies that the alleged dividend or dividends were liable to the tax of five per cent as claimed by the government.

As a separate defense to the cause of action based upon the alleged declaration of dividends for the year 1866, the Bank averred that, in 1866, it was required by the laws of New York, not only to retain from the dividends to its stockholders the amount of the municipal tax levied by that State against stockholders on the value of its shares of capital stock owned by them, respectively, but to pay over to the proper state officers, out of its funds, the amount of taxes thus levied upon the par value of said stock, and deduct the amount ratably from the dividends to be paid by it to stockholders; that in 1866, in pursuance of the laws of New York, it retained and paid to such officers the amount of taxes so levied by the State upon the shares of defendant's stock owned by stockholders, and the amount so paid was $56,555.69; that in making up returns to the United States assessor it did not include that amount in its statement of dividends, being advised, and now insisting, that such amount was a legitimate expense of its business and in no sense part of dividends, or to be returned as such.

The Statute of New York here referred to is that of April 23, 1866, providing that no tax shall thereafter be assessed upon the capital of any bank or banking association organized under the authority of the State or of the United States, "but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein;" such shares to be "included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town or ward where such bank or banking association is located." The 6th section of that Act provides: "For the purpose of collecting such taxes, and in addition to any other law of this State, not in conflict with the Constitution of the United States, relative to the imposition of taxes, it shall be the duty of every such bank or banking association, and the managing officer or officers thereof, to retain so much of any dividend or dividends belonging to such stockholder as shall be necessary to pay any taxes assessed in pursuance of this Act, until it shall be made to appear to such officer that such taxes have been paid." Laws of N. Y. 1866, vol, 2, p. 1647.

A similar defense was made in respect to the alleged declarations of dividends for the years 1867, 1868 and 1870.

In reference to the causes of action based upon the alleged declarations of dividends for 1866, 1867 and 1868, the Bank makes further special defenses, which are set out at great length, but are stated by its counsel as follows: "That in each of said years 1866, 1867 and 1868 the Bank sustained losses from the embezzlement of its funds, by its cashier,

to an amount in each of said years largely exceeding the amount of the so-called 'dividend' or state tax for such year; that said losses were concealed from the other officers of the Bank until July, 1869, and in the interim the Bank was led to believe that its profits were much larger than they actually were, and to pay and distribute among its stockholders, and to assume to add to its surplus fund, much larger sums than it had actually earned, and to make erroneous returns of its dividends from earnings and of its additions to surplus, and to pay to the United States a much larger tax thereon than was really payable. The following is a summary of the erroneous returns so made, and of the erroneous taxes so paid to the United States, as stated in said separate defenses:

Year.	Dividend.	Addition to Surplus Fund.	Total.	Five per cent tax paid.
1866....	$448,947 36	$30,000	$478,947 36	$23,947 36
1867....	325,789 40	30,000	355,789 40	17,789 48
1868....	315,789 48	30,000	345,789 48	17,289 48
Amount of taxes paid on erroneous dividends, and on erroneous additions to surplus, during said three years.....				$59,026 32

"That, in making said erroneous dividends and additions to the surplus, the Bank, in each of said years, drew the same largely from its capital and its surplus earned in former years, and that since its discovery of said losses it has been compelled to apply its profits made since July 1, 1869, to make good the impairment of its capital and surplus caused by said erroneous payments, and to withhold from its stockholders the portion of its profits so applied, and that the state taxes, or 'dividends,' paid by the Bank to the State of New York in 1866, 1867 and 1868 were not paid from its earnings, income or gains in either of said years, but wholly from its capital and accumulated surplus of former years, and was not liable to the tax of five per cent imposed by section 120, and that section does not apply to such a payment." The claim of the defendant, in its answer, was that, if it may not treat the amount paid to the State as municipal taxes on the value of its stock held by stockholders as a legitimate expense of its business in the years 1866, 1867 and 1868, respectively, it is entitled to have deducted from the amount of tax on the sums alleged to have been declared as dividends the amounts it paid, through mistake of fact, on the excess of profits returned for the above years over the profits actually made and realized from its business in those years.

In the district court a demurrer to the counts of the answer containing the special defenses was overruled, and judgment given for the defendant. 15 Fed. Rep. 222. Upon writ of error to the circuit court that judgment was reversed, and the cause was remitted to the district court, where, upon final trial, judgment was rendered in favor of the United States for the sum of $28,625.33. 24 Fed. Rep. 577. This judgment having been affirmed in the circuit court, the case has been brought here by the Bank.

The Act of Congress was correctly interpreted by the circuit court. That the amounts paid by the Bank to the State in the years 1866, 1867, 1868 and 1870 came from dividends declared by it to be due and payable to stockholders, as part of its earnings, income or gains, is entirely clear. Because they were from dividends, so declared, the Bank recognized its obligation to pay, and did pay, the taxes assessed by the State upon shares owned by stockholders. It was not required to retain the amount of taxes due the State except from "dividends belonging to such stockholders." The taxes constituted a claim against stockholders only, and the Bank was made simply an agent to collect them for the State. Their retention by the Bank out of dividends declared due to stockholders was a convenient mode adopted by the State to collect its taxes. The circuit judge well said that, in legal effect, the retaining by the Bank of the amount of the taxes assessed against stockholders was the same as if it had paid the whole dividend to stockholders, and the latter had handed back the sum due from them for municipal taxes, [364 and authorized the Bank to pay it. For these reasons, the Bank had no right to omit from its return a statement of the sums retained by it for the State out of dividends to stockholders in the years 1866, 1867, 1868 and 1870.

This is an end of this case, unless, as contended, the embezzlement of the Bank's cashier, whereby it was led to believe that its profits were larger than they actually were, and whereby it was induced to distribute among its stockholders and add to its surplus or contingent funds larger sums than were actually earned, and to make erroneous returns of dividends from earnings and of additions to surplus, constitutes a defense to the action. We are of opinion that the liability of the Bank, under section 120, depends solely upon the question whether dividends were, in fact, declared due and payable to stockholders from its earnings, income or gains, and whether undistributed sums were, in fact, made or added to its surplus or contingent fund. Whether or not such dividends should be declared, or such additions made, was for the Bank to determine. In view of the language and object of the Statute, we hold that if the declarations or additions were not recalled or rescinded before the time when it became the duty of the Bank to make its returns to the assessor, the question whether or not, for the purposes of taxation by the United States, dividends had been declared due to stockholders, or additions made to surplus or contingent funds, was closed, and the liability of the Bank for the tax of five per cent on such dividends or additions attached. If the Bank, in good faith and by mistake, made a declaration of dividends, or an addition to its surplus or contingent funds, when it was not in a condition to do so, the mistake cannot be corrected by the courts in an action brought to recover the tax. Relief must come from another branch of the government.

In *Bailey* v. *New York C. & H. R. R. Co.*, 106 U. S. 109, 113, 115 [27: 81, 83], this court had occasion to construe section 122 of the above Act of Congress, providing that "any railroad, canal, turnpike, canal navigation or slackwater company indebted for any money for which bonds or other evidences of indebtedness have been issued, payable in one or more [365 years after date, upon which interest is stipulated to be paid, or coupons representing the

interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders . . . as part of the earnings, profits, income or gains of such company, and all profits of such company carried to the account of any fund or used for construction, shall be subject to and pay a tax of five per centum on the amount of such interest or coupons, dividends or profits, whenever and wherever the same shall be payable," etc. 13 Stat. 283; 14 Stat. 138. The court, speaking by *Mr. Justice* Matthews, said: "It is true, indeed, that by the terms of the law the amount paid as interest on bonds is charged with a tax as part of the earnings, although there may have been no net earnings out of which to pay it; but the law proceeds upon a presumption which disregards what is merely exceptional. And we have no hesitation in saying that, in reference to a dividend declared as of earnings for the current year and paid as such to stockholders, whether in money or in scrip, no proof would be admissible, for the purpose of avoiding the tax, that no earnings had in fact been made. The law conclusively assumes, in such a case, that a dividend declared and paid is a dividend earned." The same principle must govern the construction of section 120, and determines the present case in favor of the United States.

Judgment affirmed.

Mr. Justice **Field** dissented.

366] C. R. HANDLEY ET AL., *Appts.*,
v.
SEBASTIAN STUTZ ET AL.

(See S. C. Reporter's ed. 366-370.)

Suit in equity to compel payment of stock subscriptions—jurisdiction of circuit court—jurisdiction of United States Supreme Court.

1. A suit in equity against a corporation and its stockholders to compel them to pay their unpaid subscriptions to stock, as a fund to be distributed among its creditors, can only be maintained by one or more creditors in behalf of all, and not by any one creditor to secure payment of his own debt to the exclusion of others.

2. In an equity suit to compel the payment of the unpaid subscriptions to the capital stock of a corporation as a fund for the payment of its debts, where there is more than $2,000 alleged to be due from it to the plaintiff, the United States circuit court has jurisdiction, and authority to administer and distribute the fund for the benefit of all its creditors.

3. Where the trust fund administered and ordered to be distributed by the circuit court, in a suit to compel the stockholders of a corporation to pay their subscriptions to stock to realize the fund, amounts to more than $5,000, this court has jurisdiction of the appeal, which is not affected by the fact that the amounts decreed to some of the creditors are less than that sum.

[No. 1516.]

Submitted Nov. 10, 1890. Decided Dec. 8, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Middle District of Tennessee, adjudging payment by stockholders of a corporation of the amounts due upon their subscriptions to stock for the payment of debts of the corporation.

On motion to dismiss for want of jurisdiction and questioning the jurisdiction of the Circuit Court. *Motion to dismiss appeal overruled, and jurisdiction of the Circuit Court sustained.*

Statement by *Mr. Justice* **Gray**:

This was a bill in equity, filed February 8, 1889, in the Circuit Court of the United States for the Middle District of Tennessee, by citizens of Pennsylvania, of Indiana and of Ohio, judgment creditors of the Clifton Coal Company, in behalf of themselves and all other creditors who should come in and contribute to the expenses of the suit, against that corporation, which was a Kentucky corporation, whose chief officers resided in Tennessee, and against sixteen individuals, alleging that they were stockholders in the corporation and citizens of Tennessee, and had paid nothing for their stock and were liable to the corporation for the amounts thereof, and their liabilities were assets of the corporation and a trust fund for the payment of all its debts; that the corporation was insolvent, and had no other assets that the plaintiffs could reach; and that its officers had declined to collect or to attempt to collect any of the amounts so due to it, and had neglected to administer the trust fund.

The bill prayed that the defendant stockholders might be decreed to pay to the [36
plaintiffs, and to such other creditors as might become parties, such sums as might be found due them; that such sums might be assessed upon the stockholders as law and equity require; and that the moneys due from the stockholders to the corporation might be decreed to be held in trust by them, and to be a trust fund for its creditors, and be administered by the court as a trust fund pledged for the payment of the debts of the corporation; and for general relief.

The corporation, though served with process, did not appear, and no further proceedings were taken against it. The plaintiffs

---

NOTE.—*Jurisdiction of United States circuit court depending on parties and residence.* See *note* to Emory v. Greenough, 1: 640.

Jurisdiction of United States courts over common-law offenses. See *note* to United States v. Coolidge, 4: 124.

Jurisdiction of state and United States courts, as to territory and offense. See *note* to United States v. Bevans, 4: 404.

Jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution. See *notes* to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

Jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws. See *notes* to Hart v. Lamphire, 7: 679; Commercial Bank of Cincinnati v. Buckingham, 12: 169.

dismissed their bill against three of the individual defendants, because, as recited in the order of dismissal, they were not within the jurisdiction of the court, being citizens of other States than Tennessee. The other defendants appeared and answered; and upon a hearing it was adjudged that the amount of their stock had never been paid, and was still due from them to the corporation, and constituted a trust fund for the payment of the debts of the plaintiffs and of other creditors who might come in. A receiver was appointed, and the case referred to a master to receive proofs of claims. 41 Fed. Rep. 531. The master's report allowed sixty-three claims of different creditors, amounting in all to $22,888; those of the original plaintiffs for $4,032, $3,286 and $464, respectively; one other claim for $3,527, and the rest varying from $1,060 down to $3.25.

As to the claims for less than $2,000 each, the defendants excepted to the master's report, and moved the circuit court to dismiss the bill for want of jurisdiction. On September 6, 1890, the court overruled the exception and motion, confirmed the master's report, and decreed that all the claims allowed by the master were just debts of the corporation and entitled to be paid out of the assets; and that, in order to pay the amount of these debts, the defendants should pay to the receiver, and he should be authorized to collect, their unpaid subscriptions to stock, amounting in all to $56,175, the sums so charged against five of the defendants being more than $5,000 each, and against each of the other defendants less than $5,000. The defendants so charged with more than $5,000 appealed to this court.

368] The appellees now moved this court as follows:

"First. To advance this cause for hearing, and now to hear the same, so far as there may be appeals herein, under the provisions of the Act of February 25, 1889, chap. 236, questioning the jurisdiction of the circuit court to render certain parts of the relief granted by its judgment herein.

"Second. To dismiss all the other appeals herein, for the reason that this honorable court has not jurisdiction of the same."

By agreement of parties, and leave of court, the case was advanced for hearing as to the questions of the power of the circuit court to grant the relief decreed; and those questions, as well as the motion to dismiss, were submitted on printed briefs.

Messrs. **Walter Evans** and **Jas. R. Macfarlane,** for appellees, for motion:

There is not in dispute between any creditor and any appellant as much as the required jurisdictional amount.

Seaver v. *Bigelow*, 72 U. S. 5 Wall. 208 (18: 595); *Henderson* v. *Wadsworth*, 115 U. S. 264 (29: 377); *Stewart* v. *Dunham*, 115 U. S. 61 (29: 329); *Gibson* v. *Shufeldt*, 122 U. S. 27 (30: 1083); *Schwed* v. *Smith*, 106 U. S. 188 (27: 156).

As to jurisdiction in the circuit court, this court has conclusively settled the question in *Stewart* v. *Dunham*, 115 U. S. 61-65 (29: 329-331).

Messrs. **Edwin H. East** and **James S. Pilcher,** for appellants, in opposition to motion:

The question of jurisdiction of the subject matter is always to be considered in the United States courts, even though not raised by the parties.

Chapman v. *Barney*, 129 U. S. 677 (32: 800); *Sullivan* v. *Fulton S. B. Co.* 19 U. S. 6 Wheat. 450 (5: 302): *Jackson* v. *Ashton*, 33 U. S. 8 Pet. 148 (8: 898); *Grace* v. *American Cent. Ins. Co.* 109 U. S. 278 (27: 932); *Cameron* v. *Hodges*, 127 U. S. 322 (32: 132).

The amount in controversy, as against the several appellants, is in excess of $5,000.

Germania Nat. Bank v. *Case*, 23 U. S. L. ed. 961; Morawetz, Priv. Corp. § 866, and cases cited.

Where two or more parties may join as a matter of convenience, to prevent a multiplicity of suits, in one action, for the ascertainment and distribution of their respective interests in a common fund, the interest of each independent of others must amount to the sum of $2,000, to give jurisdiction to the United States circuit court.

Rich v. *Bray*, 2 L. R. A. 225, 37 Fed. Rep. 273; *Bernard's Twp.* v. *Stebbins*, 109 U. S. 341 (27: 956).

A creditor must sue on behalf of himself and all other creditors who are willing to join, for unpaid subscriptions.

Taylor, Priv. Corp. § 704; *Dabney* v. *Bank of South Carolina*, 3 S. C. 124; *Sawyer* v. *Hoag*, 84 U. S. 17 Wall. 610 (21: 731); *Hickling* v. *Wilson*, 104 Ill. 54; *Lane's App.* 105 Pa. 49; *Brundage* v. *Monumental G. & S. Mfg. Co.* 12 Or. 322; *Patterson* v. *Lynde*, 112 Ill. 196.

The liability is a trust fund for the benefit of corporate creditors, and no one creditor can assume that he alone is entitled to what any stockholder owes.

Patterson v. *Lynde*, 106 U. S. 519 (27: 265).

Although the distributive share of each representative is below the amount necessary to give this court jurisdiction of the appeal, a motion to dismiss should be disallowed.

Shields v. *Thomas*, 58 U. S. 17 How. 3 (15: 93): *Rodd* v. *Heartt*, 84 U. S. 17 Wall. 354 (21: 627); *Washington Market Co.* v. *Hoffman*, 101 U. S. 112 (25: 782); *Parcher* v. *Cuddy*, 105 U. S. 773 (26:937); *Davies* v. *Corbin*, 112 U. S. 36 (28: 627).

Mr. Justice **Gray** delivered the opinion of the court:

This is a bill in equity by some, in behalf of all, of the creditors of a corporation, against the corporation and holders of stock therein. The bill is not founded upon any direct liability of the stockholders to the plaintiffs; but upon the theory that, the corporation being insolvent and having no other assets, the sums due to it from the stockholders on their unpaid subscriptions to stock ought to be paid by them to the corporation as a trust fund to be distributed among the plaintiffs and all other creditors of the corporation, so far as required to satisfy their just claims, and that, the corporation having neglected to collect these sums or to administer the trust, and the plaintiffs and defend-

ants being citizens of different States, the circuit court, sitting in equity, should compel those sums to be paid in by the stockholders, to be administered as a trust fund and to be distributed among all creditors who should come in. Such a bill can only [369] be maintained by one or more creditors in behalf of all, and not by any one creditor to secure payment of his own debt to the exclusion of others. *Sawyer* v. *Hoag*, 84 U. S. 17 Wall. 610, 622 [21: 731, 736]; *Patterson* v. *Lynde*, 106 U. S. 519 [27: 265]; *Johnson* v. *Waters*, 111 U. S. 640, 674 [28: 547, 559]. In *Hatch* v. *Dana*, 101 U. S. 205 [25: 885], the bill of a single creditor, which was sustained by the court, was brought in behalf of himself and all other creditors of the corporation who should come in and contribute to the expenses of the suit; no other creditors came in; and it did not appear that there were any others.

Each of the appellants has been charged by the decree below with a sum of more than $5,000; and it is undisputed that each of them, if the others should prove insolvent, would be obliged to pay the whole sum charged against him, and that each, therefore, has more than $5,000 at stake. The contest is upon the sufficiency in amount of the creditors' claims to support the jurisdiction of the circuit court in the first instance, and of this court on appeal, within the meaning of the Statutes limiting the jurisdiction of each court to cases in which the sum in dispute exceeds $2,000 and $5,000 respectively. Acts of August 13, 1888, chap. 866, § 1 (25 Stat. 434); February 16, 1875, chap. 77, § 8 (18 Stat. 316).

The sums alleged to be due from the corporation to the original plaintiffs amounting to more than $2,000, the circuit court had jurisdiction of the case, and authority to administer and distribute the amounts due from the individual defendants to the corporation for unpaid subscriptions to stock, as a trust fund for the benefit of all the creditors of the corporation, and for that purpose to permit creditors, who had not originally joined in the bill, to come in and prove their claims before a master. *Johnson* v. *Waters*, above cited.

The trust fund so administered and ordered to be distributed by the circuit court amounting to much more than $5,000, the appellate jurisdiction of this court is not affected by the fact that the amounts decreed to some of the creditors are less than that sum. It was immaterial to the appellants how the sums decreed to be paid by them should be distributed, and (which is more decisive) such a [370] bill as this could not have been filed by one creditor in his own behalf only, and the case does not fall under that class in which creditors, who might have sued severally, join in one bill for convenience and to save expense. This court therefore has jurisdiction of the whole appeal, according to the rule affirmed in *Gibson* v. *Shufeldt*, 122 U. S. 27 [30: 1083], and the cases there collected.

Motion to dismiss appeal overruled, and jurisdiction of the Circuit Court sustained.

ROBERT HAMILTON, *Plff. in Err.*, [37

v.

HOME INSURANCE COMPANY OF NEW YORK.

(See S. C. Reporter's ed. 370-386.)

Contract, clause requiring arbitration—when award of arbitrators is a condition precedent to a suit on a contract of insurance—when not a condition precedent.

1. A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is valid.
2. If a contract of insurance provides that no action upon it shall be maintained until after an award by arbitrators is made as to the amount due upon it, the award is a condition precedent to a right of action on the contract.
3. Where there is no condition in a policy of insurance that no action shall be maintained upon it until an award made by arbitrators of the amount due thereon, an agreement therein to submit the amount to arbitration is collateral and independent; and a breach of such agreement, while it will support a separate action, cannot be pleaded in bar to an action on the policy.

[No. 98.]

Argued Dec. 1, 2, 1890. Decided Dec. 15, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio, to review a judgment upon an insurance policy in favor of defendant. *Reversed.*

Statement by *Mr. Justice* **Gray:**

This was an action, brought June 26, 1886, upon a policy of insurance, numbered 3190, by which the Home Insurance Company of New York insured Robert Hamilton for one year from February 23, 1886, on a stock of tobacco in his warehouse at 413 and 415 Madison Street in Covington in the State of Kentucky, against loss or damage by fire, to the amount of $5,000, "to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the Company in New York."

The policy, after providing that in case of loss the assured should forthwith give

NOTE.—*As to forfeiture of policy for nonpayment of premium; waiver,*—see *note* to Thompson v. Knickerbocker Life Ins. Co. 26: 765.

That misrepresentation or fraud vitiates policy, see *notes* to M'Lanahan v. Universal Ins. Co. 7: 93; Columbian Ins. Co. v. Lawrence, 7: 395.

Effect of agent's filling in untrue answers in application for insurance, without knowledge of assured. See *note* to Union Mut. L. Ins. Co. v. Wilkinson, 20: 617.

As to contracts, their interpretation and validity, see *note* to Bell v. Bruen, 11: 89.

Covenants in contract; when dependent and when independent. See *note* to Goldsborough v. Orr, 8: 600.

Limiting the time within which action must be brought; waiver of; estoppel as to. See *note* to Southern Express Co. v. Caldwell, 22: 556.

notice, and as soon afterwards as possible furnish proofs of loss, with a magistrate's certificate, submit to examination on oath, and produce books and vouchers, and copies of lost books and invoices, further provided, among other things, as follows:

"When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the Company of the whole, naming the quantity, quality and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers) to be mutually appointed by the assured and the Company, their report in writing to be made under oath before any magistrate or other properly commissioned person, one half of the appraisers' fees to be paid by the assured. The Company reserves the right to take the whole or any part of the articles at their appraised value; and until such proofs, declarations and certificates are produced, and examinations and appraisals permitted, by the claimant, the loss shall not be payable."

"But provided, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the Company under this policy."

"And it is hereby understood and agreed by and between this Company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing."

The answer admitted the execution of the policy, and notice of loss; put in issue the amount of loss; denied that the plaintiff ever delivered due proofs of loss, or had performed the conditions of the policy on his part, and, after reciting the substance of the provisions above quoted, alleged as follows:

"And the defendant says that differences having arisen touching the loss and damage sustained by said plaintiff under said policy and the amount thereof, the plaintiff claiming a loss of $40,000, and the defendant claiming and believing that it was slight and but a very small part of said sum, and being unable to agree upon the amount of said loss, this defendant requested and demanded in writing that the amount of such loss and damage should be submitted to and ascertained and determined by impartial arbitrators, whose award in writing should be binding upon the parties as to the amount of loss or damage, but should not decide the liability of the Company under said policy.

"And the said defendant further says that the plaintiff wholly disregarded the terms and conditions of said policy in that respect, and neglected and refused to have such arbitration, and refused to choose or submit to arbitrators chosen in accordance with the terms and provisions of said policy the amount of the loss or damage by fire to the property covered by said policy, and refused to be governed in the ascertainment of said loss by any of the terms and conditions of said policy, and, against the protest of the defendant, proceeded to and did sell all of said property at auction. An arbitration and the ascertainment of the said loss thereby, as provided in said policy, became impossible, and this defendant was deprived of its rights and privileges under said policy with respect to said property and the appraisement thereof.

"This defendant further says that the damage done to the property insured was of such a nature as to require a careful and scrutinizing examination to ascertain the injury thereto and loss thereon, and that an appraisement by arbitrators, as required by the terms and conditions of said policy, was of the greatest importance to the defendant, and the only means under said policy whereby the exact amount of damage and injury sustained by said plaintiff upon said property could be determined; and the said plaintiff, by the sale of said property, and in disregarding the terms and conditions of said policy in that respect, wholly deprived this defendant of the right to an arbitration, as provided in said policy, and all other rights in respect to the property so injured or damaged by said fire. [373]

"The defendant further says that by reason of the failure and refusal of said plaintiff to agree upon arbitrators to determine the amount of the loss and damage so sustained as aforesaid, and his refusal to submit the amount of such loss to arbitration in accordance with the plain terms and provisions of said policy, and the sale of said property so injured as aforesaid against the written protest of the defendant, the said plaintiff is not entitled to recover in this action, nor to have or maintain this action against the said defendant."

The plaintiff filed a replication, denying these allegations of the answer.

At the trial, the plaintiff introduced evidence tending to prove a loss or damage by fire on April 16, 1886, to the amount of the insurance, and the delivery of proofs of loss in accordance with the policy, and put in evidence a policy of the Liverpool and London and Globe Insurance Company on the same property; the defendant introduced evidence tending to prove that the amount of loss or damage was less; and there was put in evidence a correspondence in writing between the parties or their authorized agents at Cincinnati, the material parts of which were as follows:

April 26, 1886—plaintiff to defendant: "I inclose proof of loss under policy of your Company, with invoice attached, in compliance with the requirements of the policy. If there is anything defective in the substance or form of the above proof, please advise me thereof at once that I may perfect the same to your satisfaction, and return the proof to me in such case for that purpose. The property described and damaged has been invoiced and arranged, and is ready for examination by your Company. Such examination must be made at once, for the reason that I am obliged to occupy the premises in the prosecution of my business, and each day of delay involves considerable loss and expense to me. As before advised, I [374] propose to send the entire stock to be sold at public auction in a few days, whereof I will give you notice. It can be readily inspected in a short time where it now lies."

April 27, 1886—defendant to plaintiff: "Received of Robert Hamilton papers purporting to be proofs of loss under Home Insurance policy No. 3190."

April 28, 1886—defendant and other insurance companies to plaintiff: "The undersigned, representing the several insurance companies against which you have made claim for loss under their respective policies of insurance upon stock in your tobacco factory, Nos. 413 and 415 Madison Street, Covington, Ky., claimed to have been damaged by fire on April 16, 1886, beg leave jointly to take exception to the amount of claim made, and to demand that the question of the value of and the loss upon the stock be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance under which claim is made; and we hereby announce our readiness to proceed at once with this appraisement, so soon as your agreement to the demand is declared. We further desire jointly to protest against the removal, sale or other disposition of the property until such an appraisement has been had, and to notify you that the insuring companies will in no way be bound by such *ex parte* action."

April 29, 1886—plaintiff's counsel to defendant and other insurance companies: "Mr. Hamilton is not endeavoring to obtain any unfair advantage or unfair adjustment of his loss against the companies. He had believed that, in view of the fact that the traffic in tobacco is so large in this city, and substantially all of it, at least ninety-nine per cent of the leaf tobacco business, is transacted by sale at public auction, that a sale of this tobacco presented the fairest mode of ascertaining its actual value as it stands. It is in substance and effect an appraisement in detail of every package by the entire trade in this city. But in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco, to act as arbitrator in your behalf, Mr. Hamilton will accede to your [proposition, upon the express understanding that the arbitrators selected shall have a full *opportunity to* examine the stock of tobacco, and that it shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award." "If the proposed arbitration is satisfactory, will you at once inform me of the arbitrator selected by you and submit to me the form of agreement for arbitration which you propose? Mr. Hamilton will do the like in respect to the arbitrator selected by him."

April 30, 1886—defendant and other insurance companies to plaintiff's counsel: "We must insist upon arbitration, in accordance with the terms of our several contracts, without importing into it any conditions as to the sale of the property. Such conditions would be incompatible with the provisions of our several policies of insurance and the rights of the insuring companies thereunder. As soon as Mr. Hamilton indicates his readiness to proceed with the arbitration called for, we will submit the name of an arbitrator, and also a form of agreement for arbitration."

April 30, 1886—plaintiff's counsel to insurance companies: "Mr. Hamilton, and I in his behalf, deny that the arbitration in the manner indicated is in violation of the terms of any of the policies, or imports any condition into it which the insured is not entitled to insist upon, or which is incompatible with the provisions of the several policies of insurance, or the rights of the insurance companies thereunder. Mr. Hamilton is ready, and has directed to me to express his readiness, to proceed at once with an arbitration which, as he understands it, is in substantial compliance with the arbitration provided for in all the several policies; but they are not alike in their provisions upon this subject of arbitration, and a literal compliance with some of them would be inconsistent with a literal compliance with others. The only way, as it seems to me, that Mr. Hamilton, or I in his behalf, can determine whether what you call the 'arbitration called for' is what Mr. Hamilton understands to be the 'arbitration called for' and is willing to accede to, is for you to [3 indicate what you understand the arbitration called for to be, by submitting a form of agreement for arbitration, or in some other mode indicating the specific terms of the arbitration which you have demanded. I wish to say that, as I understand the expression in my letter of the 29th, that 'it' (the tobacco) 'shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they may make their award,' does not in any wise call upon the companies to consent to a sale of the property. Mr. Hamilton is quite ready to take upon himself the responsibility of selling it. It simply requires that the arbitration shall be commenced before the sale, when the arbitrators may have an opportunity of examining the property, and that the award shall not be made until after the sale has taken place, and the assured has had an opportunity to

submit the result of it, with other competent evidence, to the arbitrators before the award is made."

May 3, 1886—insurance companies to plaintiff's counsel: "In compliance with the request in your letter of April 30th, addressed to the companies insuring Robert Hamilton, we herewith inclose a form of agreement for 'submission to appraisers,' which is in practical accordance with the conditions of the policies of the several companies, and which all the companies are willing to sign, and abide by the award reached thereunder. We must again decline to entertain your proposition that the arbitrators, after examining the stock, shall postpone their award until after the stock shall have been sold, when the result of such sale, with other evidence, shall be submitted to the arbitrators. We insist that the arbitration provided for in such case by our policies is in no sense a court for the hearing of evidence. The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information and the forming of their own judgments as to the value and damage of the goods. But we insist that under the conditions of the several policies there can be no abandonment of the stock to the companies, and that after an award has been reached the companies have the right to take the stock, in whole or in part, at the appraised value. The companies propose to stand upon the conditions of their policies, and decline all propositions looking to a waiver thereof, or adding new and inconsistent conditions thereto."

The principal part of the form of "submission to appraisers," inclosed in this letter, was as follows: "It is hereby agreed by Robert Hamilton, of the first part, and the several insurance companies, by their representatives, whose names are hereunto affixed, of the second part, that—— ——and—— ——shall appraise and estimate the loss by fire of April 16, 1886, upon the property of Robert Hamilton, as specified below and as hereinafter provided. In case of disagreement, said appraisers shall select a third, who shall act with them in matters of difference only. The award of said appraisers or any two of them, made in writing in accordance with this agreement, pursuant to the terms of the policies, shall be binding upon both parties; but it is understood that this agreement and appraisement are only for the purpose of fixing the sound value of the property immediately before the fire and the loss or damage thereon occasioned by said fire, and shall not waive, invalidate or terminate the right of the insurers to take said property at its appraised value, or any other rights of either party hereto, but the same are to be construed solely by reference to said policies."

May 4, 1886—plaintiff's counsel to insurance companies: "There can be no misunderstanding as to the position taken by the companies and the assured in this matter. 1st. I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made. This Mr. Hamilton declines to do. 2d. Mr. Hamilton is willing that the companies jointly, or as they may arrange between themselves, shall make their own appraisement through their own appraisers of the value of the stock, and that they shall jointly, or either of them, with the consent of the rest, have the right to take the stock, in whole or in part, at [37 their appraisal. 3d. Mr. Hamilton has made and makes no claim to abandon the property, and he has made and makes no claim that the companies shall consent to the sale by him of the damaged stock."

Inclosed in this letter, and signed by the plaintiff's counsel, was the following: "To the Liverpool and London and Globe Insurance Company and the companies jointly acting with it in respect to the loss sustained by Robert Hamilton on the property in Nos. 413 and 415 Madison Street, Covington, Ky. Mr. Hamilton demands of the several insurance companies an arbitration of the amount of the loss sustained upon the goods covered by fire on the 16th day of April, and will select an arbitrator to represent him in pursuance of the provisions of the policy, it being stipulated in the agreement for arbitration that the several companies and the assured shall be duly notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, as well as personally examine the damaged goods, in considering and awarding the amount of the loss."

May 5, 1886—insurance companies to plaintiff's counsel. "Your communication of the 4th is at hand. We have nothing to add to our letter of the 3d; and if, as we are made to understand, Mr. Hamilton declines to consent to a form of 'submission to appraisers' that does not provide for the introduction of 'all competent legal testimony that may be offered by either party' (under which provision, as you have repeatedly declared, Mr. Hamilton would seek to present evidence based on a sale of the property), we must accept your communication as a refusal to comply with our request and with the conditions of the policies of insurance, which are clearly incompatible with your wishes in the matter."

May 7, 1886—insurance companies to plaintiff's counsel: "Referring to your letter of the 4th, setting forth your understanding of the position taken by the two parties, permit me, on behalf of the companies, to take exceptions to your first statement, to wit: 'I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their [371 own judgment and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made.' This does not correctly state our position, which remains now as stated in our communication of the 3d, to wit: 'The appraisers may, at

their discretion, seek any evidence they deem necessary for their own full information.' What we do object to and protest against is the sale of the goods, or the consideration by the appraisers of evidence founded on that fact or result. If the form of 'submission to appraisers' we submitted contains any provision or condition limiting or defining the duties of the appraisers and not prescribed by the several policies, each company will submit its own form, as we desire and demand a submission free from any conditions imposed by either party."

The plaintiff also gave in evidence a letter from his counsel to the Liverpool and London and Globe Insurance Company, dated May 20, 1886, inclosing a notice in a newspaper of the day before of a sale by auction to be had on May 29, 1886, at the plaintiff's warehouse in Covington, of the tobacco insured by the policy in suit.

Upon this evidence, the court instructed the jury that, on the issues joined on the special defenses in the answer, the plaintiff could not recover, and that they should return a verdict for the defendant. The plaintiff tendered a bill of exceptions to these instructions, and, after verdict and judgment for the defendant, sued out this writ of error.

Messrs. **E. W. Kittredge** and **Joseph Wilby,** for plaintiff in error:

A condition in a policy providing for an arbitration cannot operate to deprive the insured of his right of action, unless clearly made a condition precedent to the existence of such right.

Liverpool, L. & G. Ins. Co. v. *Creighton*, 51 Ga. 95; *Patterson* v. *Triumph Ins. Co.* 64 Me. 500; *Roper* v. *London*, 1 El. & El. 825; *Gere* v. *Council Bluffs Ins. Co.* 67 Iowa, 272; *Reed* v. *Washington F. & M. Ins. Co.* 138 Mass. 572; *Canfield* v. *Watertown F. Ins. Co.* 55 Wis. 419; *German-American Ins. Co.* v. *Steiger*, 109 Ill. 254; Wood, Ins. (ed. 1878) 751, and cases cited in *note; Clement* v. *British American Assur. Co.* 141 Mass. 298.

Messrs. **Channing Richards,** *Thomas B. Paxton* and *Charles H. Stephens*, for defendant in error:

That no action can be sustained against the Company upon the policy until after an award has been obtained fixing the amount of the claim as provided in the policy, is, upon a fair construction of the contract, a condition precedent to recovery in this case.

Scott v. *Avery*, 5 H. L. Cas. 811; *Elliott* v. *Royal Exchange Ins. Co.* L. R. 2 Exch. 237; *Braunstein* v. *Accidental Death Ins. Co.* 1 Best & S. 782; *Hall* v. *Norwalk F. Ins. Co.* 57 Conn. 114; *Old Saucelito L. & D. Dock Co.* v. *Commercial Union Assur. Co.* 66 Cal. 253; *Delaware & H. Canal Co.* v. *Pennsylvania Coal Co.* 50 N. Y. 250; *Reed* v. *Washington F. & M. Ins. Co.* 138 Mass. 572; *Scottish U. & N. Ins. Co.* v. *Clancy*, 71 Tex. 5.

[883] *Mr. Justice* **Gray** delivered the opinion of the court:

This case resembles in some aspects that of *Hamilton* v. *Liverpool & L. & G. Ins. Co.*, 136 U. S. 242 [34: 419], decided at the last term, but it is essentially different in important and controlling elements.

In that case, the effect of the provisions of the policy, by reason of which it was held that the assured, having refused to submit to the appraisal and award provided for, could not maintain his action, was thus stated by the court: "The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action." 136 U. S. 254, 255 [34: 423].

That policy looked to a single appraisal and award, to be made as one thing and by one board of appraisers or arbitrators, whenever any difference should arise between the parties, and to be binding and conclusive as to the amount of the loss, although not to determine the question of the liability of the company; and the policy contained, not only a provision that until such an appraisal the loss should not be payable, but an express condition that no action upon the policy should be sustainable in any court until after such an award.

In the case now before us, on the other hand, the appraisal and the award are distinct things, and to take place at separate times, and the effect assigned to each is quite different from that given to the appraisal and award in the other policy. The "appraisal," without which the loss is not payable, is required to be made, not merely when differences arise as to its amount, but in all cases, and results in a mere "report in writing," which is not declared to be binding upon the parties in any respect, and is in truth but a part of the proofs of loss. It is only by a separate and independent provision, and when differences arise touching any loss "after proof thereof has been received in due form," that the matter is required, at the request of either party, to be submitted to "arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss, but shall not decide the liability of this Company under the policy;" and there is no provision whatever postponing the right to sue until after an award.

The special defenses set up, with some tautology and surplusage, in the answer, reduce themselves, when scrutinized, to a

single one, the plaintiff's refusal to submit to an award of arbitrators, as provided in the policy. This appears by the general frame of the answer, and by its speaking of the award as "an arbitration and the ascertainment of the said loss thereby," and as "an appraisement by arbitrators," as well as by the distinct averments that the defendant requested and the plaintiff declined a submission to arbitration, and by the omission of any specific allegation that the plaintiff neglected to procure a report of appraisers.

The evidence introduced at the trial was to the same effect. Proofs of loss, sent by the plaintiff to the defendant, with a request that any defects in substance or form might be pointed out so that he might perfect the proofs to the defendant's satisfaction, were received by the defendant, without then or afterwards objecting to their form or sufficiency. The subsequent correspondence between the parties was evidently influenced in form by embracing insurances in different companies under policies with various provisions; but, as applied to the policy in suit, it manifestly related, and was understood by both parties to relate, not to a mere report of appraisers, but to an award of arbitrators which should bind both parties as to the amount of the loss.

The instruction to the jury, therefore, that on the issues joined on the special defenses in the answer, and upon the evidence in the case, the plaintiff could not recover, was in effect a ruling that the plaintiff could not maintain his action because he had refused to submit the amount of his loss to arbitration.

A provision, in a contract for the payment of money upon a contingency, that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton* v. *Liverpool & L. & G. Ins. Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. *Roper* v. *Lendon*, 1 El. & El. 825; *Collins* v. *Locke*, L. R. 4 App. Cas. 674; *Dawson* v. *Fitzgerald*, L. R. 1 Exch. Div. 257; *Reed* v. *Washington F. & M. Ins. Co.* 138 Mass. 572; *Seward* v. *Rochester*, 109 N. Y. 164; *Birmingham F. Ins. Co.* v. *Pulver*, 126 Ill. 329, 338; *Crossley* v. *Connecticut F. Ins. Co.* 27 Fed. Rep. 30.

The rule of law upon the subject was well stated in *Dawson* v. *Fitzgerald*, by *Sir* George Jessel, Master of the Rolls, who said: "There are two cases where such a plea as the present is successful: first, where the action can only be brought for the sum named by the arbitrators; secondly, where it is agreed that no action shall be brought till there has been an arbitration, or that arbitration shall be a condition precedent to the right of action. In all other cases where there is, first, a covenant to pay, and, secondly, a covenant to refer, the covenants are distinct and collateral, and the plaintiff may sue on the first, leaving the defendant" [38
"to bring an action for not referring," or (under a modern English statute) "to stay the action till there has been an arbitration." L. R. 1 Exch. Div. 260.

Applying this test, it is quite clear that the separate and independent provision, in the policy now before us, for submitting to arbitration the amount of the loss, is a distinct and collateral agreement, and was wrongly held by the circuit court to bar this action.

Judgment reversed, and case remanded, with directions to set aside the verdict, and to take such further proceedings as may be consistent with this opinion.

Ex parte:
In the matter of WRIGHT LANCASTER [39
ET AL., *Petitioners.*

(See S. C. Reporter's ed. 393-395.)

Habeas corpus, when leave to file petition for will be denied.

Where persons indicted in the circuit court and in custody have not invoked the action of the circuit court by a motion to quash the indictment or otherwise, this court will deny leave to file here a petition for a writ of habeas corpus, asked upon the ground that the matters charged do not constitute any offense under the laws of the United States or cognizable in the circuit court, and that for other reasons the indictment cannot be sustained.

Submitted Dec. 4, 1890. Decided Dec. 5, 1890.

ON MOTION to file a petition for a writ of habeas corpus. *Denied.*

Messrs. Augustus O. Bacon and **Washington Dessau**, for the petitioners, for motion.

Mr. **W. H. H. Miller**, *Atty-Gen.*, in opposition.

Fuller, *Ch. J.:*

The petitioners were indicted under sections 5508 and 5509 of the Revised Statutes, on the 20th of November, 1890, in the Circuit Court for the Southern District of Georgia, and have been taken into custody. They have not invoked the action of the circuit court upon the sufficiency of the indictment by a motion to quash or otherwise, but ask leave to file in this court a petition for a writ of habeas corpus, upon the ground that the matters and things set forth and charged do not constitute any offense or offenses under the laws of the United States or cognizable in the circuit court, and that for other reasons the indictment cannot be sustained. In this posture of the case we must decline to interfere.

The application for leave to file the petition is denied.

395] COUNTY OF FOND DU LAC, *Plff. in Err.*,
v.
SARAH MAY.

(See S. C. Reporter's ed. 395-408.)

Patent right—construction of—old mechanism—aggregation.

1. The patent No. 25,662, granted to Edwin May, Oct. 4, 1859, for an improvement in the construction of prisons, is void.
2. The several elements of the patented device in such patent are old; the angle door is an old contrivance, and the combination of it with the safe lock or bolt, claimed in claim 1, is not new or patentable; nor is the combination of such door with a lock of any kind a patentable invention.
3. The mechanism is old in its use to move a door or a gate at a distance, and the mechanical operation of the device is the same, whether the mechanism passes through a solid iron barrier, or a grated iron barrier, or a barrier of another material, or through no barrier at all.
4. As the mechanical operation and effect of the patented devices are the same whether there be a grating or other barrier or not, there is no patentable combination between the devices and the grating. The case is one of mere aggregation.

[No. 61.]

Argued Nov. 26, 1890. Decided Dec. 15, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin, to review a judgment for damages for the infringement of letters-patent No. 25,662, granted to Edwin May, for an improvement in the construction of prisons. *Reversed.*

The facts are stated in the opinion.

Messrs. **Charles E. Shepard** and *J. H. McCrory*, for plaintiff in error:

There was neither any valid patented device nor an infringement thereof.

Brown v. *Piper*, 91 U. S. 37 (23: 200); *Roberts* v. *Ryer*, Id. 157 (270); *Terhune* v. *Phillips*, 99 U. S. 592 (25: 293); *Tucker* v. *Spalding*, 80 U. S. 13 Wall. 453 (20: 515).

Such devices are now in such common use for one purpose or another that the court can and will take judicial notice of them.

Stephenson v. *Brooklyn C. T. R. Co.* 114 U. S. 149 (29: 58); *Burt* v. *Evory*, 133 U. S. 349 (33: 647); *Hill* v. *Wooster*, 132 U. S. 693 (33: 502); *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* Id. 161 (295); *Aron* v. *Manhattan R. Co.* Id. 84 (272); *St. Germain* v. *Brunswick*, 135 U. S. 227 (34: 122).

If the devices are novel, they are not the result of invention.

Heald v. *Rice*, 104 U. S. 754 (26: 916); *Hall* v. *Macneale*, 107 U. S. 90 (27: 367); *Thompson* v. *Boisselier*, 114 U. S. 1 (29: 76); *Dunbar* v. *Meyers*, 94 U. S. 187 (24: 34); *Stephenson* v. *Brooklyn C. T. R. Co.* 114 U. S. 149 (29: 58).

Even if otherwise patentable, these claims lack the element of co-operation. The devices described are mere aggregations.

Double-Pointed Tack Co. v. *Two Rivers Mfg. Co.* 109 U. S. 117 (27: 877); *Pickering* v. *McCullough*, 104 U. S. 318 (26: 751); *Hendy* v. *Golden State & M. I. Works*, 127 U. S. 370 (32: 207); *Furbush* v. *Cook*, 2 Fish. Pat. Cas. 669.

The County is not liable for infringement of a patented device used in its jail.

Dill. Mun. Corp. (4th ed.) §§ 22-27, 966, 997; *Hamilton County* v. *Mighels*, 7 Ohio St. 109, 118; *Hill* v. *Boston*, 122 Mass. 344; *Com.* v. *Brice*, 22 Pa. 211; *Lorillard* v. *Monroe*, 11 N. Y. 392; *People* v. *Town Auditors*, 74 N. Y. 310; *People* v. *Town Auditors*, 75 N. Y. 316; *Wehn* v. *Gage County*, 5 Neb. 494.

Counties and towns are not liable in tort for either misfeasance or nonfeasance of their officers.

Ward v. *Hartford County*, 12 Conn. 406; *Wilson* v. *School Dist. No. 4*, 32 N. H. 118; *State* v. *Leffingwell*, 54 Mo. 458; *Kincaid* v. *Hardin County*, 53 Iowa, 430; *Askew* v. *Hale County*, 54 Ala. 639; *Soper* v. *Henry County*, 26 Iowa, 264; *State* v. *Hancock County*, 11 Ohio St. 190; *Hollenbeck* v. *Winnebago County*, 95 Ill. 151; *Stilling* v. *Thorp*, 54 Wis. 528; *Bigelow* v. *Randolph*, 14 Gray, 541; *Eastman* v. *Meredith*, 36 N. H. 284; *Western College* v. *Cleveland*, 12 Ohio St. 379; *May* v. *Juneau County*, 30 Fed. Rep. 241.

Messrs. **M. C. Burch** and *Duane E. Fox* for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Eastern District of Wisconsin, on the 26th of September, 1885, by Sarah May against the County of Fond du Lac, a corporation of the State of Wisconsin, to recover damages for the infringement of letters-patent No. 25,662, granted to Edwin May, October 4, 1859, for fourteen years from that day, for an "improvement in the construction of prisons."

The specification and claims of the patent are as follows: "Be it known that I, Edwin May, of Indianapolis, in the County of Marion and State of Indiana, have invented certain new and useful improvements in the construction and operation of prisons, of which the following is a full and exact description, reference being had to the accompanying drawings and the letters marked thereon. Figure 1 is a perspective and figures 2, 3, 4, 5, 6, 7, 8 are sectional views showing the construction and general arrangement of the same.

"A represents the side and end walls of the prison; B, the floor; C, the outside door; D, inside or angle door; E, moulding or hood over door C; F, the cells; G, the small door of the safe or box J; H, the crank which operates the drum (*p*); I, bolt or lock to the angle door D; *a*, a bar connected with the bolts S, which are operated by the levers (*b*) for the purpose of fastening the cell doors (*j*); *c*, fulcrum of the lever (*b*); *d*, levers

NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 433.

As to patentability of inventions, see *notes* to Thompson v. Boisselier, 29: 76; Corning v. Burden, 14: 683.

As to abandonment of invention, see *note* to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see *note* to Corning v. Burden, 14: 683.

for operating the sliding doors (*l*); *e*, wire rope or endless chain which operates the levers (*d*); *f*, hinge joints to levers (*d*); *g*, support of pulleys for chain or wire rope; *h*, pulleys over which the chain or wire rope (*e*) operates; *i*, the grated partition; *j*, cell doors; *k*, slide or groove for doors (*l*) to work in; *m*, rollers for sliding doors (*l*); *n*, guard or slide for levers (*d*); *o*, staple to padlock levers (*b*); *q*, pawl or catch to hold the drum (*p*) in place; *r*, rollers for bar (*d*) to work over.

"The nature and extent of the improvement will be more readily understood by reference to the object sought, which is, avoiding the necessity of actual contact with the prisoners, while the keeper has perfect knowledge and control of them, and preventing their escape by knocking down the keeper, which has often occurred where the common arrangement of prisons has been used. It is peculiarly adapted to county prisons and that portion of state prisons appropriated to solitary confinement.

"The following is the manner of operating the same and managing the prisoners: The jailer, opening the outside door C, releases the edge of the small or safe door G, giving access to the crank H, which operates the doors (*l*) in the grated partition (*i*) by means of the endless chain or rope which passes around the drum (*p*) and is attached to the hinge or joint (*f*) of the lever (*d*). The angle door D is held by the bolt or lock I while the keeper is allowed to examine every part of the hall, which the peculiar shape of the angle door D allows. Should there be any prisoners in the first hall they are ordered to retire through the doors (*l*) in the grated partition (*i*). The doors (*l*) are then closed by operating the crank H, as has been shown. The keeper then, unlocking, passes through the angle door D into the first hall, being separated from the prisoners by the grating (*i*), through which he orders the prisoners each to his cell, and to close the door after him. By operating the lever (*b*) the bars (*a*) are drawn, while the bolts S, being drawn over the doors, secure the same. He then passes in and locks the doors (*j*), whereby an iron grating is always kept between the keeper and the prisoners.

"What I claim and desire to secure by letters-patent is—

"First. The angle door D, in combination with the safe lock or bolt I, when constructed and operated substantially as set forth.

"Second. The safe J, containing the drum (*p*) and bolt I, and being held by the outer door C, when constructed and operated substantially as and for the purposes set forth.

"Third. The endless chain or rope (*e*), in combination with the levers (*d*) when constructed and operated substantially as and for the purposes set forth.

"Fourth. The combination and arrangement of the levers (*b*), bar (*a*) and bolts or lugs S, when operated from without the grating *i*, substantially as and for the purposes set forth."

The patent was, on the 4th of October, 1873, extended by the commissioner of patents for seven years from that day. The patentee, who was the husband of the plaintiff, died on the 27th of February, 1880. The plaintiff claimed that one Edwin Forrest May, on the 6th of March, 1880, was duly appointed executor of Edwin May by the proper tribunal; that, he having resigned his trust on the 7th of June, 1880, one McGinnis was duly appointed administrator *de bonis non*, with the will annexed, of Edwin May; and that McGinnis, on the 6th of March, 1882, under a proper order of the proper court to that effect, conveyed to the plaintiff all the title of the estate of the patentee under the patent and its extension, including all rights of action and claims for damages which the estate had by virtue thereof. Damages were claimed for the use of the patented invention, as covered by claims 1, 3 and 4, for the period of the extended term, from October 4, 1873, to October 4, 1880.

The defendant, by an answer and a notice of special matter, set up in defense the Statute of Limitations of the State of Wisconsin, and want of novelty. The case was tried by a jury, who found that during the extended [391 term of the patent the defendant had infringed claims 1, 3 and 4; and they awarded to the plaintiff $1,774.68 damages. 27 Fed. Rep. 691. The defendant moved for a new trial on various grounds, including one that the court erred in not instructing the jury to render a verdict for the defendant, and another that the court erred in ruling that the plaintiff was the owner of the cause of action. This motion was denied; and the defendant then moved for an arrest of judgment, on the grounds (1) that the patent was void on its face, because none of the claims were for a patentable invention or combination, and that no one of the several combinations claimed in it as the patentee's inventions was a new or patentable invention; and (2) that the plaintiff was not the lawful owner of the cause of action sued upon. This motion was overruled, and judgment was entered for the plaintiff for $1,774.68 and costs. To review that judgment the defendant has brought a writ of error.

At the trial, when the patent was offered in evidence, it was objected to by the defendant on the ground that, on the face of the specification and claims, it was invalid. This objection was overruled and the defendant excepted. The same objection was made to the certificate of extension, and overruled, and the defendant excepted. The proceedings for the appointment of the executor and of the administrator *de bonis non*, and for the sale of the patent, the conveyance to the plaintiff and the order of the court confirming the sale and conveyance, were then put in evidence under the objection and exception of the defendant that they did not vest in the plaintiff any title to the cause of action sued on.

One Luther V. Moulton was then introduced as a witness by the plaintiff, and testified as follows: "I live at Grand Rapids, Michigan; am a partner in a foundry there; I have had experience in mechanics and patents; have photographed models; have been consulted about the patentability of mechanical devices; have been an expert witness

in patent causes; have done patent soliciting; am acquainted with the May patent in suit; know its specifications and claims, and am acquainted with its practical operation and effect."

400] It was contended that the defendant had infringed the patent by constructing and using a county jail containing the inventions covered by claims 1, 3 and 4. Models of a jail constructed according to the patent, and of the defendant's jail, were introduced in evidence by the plaintiff and identified as correct. A stipulation was then put in evidence, signed by the attorneys for the parties, to the effect that the device used by the defendant in its jail for fastening the doors had been in use therein since 1869. The witness Moulton then proceeded: "In my opinion the model representing the defendant's jail contains the mechanical equivalents of the devices described in the specification, and claimed particularly in the first, third and fourth claims of the patent in question. The results produced by the combinations claimed in the patent are produced by substantially the same means." On cross-examination he testified as follows: "The novelty and utility of this patented device consists in interposing a grating or wall between the person operating the mechanism for securing the doors and the prisoners, so that they can be observed through the door or grating, and the corridor doors be closed and secured, or unlocked and opened, or the cell doors can be locked or unlocked, all without any contact between the jailer and the prisoners, and without the jailer being in the same apartment with the prisoners, and thus exposed to attack by them. The several elements of the device are probably old. The novelty consists in the particular combinations, whereby a new and useful result is produced. I think an angle door is old; have never seen them in jails; have seen angle doors and curved doors and illustrations of them in books many years ago, before 1859. Locks and bolts upon doors are also old, and to put a lock or bolt upon such a door would not be invention. In defendant's jail the corridor doors are not closed by the fastening mechanism as described in the patent, but, when closed by the prisoners or turnkey, they are locked by bolts moved by rock-shafts extending from the outer apartment, through the wall, into the jail proper and to the corridor doors. There is nothing new in a rock-shaft as applied to the purpose of transmitting motion to bolts or other like

401] uses; it is the equivalent of an endless chain, or any other well-known device for transmitting motion; it is very old. The operation and effect of the rock-shaft, the handle or lever that moves it and the bolts that it moves, in connection with the corridor doors thereby locked and unlocked, are precisely the same with or without a wall or grating interposed between the handle or lever and the door locked, and also the same as the corresponding parts in the May patent. In the Fond du Lac jail the handle of this rock-shaft and the place where it is operated are a few feet distant from the angle door. There is an embrasure or slit in the wall by these handles to the rock-shafts, through which two corridors, one over the other on one side of the jail, can be observed; but the other side of the jail, with its two corridors and two tiers of cells, cannot be observed. The doors of all four corridors are locked by rock-shafts, all starting and moved from the same point. The operation and effect of the arrangement of the lever (*b*), bar (*a*) and bolts or lugs (S), as described in the patent, for locking and unlocking the cell doors, are precisely the same, whether the lever is operated through a wall or grating, or whether there is none there. Mechanically, the effect is precisely the same with or without the grating, so far as fastening and unfastening the doors is concerned. The only difference is in the effect of the grating to protect the jailer and guard against escapes. Every separate element of the combination of the fourth claim is old—the bar, the lever, the lugs or bolts and the grating. Levers have long been used, long before this patent, to move a long bar and thereby to move bolts, lugs or the like, at a distance; so, also, similar devices passing through a wall, to open and close and secure window shutters and the like; but the particular combination adapted to interpose protection between the person operating the device and those on the other side of the wall or grating was new and patentable, and so patented to Mr. May. The grating has nothing to do directly with locking or unlocking the doors. It affords protection to the operator while so doing. So with the second claim in suit, which is the third of the patent. All its separate elements are old. It is only the particular combination applied to this purpose that is new and patentable."

The plaintiff then gave evidence to show that the patented contrivance was useful and economical, and for much of the time since it was patented had been in use in sundry jails and prisons in this country. It was further proved that the defendant had used in its jail, ever since 1869, the outside angle door, the contrivance for locking and unlocking the corridor doors and the contrivance for locking and unlocking the cell doors, which were exhibited by the model of its jail which had been put in evidence. Other evidence was given on the part of the plaintiff, but none to contradict what had been testified to by the witness Moulton; and at the close of the plaintiff's case the defendant moved that a verdict be directed for it, on the grounds, among others, that the patent was void for lack of novelty, and that the combinations described in it were not operative combinations, and were old and well-known devices applied to similar uses. This motion was overruled, and the defendant excepted.

Thereupon the defendant proved that at the Wisconsin State Prison at Waupun, the Chemung County Jail at Elmira, New York, and elsewhere, there had been in common and public use, well known to many persons, for many years before 1859, a device consisting of a lever, a bar and lugs or bolts attached, operated substantially as described in said patent, to lock or unlock the cell

doors, but without any intervening wall, corridor grating or other protection to the jailer against attack; that such device, except for the absence of a corridor wall or grating, was substantially identical with, and a mechanical equivalent of, the device described in said patent, and claimed in the fourth claim thereof, and that it was used and operated in the same way, to lock or unlock the cell doors after they had been closed.

No evidence in rebuttal was offered by the plaintiff, and, the testimony being closed, the defendant renewed its motion for a verdict to be directed for it, on the grounds before stated; but the motion was denied, and the defendant excepted.

The defendant then prayed that the jury be instructed that each of the claims 1, 3 and 4 was void; that claim 1 did not claim a new device, nor was the combination claimed therein an operative combination, but was a mere aggregation; that claim 3 did not describe a new device; and that it was a question for the jury whether there was an invention, or exercise of the inventive faculty, in the construction of the devices described in the patent. Each of these instructions was refused, and the defendant excepted to each refusal. The case was submitted to the jury under instructions from the court, the defendant excepting thereto because the court did not submit it to the jury to say whether the elements specified in each of the several combinations in claims 1, 3 and 4 appeared together in a practical combination, or whether it was a mere aggregation.

We are of opinion that the court ought to have directed a verdict for the defendant, on the ground that the patent was void; and that the judgment must be reversed. The objects sought to be accomplished by the patentee were twofold—safe observation of the prisoners while they were out of their cells but within the outer inclosure of the jail, and a safe mode of locking them in their cells without risk of personal contact with them. These objects he sought to attain by three contrivances, which are the foundations of the four claims of the patent. Proceeding inwards from the outside of the jail, these three contrivances are as follows: (1) An angle door D, with the angle in the middle line of the door, projecting inward, a safe or box J, containing a drum (*p*) operated by a crank H, and a bolt or lock I to the angle door D. This contrivance, which is the subject of claim 1, enables the jailer, after he opens the extreme outer door of the jail, to have access to the angle door, so as to look through its grated bars in all directions by means of the angle, while that door is securely held by the bolt or lock I, and to inspect the interior of the prison and observe the prisoners, and direct them to retire behind the corridor or partition doors (*l*) in the grated partition (*i*). This partition separates an outer hall or space from the corridors which run along the tiers of cells. (2) When the prisoners have thus retired behind the corridor or partition doors (*l*), the next step is to open the safe or box J, from the space between the outer door and the angle door, and by the crank H operate the drum (*p*), which carries the wire rope or endless chain (*e*), which, by pulleys, levers and hinges, opens or shuts the corridor or partition doors (*l*). Those doors being closed while the jailer is still outside of the angle door, he can then open the angle door and go into the inner hall. The mechanism thus explained is the foundation of claims 2 and 3. (3) Then the jailer, having between him and the prisoners the grated partition (*i*) with the doors in it closed, can direct each prisoner to retire to his cell and to close the cell door after him. The jailer then, by operating the lever (*b*), can draw the bars (*a*) and carry the bolts or lugs S over the cell doors, and thus secure them. He can then advance into the corridor and further secure the cell doors by ordinary locks on them. This mechanism is the foundation of claim 4.

The novel idea set forth in the patent is to interpose a grating between the jailer and the prisoners at every stage of opening or shutting a door. Previously, there had been between the jailer and the prisoners no intervening wall, corridor grating or other protection against attack; but, with that exception, the prior device used in the Wisconsin State Prison and the Chemung County Jail was substantially identical with, and a mechanical equivalent of, the device claimed in claim 4 of the patent, and operated in the same way to fasten and unfasten the cell doors.

The several elements of the patented device were old. Moulton testified that he had seen angle doors and curved doors, and illustrations of them in books, before 1859; that in the defendant's jail the corridor doors were not closed by the fastening mechanism described in the patent, but, when closed by the prisoners or the turnkey, were locked by bolts moved by rock-shafts extending from the outer apartment, through the wall, into the jail proper and to the corridor doors; that there was nothing new in a rock-shaft applied to the purpose of transmitting motion to bolts or to other like uses; that it was the equivalent of an endless chain or any other well-known device for transmitting motion, and was very old; that the operation and effect of the rock-shaft and handle or lever that moved it and the bolts that it moved, in connection with the corridor doors thereby locked and unlocked, were precisely the same with or without a wall or grating interposed between the handle or lever and the door locked; that the operation and effect of the arrangement of the lever (*b*), bar (*a*) and bolts or lugs S, as described in the patent, were precisely the same, whether the lever was operated through a wall or grating or not; that mechanically the effect was precisely the same with or without the grating, so far as fastening and unfastening the doors was concerned; that the only difference was in the effect of the grating to protect the jailer and guard against escapes; that every separate element of the combination of claim 4 was old, the levers, the bars, the bolts or lugs and the grating; that levers had been

used long before the patent to move a long bar and thereby move bolts, lugs or the like at a distance, and so had similar devices passing through a wall to open and close window-shutters and the like, but that the particular combination, adapted to interpose protection between the person operating the device and persons on the other side of the wall or grating, was new; that the grating had nothing to do directly with locking or unlocking the doors, but afforded protection to the operator while so doing; that all the elements of claim 3 of the patent were old; and that it was only the particular combination applied to the purpose indicated that was new.

As the angle door was an old contrivance, it is manifest that the combination of it with the safe lock or bolt I, claimed in claim 1, was not new or patentable. As the witness Moulton says, locks and bolts upon doors are old, and to put a lock or bolt upon an angle door would not be invention. Nor is the combination of an angle door with a lock of any kind a patentable invention, even though the particular lock had not before been put upon an angle door. Moreover, the combination claimed in claim 1 is one of the angle door with the particular lock or bolt I, that is, such lock or bolt as an integral part of the safe or box J, with its drum (p) and connections, in which view the apparatus in the defendant's jail does not infringe claim 1.

406] As to the patentability of claims 3 and 4, the feature which it is alleged makes both of them patentable is the interposition of a barrier between the jailer and the prisoners. In claim 3, the sliding doors are opened and closed, while the angle door is still locked. In claim 4, the cell doors are fastened by means of the bolts or lugs S, during the time the grated doors in the corridor are securely closed. In view of the evidence, it is clear that the devices covered by claims 3 and 4, as mechanical devices, existed before, having the same mechanical elements and the same mechanical operation and effect. The whole combination was the same, so far as it was a mechanical or patentable combination, namely, a lever, a bar passing through an interposed barrier, a lever or its mechanical equivalent at the other end, and something to be moved by the motion thus transmitted through the barrier. The patentee merely used the same devices which had before been used by other persons, between one side of an interposed barrier and the other, with the same mechanical effect. His motive was, and his use of the device was, to protect the jailer, by a sufficient barrier, from being injured by the prisoners; but neither the motive nor the strength of the barrier can enter as an element into the question. The case is one merely of a double use. The mechanism was old in its use to move a door or a gate at a distance, and the mechanical operation of the device was the same, whether the mechanism passed through a solid iron barrier, or a grated iron barrier, or a barrier of another material, or through no barrier at all. Mr. Moulton testifies that the mechanical effect is precisely the same with or without the grating, so far as fastening and unfastening the doors is concerned, the only difference being in the effect of the grating to protect the jailer and guard against escapes. *Tucker* v. *Spalding*, 80 U. S. 13 Wall. 453 [20: 516]; *The Corn-Planter Patent*, 90 U. S. 23 Wall. 181, 232 [23: 161, 173]; *Brown* v. *Piper*, 91 U. S. 37 [23: 200]; *Dunbar* v. *Meyers*, 94 U. S. 187 [24: 34]; *Vinton* v. *Hamilton*, 104 U. S. 485, 491 [26: 807, 809]; *Heald* v. *Rice*, Id. 737, 754 [910, 916]; *Hall* v. *Macneale*, 107 U. S. 90 [27: 367]; *Thompson* v. *Boisselier*, 114 U. S. 1 [29: 76]; *Stephenson* v. *Brooklyn C. T. R. Co.* Id. 149 [58]; *Aron* v. *Manhattan R. Co.* 132 U. S. 84 [33: 272]; *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* Id. 161 [295]; *Hill* v. [40
Wooster, Id. 693 [502]; *Burt* v. *Evory*, 133 U. S. 349 [33: 647]; *St. Germain* v. *Brunswick*, 135 U. S. 227 [34: 122].

As the mechanical operation and effect of the patented devices are the same whether there be a grating or other barrier or not, there is no patentable combination between the devices and the grating. The grating performs no mechanical function and has no mechanical effect. The case is one of mere aggregation. *Pickering* v. *McCullough*, 104 U. S. 310, 318 [26: 749, 752]; *Double-Pointed Tack Co.* v. *Two Rivers. Mfg. Co.* 109 U. S. 117 [27: 877]; *Stephenson* v. *Brooklyn C. T. R. Co.* 114 U. S. 149 [29: 58]; *Hendy* v. *Golden State & M. I. Works*, 127 U. S. 370 [32: 207]; *Aron* v. *Manhattan R. Co.* 132 U. S. 84 [33: 272].

This patent was granted under the Act of July 4, 1836, chap. 357, the sixth section of which (5 Stat. 119) provides for the granting of a patent for "any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement in any art, machine, manufacture or composition of matter." It was not granted for an art or process, that is, "an act or series of acts performed upon the subject matter to be transformed and reduced to a different state or thing." *Cochrane* v. *Deener*, 94 U. S. 780, 788 [24: 139, 141]. So far as the grating is sought to be made an element in the combinations of claims 3 and 4, it is not an element of the mechanism. It is no part of the machine, and has no effect upon its operation. Nor is the apparatus a manufacture or a composition of matter. In the patent, the invention is called one of an "improvement in the construction of prisons," and in the specification it is called an invention of "improvements in the construction and operation of prisons." In *Jacobs* v. *Baker*, 74 U. S. 7 Wall. 295 [19: 200], suit was brought on four patents for "improvements in the construction of prisons." One was for a secret passage or guard-chamber around the outside of an iron-plate jail, and between the jail and the surrounding inclosure, constructed for the purpose of allowing the keeper to oversee and overhear the prisoners without their being conscious of his presence. Another was for improved iron walls for iron-plate jails. Another was for an improvement in joining the metal plates. An- [40
other was for arranging iron-plate cells in jails. This court held that an improvement

in the construction of a jail did not come under the denomination of a machine, or a manufacture, or a composition of matter; and that it was doubtful whether it could be classed as an art. But, however this may be, the grating, in the present case, cannot be considered as a part of a patentable mechanical combination. *Brown* v. *Davis*, 116 U. S. 237, 249 [29: 659, 663], and cases there cited; *Forncrook* v. *Root*, 127 U. S. 176, 181 [32: 97, 99].

The judgment is reversed, and the case is remanded to the Circuit Court, with a direction to grant a new trial.

---

[423] BUSELL TRIMMER COMPANY ET AL.,
Appts.,
v.
FRANK M. STEVENS ET AL.

(See S. C. Reporter's ed. 423–435.)

Patent for trimming boot and shoe soles, invalid —combination of old elements—original thought—improvement in degree.

1. The patent No. 238,303, issued to Orcutt, March 1, 1881, for improvements in rotary cutters for trimming the edges of boot and shoe soles, has no patentable novelty.
2. A combination of old elements, such as are found in said patent, does not constitute a patentable invention.
3. Orcutt's patent shows great industry in acquiring knowledge of what others had done, good judgment in selecting and combining the same and mechanical skill; but it presents no discoverable trace of the exercise of original thought.
4. An improvement in degree only upon earlier patents, designed to accomplish the same object, is not patentable.

[No. 71.]

Argued Nov. 12, 13, 1890. Decided Dec. 15, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Massachusetts, dismissing a suit for the infringement of letters-patent. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. E. Maynadier,** for appellants:

Orcutt is the first to produce a rotary cutter, each blade of which has a flat front face, in connection with a top surface having the rand lip and bed of the hand plane, the top surface of each blade being the guard for the succeeding blade.

Smith v. *Goodyear D. V. Co.* 93 U. S. 486 (23: 952); *Colgate* v. *Western U. Teleg. Co.* 15 Blatchf. 365; *Le Roy* v. *Tatham*, 55 U. S. 14 How. 156 (14: 367), 63 U. S. 22 How. 132 (16: 366); *Parks* v. *Booth*, 102 U. S. 96 (26: 54).

Orcutt's invention is not the case of the application of an old machine to a similar or analogous subject, with no change.

Pennsylvania R. Co. v. *Locomotive Engine S. T. Co.* 110 U. S. 493 (28: 223).

Mr. **T. W. Porter,** for appellees:

The patent is void because it is for an invention other than that applied for or sworn to.

Eagleton Mfg. Co. v. *West B. & C. Mfg. Co.* 111 U. S. 490 (28: 493).

Cases cited upon question of dedication:

Hill v. *Comr. of Patents*, 33 Pat. Off. Gaz. 757; *Miller* v. *Bridgeport Brass Co.* 104 U. S. 350 (26: 783); *Campbell* v. *James*, Id. 356 (786); *Matthews* v. *Flower*, 33 Pat. Off. Gaz. 887; *Suffolk Mfg. Co.* v. *Hayden*, 70 U. S. 3 Wall. 315 (18: 76); *Morris* v. *Huntington*, 1 Paine, 348; *Chicago & N. W. R. Co.* v. *Sayles*, 97 U. S. 554 (24: 1053), 15 Pat. Off. Gaz. 243; *James* v. *Campbell*, 104 U. S. 382 (26: 795), 21 Pat. Off. Gaz. 337; *Mahn* v. *Harwood*, 112 U. S. 354 (28: 665).

Cases cited in support of denial of novelty in complainants' cutter:

Tucker v. *Spaulding*, 5 Fish. Pat. Cas. 299, 80 U. S. 13 Wall. 453 (20: 515), 1 Pat. Off. Gaz. 144; *Brown* v. *Piper*, 91 U. S. 37 (23: 200), 10 Pat. Off. Gaz. 417; *Collins Co.* v. *Coes*, 28 Pat. Off. Gaz. 1010; *Pennsylvania R. Co.* v. *Locomotive Engine S. T. Co.* 110 U. S. 490 (28: 222); *Stephenson* v. *Brooklyn C. T. R. Co.* 31 Pat. Off. Gaz. 263; *Vinton* v. *Hamilton*, 104 U. S. 485 (26: 807); *Morris* v. *McMillin*, 112 U. S. 244 (28: 702); *Blake* v. *San Francisco*, 31 Pat. Off. Gaz. 380; *Hailes* v. *Van Wormer*, 87 U. S. 20 Wall. 353 (22: 241); *Phillips* v. *Detroit*, 111 U. S. 604 (28: 532); *Thompson* v. *Boisselier*, 31 Pat. Off. Gaz. 377; *Brady* v. *Atlantic Works*, 107 U. S. 192 (27: 438), 23 Pat. Off. Gaz. 1333; *Sawson* v. *Grand St. R. Co.* 107 U. S. 649 (27: 576); *Smith* v. *Nichols*, 88 U. S. 21 Wall. 112 (22: 566); *Gardner* v. *Herz*, 118 U. S. 193 (30: 164); *Miller* v. *Force*, 116 U. S. 22 (29: 552); *Reckendorfer* v. *Faber*, 92 U. S. 347 (23: 719); *Pickering* v. *McCullough*, 104 U. S. 310 (26: 749); *Heald* v. *Rice*, Id. 737 (910).

Mr. Justice **Lamar** delivered the opinion [42 of the court:

This was a suit in equity, brought by the Busell Trimmer Company, a New Hampshire corporation, and William D. Orcutt against Frank M. Stevens, Henry B. Cunningham and Samuel N. Corthell, for the alleged infringement of letters-patent No. 238,303, issued to Orcutt, March 1, 1881, upon an application filed January 6, 1879, for "improvements in rotary cutters, for trimming the edges of boot and shoe soles."

The bill, filed May 9, 1884, alleged the issue of said letters-patent to Orcutt, and the granting of an exclusive license to the Busell Trimmer Company to manufacture and sell the invention described therein, and set out, with considerable detail, the value, importance and novelty of the patented invention.

It then alleged that, as the result of a suit

NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 433.

As to patentability of inventions, see *notes* to Thompson v. Boisselier, 29: 76; Corning v. Burden, 14: 683.

As to abandonment of invention, see *note* to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see *note* to Corning v. Burden, 14: 683.

Including process and product in same patent; separate patents therefor. See *note* to Evans v. Eaton, 4: 433.

What re-issue may cover. See *note* to O'Reilly v. Morse, 14: 601.

in equity brought in the court below in January, 1882, by these complainants against the Corthell Manufacturing Company, for infringements of the aforesaid letters-patent, such proceedings were had that a consent decree was entered in complainants' favor, the following resolution of the stockholders of the defendant in that suit having been passed as a part of such compromise:

"*Resolved*, That in the acceptance of the offer this day tendered to us by the Busell Trimmer Company it is done with the express understanding by all the parties thereto
25] that it is mutually entered into for the purpose of consolidating he several interests of the two companies, and to that end none of the parties in their corporate capacity or as individuals will directly or indirectly enter into the manufacture of trimming machines or cutters for the sole edge of boots and shoes, except in connection with and for the benefit of the two companies as consolidated."

It further alleged that the defendants were, at that time, stockholders in the Corthell Manufacturing Company, and acquiesced in such resolution; that they were afterwards employed by the complainant, the Busell Trimmer Company, in various capacities, until within about a year previous to the commencement of this suit; that while so employed, the defendants Stevens and Cunningham secretly sold small cutters manufactured with complainants' tools, which were facsimiles of those manufactured by complainants; and that, after they left complainants' employ, the defendants associated themselves together to manufacture, and continued to manufacture and sell, cutters embracing complainants' invention, in violation of complainants' rights under the patent, and to their damage $20,000.

The bill prayed for an injunction, an accounting and damages, and for other and further relief.

The answer made no reference to the consent decree and compromise between the Busell Trimmer Company and the Corthell Manufacturing Company, referred to in the bill, but set up, as defenses, (1) the invalidity of the patent, because the thing alleged to have been patented had been in long use previous to that time, and was not useful; (2) the insufficiency of the specification and drawings of the patent to enable one skilled in the art to which it pertained to construct the article for which the patent was claimed; (3) the want of novelty in the alleged invention; (4) the long-continued use of rotary cutters embodying the same principles as were contained in the alleged invention, by various persons and firms engaged in the manufacture of boots and shoes, in various parts of the United States; and (5) that Orcutt's prior patent No. 212,971, dated March 4, 1879, showed and described all that was
26] claimed in the patent in suit, and that from the date of that patent to January, 1881, Orcutt made no claim to the subject matter of the later patent, thus abandoning such invention to the public, by reason whereof the patent in suit was void.

Replication was filed, issue was joined, proofs were taken and on the 14th of September, 1886, a final decree was entered by the circuit court, held by *Mr. Justice* Gray and *Judge* Colt, dismissing the bill, from which decree complainants appealed to this court. The opinion of the circuit court, delivered by *Judge* Colt, is found in 28 Fed. Rep. 575.

The specification, claims and drawings of the patent in suit are as follows.

"My invention relates to that class of rotary cutters, consisting of a series of cutting blades arranged about a common hub, and it consists in certain peculiarities of construction of the blades, more fully described below.

"Figure 1 is a perspective view of one form of rotary cutter embodying my invention. Figures 2 and 3 are perspective views (enlarged for greater clearness) of the upper portion of one of the blades. Figure 4 is a cross-section enlarged, illustrating my improved cutter as used.

"The blades *d* of my improved cutter have a flat front face, *a*, a flat rear face, *b*, and a top surface, *c*. A number of ridges, 1 2, extend across this top surface or circumferentially of the cutter, making what is called a 'molded' or 'fancy' surface, which is the converse of the sole edge desired, every ridge, 2 2, making a corresponding depression in the sole edge, the ridge 1 at the side of the cutter. and when in use next the rand guide takes out the rand or welt.

"The main feature of my invention consists in the blade thus formed, with a flat front face and a molded or fancy top surface the converse of the sole edge, and having the ridge 1 or the ridges 2 2, either or both, extending across its top surface—that is, extending from front to back, as shown in the drawings—my improved cutter having a series of such blades, the cutting edges of each blade extending to one side of the cutter to adapt it for use on the edge of the sole next the upper, and each cutting edge having the same relation with the axis as all the others. [42
Each blade *d* is shown in this instance as a distinct piece secured to a hub, *d'*, substantially as in the United States patent No. 82,402 to Harrington, dated September 22, 1868. My invention, however, does not relate to the mode or process of manufacture, but to the article of manufacture, and the blades and hub may be in one piece and constructed by any suitable mode or process too well known to need description, and I disclaim as any part of my invention both the cutters and both the modes of manufacture described in the patent to Harrington above named and in the patent to Brown, No. 45,294, dated November 29, 1864.

"The flat front faces *a* of the blades are not radial, but are so inclined as to make each blade slightly hooking, and thereby form a knife edge at the intersection of the flat front face with the top surface *c* and its ridges, 1 2 2. This is very desirable, for if the front faces *a* be not so inclined the tool will be a scraper rather than a rotary cutter.

"The blades are made quite thick from front to rear, so that they may be ground

back as they become dull, and they are ground only on their front faces *a*, these faces being always maintained at substantially the same pitch. The grinding is done with a flat grinding surface (the flat side of a small emery wheel), and does not alter at all the shape of the cutting edge of the blades. The tops *c* and ridges 1 2 2 are inclined rearward, to give the necessary clearance, as will be well understood.

"I am aware of the patent No. 207,895 to Corthell, but in that cutter each blade is flat on top, and its front face is molded, the cutting edge being formed by the intersection of the flat top and molded front face, and the ridge corresponding to the ridge 1 of my cutter is across the front face of the blade, or nearly radial, instead of across the top *c* of the blade, or nearly circumferential, as in my cutter. The same is true of the ridges corresponding to the ridges 2 of my cutter. When the ridge 1 is at one side of the front face, as in Corthell's cutter, the height of the projection above its base is limited by the necessary closeness together of the blades. Moreover, the depth of cut is always less [28] than the height of the projection. The main object of my invention is to provide a sole-edge cutter, in which the depth of cut is the same as the height of the projection, and in which the height of the projection is not limited by the closeness together of the blades. I am also aware of the patents to Brown and Harrington, above mentioned, but both those cutters are wholly unsuited for trimming sole edges, and both lack the ridge 1 at one side of the top surface of the blade for taking out the rand, and also lack the ridges 2 2 for beading the sole edge. I disclaim, therefore, all that is shown in either of the above named patents.

"What I claim as my invention is:

"1. A rotary cutter for trimming sole edges, the blades *d* of which are provided with flat front faces *a*, and have their outer or peripheral ends *c* molded throughout to a uniform shape, the converse of the desired [29] shape to be given to the sole edge, and slightly eccentric to the axis of the cutter, substantially as described.

"2. A rotary cutter for trimming sole edges, the blades *d* of which are each provided with a flat front face, *a*, and a slightly eccentric cutter or peripheral end, *c*, having formed thereon the end ridges 1 and 2, extending circumferentially across said face, substantially as and for the purposes described."

The circuit court held that the patentability of the invention was to be determined by reference to two classes of prior tools, namely, the old hand tool or plane, and the Brown gear cutter, patented in 1864, and found, upon a comparison between the various forms of the Brown gear cutter and the Orcutt cutter, that there was no substantial difference between them, except as to the shape of the top surface of the blades that were used to cut the form or outline of the path or figure in the material operated upon; that the form of the cutting teeth in the Orcutt patent was substantially the same as that used in the old hand plane or tool; that the use of the rotary rand knife in the Orcutt patent, in connection with the rand guide, claimed by him to perform a different function from the rand lip of the old hand plane, was not sufficient to sustain the patent, because both the rotary rand knife and the rand guide were found in prior devices; and that the substance of Orcutt's improvements lay in the application of the well-known form of blade to a Brown milling cutter, for the purpose of trimming the edges of boot and shoe soles, which was merely a case of double use, and was therefore not patentable.

The errors assigned are, that the court erred (1) in holding that the application of a well-known form of blade, used in the old hand tool for trimming sole edges, to a metal milling cutter, also old and well known, for the purpose of producing a rotary cutter for trimming sole edges, is a case of double use, and not patentable; (2) in holding that, in view of the state of the art, there was no invention in the Orcutt cutter; and (3) in holding that, in view of the two classes of prior tools referred to, taken in connection with a third class of old devices, in which both the rotary rand knife and the rotary rand guide were found, the patent could not be sustained.

It is hardly necessary to discuss these as- [43] signments of error *seriatim*. It will be

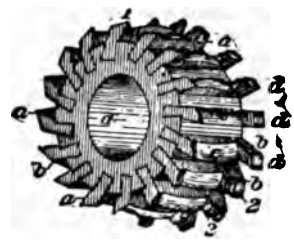


Fig. 1

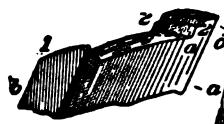


Fig. 2

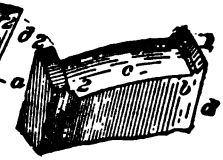


Fig. 3

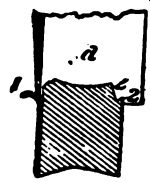


Fig. 4

sufficient, perhaps, to refer to some of the essential features of the patent in suit which are claimed to constitute elements of invention.

We have examined the evidence in the case very carefully. That of appellants' principal expert witnesses, John A. Coleman, Frederick W. Coy and O. L. Noble, was unusually clear and intelligent, and was given very ingeniously in support of the theory of the appellants' case; but we think that even their testimony, when subjected to the analysis of cross-examination, contains retractions and admissions fatal to the validity of Orcutt's patent, as containing a patentable novelty.

We are clearly of opinion that the circuit court was correct in its construction of this patent. In this connection, the state of the art when the application for the patent was made must be taken into consideration. The old hand plane or tool for trimming the edges of boot and shoe soles had been in existence for a long time; but, while it accomplished the purposes for which it was designed, it was found to operate too slowly to meet the demands of the business. Accordingly, various attempts had been made to perform the work done by the old hand tool with rotary cutters operated by machinery. A number of patents were issued to various persons, named in the record, for various forms of such devices, long before the date of Orcutt's application. We were furnished on the argument with specifications and drawings of many of such patents,—some English, but mostly American,—running back as early as 1855, when an English patent was issued to one Molière, for what was known as a burr cutter, used to cut only the bed or main body of the boot or shoe sole. It is not deemed necessary to refer to all of the various patents issued from that time up to the date of Orcutt's patent. All of them may be said to have had but one object, viz., the performance of the work formerly done only by the old hand tool; and were improvements, more or less new and useful, in the leather art. An examination of them discloses the fact that, to a greater or less degree, each was an improvement on its predecessors, and was, in like manner, improved upon by those that [431] followed, in the order of time. The operations of those rotary cutters did not entirely supersede the use of the old hand tool, or the embodiment of the principles of that tool in an automatic machine which imitated the movements of that plane or tool when at work. A number of patents, it appears, were issued for such machines.

The precise features, or combination of features, which, it is claimed, constituted Orcutt's alleged invention, are thus stated by appellants' counsel: "There is nothing whatever in the state of the art of trimming or of burnishing sole edges tending to show any rotary cutter, prior to Orcutt's, made up of a number of blades, each having a rand lip and bed (or a bed, or bed guard, or channel guard in connection with a rand lip and bed), each with a flat front face; and each blade the guard for the cutting edge of the succeeding blade."

We do not think that this statement is sustained by the testimony of the appellants' own witnesses, even putting out of view all the evidence controverting it, given by defendants' numerous expert witnesses, consisting of manufacturers, dealers in shoes, experienced and skillful operators and machinists in making shoes, trimmings, soles and all branches of the leather art. A rotary cutter in the metal art, called the Brown & Sharpe metal cutter, had been well known and in general and constant use seventeen years before the date of the Orcutt patent. The counsel for appellants admits that that rotary cutter "bears a close resemblance to Orcutt's sole-edge cutter. . . . It is made up of a number of blades, each having a flat front face, and a molded top surface, the converse of the surface to be milled; and moreover, each tooth has the proper clearance, so that, if one of the Brown & Sharpe metal cutters and one of the Orcutt cutters be compared, when not in use, say, one held in the left hand, the other in the right, there is a marked likeness between them; in fact, no substantial difference, except that one lacks and the other has a rand lip, bed," etc. Similar admissions by Orcutt himself, and by Noble, the manager of his (Orcutt's) company, leave no doubt upon our minds that the principles of construction and operation of the Brown cutter are substantially identical with those of most, if not all, of the [432] rotary leather cutters. The appellants' counsel, as we have seen, says that the only exception to the marked likeness between the Brown cutter and that of Orcutt is, that "one lacks and the other has a rand lip, bed," etc. With regard to this exception, so asserted, Coleman, the expert witness on whom the appellants mainly rely, testifies as follows: "*Q.* You have spoken of Orcutt's cutter being adapted to trim at the same time the rand, the bed and the guard of a shoe sole, or, as you term them, the three fundamental principles of the shoe sole. Do you or not regard Orcutt as the first to accomplish that result with a rotary cutter?" His first answer being considered evasive the question was repeated, and he replied, "No, I do not. Others had made different cutters intended to accomplish the same purpose." It is true that with this admission he also connected the somewhat inconsistent declaration that Orcutt, by his alleged invention, "created a structure which differed in form and principle from any tool previously used for the operations of trimming the rand, bed and guard, because he produced a tool which had blades having top-molded faces the converse of the form of the sole edge to be trimmed, and the flat front faces of the teeth were so inclined forward that they could make a proper cutting edge for leather, and those faces could be ground without disturbing the top-molded face of the teeth." But when cross-examined in detail as to each of those alleged novel differences, he admitted that the facility for sharpening Orcutt's cutter without disturbing its periphery (or the top-molded face of the teeth) was the same as in the Brown cutter and the Snell & Atherton hand-trimming tools; that the forward incline (the rake or overhang) of the teeth was the same as in the Snell & Atherton cutters; that, in his opinion, the increase in

the number of teeth in the Orcutt cutter over that of Brown, in view of the art as shown by other and earlier cutters, did not constitute, in itself, an element of invention; that rand guides were in common use with a rotary cutter before Orcutt's cutter; that a rand guide as employed in an Orcutt cutter does not perform any other or different office, or effect any other or different result, from [33] that which it performed when used with other rotary cutters earlier than Orcutt's; that the employment of such rand guide in the Orcutt cutter would not in itself constitute an invention; that rand cutters were in common use both with hand tools and rotary sole-trimming tools before Orcutt's patent; that the result or product of the Orcutt cutter, to wit, the sole edge trimmed by it, was identical with that trimmed by the exhibit hand tools; that the shoe was held in the same manner while being trimmed by the Orcutt cutter, as with any other and earlier cutter; and that before Orcutt's invention it was common to trim the rand, the bed and the guard at one and the same operation, with both hand and rotary cutters.

Effort was made to show by other witnesses that the features in the Orcutt patent, specified in the statement of counsel above quoted, are all patentable novelties, especially the combination of them into one device. We repeat that, in view of the previous state of the art, we think otherwise. The evidence, taken as a whole, shows that all of those claimed elements are to be found in various prior patents,—some in one patent, and some in another, but all performing like functions in well-known inventions having the same object as the Orcutt patent,—and that there is no substantial difference between the Brown metal cutter and Orcutt's cutter, except in the configuration of their molded surfaces. That difference, to our minds, is not a patentable difference, even though the one cutter was used in the metal art, and the other in the leather art. A combination of old elements, such as are found in the patented device in suit, does not constitute a patentable invention. *Florsheim* v. *Schilling*, 137 U. S. 64 [34: 574], decided at this term of the court, and cases there cited.

We do not think that the cases cited by counsel for the appellants sustain his position that Orcutt's alleged invention is a combination of previous devices, rearranged with connections and adaptations so adjusted as to produce a novel and valuable use. In *Le Roy* v. *Tatham*, 55 U. S. 14 How. 156, 177 [14: 367, 376], one of those cases, the claim was for a combination of old parts of machinery to make lead pipes, in a particular manner, under heat and pressure. The com- [34] bination was held not to be patentable, the court saying: "The patentees claimed the combination of the machinery as their invention in part, and no such claim can be sustained without establishing its novelty—not as to the parts of which it is composed, but as to the combination." The court also quoted, with approval, the following from *Bean* v. *Smallwood*, 2 Story, 408, an opinion by *Mr. Justice* Story: "He (the patentee) says that the same apparatus, stated in this last claim, has been long in use, and applied, if not to chairs, at least in other machines, to purposes of a similar nature. If this be so, then the invention is not new, but at most is an old invention or apparatus or machinery applied to a new purpose. Now, I take it to be clear, that a machine or apparatus or other mechanical contrivance, in order to give the party a claim to a patent therefor, must in itself be substantially new. If it is old and well known, and applied only to a new purpose, that does not make it patentable." That case, instead of militating against our view in this, in reality supports it.

The distinction between a double use, as the result of mere mechanical skill, and a new use created by the inventive faculty, is strikingly illustrated in the other case cited by appellants, viz., *Colgate* v. *Western U. Teleg. Co.*, 15 Blatchf. 65. That case was a suit for an infringement of a patent, for the combination of gutta-percha and metallic wire in such form as to incase a wire or other conductors of electricity within the non-conducting substance, gutta-percha, making a submarine telegraph cable which might be suspended on poles in the air, submerged in water or buried in the earth. It was contended that the patent was invalid, because a metallic wire covered with gutta-percha, as a mechanical protection from abrasion or injury from without, existed before the plaintiff's invention. It was decided that the use by the patentee of the wire so covered, to conduct electricity, was not a double use of the covered wire nor a use for a purpose at all analogous to any before made of it; but that it was an entirely new use, the result of a discovery that gutta-percha was an electrical non-conductor, evolved by original thought, totally different from its quality previously known and applied, as a mere mechanical protector from external injuries.

But the patent before us is no such case. [43 The most that can be said of it is that it shows, on the part of Orcutt, great industry in acquiring a thorough knowledge of what others had done in the attempt to trim shoe soles in a rapid and improved mode, by the various devices perfected by patents for that purpose, good judgment in selecting and combining the best of them, with no little mechanical skill in their application; but it presents no discoverable trace of the exercise of original thought.

Furthermore, according to the evidence submitted by the appellants, it is shown that the features of the patent in suit are substantially the same as those in Orcutt's earlier patent of March 4, 1879, having the same object, except that in the patent in suit the teeth are claimed to be detachable from the hub, while in that of 1879 they are shown to be solidly incorporated with the hub. Even admitting such a difference to exist, it does not constitute a patentable difference, in view of the prior state of the art; for the detachable teeth are found in the Corthell patent No. 207,395, of August 27, 1878. But, as a matter of fact, there is no such difference; for, as stated in the specification

of the patent in suit, "the blades and hub may be in one piece," etc., thus showing that no claim is made in the patent itself on that score. This, of itself, would be sufficient to defeat the later patent.

It may be admitted that Orcutt's later patent performed the work it was designed to accomplish in a better and more workmanlike manner than any of the preceding cutters patented, because, as already stated, there were constant improvements in the art to which it related. So far as this record shows, it was the last of a series of patents designed to accomplish the same object. As such, it necessarily retained all the beneficial features of those earlier patents, and, to a certain extent, improved upon them. Such improvement, however, was an improvement in degree only, and was therefore not patentable. *Ivory* v. *Burt*, 133 U. S. 349 [33:647], and cases there cited.

Decree affirmed.

---

[411] UNION STOCK YARDS NATIONAL BANK, *Appt.*,
v.
A. J. GILLESPIE ET AL.

(See S. C. Reporter's ed. 411–423.)

A bank cannot apply deposits by agent to his individual debt—liability of bank—equitable remedy.

1. A bank which knows that a person having an account with it is a factor or agent to sell for others on commission, and is not a buyer or seller for himself, and that he is failing in business, cannot take the money proceeds of sales by the factor deposited with the bank, and apply it to the payment of the individual debt of the factor.
2. One who takes from a factor, in payment of his debt, moneys which he knows equitably belong to the factor's consignor and principal, must account to the principal for such moneys.
3. Where the title to moneys deposited in a bank is equitable rather than legal, the owner of the equitable title may maintain a suit in equity against the bank to enforce his equitable right to the moneys; his remedy is not one at law.

[No. 79.]

Argued Nov. 17, 18, 1890. Decided Dec. 15, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, in favor of the equitable owner of deposits in a Bank, against the Bank, for the deposits. *Affirmed.*

The facts are stated in the opinion.

Mr. **Edward O. Brown**, for appellant:

The complainants have a plain, adequate and complete remedy at law by an action for money had and received.

Clark v. *Shee*, Cowp. 197, 199; *Mason* v. *Waite*, 17 Mass. 560, 563; *Merrill* v. *Bank of Norfolk*, 19 Pick. 32; *Bayne* v. *United States*, 92 U. S. 642, 643 (23: 997, 998).

Therefore they cannot have any relief in equity.

Wright v. *Ellison*, 68 U. S. 1 Wall. 16, 22 (17: 555, 557); *Oelrichs* v. *Spain*, 82 U. S. 15 Wall. 211, 227 (21: 43, 44); *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189, 212 (26: 975, 983); *Parkersburg* v. *Brown*, 106 U. S. 487, 500 (27: 238, 244): *Litchfield* v. *Ballou*, 114 U. S. 190, 192 (29: 132, 133).

The decree fails to find facts justifying its mandate, and is therefore erroneous.

2 Dan. Ch. Pr. 986, 990; *Lambert* v. *Peyton*, 8 H. L. Cas. 1, 6, 12, 17; *Wabash & E. Canal Co.* v. *Beers*, 67 U. S. 2 Black, 448, 457 (17: 327 332).

The partnership of Rappal, Sons & Co. was entitled to enforce its factor's lien against W. P. Bowen & Co.

1 Story, Eq. Jur. §§ 679, 680; *Haven* v. *Wakefield*, 39 Ill. 509, 518; *Bolton* v. *Puller*, 1 Bos. & P. 539, 546; *Ward* v. *Brandt*, 11 Mart. 331, 429.

Rappal, Sons & Co. were, when they had sold the cattle, not trustees, but merely debtors, of the owners.

Chapman v. *Forsyth*, 43 U. S. 2 How. 202, 208 (11: 236, 238); *Hennequin* v. *Clews*, 111 U. S. 676, 680, 682 (28: 565, 567, 568); *Ex parte Dale*, L. R. 11 Ch. Div. 772, 775; *Knatchbull* v. *Hallett*, L. R. 13 Ch. Div. 696.

The bona fide taker of money for value is not affected by defects in the title of the person from whom he received it.

Ford v. *Hopkins*, 1 Salk. 283, 284; *Miller* v. *Race*, 1 Burr. 452, 457; *Murray* v. *Lardner*, 69 U. S. 2 Wall. 110, 121, 122 (17: 857, 859).

Taking in payment of a pre-existing debt is taking for value.

Swift v. *Tyson*, 41 U. S. 16 Pet. 1, 16, 19, 20 (10: 865, 870, 871, 872); *Brooklyn C. & N. R. Co.* v. *National Bank of the Republic*, 102 U. S. 14, 38 (26: 61, 70); *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268, 273; *Currie* v. *Misa*, L. R. 10 Exch. 165, 168.

A banker has a lien on all deposits received by him on general account.

Commercial Bank v. *Hughes*, 17 Wend. 94, 100; *Clayton's Case*, 1 Meriv. 572, 608; *Currie* v. *Misa*, L. R. 10 Exch. 165; *Brandao* v. *Barnett*, 12 Clark & F. 787, 805, 810; *Marsh* v. *Oneida Central Bank*, 34 Barb. 298, 299; *Central Nat. Bank* v. *Conn. Mut. L. Ins. Co.* 104 U. S. 54, 71 (26: 693, 700).

Deposits received bona fide on general account become the money of the banker.

Marine Bank v. *Fulton Bank*, 69 U. S. 2 Wall. 252, 256 (17: 785, 787); *Thompson* v. *Riggs*, 72 U. S. 5 Wall. 663, 678 (18: 704, 707); *National Bank of the Republic* v. *Millard*, 77 U. S. 10 Wall. 152, 155 (19: 897, 899); *Bank of the Metropolis* v. *New England Bank*, 42 U. S. 1 How. 234, 239, 240 (11: 115, 116); Edw. Bills and Notes (3d ed.) § 452, pp. 321, 322; *Stalker* v. *McDonald*, 6 Hill, 93, 96, 113.

NOTE.—*As to collection by banks, liability for*, see *note* to Washington Bank v. Triplett, 7: 37.

As to liability of bank upon check, see *note* to National Bank of the Republic v. Millard, 19: 897.

As to liability of bank for general deposits, see *note* to Planters Bank v. Union Bank, 21: 473.

As to special deposits, responsibility of bank for, see *note* to First Nat. Bank of Carlisle v. Graham, 25: 750.

As to certification of checks, liability of banks on, see *note* to Merchants Nat. Bank v. State Nat. Bank, 19: 1008.

Defendant was under no obligation to complainants to give any extraordinary notice of the nonpayment of the draft.

Shearm. & Redf. Neg. §§ 17, 22, 54; *Thorne* v. *Deas*, 4 Johns. 84, 97, 101; *Smith* v. *Cologan*, 2 T. R. 188, *note*.

Messrs. **L. H. Bisbee, J. W. Beebe,** *John P. Ahrens* and *Henry Decker*, for appellees:

The suit was properly brought on the equity side of the court.

Central Nat. Bank v. *Conn. Mut. L. Ins. Co.* 104 U. S. 54 (26: 693); *Sims* v. *Brittain*, 4 Barn. & Ad. 375; *Williams* v. *Everett*, 14 East, 582; *Yates* v. *Bell*, 3 Barn. & Ald. 643; *Pannell* v. *Hurley*, 2 Col. Ch. 241; *Pennell* v. *Duffell*, 4 DeG. M. & G. 372; *Bodenham* v. *Hoskyns*, 2 DeG. M. & G. 903; *Frith* v. *Cartland*, 2 Hem. & M. 417; *Whitley* v. *Foy*, 6 Jones, Eq. 84; *Veil* v. *Mitchel's Admr.* 4 Wash. C. C. 105; *New York Ins. Co.* v. *Roulet*, 24 Wend. 505; *Varet* v. *New York Ins. Co.* 7 Paige, 560; *Kirkpatrick* v. *McDonald*, 11 Pa. 387.

The circumstances known to the officers of the Bank were sufficient to put them on inquiry, so that the Bank is chargeable with notice that these deposits were the proceeds of cattle shipped by appellees to Rappal, Sons & Co., for sale by them on commission for the account of appellees.

Hogan v. *Shorb*, 24 Wend. 458; *Moore* v. *Clementson*, 2 Camp. 22; *Barring* v. *Corrie*, 2 Barn. & Ald. 137; *Fish* v. *Kempton*, 7 C. B. 687; *Baltimore* v. *Williams*, 6 Md. 235; 2 Smith, Lead. Cas. 1, 363.

The evidence that such facts and circumstances were known to the Bank as should have put it on inquiry was such that the finding of the court below will not be disturbed, whether it had notice being a question of fact.

Parker v. *Pheteplace*, 68 U. S. 1 Wall. 684 (17: 675); *Lytle* v. *Arkansas*, 63 U. S. 22 How. 193 (16: 306); *Harrell* v. *Beall*, 84 U. S. 17 Wall. 590 (21: 692); *Alviso* v. *United States*, 75 U. S. 8 Wall. 337 (19: 305).

Mere application of deposits on pre-existing debt is not sufficient to entitle the Bank to the defense of bona fide purchaser.

Dickerson v. *Tillinghast*, 4 Paige, 221: *Coddington* v. *Bay*, 20 Johns. 637; *Basset* v. *Nosworthy*, 2 Lead. Cas. in Eq. 103; *Van Alen* v. *American Nat. Bank*, 52 N. Y. 1; *Nichols* v. *Martin*, 35 Hun, 168; *Powell* v. *Jeffries*, 4 Scam. 387.

The cattle belonging to appellees, the proceeds derived therefrom became trust funds in the hands of Rappal, Sons & Co., and were held by them in trust for appellees.

Schudder v. *Shiells*, 17 How. Pr. 420; *Duguid* v. *Edwards*, 50 Barb. 289; *Chesterfield Mfg. Co.* v. *Dehon*, 5 Pick. 7; *Merrill* v. *Bank of Norfolk*, 19 Pick. 32.

The trust followed these proceeds into the hands of the Bank, which under the facts was bound by the trust and liable in equity to account for it to the appellees.

Chesterfield Mfg. Co. v. *Dehon*, 5 Pick. 7; *Ex parte Kingston*, L. R. 3 Ch. App. 696; *Re Hallett's Estate*, L. R. 13 Ch. Div. 696; *Overseers of Poor* v. *Bank of Virginia*, 2 Gratt. 547; *Wormley* v. *Wormley*, 21 U. S. 8 Wheat. 421 (5: 651).

The question of notice is one of law and fact. *Carroll* v. *Upton*, 3 N. Y. 274; *Clark* v. *Owens*, 18 N. Y. 435.

In chancery cases, where the evidence is conflicting, this court will not disturb the finding of the court below.

The court will follow a fund similar to the one in controversy into the hands of a third party and will compel the party holding it to account.

Chesterfield Mfg. Co. v. *Dehon*, 5 Pick. 7; *Merrill* v. *Bank of Norfolk*, 19 Pick. 32; *Caldwell* v. *Carrington*, 34 U. S. 9 Pet. 86 (9: 60).

Mr. Justice **Brewer** delivered the opinion [413] of the court:

On the 25th day of May, 1887, a decree was rendered in the Circuit Court of the United States for the Northern District of Illinois, in favor of appellees and against appellant, for $26,585.90. That decree is challenged by this appeal. Two questions are presented, one of right, the other of jurisdiction. Ought the Bank to be compelled to pay to [414] the Gillespies such sum of money? And had a court of equity jurisdiction to entertain and render a decree in this suit? In respect to the first question, it may be premised that the Gillespies were the owners of certain cattle, which were consigned to the firm of Rappal, Sons & Co. for sale; that the proceeds of the sales made by the Rappals were deposited in the Bank,—and it is for this money that the suit was brought. This general statement compels the equitable conclusion that, as the Gillespies owned the cattle, they ought to have the moneys received from their sale. The right of an owner of property is not limited to the property itself, but extends to everything which is its direct product or proceeds. But this outline does not present the questions involved in this case, and a more detailed statement of the facts is requisite. A. J. Gillespie and his two sons, Thomas E. Gillespie and Louis J. Gillespie, were citizens of Kansas City, Missouri, doing business there as A. J. Gillespie & Co. Frederick J. Rappal and his two sons, Lawrence L. Rappal and Frederick J. Rappal, Jr., were citizens of Illinois engaged in the live-stock commission business as partners under the firm-name of Rappal, Sons & Co., at the Union Stock Yards in Chicago. The Union Stock Yards National Bank was a Bank organized under the laws of the United States, and also located at the Union Stock Yards in Chicago. The consignments were made in October, 1885. In the spring of that year, Frederick J. Rappal, Sr., went to Kansas City to work up business for his firm. On arriving there he formed a nominal partnership, at least, with William P. Bowen and Milton James, for the purpose of buying cattle and sending them to Chicago for sale. The partnership name was W. P. Bowen & Co. On behalf of this firm, the elder Rappal made a contract with the Gillespies, by which the latter were to advance the money for the purchase of cattle; to take charge of the forwarding of them, receiving in consideration therefor five dollars a carload, afterwards changed to $2.50 a carload; and in pursuance of this

contract, Rappel selected and purchased the cattle in controversy, receiving from the vendors orders of which the following is a specimen:

"Kansas City, Mo., Oct. 8, '85.
"Union Stock Yard & Transit Co., Chicago, Ill.:
"Please deliver to A. J. Gillespie & Co. four cars cattle, consigned from Shelby & Fulkeeson to us *via* C., B. & Q. R. R.
"Mountjoy White & Co.
"Deliver above cattle to Rappal Sons.
"A. J. Gillespie & Co."

Indorsed on the back the following: "Rappal, Sons & Co."

The allegation of the bill is that the Gillespies, complainants, were owners of these cattle; and the contention is, that the proof does not establish this allegation but shows that the Gillespies were not owners, but simply loaners of money on the security of the cattle. In respect to this, the learned circuit judge ruled as follows: "I hold that the cattle belonged to the Gillespies, or that the Gillespies were entitled to control them so far as necessary to protect themselves for advancements made on the purchases." This is a very accurate statement of the relations of the parties; and in equity the Gillespies may properly be considered the owners. They paid for the cattle; the orders for possession, equivalent to bills of sale, were in their name; they controlled the shipments; and until their money advanced and stipulated profits were received, they were equitably the owners and in control. The senior Rappal, or Bowen & Co., were agents to purchase, with a stipulation for compensation for services, in the amount received exceeding a named sum.

Rappal, Sons & Co. were in the commission business—known to the Bank to be in that business. They were not buyers and sellers, but factors—agents to sell. Presumably, therefore, moneys deposited by them were the proceeds of cattle consigned to them for sale. Their business being known to the Bank, such presumption goes with their deposits; and while not of itself notice, is a circumstance to compel inquiry on the part of the Bank in respect to any particular deposit. We do not mean to be understood as implying that a bank receiving deposits from one whom it knows to be [416] in the commission business receives every deposit in trust for any unknown principal. A bank is not sponsor for all its depositors, although it may know the character of their business. Its relations to its depositors are those of debtor; and, generally, receiving and paying out money on the checks of its depositors, it discharges the full measure of its obligations. It is not ordinarily bound to inquire whence the depositor received the moneys deposited, or what obligation such depositor is under to other parties. It is only when there gather around any deposit, or line of deposits, circumstances of a peculiar nature, which individualize that deposit or line of deposits, and inform the bank of peculiar facts of equitable cognizance, that debarred from treating the deposit as that of moneys belonging absolutely to the depositor. We notice, therefore, the peculiar circumstances which cast knowledge upon this Bank, in respect to these deposits. And this knowledge was not limited to the character of the business of the depositor, that of commission merchants, but extended to its results. The bank account of the Rappals with the appellant, from the 1st of January, 1885, up to and including the end of these transactions, is presented. It was a bank account of continuous and increasing overdrafts. Striking the balance, for the several months, of the daily credits and overdrafts, the average result against the Rappals, month by month, was as follows: January, $1,476.25; February, $3,275.64; March, $2,483.77; April, $8,122.20; May, $6,526.03; June, $9,850.46; July, $10,897.96; August, $12,494.05; September, $15,227.91; and in the two days of October prior to that deposit which closed the overdraft, the account was thus: October 1, $18,922.21, overdraft; October 2, $18,454.89, overdraft. From the 1st of August until October 2, only on three occasions—August 27 and 28 and September 3—were there balances to the credit of the Rappals, and those of small amounts.

It is obvious from this account that the business of the Rappals was failing. The story of their failure was written by the officers of the Bank on its books, and it knew all that such story told. It knew that it had, as hereafter disclosed, given credit to the Rappals with the Kansas City dealers. It saw them failing in business. It knew their business was that of factor, receiving and selling for others on commission. Why this particular occasion should be seized upon, the testimony does not disclose; but is it not obvious that the Bank intended to arrest this continuing overdraft; and, familiar with the character of the business of the Rappals, contemplated, with or without their knowledge, the seizure and appropriation of the proceeds of some consignment?

Further, as herteofore suggested, it appears that the assistant cashier of the Kansas City Stock Yards Bank wrote to the cashier of the Union Stock Yards National Bank a letter of inquiry as to the financial standing, individual responsibility and nature of the business of Rappal, Sons & Co., to which this answer was returned:

"Union Stock Yards National Bank, July 20, 1885.
"P. Connelly, Esq., Assistant Cashier, Kansas City, Mo.
"Dear Sir: Your favor of the 17th instant received. Rappal, Sons & Co. are a firm in good standing, financially and otherwise. I don't think they keep much ready money in the business, but F. J. Rappal owns large farms near Joliet, and is estimated worth $50,000 to $60,000. He is a man of high character and has always had good credit, even before he had any means.
"Yours truly,
"G. E. Conrad, Cashier."

This letter was shown to the Gillespies, and they were informed at the same time that the Kansas City Bank had arrangements for

notification by telegraph in case any draft was not paid. The effect of this letter was to encourage confidence in the Rappals, whatever may have been the motive of the defendant Bank; and, in this respect, it is fair to say that there is no evidence to justify the inference that it was known to be inaccurate or intentionally misleading; but here, as often elsewhere, results rather than motives are significant as to determining liability. Again, it will be noticed that the Gillespies were advised that nonpayment of any draft would be promptly communicated by telegraph. That was in fact the uniform custom of the defendant Bank. It so happened that the various shipments of cattle and the corresponding drafts were on different days. The first shipment reached Chicago, and the cattle were sold, on October 2,—Friday. The draft for the amount thereof, $6,506.40, arrived the same day and was presented to the Rappals, and not paid. No explanation was given to the Bank by the Rappals for the nonpayment. No notice was communicated by telegraph of the nonpayment, and no information was received at Kansas City thereof until Monday, October 5. On Saturday, October 3, and Monday, October 5, the balance of the shipment, being the bulk of the cattle, were received and sold, the major portion being so received and sold on Saturday. As the draft received Friday was not accepted or paid, if notice thereof had been given promptly by telegraph, as was the custom, and as the Gillespies were advised was the custom, they might have protected the balance of the cattle, and prevented the Rappals from receiving and selling them. It is fair to say that the testimony shows, and so it was found by the circuit judge, that this failure to telegraph was due to the negligence of a clerk, and was not the intentional act of the Bank; but we cannot conceive that the question of motive is significant. The result of the omission of the officers of the Bank to telegraph Friday, whether intentional or accidental, was the same; and the Bank is equally responsible whether the result flowed from negligent or intentional omission. Again, it must be noticed that when, on Friday morning, the Bank received the draft, it was information to it that a shipment to the Rappals accompanied the draft; and when the Rappals declined to pay that draft, that fact suggested either that the Rappals had not received the shipment, or else that, having received it, they proposed to appropriate the proceeds and repudiate the obligations of factor to principal. When the sale tickets were deposited that evening, it was notice that they had received the shipment, and that for some reason they were contesting their liability to the consignor. As the office of the Rappals was but four or five hundred feet from the Bank, it knew that it could ascertain the exact facts; but it failed to make inquiry; and under those circumstances, failing to inquire and failing to notify the consignor and drawer, it is fairly held responsible for its ignorance of facts which it might easily have acquired knowledge of, and its omission to do that which both its custom and duty compelled it to do.

Summing up these various facts, it may be observed that the Bank knew that the business of the Rappals was a failing one; that, instead of making money, they were gradually going deeper and deeper into debt. It knew that the Rappals were not buyers, but simply consignees and factors; and that the moneys received by them on account of sales, of right belonged to their consignors and principals. It knew from the draft received that a shipment had been made to the Rappals. It knew that it had failed to give notice of the nonpayment of the first and smaller draft, and so had put it out of the power of the consignors to protect themselves against the subsequent misconduct of the consignees and factors. It knew, or was chargeable with the knowledge of the fact, that the consignors were confiding in the consignees and factors on the strength of the representations it had made. Upon nonpayment of the first and smaller draft, it knew that it was in a position to easily acquire knowledge of the exact facts; and with its means of knowledge it remained inactive and silent. With all these matters resting in actual or imputable knowledge, it accepts from the Rappals, consignees and factors, the proceeds of the sale of cattle consigned to them by the Gillespies. Can it be that it is not held to know that it was taking from the Rappals the proceeds of complainants' property consigned to them for sale, to discharge their debt to it? While the obligation of a factor to his principal is not a debt created by one acting in a fiduciary capacity, within the meaning of the Bankrupt Law, as was adjudged in *Chapman* v. *Forsyth*, 43 U. S. 2 How. 202 [11: 236], and *Hennequin* v. *Clews*, 111 U. S. 676 [28: 565], the question here is not as to the character of the obligation of factor to principal, but as to the liability of one who takes from a factor, in payment of his debt, moneys which he knows equitably belong to that factor's consignor and principal. Justice forbids the upholding of such a transaction, and demands that the Bank, receiving from the factor in [426
payment of a debt from the factor to itself, moneys which it must have known were the proceeds of the property received from his consignor and principal, account to that principal for the moneys so received and appropriated. The question of right must be resolved in favor of the rulings of the circuit court, and it must be affirmed that the complainants are entitled to the moneys so received by the Bank. It is equitable, therefore, that the decree be affirmed, if the suit be one of which equity may take cognizance; and so we pass to the second question, that of jurisdiction.

We are met with the proposition that equity ought not to interfere when the law furnishes a remedy; that when a bank has money in its possession which, in fact, belongs to a third party, received from whatever source it may be, an action at law will lie; and that, therefore, no case for equitable cognizance is presented. But this latter

proposition has some limitations. It may be true if the full legal title to the moneys is in such third party; but it is not true when his title is equitable rather than legal; and the right of these complainants as against the Bank, to the moneys deposited by their factor, is equitable. True, the obligation of a factor to his principal for moneys received on the sale of property consigned to him for sale is not a debt created by one acting in a fiduciary capacity, within the meaning of the Bankrupt Law, but it does not follow that no fiduciary obligation inheres in such debt. The case of *Chapman* v. *Forsyth*, 43 U. S. 2 How. 202 [11: 236], turned not so much on the existence of a trust obligation as on the question as to what trust obligations were intended by the Bankrupt Act. The court observes: "The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian' or 'trustee,' are not cases of implied but special trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The Act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the Act." It cannot be doubted that an element of a fiduciary nature enters into the obligation of the factor—an [121] element different from that which exists in case of vendor and purchaser. There is a confidence beyond that in the capacity and willingness of a debtor to pay; there is a reliance of a principal on his agent, a confidence that the agent will do as his principal directs, and be loyal to the duties springing from such relation. When property is consigned to a factor, and before sale, who doubts the continuing title of the principal, or his power to restrain unauthorized disposition of such property, or to compel observance by the factor of all the conditions of the trust reposed in him? Can it be that on the moment of sale all these rights of the principal and consignor end, and that there has arisen in their place nothing but a simple debt from factor to principal, with absolute power on the part of the factor to dispose of the moneys received as he sees fit, and with no power on the part of the principal to challenge such misappropriation, when the party who receives the moneys knows the wrongful act of the factor? While it may be true that a legal title to the moneys received on such sale is in the factor rather than in the principal, so that the principal may not maintain an action at law as against one receiving such moneys from the factor, yet, equitably, those moneys belong to the principal, and equitably they may be followed into the hands of any person who receives them chargeable with notice of their trust character. The case of *Central Nat. Bank* v. *Com. Mut. L. Ins. Co.*, 104 U. S. 54 [26: 693], is in point. In that case one Dillon was the agent of the insurance company. He kept an account with the bank—the account was entered on the bank books with him as general agent. As agent of the insurance company he collected, and it was his duty to remit, the premiums. In the course of his dealings with the bank he borrowed money on his personal obligation. Finally the bank sought to appropriate his deposits to the payment of this debt. The insurance company filed its bill in equity to recover the amount of those deposits as equitably belonging to it. The fact that they were premiums received for the insurance company was shown. It was held that, under the circumstances, the bank received them with knowledge that, though the legal title to the moneys was in Dillon, the beneficial ownership was in the insurance com- [4 pany, and the decree in favor of the insurance company was therefore sustained. This court, by *Mr. Justice* Matthews, discusses the question of the liability of the bank to the insurance company and the necessity of a suit in equity to establish the rights of the company in these words: "It is objected that the remedy of the complainant below, if any existed, is at law and not in equity. But the contract created by the dealings in a bank account is between the depositor and bank alone, without reference to the beneficial ownership of the moneys deposited. No one can sue at law for a breach of that contract, except the parties to it. There was no privity created by it, even upon the facts of the present case, as we have found them, between the bank and the insurance company. The latter would not have been liable to the bank for an overdraft by Dillon, as was decided by this court in *Central Nat. Bank* v. *Royal Ins. Co.*, 108 U. S. 783 [26: 459], and, conversely, for the balance due from the bank, no action at law upon the account could be maintained by the insurance company. But although the relation between the bank and its depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, 'To whom in equity does it beneficially belong?' If the money deposited belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his bank account." See also *Manhattan Bank* v. *Walker*, 130 U. S. 267 [32: 959].

The case in 104 U. S., with the authorities cited in it, is decisive of this. The legal title to these moneys deposited was in the Rappals; so it was in that case in Dillon. The beneficial ownership is in the Gillespies there it was in the insurance company. The circumstances surrounding the deposits, and the relations between the depositor and the bank, were such as to impart notice to the bank that the beneficial ownership was outside of the legal title. With that notice, it had no right to appropriate the deposits to pay the obligations of the depositor to the bank, but it was properly adjudged liable in a suit in equity, and in that alone, to the claims of the beneficial owner. Here the [4 beneficial owner was the Gillespies; the legal title was in the Rappals; but when they deposited with the Bank, the latter received the moneys with notice that the beneficial ownership was elsewhere than in the Rappals. It could not in equity take them and cancel their private debt to it. What might have been the duty of the Bank in respect to a

check drawn by the Rappals upon these moneys, in favor of a third party, in view of their legal title and primary control, and what equities the Gillespies might have in case the Bank had paid such a check, are questions not now before us, and in respect to which we express no opinion. We only decide that, under the circumstances of this case, the Bank could not in equity take these particular deposits from the Rappals in payment of their debt to it. As the claim of the Gillespies against the Bank was equitable purely, equity alone had jurisdiction.

We conclude, therefore, that the proper forum was sought, and the decree was right; and *it is affirmed.*

8] SARAH MAY, *Plff. in Err.*,
v.
COUNTY OF JUNEAU.

(See S. C. Reporter's ed. 408-411.)

Patent for improvement in prisons, invalid—pleadings in patent cases.

1. The patent No. 25,662, granted to Edwin May, Oct. 4, 1859, for an improvement in the construction of prisons, is invalid, on the grounds set forth in the opinion in *County of Fond du Lac* v. *May, ante*, p. 714.

2. In an action for damages for infringement of letters-patent, want of patentability is a defense, though not set up in an answer or plea.

[No. 94.]

Argued and Submitted Nov. 26, 1890. Decided Dec. 15, 1890.

IN ERROR to the Circuit Court of the United States for the Western District of Wisconsin, to review a judgment for defendant in an action to recover damages for the infringement of letters-patent. *Affirmed.*

The facts are stated in the opinion.

Messrs. **M. C. Burch** and *Duane E. Fox* for plaintiff in error.

Mr. **S. U. Pinney**, for defendant in error:

The use of an old method to produce new results is not the subject of a patent.

Cornplanter Case, 90 U. S. 23 Wall. 232 (23: 173); *Vinton* v. *Hamilton*, 104 U. S. 491 (26: 809).

An improvement in the construction of jails is not the subject of a patent, not being a machine, a manufacture, a composition of matter or an art.

Jacobs v. *Baker*, 74 U. S. 7 Wall. 295 (19: 200).

A result or effect is not patentable.

Carver v. *Hyde*, 41 U. S. 16 Pet. 513 (10: 1051); *New Process Fermentation Co.* v. *Maus*, 20 Fed. Rep. 725; *LeRoy* v. *Tatham*, 55 U. S. 14 How. 156 (14: 367); *Case* v. *Brown*, 69 U. S. 2 Wall. 320 (17: 817); *Swain T. & Mfg. Co.* v. *Ladd*, 102 U. S. 408 (26: 184).

The use of an old device in a new position is not an invention. The law cannot take notice of the motive of the inventor or the new result of the use of the old device.

Tucker v. *Spalding*, 80 U. S. 13 Wall. 453 (20: 515); *Brown* v. *Piper*, 91 U. S. 37 (23: 200); *Hurt* v. *Evory*, 133 U. S. 349 (33: 647); *Hill* v. *Wooster*, 132 U. S. 693 (33: 502); *Watson* v. *Cincinnati, I. St. L. & C. R. Co.* 132 U. S. 161 (33: 295); *Aron* v. *Manhattan R. Co.* 132 U. S. 84 (33: 272); *St. Germain* v. *Brunswick*, 135 U. S. 227 (34: 122); *Heald* v. *Rice*, 104 U. S. 754 (26: 916); *Hall* v. *Macneale*, 107 U. S. 90 (27: 367); *Thompson* v. *Boisselier*, 114 U. S. 1 (29: 76); *Dunbar* v. *Meyers*, 94 U. S. 187 (24: 34); *Stephenson* v. *Brooklyn C. R. Co.* 114 U. S. 149 (29: 58); *Double-Pointed Tack Co.* v. *Two Rivers Mfg. Co.* 109 U. S. 117 (27: 877); *Pickering* v. *McCullough*, 104 U. S. 318 (26: 751); *Hendy* v. *Golden State & M. Iron Works*, 127 U. S. 370 (32: 207); *Furbush* v. *Cook*, 2 Fish. Pat. Cas. 669.

A county is not liable for the misfeasance or nonfeasance of its officers, agents or servants when pursuing its public duty.

Gilman v. *Contra Costa County*, 8 Cal. 52, 68 Am. Dec. 294; *Hamilton County* v. *Mighels*, 7 Ohio St. 109, 118; *Com.* v. *Brice*, 22 Pa. 211; *Lorillard* v. *Monroe*, 11 N. Y. 392; *People* v. *Town Auditors*, 74 N. Y. 311; *Kincaid* v. *Hardin County*, 52 Iowa, 430; *House* v. *Montgomery County*, 60 Ind. 580; *Hollenback* v. *Winnebago County*, 95 Ill. 148; *Hill* v. *Boston*, 122 Mass. 344; *Wehn* v. *Gage County*, 5 Neb. 494.

A county is not liable for the infringement of a patent.

Jacobs v. *Hamilton County*, 1 Bond, 500.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Western District of Wisconsin, by Sarah May against the County of Juneau, a cor- [40
poration of the State of Wisconsin, to recover damages for the infringement of letters-patent No. 25,662, granted to Edwin May, October 4, 1859, and extended for seven years from October 4, 1873, for an "improvement in the construction of prisons," being the same patent involved in case No. 61, *County of Fond du Lac* v. *May, ante*, p. 714, decided herewith. The specification and claims are set forth in the opinion in that case. The complaint alleged infringement only during the extended term, and only claims 1 and 4 were involved in this suit. The title of the plaintiff was the same as in No. 61. A demurrer to the complaint was overruled *pro forma*, and the questions raised by it were reserved for hearing. The defendant then answered, setting up that it was a corporation existing

---

NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 433.

As to patentability of inventions, see *notes* to Thompson v. Boisselier, 29: 76; Corning v. Burden, 14: 683.

As to abandonment of invention, see *note* to Pennock v. Dialogue, 7: 827.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see *note* to Corning v. Burden, 14: 683.

Including process and product in same patent; separate patents therefor. See *note* to Evans v. Eaton, 4: 433.

What reissue may cover. See *note* to O'Reilly v. Morse, 14: 601.

for public purposes and was not liable in the suit; also, that the matter covered by the patent, especially claim 4, was not the subject of a patent. The case was tried before a jury, which, under the direction of the court, found a verdict for the defendant, on which judgment was entered for it, to review which the plaintiff has brought a writ of error.

The plaintiff put in her title, being the same papers as in No. 61, and then Luther V. Moulton, the same witness as in No. 61, testified as follows: "I live at Grand Rapids, Michigan; am a partner in a foundry there. I have had experience in mechanics and patents; have photographed models; have been consulted about the patentability of mechanical devices; have been an expert witness in patent causes; have done patent soliciting; have examined and am acquainted with the May patent in suit; know its specifications and claims, and am acquainted with its practical operation and effect. I have examined the jail of the defendant County and the cells therein and the device there in use for fastening the doors of the cells, its arrangement and method of operation. Such device contains, in my opinion, the mechanical equivalent of the so-called May patent. It is substantially the same thing as the device described in the specification and claims of the patent in question, except the second and third claims. The results produced by the combinations claimed in [410] the patent, so far as they relate to the first and fourth claims, are produced in the jail by substantially the same means." The model of the patent was then put in evidence, and the witness explained the method of operating the device by reference to the model, and pointed out the similarity between the device used by the defendant and that of the model. On cross-examination he testified: "The novelty and utility of this patented device consists in interposing a grating or wall between the person operating the mechanism for securing the doors and the prisoners, so that they can be observed through the door or point of observation, and the corridor doors be closed and secured, or unlocked and opened, or the cell doors locked or unlocked, all without contact between the jailer and the prisoners, and without the jailer being in the same apartment with the prisoners, and thus exposed to attack by them. The several elements of the device are probably old. The novelty consists in the particular combinations whereby a new and useful result is produced. I think an angle door is old; have never seen them in jails; have seen angle doors and curved doors and illustrations of them in books many years ago, before 1859. Locks and bolts upon doors are also old, and to put a lock or bolt on a door would not be novelty or invention. The operation and effect of the lever in moving the device which locks and unlocks the cell doors are precisely the same without or with a wall or grating interposed between the lever and the door locked. All the separate elements of this device have long been in use for different purposes and are old, but the particular combination adapted and intended to interpose protection between the person operating the device and those on the other side of and within the wall or grating was new."

The plaintiff then gave evidence tending to show that the patented device was useful and economical, and had been in use in many jails and prisons since it was patented. It was admitted that the device was put into the jail of the defendant in 1878, and had been in use there ever since. Other evidence was put in on the part of the defendant, including a stipulation signed by the attorneys for the respective parties, setting forth that, prior to October 5, 1859, a device or contrivance was in use at the state prison at [411] Waupun, Wisconsin, and elsewhere, for fastening a series or row of cell doors by means of a lever and horizontal bar, but not operated outside of a corridor or partition separating the prisoners from the jailer.

At the close of the testimony on both sides, the defendant moved the court to direct a verdict for the defendant on the grounds, (1) that the defendant was merely a territorial division of the State, existing only as a political subdivision thereof, and could not be sued for the infringement of a patent; (2) that the right of action in the suit had never been assigned to the plaintiff. The court sustained the motion on both grounds (30 Fed. Rep. 241), and directed the jury to return a verdict for the defendant, which was done. The plaintiff excepted to the ruling and to the direction.

On the grounds set forth in the opinion in No. 61, *County of Fond du Lac* v. *May*, the patent was invalid, and the judgment must be affirmed. This defense was set up in the answer, and the motion to direct a verdict for the defendant was broad enough to cover the question of the invalidity of the patent, although that ground was not then distinctly urged. Want of patentability is a defense, though not set up in an answer or plea. *Brown* v. *Piper*, 91 U. S. 37, 44 [23: 200, 202]; *Dunbar* v. *Meyers*, 94 U. S. 187 [24: 34]; *Slawson* v. *Grand Street R. Co.* 107 U. S. 649, 652 [27: 576, 577]; *Hendy* v. *Golden State & M. Iron Works*, 127 U. S. 370, 375 [32: 207, 209].

Judgment affirmed.

TEXAS LAND AND CATTLE COMPANY, LIMITED, *Plff. in Err.*, *v.* J. W. SCOTT.

(See S. C. Reporter's ed. 436.)

Motion papers—Richmond & D. R. Co. v. Thouron, *134 U. S. 45 (33: 871), followed.*

1. Motion papers should contain in themselves so much of the record as to enable the court to act understandingly.
2. *Richmond & D. R. Co.* v. *Thouron*, 134 U. S. 45 (33: 871), which holds that an order of the circuit court remanding a case to the state court is not appealable, followed.

[No. 1471.]

Decided Nov. 10, 1890.

IN ERROR to the Circuit Court of the United States for the Western District of Texas.

On motion to dismiss or affirm. *Dismissed.*

Mr. **A. W. Houston,** for defendant in error, in favor of motion.

Per **Curiam:**

Motion papers should contain in themselves so much of the record as to enable the court to act understandingly, and these are deficient in that regard. We have, however, examined the record, and *the writ of error is dismissed* upon the authority of *Richmond & D. R. Co. v. Thouron*, 134 U. S. 45 [33: 871].

386] PROPELLER BURLINGTON ET AL., *Appts.*, *v.* DARIUS C. FORD.

(See S. C. *The Propeller Burlington*, Reporter's ed. 386-392.)

Jurisdictional amount—admiralty suit—limitation of liability—review in admiralty cases—contract to tow vessel—actionable negligence.

1. In a suit in admiralty, by libelant as owner of a barge and trustee for the owner of her cargo, against a propeller, to recover damages for the loss of the barge and cargo, through the negligence of the propeller, while being towed by her, in which the libelant recovered the sum of $5,567.65, this court has jurisdiction, although such amount was subsequently apportioned so as to show the allowance for the loss of the barge and for the cargo separately, to wit: $2,544.61 for the loss of the barge, and $3,023.04 for the cargo.

2. In a suit in admiralty, where the libelant recovered more than $5,000, sufficient to give this court jurisdiction, the fact that, upon subsequent proceedings for limitation of liability in another suit, the libelant could not collect more than $4,658, does not deprive this court of jurisdiction.

3. The review by this court of the decrees of the circuit court in admiralty cases is limited to a determination of the questions of law arising upon the record and to such rulings of the circuit court, duly excepted to, as are presented by a bill of exception. Where there is no bill of exceptions the inquiry is confined to whether the findings of the circuit court justify its decree.

4. The burden is upon him who alleges a breach of a contract to tow a vessel to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness, to his injury, in the performance.

5. Where the findings of the circuit court in an admiralty case for the loss of a barge and cargo while being towed by a propeller establish an actionable lack of the usual caution and skill on the part of the propeller, and that what was omitted to be done was within the power of the propeller to do, and should have been done by any master of competent skill and experience, and that different conduct would have prevented the loss, the findings are sufficient to sustain a decree for the loss against the propeller.

[No. 783.]

Submitted Dec. 1, 1890. Decided Dec. 15, 1890.

NOTE.—*As to conclusiveness of judgments in admiralty; when may be re-examined,*—see *note* to Williams v. Armroyd, 3: 392.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Michigan in favor of libelant in an admiralty case for the loss of a barge and cargo, while being towed by a Propeller, against the Propeller.

On motion to dismiss or affirm. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

Darius C. Ford filed his libel in the District Court of the United States for the Eastern District of Michigan, as owner of the barge William Vanetta, and trustee for the owners of her cargo, against the Propeller Burlington, to recover damages for the loss of the barge and cargo in Lake Erie, while being towed by the Propeller, because, as averred, of her careless and negligent management. [38

Bradley and Burrington, as owners of the Propeller, answered, denying carelessness and negligence, and pleading also the Limitation of Liability Act in connection with an appraisal and stipulation in the case.

The district court found the Burlington guilty of the carelessness and negligence alleged, and entered a final decree confirming the report of the commissioner fixing the damages for the loss of the cargo at the sum of $3,361.93, and for the loss of the barge and freight at the sum of $2,829.83, in all, $6,191.76; and it further appearing to the court that the Propeller had been duly appraised at the sum of $5,300, and that a stipulation with sureties had been filed in that amount to secure the judgment of the court, it was ordered that the said sum of $5,300 be apportioned and distributed as follows: $2,422.28 to libelant for his damages by reason of the loss of the barge and freight, and $2,877.72 to libelant as trustee for the owners of the cargo; and these sums were awarded to him for the damages therein, and it was decreed that he recover the same of the claimant of the Propeller and the sureties in the stipulation with costs, and that libelant have execution therefor.

The owners of the Propeller appealed to the circuit court, and, the appeal having been heard, that court made the following findings of fact and conclusion of law, to wit:

"This court finds from the evidence that there was an agreement on the part of the Burlington to tow the Vanetta from Detroit to Cleveland *via* the South passage, through Lake Erie.

"That in violation of such agreement the master of the Burlington, after entering Lake Erie and running for some hours on the proper course for the South passage, changed the course of the Burlington and took the Vanetta *via* north shore of Lake Erie. [38

"That the South passage was the usual, safest and proper course from the Detroit River through Lake Erie to Cleveland at that season of the year, especially with the wind from the southward and westward, as it prevailed when the Burlington started on the trip with the Vanetta in tow.

"That with the wind as it was, the north shore was a lee shore to the Burlington and her tow, and in taking the North passage, the

master of the Burlington not only violated his agreement with the Vanetta, but by this direction actually exposed the latter to greater risk and danger.

"That the master of the Burlington, having sought and gained shelter from the southwest wind on the east side of Pt. Pelee Island, which offered him a safe and sufficient protection, about 3 o'clock in the morning of April 1st, 1886, left that shelter and pulled the Vanetta and her other barge back to the north'ard and westward into the open lake, where the Burlington and her tow were subjected to the full force of the wind on a lee shore and where the Burlington was unable to control and manage said barge, thereby bringing about a collision between them, which resulted in serious injury to the Vanetta and led to her total loss.

"That it was an improper and unseamanlike move on the part of the Propeller Burlington to leave the shelter of the east side of Pt. Pelee Island and go back into Pigeon Bay on a lee shore, where the Vanetta was exposed to greater danger, which resulted in her loss.

"That the Propeller was in fault for not attempting to tow the Vanetta to a place of greater safety after the latter was injured in Pigeon Bay and had signaled the former for help.

"It follows, therefore, as a matter of law, that said Propeller Burlington is liable to the libelant and appellee for the value of said barge William Vanetta, and her cargo, as adjudged by the district court, whose judgment and decree in this case is in all things affirmed, with costs and interest on the amount awarded libelant in the court below. Judgment will accordingly be rendered herein against the appellant and the stipu-
[389] lators on the appeal bond for the amount of the decree below with interest and costs, for which execution is awarded."

And decree was thereupon entered as follows:

"This cause having been fully argued by counsel on either side, and the record of the court below being seen and fully considered, it is now by this court considered, adjudged and decreed that the judgment and decree of the district court aforesaid be and the same is now in all things affirmed.

"And it is further considered, adjudged and decreed by this court, that the said libelant do recover of and from the said Russell M. Bradley and Riley M. Burrington, claimants and appellants, and also against Perry R. Hall, Russell M. Bradley, Charles H. Bradley and Jay Conderman, as sureties on appeal for said appellants, the sum of five thousand, five hundred and sixty-seven dollars and sixty-five cents damages, being the sum for which judgment or decree in the court below was allowed ($5,300), with interest to this day ($267.65), together with said libelant's cost of suit both in the district court and in this court, to be taxed by the clerk of this court. It is further ordered, considered, adjudged and decreed that the above sum of five thousand, five hundred and sixty-seven dollars and sixty-five cents be apportioned and distributed between libelant as owner of scow William Vanetta and freight, and as trustee for the owners of the cargo of said scow, in manner following: the sum of two thousand five hundred and forty-four dollars and sixty-one cents ($2,544.61) to libelant for his damages by reason of the loss of said scow William Vanetta and freight; and the sum of three thousand and twenty-three dollars and four cents ($3,023.04) to libelant as trustee for the owners of the cargo of said scow, and that he have execution against the said claimants and appellants and said sureties on appeal therefor."

From this decree an appeal was taken to this court. It was shown by affidavit that, after this appeal was taken, the owners of the Propeller filed their petition in the district court alleging, among other things, the assertion of claims against them as owners of the Propeller by reason of the loss of the barges Vanetta and Star of Hope, while in tow of the Propeller; the seizure of the [390
Propeller at the suit of the appellee, her appraisal at the sum of $5,300 and the filing of the stipulation in that sum; and praying that they might contest their liability and the liability of the Propeller for the loss of the barges; that such proceedings were had thereunder as resulted in finding the value of the Propeller on the day of the loss at $7,000; that there was due appellee by reason of the loss of the Vanetta the sum of $5,330.74 and interest, and to the owners of the Star of Hope by reason of her loss the sum of $4,000 and interest, and a final decree was entered limiting the liability of appellants to the sum of $7,000 with interest, which decree was on appeal to the circuit court in all things affirmed; that at the date of the entry of the decree from which the appeal in this case was taken there was due appellee the sum of $6,542.06, and to the owners of the Star of Hope the sum of $4,488, principal and interest; that at that date the declared value of the Propeller, with interest from the day of the loss, was $7,854; and that the proportion due to appellee was the sum of $4,658. This appears in substance, with a slight difference in the amounts by reason of the calculation of interest, from the report of the commissioner in the limited liability proceedings, a copy of which was attached to the affidavit.

Mr. **H. C. Wisner,** for appellee, in favor of motion:

This court has no jurisdiction as to the amount in controversy.

Gibson v. *Shufeldt*, 122 U. S. 27 (30: 1083); *Oliver* v. *Alexander*, 31 U. S. 6 Pet. 143 (8: 349); *Rich* v. *Lambert*, 53 U. S. 12 How. 347 (13: 1017); *Ex parte Baltimore & O. R. Co.* 106 U. S. 5 (27: 78); *The Nevada*, Id. 154 (149).

The findings are not reviewable.

The Maggie J. Smith, 123 U. S. 349 (31: 175).

This decree can only be reversed for matter of law.

The Excelsior, 123 U. S. 40 (31: 75); *The Webb*, 81 U. S. 14 Wall. 406 (20: 774).

Messrs. **H. H. Swan** and **F. H. Canfield,** for appellants, in opposition to motion:

The matter in dispute, exclusive of costs, exceeds the sum of $5,000, and the case is therefore appealable.

The Commander-in-Chief, 68 U. S. 1 Wall. 43 (17: 609); *The Blackwall*, 77 U. S. 10 Wall. 1 (19: 870); *Gibson* v. *Shufeldt*, 122 U. S. 33, 34 (30: 1086); *Rodd* v. *Heartt*, 84 U. S. 17 Wall. 354 (21: 627); *Estes* v. *Gunter*, 121 U. S. 183 (30: 884); *Oliver* v. *Alexander*, 31 U. S. 6 Pet. 143 (8: 349); *Rich* v. *Lambert*, 53 U. S. 12 How. 352 (13: 1019).

There being no ground whatever for this motion to dismiss, the court will not consider the motion to affirm, and we are not called upon to discuss that matter at all.

The Connemara, 103 U. S. 754, 756 (26: 322); *Davies* v. *Corbin*, 113 U. S. 687 (28: 1149).

The only inquiry, therefore, is, Do the facts found show negligence? There is no finding reflecting on the competency of the master.

Lawrence v. *Minturn*, 58 U. S. 17 How. 110 (15: 62); *The Star of Hope*, 76 U. S. 9 Wall. 230, 231 (19: 646).

Damage sustained by a tow does not ordinarily raise a presumption that the tug has been in fault.

The Webb, 81 U. S. 14 Wall. 414 (20: 775); *The L. P. Dayton*, 120 U. S. 353 (31: 675), affirming *S. C.* 18 Blatchf. 411; *The Mosher*, 4 Biss. 274.

The facts do not show the tug liable.

The W. E. Gladwish, 17 Blatchf. 77; *The Thomas Kiley*, 5 Ben. 301; *The Mohawk*, 7 Ben. 189, affirmed on appeal; *The Clematis*, Brown, Adm. 502; *The James P. Donaldson*, 19 Fed. Rep. 264; *The Mosher*, 4 Biss. 274.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This case comes before us on a motion to dismiss, united with a motion to affirm. Appellee contends that as he recovered for himself, as owner, only the sum of $2,544.61, and for the owners of the cargo only the sum of $3,023.04, the matter stands as though two separate suits had been brought, and that the amount in controversy in either does not reach the jurisdictional sum; and *Ex parte Baltimore & O. R. Co.*, 106 U. S. 5 [27: 78], and *The Nevada*, Id. 154 [149], are cited. But in both of those cases the owners of the vessel and the owners of the cargo were parties to the proceedings and recovered the amounts due them respectively. Here Ford is to be treated in all respects as the sole libelant, and the decree is for the recovery of the total sum of $5,567.65, and although this amount was subsequently apportioned so as to show the allowance for the loss of the barge and that for the loss of the cargo, separately, the decree for recovery of the aggregate remained the same, and the execution ordered against the claimants and their sureties on appeal would issue for the single amount.

Nor does the fact that, upon the subsequent proceedings for limitation of liability, it appeared that Ford could not collect more than $4,658, his *pro rata* share of the limit decreed, affect the question. That limitation was arrived at in the other suit, and cannot be laid hold of as controlling this. We think, however, under the circumstances, that there was color for the motion to dismiss, though we overrule it, and that we may therefore consider the motion to affirm.

Under the Act of February 16, 1875 (18 Stat. 315, chap. 77), our review of the decrees of the circuit courts upon their findings of fact and conclusions of law in admiralty cases is "limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law." There is no bill of exceptions here, and the inquiry is reduced simply to whether the findings of the circuit court justify the decree appealed from.

The general rule is laid down by *Mr. Justice* Strong, delivering the opinion of the court in *The Steamer Webb*, 81 U. S. 14 Wall. 406, 414 [20: 774, 775], "that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it." [391

The circuit court found that the loss of the Vanetta was the result of improper and unseamanlike conduct on the part of the Propeller Burlington. And the findings state various facts showing that the Propeller was in fault, and that but for such fault the loss would not have happened. Findings that the master of the Burlington took the Vanetta *via* the north shore of Lake Erie when the South passage was the usual, safest and proper course at that season of the year, especially with the wind as it then prevailed, and that in doing so he violated his agreement with the Vanetta and exposed the latter to greater risk and danger; that the master, having gained shelter which offered a safe and sufficient protection, left it and pulled the Vanetta and the other barge into the open lake, where the Propeller and her tow were subjected to the full force of the wind on the lee side, and the Propeller was unable to control and manage the barges, which resulted in serious injury to the Vanetta and led to her total loss; that this was an improper and unseamanlike move, and resulted in the Vanetta's loss; and that the Propeller was in fault for not attempting to tow the Vanetta to a place of greater safety after the latter was injured in Pigeon Bay and had signaled the former for help,—are findings from which the conclusion of law followed; for these findings established that in what was done, there was an actionable lack of the usual caution and skill, and that what

was omitted to be done was within the power of the Propeller to do, and should have been done by any master of competent skill and experience; and that different conduct would, in all probability, have prevented the catastrophe. As we cannot go behind the findings, and they are sufficient to sustain the decree, further argument is not required. *The Maggie J. Smith*, 123 U. S. 349 [31: 175]; *The Gazelle*, 128 U. S. 474 [32: 496]. *Decree affirmed.*

---

[483] CLIFTON HOLDEN, *Appt.*,
v.
STATE OF MINNESOTA.

(See S. C. Reporter's ed. 483-496.)

Minnesota Act of 1889 in regard to murder—effect of—did not repeal prior law—not ex post facto—*4th section—habeas corpus—statement in application—warrant of governor—regulations as to punishment.*

1. The Minnesota Act of 1889, in regard to the mode of inflicting the punishment of death, repealed only such previous laws as were inconsistent with its provisions; and previous statutes that were consistent with its provisions were unaffected.
2. The Act of 1889 did not supersede the prior law, prescribing, as the punishment for murder in the first degree committed prior to April 24, 1889, death by hanging, to be inflicted after the issue by the governor of a warrant of execution.
3. The third section of that Act, which prescribes the hour of the day before which, and the manner in which, the punishment by hanging shall be inflicted, is not *ex post facto* as to offenses committed before its passage.
4. The fourth section of the Act of 1889, prescribing solitary confinement, applies only to future offenses, not to those committed prior to its passage.
5. Where the statement in the application for a writ of habeas corpus, that the appellant is kept in solitary confinement, is denied in the return to the writ, and there is no proof in the record upon the subject, it cannot be presumed that the statement is true.
6. It is competent for the State to establish the regulation that the day on which the punishment of death should be inflicted should depend upon the warrant of the governor, and such regulation is entirely consistent with due process of law.
7. The Legislature of a State can legally prescribe regulations that the sentence to death shall be executed before sunrise and within the walls of the jail, or within some other inclosure higher than the gallows so as to exclude the view of persons outside, and the number and character of those who may witness the execution, and that newspaper reporters shall be excluded; and such regulations when applied to offenses previously committed are not *ex post facto.*

[No. 1237.]

Argued Nov. 20, 21, 1890. Decided Dec. 8, 1890.

APPEAL from a judgment of the Circuit Court of the United States for the District of Minnesota, denying the application for the discharge of a prisoner on a writ of habeas corpus, he being sentenced to death for murder. *Affirmed.*

The facts are stated in the opinion.

Mr. **Chas. C. Willson** for appellant.

Messrs. Moses E. Clapp and **H. W. Childs** for appellee.

Mr. Justice **Harlan** delivered the opinion [4 of the court:

By an indictment returned May 15, 1889, in the District Court of Redwood County, Minnesota, Clifton Holden was charged with the crime of murder in the first degree, committed in that county on the 23d day of November, 1888. Having been found guilty, and a motion for a new trial having been overruled, he prosecuted an appeal to the Supreme Court of the State. That court affirmed upon the merits the order denying the motion for a new trial, and remitted the case to the district court. *State* v. *Holden*, 42 Minn. 350. In the latter court it was adjudged, February 18, 1890, that, as a punishment for the crime of which he had been convicted, Holden be confined in the common jail of Brown County (there being no jail in Redwood County), and that thereafter and after the lapse of three calendar months from the date of the sentence, and at a time to be designated in the warrant of the governor of [4 the State, he be taken to the place of execution and hanged by the neck until dead. Gen. Stat. Minn. 1878, chap. 117, § 1.

On the 21st of May, 1890, the governor issued a warrant to the sheriff, which, after reciting the judgment, commanded and required him to cause execution of the sentence of the law to be done upon the convict on Friday, the 27th day of June, 1890, before the hour of sunrise of the day last named, at a place in the County of Redwood, to be selected by such officer, "conformably with the provisions of section 3 of an Act entitled 'An Act Providing for the Mode of Inflicting the Punishment of Death, the Manner in Which the Same shall be Carried into Effect, and Declaring a Violation of Any of the Provisions of This Act to be a Misdemeanor,' approved April 24, 1889."

The accused, being in custody under the above judgment and warrant, presented to the Circuit Court of the United States for the District of Minnesota his written application for a writ of habeas corpus, based upon the ground that he was restrained of his liberty in violation of the Constitution of the United States. The writ was issued, and the officers having charge of the accused made a return, to which the petitioner filed an answer. The attorney-general of Minnesota appeared on behalf of the State, insisting that the detention of the petitioner was not in violation of the supreme law of the land. Upon final hearing the application for discharge was denied. From that order the present appeal was taken under section 764 of the Revised Statutes, as amended by the Act of March 3, 1885 (23 Stat. chap. 353, p. 437).

The principal question before us depends upon the effect to be given to the Act, re-

NOTE.—*As to constitutionality of* ex post facto *laws*, see *notes* to Calder v. Bull, 1: 648; Sturges v. Crowninshield, 4: 529.

ferred to in the governor's warrant, of April 24, 1889. That Act is as follows:

"§ 1. The mode of inflicting the punishment of death shall in all cases be hanging by the neck until the person is dead. § 2. Whenever the punishment of death is inflicted upon any convict in obedience to a warrant from the governor of the State, the sheriff of the county shall be present at the execution, unless prevented by sickness or other casualty; and he may have such military guard as he may think proper. He shall return the warrant with a statement under his hand of doings thereon as soon as may be after the said execution to the governor, and shall also file in the clerk's office of the court where the conviction was had an attested copy of the warrant and statement aforesaid, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence. § 3. The warrant of execution shall be executed before the hour of sunrise of the day designated in the warrant and within the walls of the jail in all cases where the jail is so constructed that it can be conveniently done therein; but when the jail is not so constructed, the warrant shall be executed within an inclosure which shall be higher than the gallows, and shall exclude the view of persons outside, and which shall be prepared for that purpose, under the direction of the sheriff, in the immediate vicinity of the jail, of, if there be no jail in the county, at some convenient place at the county-seat, to be selected by the sheriff. § 4. After the issue of the warrant for execution by the governor, the prisoner shall be kept in solitary confinement, and the following persons shall be allowed to visit him, but none other, viz: the sheriff and his deputies, the prisoner's counsel, any priest or clergyman the prisoner may select, and the members of his immediate family. § 5. Besides the sheriff and his assistants, the following persons may be present at the execution, but none other: the clergyman or priest in attendance upon the prisoner and such other persons as the prisoner may designate, not exceeding three in number, a physician or surgeon, to be selected by the sheriff, and such other persons as the sheriff may designate, not exceeding six in number, but no person so admitted shall be a newspaper reporter or representative. No account of the details of such execution, beyond the statement of the fact that such convict was on the day in question duly executed according to law, shall be published in any newspaper. § 6. Any person who shall violate or omit to comply with any of the provisions of this Act shall be guilty of a misdemeanor. § 7. All Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed. § 8. This Act shall take effect and be in force from and after its passage." Gen. Laws Minn. 1889, chap. 20, p. 66.

The contention of the appellant is that by the law of Minnesota, in force when the alleged crime was committed, and up to the passage of the Act of April 24, 1889, the punishment for murder in the first degree was death, without solitary confinement of the convict; that the Act of that date adding the penalty of solitary confinement between the date of the governor's warrant and the execution, would, if applied to previous offenses, be *ex post facto* in its nature, and, therefore, was inconsistent with the prior law; and that inasmuch as that Act made no saving as to previous offenses, and repealed all Acts and parts of Acts inconsistent with its provisions, there was no statute in force, after the 24th of April, 1889, prescribing the punishment of death for murder in the first degree committed before that date. While this may not be expressed in terms, it is in fact the contention of the appellant, the argument in his behalf necessarily leading to this conclusion; for he insists that the repeal by the seventh section of the Act of 1889 of all prior inconsistent laws was an act of complete amnesty in respect to all offenses of murder in the first degree previously committed, making subsequent imprisonment therefor illegal. Whether such was the result of that Act, interpreted in the light of prior statutes, is the principal question on this appeal.

By the General Statutes of Minnesota, in force at the close of the legislative session of 1878, it was provided (chap. 94) that the killing of a human being, without the authority of law, and with a premeditated design to effect the death of the person killed, or any human being, was murder in the first degree (§ 1); and that whoever was convicted thereof should suffer the penalty of death, and be kept in solitary confinement for a period of not less than one month nor more than six months, in the discretion of the judge before whom the conviction was had, at the expiration of which time it became the duty of the governor to issue his warrant of execution. Gen. Stat. 1878, § 2, pp. 882, 883. Other sections of the same chapter were as follows: "§ 3. The [481
penalty of death as a punishment for crime is hereby abolished in this State, except in the cases provided for in section two of this Act, and hereafter the penalty for the crime of murder in the first degree shall be as prescribed in sections two and three of this Act. 1868, chap. 88, § 1. § 4. Whenever, upon the trial of any person upon an indictment for murder in the first degree, the jury shall have agreed upon a verdict of guilty of such offense, such jury may also determine in the same manner that the person so convicted shall be punished by death, and, if they so determine, shall render their verdict accordingly; and in such case the person so convicted shall be punished by death, as prescribed by section two of chapter ninety-four of the General Statutes for the punishment of murder in the first degree. Id. § 2. § 5. Whoever shall be convicted of murder in the first degree, if the jury upon whose conviction the penalty is inflicted shall not by their verdict prescribe the penalty of death, shall be punished by imprisonment at hard labor in the state prison during the remainder of the term of his natural life, with solitary confinement upon bread and water diet for twelve days in each year

during the term, to be apportioned in periods of not exceeding three days duration each, with an interval of not less than fourteen days intervening each two successive periods. Id. § 3. § 6. The provisions of this Act shall not apply nor extend to an Act done nor offense committed prior to the passage hereof; but the provisions of law now in force, and applicable to the crime of murder in the first degree, as well in respect to the penalty affixed to the commission of such crime as in all other respects, shall be and remain in full force and effect as to any such offense heretofore committed. Id. § 4. § 7. That in all cases where the time of imprisonment is during life, solitary imprisonment in the state prison is hereby abolished, except for prison discipline. 1876, chap. 79, § 1."

By chapter 118 of the same General Statutes it was provided: "§ 3. When any person is convicted of any crime for which sentence of death is awarded against him, the clerk of the court, as soon as may be, shall make [489] out and deliver to the sheriff of the county a certified copy of the whole record of the conviction and sentence; and the sheriff shall forthwith transmit the same to the governor; and the sentence of death shall not be executed upon such convict until a warrant is issued by the governor, under the seal of the State, with a copy of the record thereto annexed, commanding the sheriff to cause the execution to be done, and the sheriff shall thereupon cause to be executed the judgment and sentence of the law upon such convict. § 4. The judge of the court at which a conviction requiring judgment of death is had, shall, immediately after conviction, transmit to the governor, by mail, a statement of the conviction and judgment, and of the testimony given at the trial." "§ 11. The punishment of death shall, in all cases, be inflicted by hanging the convict by the neck, until he is dead, and the sentence shall, at the time directed by the warrant, be executed at such place within the county as the sheriff shall select. § 12. Whenever the punishment of death is inflicted upon any convict, in obedience to a warrant from the governor, the sheriff of the county shall be present at the execution, unless prevented by sickness or other casualty; and he may have such military guard as he may think proper. He shall return the warrant, with a statement under his hand of his doings thereon, as soon as may be after the said execution, to the governor, and shall also file in the clerk's office of the court where the conviction was had an attested copy of the warrant and statement aforesaid, and the clerk shall subjoin a brief abstract of such statement to the record of conviction and sentence."

The next Statute in point of time was that of March 2, 1883, entitled "An Act Prescribing the Punishment of Murder in the First Degree." It provided that "Whoever is guilty of murder in the first degree shall suffer the punishment of death: *Provided*, That if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which the penalty of death should be imposed, the punishment shall be imprisonment for life in the penitentiary." That Act repealed sections three, four, five and six of chapter 94 of the General Statutes of 1878, as well as all Acts and parts of Acts inconsistent with its provisions. Minn. Sess. Laws 1883, chap. 122, p. 164.

Then came the Act of March 9, 1885, establishing a Penal Code, and which went into effect January 1, 1886. It contained, among others, the following sections: "§ 152. The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when perpetrated with a premeditated design to effect the death of the person killed, or of another." "§ 156. Murder in the first degree is punishable by death: *Provided*, That if in any such case the court shall certify of record its opinion that by reason of exceptional circumstances the case is not one in which the penalty of death should be imposed, the punishment shall be imprisonment for life in the state prison." "§ 541. Chapters 93, 94, 95, 96, 97, 98, 99, 100 and 101 of the General Statutes of 1878, and all Acts and parts of Acts which are inconsistent with the provisions of this Act, are repealed, so far as they define any crime or impose any punishment for crime, except as herein provided." Gen. Stat. Minn. Supplement 1888, vol. 2, 969, 978, 1050. It is important to be here observed that chapter 94, thus repealed, authorized (§ 2) the keeping of one convicted of a capital crime in solitary confinement for a period of not less than one nor more than six months, in the discretion of the judge before whom the conviction was had.

Such was the state of the law in Minnesota at the time of the commission by Holden of the crime for which he was indicted and convicted. As the Penal Code did not repeal chapter 118 of the General Statutes of 1878, except so far as the provisions of the latter were inconsistent with that Code, it is apparent that at the time his offense was committed the punishment therefor was, as prescribed in that chapter, death by hanging, and that his execution could not occur until a warrant for that purpose was issued by the governor. These provisions were not repealed by the Act of April 24, 1889. In respect to the first and second sections of that Act it is clear that they contain nothing of substance that was not in sections eleven and twelve of chapter 118 of the General Statutes of 1878. And it is equally clear that the provisions of an existing statute cannot be regarded as inconsistent with a subsequent Act merely because the latter re-enacts or repeats those provisions. As the Act of 1889 repealed only such previous Acts and parts of Acts as were inconsistent with its provisions, it is inaccurate to say that that Statute contained no saving clause whatever. By necessary implication, previous statutes that were consistent with its provisions were unaffected.

In reference to the third section of the Act of 1889, it may be said that, while its provisions are new, it cannot be regarded as, in any sense, *ex post facto;* for it only prescribes the hour of the day before which, and the manner in which, the punishment by hang-

ing shall be inflicted. Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other inclosure, and whether the inclosure within which he is executed shall be higher than the gallows, thus excluding the view of persons outside, are regulations that do not affect his sustantial rights. The same observation may be made touching the restriction in section five as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the Legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions occurring after the passage of the Act, and cannot, even when applied to offenses previously committed, be regarded as *ex post facto* within the meaning of the Constitution.

The only part of the Act of 1889 that may be deemed *ex post facto*, if applied to offenses committed before its passage, and after the adoption of the Penal Code, is section four, requiring that, after the issue of the warrant of execution by the governor, "the prisoner shall be kept in solitary confinement" in the jail, and certain persons only be allowed to visit him. The application for the writ of habeas corpus states that the appellant is kept in solitary confinement. But this was denied in the return to the writ, and there is no proof in the record upon the subject. *Crowley* v. *Christensen*, 137 U. S. 86, 94 [34: 620, 624]. The appellant insists that we must presume that the officers holding him in custody have pursued the Statute of 1889, and, consequently, that he is kept in solitary confinement. No such presumption can be indulged without imputing to the officers, charged with the execution of the governor's warrant, a purpose to enforce a statutory provision that cannot legally be applied to the case of the appellant. Even the governor's warrant furnishes no ground for such a presumption, because it did not require that the convict be kept in solitary confinement, but only that the judgment and sentence be carried into effect conformably to the third section of the Act of 1889, which section, we have seen, has no reference to the mode of confinement.

We have proceeedeed in our examination of the case upon the ground that the prior Statutes requiring the punishment of death to be inflicted by hanging, and the issuing by the governor of the warrant of execution before such punishment was inflicted, were consistent with and were not repealed by the Act of 1889, and, therefore, so far as the mere imprisonment of the appellant, and his execution in conformity with prior statutes, were concerned, they could both occur without invoking the provision in the Act of 1889, requiring solitary confinement after the warrant of execution was issued. This view, appellant contends, is not in harmony with the decision in *Medley, Petitioner*, 134 U. S. 160 [33: 835], where it was held that the effect of a clause in the Colorado Statute, repealing all Acts and parts of Acts inconsistent with its provisions, was to bring Medley's case under that Statute in *all* particulars of trial and punishment, except so far as the Legislature had power to apply other principles to the trial and punishment of the crime of which he was convicted.

There are material differences between the Colorado and Minnesota Statutes. The former provides that "the punishment of death must, in each and every case of death sentence pronounced in this [that] State, be inflicted by the warden of the state penitentiary," etc. § 1. It also contains this provision: "Whenever a person [be] convicted of crime, the punishment whereof is death, [49
and such convicted person be sentenced to suffer the penalty of death, the judge passing such sentence shall appoint and designate in the warrant of conviction a week of time within which such sentence must be executed; such week, so appointed, shall be not less than two nor more than four weeks from the day of passing such sentence. Said warrant shall be directed to the warden of the state penitentiary of this State, commanding said warden to do execution of the sentence imposed as aforesaid, upon some day within the week of time designated in said warrant, and it shall be delivered to the sheriff of the county wherein such conviction is had, who shall within twenty-four hours thereafter proceed to the said penitentiary and deliver such convicted person, together with the warrant as aforesaid, to the said warden, who shall keep such convict in solitary confinement until infliction of the death penalty." § 2. These provisions indicate the purpose of the Legislature of Colorado that that Act—no matter when the offense was committed—should control in every case *tried* after its passage in which the sentence of death was imposed. It was evidently intended that it should cover the whole subject of the trials and sentences in capital cases, as well as the mode of inflicting the punishment prescribed. It was so interpreted by the state court; for, although Medley's crime was committed before the passage of the Colorado Statute under which he was tried, the imposition of solitary confinement was part of the very judgment and sentence against him. Thus interpreted, this court held the Colorado Statute to be a legislative declaration that it was not fit that the existing law remain in force, and, consequently, that it abrogated all former laws covering the same subject, and was *ex post facto* when applied to prior offenses.

No such case is before us, and no such construction of the Minnesota Statute of 1889 is required. The sentence against the appellant did not require that he be kept in solitary confinement. Nor did that Statute cover the whole subject of murder in the first degree, or prescribe the only rules that should control in the trial and punishment for crimes of that class. It did not touch the judgments to be pronounced in such [49
cases, nor interfere with the power of the governor to issue a warrant of execution. The provisions of the previous law, as to the nature of the sentence, the particular mode of inflicting death and the issuing by the governor of the warrant of execution before

the convict was hung, were, therefore, not repealed, although some of them were re-enacted or repeated in the Statute of 1889, and other provisions relating merely to the time and mode of executing the warrant, but not affecting the substantial rights of the convict, were added. Indeed, as the Act of 1889 does not itself prescribe the punishment of death for murder in the first degree, the authority to inflict that punishment, even for an offense committed after its passage, must be derived from the previous law. The only interpretation of that Act that will give full effect to the intention of the Legislature in respect to the prior unrepealed law relating to sentences of death for murder in the first degree committed before its passage, is to hold, as we do, that its fourth section, prescribing solitary confinement, is an independent provision, applicable only to future offenses, not to those committed prior to its passage.

In this view, and as it does not appear that the appellant is kept in solitary confinement, there is no ground upon which it can be held that his mere imprisonment, in execution of the sentence of death, is in violation of the constitutional provision against *ex post facto* laws. That sentence, the subsequent imprisonment of the convict under it, without solitary confinement, and the warrant of execution, are in accordance with the law of the State as it was when the offense was committed, and do not infringe any right secured by the Constitution of the United States.

Much was said at the argument in reference to section 3 of chapter 4 of the General Statutes of 1866, declaring that "whenever a law is repealed, which repealed a former law, the former law shall not thereby be revived, unless it is so specially provided, nor shall such repeal affect any right which accrued, any duty imposed, any penalty incurred nor any proceeding commenced, under or by virtue of the law repealed." This section was admitted to be a part of the law [495] of Minnesota at the time the appellant's offense was committed, and when the Act of 1889 was passed. On behalf of the State it is contended that the former law for the punishment of murder in the first degree is to be read in connection with that section. We have not deemed it necessary to consider whether that section is applicable to capital cases, or to determine whether the punishment of death is, within its meaning, a "penalty." Independently of that section, and for the reasons stated, we hold that the Act of 1889, although applicable to offenses committed after its passage, did not supersede the prior law prescribing, as the punishment for murder in the first degree committed prior to April 24, 1889, death by hanging, to be inflicted after the issue by the governor of a warrant of execution.

Among the assignments of error by the appellant is one to the effect that "the judgment of the state district court that he be hanged at a time to be fixed by the governor of Minnesota was not a valid exercise of judicial authority or due process of law thus to deprive him of life at such time as the executive should arbitrarily appoint." We do not understand the counsel of the appellant to press this point. But as this assignment of error has not been formally withdrawn, and as human life is involved in our decision, it is proper to say that under the law of Minnesota, at the time appellant committed the crime of which he was convicted, as well as when he was indicted and tried, the day on which the punishment of death should be inflicted depended upon the warrant of the governor. It is competent for the State to establish such regulations, and they are entirely consistent with due process of law. The court sentenced the convict to the punishment prescribed for the crime of murder in the first degree, leaving the precise day for inflicting the punishment to be determined by the governor. The order designating the day of execution is, strictly speaking, no part of the judgment, unless made so by statute. And the power conferred upon the governor to fix the time of infliction is no more arbitrary in its nature than the same power would be if conferred upon the court. Whether conferred upon the governor or the court, it is arbitrary in no other sense than every power is [496] arbitrary that depends upon the discretion of the tribunal or the person authorized to exercise it. It may be also observed that at common law the sentence of death was generally silent as to the precise day of execution. *Atkinson* v. *The King*, 3 Bro. P. C. (2d ed.) 517, 529; *Rex* v. *Rogers*, 3 Burr. 1809, 1812; *Rex* v. *Doyle*, 1 Leach (4th ed.) 67; *Cuthcart* v. *Com.* 37 Pa. 108, 115; *Costley* v. *Com.* 118 Mass. 1, 35. Of course, if the statute so requires, the court must, in its sentence, fix the day of execution. Equally must it forbear to do that if the statute confers upon some executive officer the power to designate the time of infliction.

Judgment affirmed.

Mr. Justice **Bradley** and *Mr. Justice* **Brewer** concur in the judgment.

Ex parte:

THE PENNSYLVANIA COMPANY, [451]

Petitioner.

(See S. C. Reporter's ed. 451-457.)

Remanding cause to state court—jurisdictional amount—removal of cause from state to federal court.

1. The Act of Aug. 13, 1888 (25 Stat. 433), makes the

NOTE.—*As to removal of causes, under Act of 1875; citizenship,*—see *note* to Meyer v. Delaware R. Const. Co. 25: 598.

As to removal by one of two or more defendants; separable controversies,—see *note* to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see *notes* to Gaines v. Fuentes, 23: 524; Jefferson v. Driver, 29: 897.

As to removal of causes from state to federal courts where United States Constitution, Act of Congress or treaty comes in question, see *note* to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes; when denied,—see *note* to Civil Rights Cases, 27: 835.

As to removal of actions against officers; Rev. Stat., § 643,—see *note* to Davis v. South Carolina, 27: 874.

judgment of the circuit court remanding a cause to the state court final and conclusive, and has the effect of taking away the remedy by mandamus to compel that court to take jurisdiction, as well as that of appeal and writ of error.

2. By the Act of 1887, the matter in dispute must exceed the sum or value of $2,000, in order to give the circuit court jurisdiction in cases sought to be removed from a state court on account of prejudice or local influence, as well as in other cases.

3. In order to remove to the circuit court a case from a state court on account of prejudice or local influence, the circuit court must be legally satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. A formal affidavit of mere belief is not sufficient. The petition for removal should state facts and be verified, and the court may require further proof.

[No. 7, Original.]

Argued Dec. 8, 1890. Decided Dec. 22, 1890.

ON PETITION for mandamus to the judges of the Circuit Court of the United States for the District of Connecticut, to take jurisdiction of the suit of Alberto T. Roraback against the petitioner. *Denied.*

The facts are stated in the opinion.

Messrs. **Daniel Davenport** and *William H. O'Hara*, for petitioner:

Mandamus is the only and the proper remedy. *Richmond & D. R. Co.* v. *Thouron*, 134 U. S. 45 (33: 871); *Turner* v. *Farmers L. & T. Co.* 106 U. S. 555 (27: 274); *Ex parte Bradstreet*, 32 U. S. 7 Pet. 647 (8: 815); *Knickerbocker Ins. Co.* v. *Comstock*, 83 U. S. 16 Wall. 270 (21: 499); *Chicago & A. R. Co.* v. *Wiswall*, 90 U. S. 23 Wall. 507 (23: 103); *Babbitt* v. *Clark*, 103 U. S. 609 (26: 507); *Ex parte Parker*, 120 U. S. 743 (30: 820); *Re Parker*, 131 U. S. 221 (33: 123).

The right to a removal of a cause under the local prejudice clause of the Act of March 3, 1887, is not dependent on the amount involved. *Lake County* v. *Rollins*, 130 U. S. 662 (32: 1060); *Malone* v. *Richmond & D. R. Co.* 35 Fed. Rep. 625; *Claflin* v. *Commonwealth Ins. Co.* 110 U. S. 92, 93 (28: 80); *Hess* v. *Reynolds*, 113 U. S. 79 (28: 929); *American Bible Society* v. *Grove*, 101 U. S. 610 (25: 847); *Baltimore & O. R. Co.* v. *Bates*, 119 U. S. 467 (30: 438); *Kurtz* v. *Moffitt*, 115 U. S. 494 (29: 459); *Green* v. *Custard*, 64 U. S. 23 How. 484 (16: 471); *Lexington* v. *Butler*, 81 U. S. 14 Wall. 282 (20: 809); *McDermott* v. *Chicago & N. W. R. Co.* 38 Fed. Rep. 529; *Whelan* v. *New York, L. E. & W. R. Co.* 35 Fed. Rep. 854; *Frishman* v. *Ins. Cos.* 41 Fed. Rep. 449; *Huskins* v. *Cincinnati, N. O. & T. P. R. Co.* 37 Fed. Rep. 507; *Fales* v. *Chicago, M. & St. P. R. Co.* 32 Fed. Rep. 674; *Short* v. *Chicago, M. & St. P. R. Co.* 33 Fed. Rep. 115.

Mr. **Lewis E. Stanton** for respondents.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a petition of the Pennsylvania Company, a corporation and a citizen of Pennsylvania, for a mandamus to be directed to the judges of the Circuit Court of the United States for the District of Connecticut, commanding them to reinstate, take jurisdiction of and try and adjudge a certain suit of one Alberto T. Roraback, a citizen of Connecticut, against the said Pennsylvania Company. The suit had been commenced on the 4th of June, 1889, by writ returnable the first Monday of July, 1889, in the Court of Common Pleas for Litchfield County, in the State of Connecticut. The demand in said suit was for the sum of five hundred dollars. In the Term of March, 1890, of said court of common pleas the Company filed a petition for the removal of the suit to the United States Circuit Court for the District of Connecticut, on the ground of prejudice and local influence, filing therewith proper affidavit and bond, and the said court accepted said petition and bond, and granted the application and ordered the suit to be removed. On the opening of the circuit court of the United States in April, the Company entered in said circuit court a copy of the record, and also filed a petition to the same court reciting the steps already taken, re-alleging the ground of removal and praying the court to take jurisdiction of the suit; and filed an additional affidavit setting forth all the facts as to the existence of the alleged prejudice and local influence in the state court, and that the petitioner would not be able to obtain justice therein. But afterwards the plaintiff in the suit moved to remand the same to the state court, on the ground that the amount in dispute did not exceed the sum of two thousand dollars, exclusive of interest and costs. The circuit judge granted the application and made an order for remanding the cause, and the circuit court refuses to take jurisdiction of the same. 42 Fed. Rep. 420. Wherefore the present mandamus is prayed.

The first question to be decided is, whether this court has power to grant the writ applied for. The general power of the court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions. *Ex parte Bradstreet*, 32 U. S. 7 Pet. 634 [8: 810]; *New York L. & F. Ins. Co.* v. *Wilson*, 33 U. S. 8 Pet. 291 [8: 949]; *United States* v. *Gomez*, 70 U. S. 3 Wall. 752 [18: 212]; *Ex parte Roberts*, 82 U. S. 15 Wall. 384 [21: 131]; *Ex parte United States*, 83 U. S. 16 Wall. 690, 702 [21: 507, 509]; *Knickerbocker Ins. Co.* v. *Comstock*, Id. 258, 271 [493, 499]; *Chicago & A. R. Co.* v. *Wiswall*, 90 U. S. 23 Wall. 507 [23: 103]; *Ex parte Schollenberger*, 96 U. S. 369 [24: 853]; *Harrington* v. *Holler*, 111 U. S. 796 [28: 602]; *Ex parte Brown*, 116 U. S. 401 [29: 676]; *Ex parte Parker*, 120 U. S. 737 [30: 820]; *Ex parte Parker*, 131 U. S. 221 [33: 123].

It is true that after a case has proceeded to the filing of a declaration and a plea to the jurisdiction, or its equivalent, and a judgment is rendered in favor of the plea and a consequent dismissal of the action, this court has held that the plaintiff is confined to his remedy by writ of error, and cannot have a mandamus, which only lies, as a general rule, where there is no other adequate remedy. *Ex parte Baltimore & O. R. Co.* 108 U. S. 566 [27: 812]; *Ex parte*

Des Moines & M. R. Co, 108 U. S. 794 [26: 461]. But it was expressly held in *Chicago & A. R. Co.* v. *Wiswall*, 90 U. S. 23 Wall. 507 [23: 103], that a mandamus would lie to compel a circuit court to take jurisdiction of and proceed with a case which it had wrongfully remanded to the state court. The reason was that an order to remand was not a final judgment, and no writ of error would lie. This case is supported by the rule laid down by *Chief Justice* Marshall in *Ex parte Bradstreet*, 32 U. S. 7 Pet. 634 [8: 810]; and if the decision of the present case depended only on the general rule, the power of the court to issue the mandamus would be undoubted.

But in our opinion, the matter is governed by statute. This will be manifest by reference to previous legislation on the subject. The 5th section of the Act of March 3, 1875 (determining the jurisdiction of the circuit courts), provided that the order of the circuit court dismissing or remanding a cause to the state court should be reviewable by the supreme court on writ of error or appeal, as the case might be. 18 Stat. 470, 472. This Act remained in force until the passage of the Act of March 3, 1887, by which it was superseded, and the writ of error or appeal upon orders to remand causes to the state courts was abrogated. The provision of the Act of 1887 is as follows: "Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, *such remand shall be immediately carried into execution*, and no [154] appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 24 Stat. 553. This Statute was re-enacted August 13, 1888, for the purpose of correcting some mistakes in the enrollment (25 Stat. 435), but the above clause remained without change. In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case, we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the Act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are therefore of opinion that the Act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.

We also agree with the circuit judge that, by the Act of 1887, the matter in dispute must exceed the sum or value of two thousand dollars in order to give the circuit court jurisdiction, as well in cases sought to be removed from a state court on account of prejudice or local influence, as in other cases. It is true that the clause allowing a removal for such cause does not name any amount as requisite. But we should bear in mind the history of the law, and read the whole of the two sections together. The Act of 1867, which first gave the right of removal for cause of prejudice and local influence at any time before the final hearing of the case, required that the matter in dispute should exceed the sum or value of five hundred dollars, which was the amount then required for the jurisdiction of the circuit court in all ordinary cases, whether by original process or by removal from a state court—that is, in all cases except those in which jurisdiction was given independently of the amount in controversy. 14 Stat. 558. This Statute was carried into section 639 of the Revised Statutes, article "Third." Now as the Act of 1887 raises the jurisdictional limit prescribed for the circuit courts in ordinary cases to an amount exceeding the sum or value of two thousand dollars (instead of five hundred dollars), we naturally expect to find the same amount required for its jurisdiction in cases of removal for cause of prejudice or local influence. The first section requires that amount in ordinary actions for its original jurisdiction. The second section requires the same amount in ordinary cases removed from a state court. Its language is as follows:

"Sec. 2. [I.] That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. [II.] Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non residents of that State. [III.] And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. [IV.] And

where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause."

Here the first two clauses expressly require an amount exceeding two thousand dollars. The third clause, in referring to "any suit mentioned in this section," evidently means the two first clauses of the section, and, of course, is limited to cases in which the matter in dispute exceeds two thousand dollars. The fourth clause (the one in question) describes only a special case comprised in the preceding clauses. The initial words, "And where," are equivalent to the phrase, "And when in any such case." In effect, they are tantamount to the beginning words of the third clause, namely: "And when in any suit mentioned in this section."

On this point, the circuit judge refers to an opinion of *Mr. Justice* Harlan in the case of *Malone* v. *Richmond & D. R. Co.*, 35 Fed. Rep. 625, which seems to us to express the correct view of the law. It is true, other judges have taken a different view; but, on a careful consideration of the subject, we have come to the conclusion above expressed.

There is another question raised in this case, on which it is proper that we should express our opinion. It arises upon the following words of the Act: "*When it shall be made to appear to said circuit court* that from prejudice," etc. *How must it be made to appear* that from prejudice or local influence the defendant will not be able to obtain justice in the state court? The Act of 1867 only required an affidavit of the party that he had reason to believe that from prejudice or local influence he would not be able to obtain justice in the state court. Rev. Stat. § 639, art. 3. By the Act of 1887 it must be made *to appear* to the court. On this point, also, various opinions have been expressed in the circuit courts. Our opinion is that the circuit court must be legally (not merely morally) satisfied of the truth of the allegation that, from prejudice or local influence, the defendant will not be able to obtain justice in the state court. Legal satisfaction requires some proof suitable to the nature of the case; at least, an affidavit of a credible person, and a statement of facts in such affidavit, which sufficiently evince the truth of the allegation. The amount and manner of proof required in each case must be left to the discretion of the court itself. A perfunctory showing by a formal affidavit of mere belief will not be sufficient. If the petition for removal states the facts upon which the allegation is founded, and that petition be verified by affidavit of a person or persons in whom the court has confidence, this may be regarded as prima facie proof sufficient to satisfy the conscience of the court. If more should be required by the court, more should be offered.

In view of these considerations, we are disposed to think that the proof of prejudice and local influence in this case was not such as the circuit court was bound to regard as satisfactory. The only proof offered was contained in the affidavit of the general manager of the defendant corporation, to the effect that, from prejudice and local influence, the Company would not be able to obtain justice in the Court of Common Pleas for Litchfield County, or any other state court to which, etc. We do not say that, as a matter of law, this affidavit was not sufficient, but only that the court was not bound to regard it so, and might well have regarded it as not sufficient.

The petition for mandamus is denied.

Ex parte:

THE PENNSYLVANIA COMPANY, [457]
Petitioner.

(See S. C. Reporter's ed. 457, 458.)

Ex parte The Pennsylvania Company, ante, p. 738, followed.

[No. 6, Original.]

Argued Dec. 8, 1890. Decided Dec. 22, 1890.

ON PETITION for mandamus to the judges of the Circuit Court of the United States for the District of Connecticut, to take jurisdiction of the suit of Samuel A. Herman against the petitioner. *Denied.*

Messrs. **Daniel Davenport** and *William H. O'Hara* for petitioner.

Mr. **Lewis E. Stanton** for respondents.

Mr. Justice **Bradley** delivered the opinion [458
of the court:

This case in all material respects is identical with the case of *Ex parte Pennsylvania Co.*, just decided, and the same conclusion is reached as in that case.

The petition for mandamus is denied.

NEW YORK BELTING AND PACKING COMPANY, *Appt.*, [445
v.
NEW JERSEY CAR SPRING AND RUBBER COMPANY.

(See S. C. Reporter's ed. 445–450.)

Patent for rubber mats—novelty, a question of fact.

1. The first claim of the patent to the New York Belting and Packing Company, as assignee of

NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 433.

As to patentability of inventions, see *notes* to Thompson v. Boisselier, 29: 76; Corning v. Burden, 14: 683.

George Woffenden, for a design for rubber mats, is too broad to be sustained.

2. Whether or not the design in a patent is new is a question of fact, not to be determined upon demurrer to the bill, but one which should be raised by answer and settled by proper proofs.

[No. 39.]

Argued Oct. 23, 24, 1890. Decided Dec. 22, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York, dismissing a suit in equity upon a patent, upon demurrer, upon the ground that the subject matter of the patent was not patentable. *Reversed.*

The facts are stated in the opinion.

Messrs. **B. F. Lee** and *Wm. H. L. Lee*, for appellant:

The court erred in holding that the patent was void upon its face, for want of novelty.

Lehnbeuter v. *Holthaus*, 105 U. S. 94 (26: 939); *American Bell Teleph. Co.* v. *Spencer*, 8 Fed. Rep. 509; *Mundy* v. *Lidgerwood Mfg. Co.* 20 Fed. Rep. 191: *Brown* v. *District of Columbia*, 130 U. S. 87, 100 (32: 863, 868); *Stow* v. *Chicago*, 104 U. S. 547 (26: 816); *Roberts* v. *Ryer*, 91 U. S. 157 (23: 270).

Cases of this kind should not be disposed of on demurrer.

Royer v. *Schultz Belting Co.* 135 U. S. 319 (34: 214), 28 Fed. Rep. 850, 29 Fed. Rep. 281; *Keyes* v. *Grant*, 118 U. S. 25, 36, 37 (30: 54, 58); *Eclipse Mfg. Co.* v. *Adkins*, 36 Fed. Rep. 554.

Mr. **Arthur V. Briesen**, for appellee:

The patent in suit is void for uncertainty as to the matter claimed therein.

Gorham Mfg. Co. v. *White*, 81 U. S. 14 Wall. 511, 525 (20: 731, 736): *Jennings* v. *Kibbe*, 20 Blatchf. 353; *Tomkinson* v. *Willets Mfg. Co.* 23 Fed. Rep. 895.

The patent is void for want of inherent novelty.

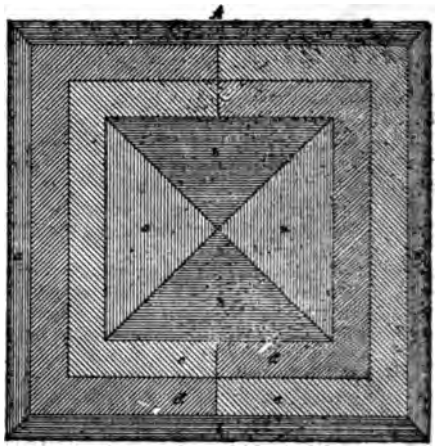
Wooster v. *Crane*, 5 Blatchf. 282, 283; *Osborn* v. *Judd*, 29 Fed. Rep. 96; *Brown* v. *Piper*, 91 U. S. 37, 43 (23: 200, 202).

The points here raised are proper to be raised by demurrer.

Metropolitan W. Mach. Co. v. *Providence Tool Co.* 1 Holmes, 161, 163; *Giant Powder Co.* v. *California Powder Works*, 98 U. S. 126, 134 (25: 77, 80): *Post* v. *Richards Hardware Co.* 26 Fed. Rep. 618; *Bogart* v. *Hinds*, 25 Fed. Rep. 484.

Mr. Justice **Bradley** delivered the opinion of the court:

This is a suit in equity brought upon a patent for a design by the New York Belting and Packing Company, assignee of [46] George Woffenden, against the New Jersey Car Spring and Rubber Company. The bill was dismissed upon demurrer, and the case is here on appeal from that decree. The ground for dismissing the bill, as stated by the circuit judge in his opinion, was that the subject matter of the patent was not patentable (30 Fed. Rep. 785), and this is the question which has been discussed on the appeal. The invention claimed in the patent is a new and original design for rubber mats of which the subjoined plate is a diagram.



Referring to the diagram, the specification describes the invention as follows:

"In accordance with this design the mat gives under the light different effects, according to the relative position of the person looking at it. If the person changes his position continuously the effects are kaleidoscopic in character. In some cases moire effects, like those of moire or watered silk, but generally mosaic effects, are produced. Stereoscopic effects also, or the appearance of a solid body or geometric figure, may at times be given to the mat, and under proper conditions an appearance of a depression may be presented.

"The design consists in parallel lines of corrugations, depressions or ridges, arranged to produce the effects as above indicated.

"The drawing represents a mat embodying this design.

"A is a mat, which is, as represented, square, although it might be oblong or other desired shape. It is divided into a number of sections, *a b c d*, the corrugations or depressions and ridges in those represented by the same letter being parallel. Thus in the center and outer border formed by the sections *a b* the corrugations extend around the mat parallel with its outer edge and with each other. At the points where each depression crosses the diagonals drawn from corner to corner of the mat through the center it makes a right angle with its previous path. In the intermediate borders the corrugations in the sections *c* are arranged at an angle with those in the sections *d*, and in both they form an angle with the corrugations in the sections *b*. By the different shading of the sections an attempt has been made to represent the mosaic

As to abandonment of invention, see *note* to Pennock v. Dialogue, 7: 327.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see *note* to Corning v. Burden, 14: 683.

Including process and product in same patent; separate patents therefor. See *note* to Evans v. Eaton, 4: 433.

What re-issue may cover. See *note* to O'Reilly v. Morse, 14: 601.

ts produced, which, it will be under-
d, vary like a kaleidoscope as the ob-
er shifts his position.

The above forms simply one of the many
s in which my invention may be carried
effect. The corrugations in the center
outer border need not extend entirely
and the mat; but in each of the sections
pression in one section may be opposite
dge in the next; and it is not necessary
the corrugations be parallel with the
s of the mat. They may run in any
ction. The ridges and depressions in the
rmediate borders might be made to form
erent angles with each other or with those
he other sections, or the borders might be
eased or diminished in number. It will,
ourse, be understood that the effect pro-
ed and the manner in which the appear-
s varies are modified more or less by these
nges. Instead of making the corrugations
he center of mat to bend four times, they
be made to change their line of direction
desired number of times in a regular or
gular way—that is to say, instead of
ing four series of parallel depressions and
ges, a number of series, less or more,
nged at various angles with each other,
be employed. I may divide the mat by
umber of imaginary lines representing a
jection of any geometrical figure, and in
h of the sections so formed make parallel
rugations or alternate ridges and eleva-
s, the different sets of corrugations mak-
with each other the proper angle to give
effects sought for.

To give the moire effects I usually make
ridges and depressions undulating, while
ntaining the parallel position with rela-
to each other. I desire, therefore, to
e it understood that I do not intend to
it the design to parallel corrugations
ch are straight throughout any consider-
s portion of their length (as represented
the drawing, for example), but that it
ludes the undulating ridges and depres-
s, or other disposition or formation in
ch the corrugations alter their direction
gularly, or in which they may be straight
a certain distance and then formed in un-
ations, and that it includes the corruga-
s arranged in concentric circles, in spi-
, in zigzags, or according to any desired
ire."

Having thus described his invention, the
entee claims:

1. A design for a rubber mat, consisting
corrugations, depressions or ridges in
allel lines, combined or arranged rela-
ely, substantially as described, to produce
iegated, kaleidoscopic, moire, stereo-
pic or similar effects, substantially as set
th.

2. A design for a rubber mat, consisting
a series of parallel corrugations, depres-
ns or ridges, the lines of said corrugations
ng deflected at one or more points, sub-
ntially as set forth.

3. A design for a rubber mat, consisting
a series of parallel corrugations, depres-
ns or ridges arranged in sections, the
neral line of direction of the corrugations
in one section making angles with or being
deflected to meet those of the corrugations [446
in the contiguous or other sections, substan-
tially as described."

The circuit judge in his opinion said:

"The patent is an attempt to secure to the patentee a monopoly of all ornamentation upon rubber mats by which variations of light and shade are produced by a series of ridges and depressions, without regard to any particular arrangement or characteristics of the lines except that they are to be parallel. Although there is an illustration in the drawing, and although each claim is for a design 'substantially as described,' the language of the specification is carefully expressed so as not to restrict the claims to the design shown in the drawing, but so that the first claim shall include every variety which can be produced by the arrangement of corrugations, depressions or ridges in parallel lines; the second, all obtainable when by the arrangement the corrugations are deflected; and the third, all obtainable when by the arrangement of corrugations in sections, those of one section make an angle with those in the coniguotus or other sections.

"It was not new to produce contrasts and variations in light and shade, or stereoscopic effects, by depressions or elevations in the surface of materials. It was old to do this by arranging them in parallel lines, as in wood, plaster and corduroy cloth. It is not novelty which will sustain a design patent to transfer to rubber, or to a rubber mat, an effect or impression to the eye which has been produced upon other materials or articles by contrast or variation of light and shade. The design of this patent is not new unless it embodies a new impression or effect produced by an arrangement or configuration of lines which introduces new elements of color or form. This is not claimed.

"None of the claims can be limited to design which produces any definite or concrete impression to the eye."

We think that the judge was right in holding that the first claim of the patent is altogether too broad to be sustained, and for the reasons stated in the opinion. But as the other claims may fairly be regarded as confining the patentee to the specific design, exhibited in his patent and shown in the drawing, we think that the demurrer should [450
have been overruled, and that the defendants should have been put to answer the bill. Whether or not the design is new is a question of fact, which, whatever our impressions may be, we do not think it proper to determine by taking judicial notice of the various designs which may have come under our observation. It is a question which may and should be raised by answer and settled by proper proofs.

There is one feature of this patent which presents an interesting if not a novel aspect. We are in the habit of regarding a design as a thing of distinct and fixed individuality of appearance—a representation, a picture, a delineation, a device. A design of such a

character, of course, addresses itself to the senses and the taste, and produces pleasure or admiration in its contemplation. But, in the patent before us, the alleged invention is claimed to be something more than such a design. It is claimed to have an active power of producing a physical effect upon the rays of light, so as to produce different shades and colors according to the direction in which the various corrugated lines are viewed—a sort of kaleidoscope effect. It is possible that such a peculiar effect, produced by such a particular design, impressed upon the substance of india-rubber, may constitute a quality of excellence which will give to the design a specific character and value and distinguish it from other similar designs that have not such an effect. As this is a question which it is not necessary now to decide, we express no opinion upon it.

We reverse the decree of the Circuit Court and remand the cause, with directions to overrule the demurrer and take such further proceedings in accordance with this opinion as law and justice may require.

---

[136] WILLIAM H. ROBERTSON, Collector of the PORT OF NEW YORK, *Plff. in Errr.*,
v.
OSWALD OELSCHLAEGER.

OSWALD OELSCHLAEGER, *Plff. in Errr.*,
v.
WILLIAM H. ROBERTSON, Collector of the PORT OF NEW YORK.

(See S. C. Reporter's ed. 436-444.)

Classification of articles under the Customs Act of 1883—principle of classification—what articles are philosophical apparatus.

1. Where the classification of articles under the Customs Acts, according to the preponderance of use to which they are applied, depends upon the evidence, it is a question for the jury.
2. Where the proper general principle of classification of articles under the Customs Acts is adopted by the judge at the trial, and there is no misapplication of it, the decision at the trial will not be reversed.
3. Various articles, mentioned in the opinion, held to be philosophical apparatus or instruments, and various other articles held not to be so, under the Duty Act of March 3, 1883.

[Nos. 86, 255.]

Argued Nov. 20, 1890. Decided Dec. 22, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment for an excess of duties paid under the Act of March 3, 1883, on the importation of goods. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Edwin B. Smith** and *Charles Curie* for Oelschlaeger.

Mr. **Wm. A. Maury**, *Assistant Atty-Gen.*, [4 for the Collector.

Mr. Justice **Bradley** delivered the opinion of the court:

This is an action brought to recover an alleged excess of duties charged for the importation of certain goods and chattels in the year 1884. The goods consisted of certain instruments used in the arts, or in laboratories, or for observation and experiment. The plaintiff, Oelschlaeger, who imported the articles, claimed that they were philosophical instruments and apparatus, and chargeable with a duty of only 35 per cent *ad valorem*, under Schedule N of the Act of March 3d, 1883, clause following, to wit: "Philopsohical apparatus and instruments, thirty-five per centum *ad valorem*." 22 Stat. 513. The defendant, on the other hand, then [4 Collector at the Port of New York, contended that the goods in question came under the head of the following clause, at the end of Schedule C, in the same Act, to wit: "Manufactures, articles or wares, not specially enumerated or provided for in this Act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum or any other metal, and whether partly or wholly manufactured, forty-five per centum *ad valorem*." 22 Stat. 501.

The question is whether the court below, on the trial of the cause, committed any error in its rulings and instructions as to what implements were and what were not embraced in the category of philosophical apparatus and instruments. There is undoubtedly a clear distinction between mechanical implements and philosophical instruments or apparatus; and whatever belonged to the former class was properly chargeable with 45 per centum *ad valorem*, and whatever belonged to the latter class with only 35 per cent.

It is somewhat difficult in practice to draw the line of distinction between the two classes, inasmuch as many instruments, originally used only for the purpose of observation and experiment, have since come to be used, partially or wholly, as implements in the arts; and, on the other hand, many implements merely mechanical are constantly used as aids in carrying on observations and experiments of a philosophical character. The most that can be done, therefore, is to distinguish between those implements which are more especially used in making observations, experiments and discoveries, and those which are more especially used in the arts and professions. For example, an astronomical telescope, a compound microscope, a Rhumkorf coil, would be readily classed as philosophical instruments or apparatus, whilst the instruments commonly used by surgeons, physicians, surveyors and navigators, for the purpose of carrying on their several professions and callings, would be classed amongst mechanical implements, or instruments for practical use in the arts and professions. In short, philosophical apparatus and instruments are such as are more commonly used for the purpose of making observations and discov- [4

NOTE.—*As to action to recover back duties paid under protest; protest, how made, and its effect,*—see *note* to Greely v. Thompson, 12: 397.

eries in nature, and experiments for developing and exhibiting natural forces, and the conditions under which they can be called into activity; whilst implements for mechanical or professional use in the arts are such as are more usually employed in the trades and professions for performing the operations incidental thereto.

The different kinds of articles which were the subject of inquiry on the trial were over forty in number. A specimen of each kind was produced in evidence and marked as an exhibit, as follows, to wit:

Ex. 1. Large compound microscope.
Ex. 1½. Prepared slides for Ex. 1.
Ex. 2. Small microscope for examining textile fabrics.
Ex. 3. Jeweler's magnifying glass.
Ex. 4. Astronomical telescope on tripod.
Ex. 5. Single-barreled telescope or marine glass.
Ex. 6. Double-barreled field glass.
Ex. 7. Opera glass.
Ex. 8. Small telescope on tripod.
Ex. 9. Magnifying glass with handle.
Ex. 10. Plano-convex lens, unmounted.
Ex. 11. Reflecting mirror used in old telescopes.
Ex. 12. Ophthalmoscope.
Ex. 13. Combination of magnifying glass and stereoscope.
Ex. 14. Oculist's outfit.
Ex. 15. Stereopticon, or magic lantern.
Ex. 16. Slides prepared for Ex. 15.
Ex. 17. Dentist's speculum.
Ex. 18. Grenet battery.
Ex. 19. Pocket battery for physician.
Ex. 20. Inductive Rhumkorf coil.
Ex. 21. Galvanometer.
Ex. 22. Geissler tube.
Ex. 23. [Not put in evidence.]
Ex. 24. Anemometer.
Ex. 25. Hygrometer.
Ex. 26. Hygrometer.
Ex. 27. Thermometer.
Ex. 28. Thermometer.
Ex. 29. Thermometer, minimum.
Ex. 30. Maximum and minimum thermometer.
Ex. 31. Thermometer (bric-a-bric).
Ex. 32. Dairy thermometer and hydrometer.
Ex. 33. Laboratory thermometer.
Ex. 34. Clinical thermometer.
Ex. 35. Clinical thermometer.
Ex. 36. Pocket thermometer.
Ex. 37. Barometer.
Ex. 38. Barometer.
Ex. 39. Barometer.
Ex. 40. Hydrometer, for general purposes.
Ex. 41. Alcoholometer.
Ex. 42. Urinometer.
Ex. 43. Radiometer.
Ex. 44. Spectacle lenses.

A gentleman of scientific attainments was examined as a witness for the purpose of explaining the specific uses to which these various instruments are respectively applied; and his evidence was all that the court or jury had before them on which to base a decision, except that common knowledge which all intelligent persons possess, and of which the judge who tried the cause may in some instances have taken judicial notice. As the result of the inquiry the judge directed the jury to render a verdict for the defendant as to the articles designated as Exhibits 2, 3, 10, 12, 14, 17, 19, 27, 28, 29, 31, 32, 34, 35, 36, 41, 42, 44, which he held not to be philosophical apparatus or instruments; and a verdict for the plaintiff as to those designated as Exhibits 1, 1½, 4, 11, 15, 16, 18, 20, 21, 22, 24, 25, 26, 30, 33, 37, 38, 39, 40, 43, which he held to be philosophical apparatus or instruments. As to six of the articles, represented by Exhibits 5, 6, 7, 8, 9, 13, he refused to direct a verdict, and left the question of their classification to the jury, who found for the plaintiff as to Exhibits 5, 6, 8, and for the defendant as to Exhibits 7, 9, 13.

With regard to the last six items, which [441] were left for decision with the jury, under the charge of the judge (which is not excepted to), we do not think that the judge erred in thus disposing of them. Each party requested him to direct a verdict in his favor. We think he was justified in refusing these requests. As before remarked, it is difficult to draw the line distinctly, and the classification of the articles referred to, according to the preponderance of use to which they are applied, depended upon a fair consideration of the evidence, which was rightly referred to the jury. No. 5 was a telescope, known as a field glass, which the witness said was not constructed specially for astronomical purposes, though it could be used for some of the stars; that it was used to gratify a laudable curiosity; a great deal by seamen. No. 6 was testified to be of the same general character, though smaller, and sometimes carried in a pouch. No. 8, the witness said, was a magnifying glass, having a lens called the Coddington lens, commonly used for examining grain and minerals and things of that sort, and by botanists and entomologists; that he, as a chemist and scientist, had had occasion to use it. The judge, on this evidence, might well hesitate to speak *ex cathedra* on the character of these instruments; and we cannot say that the jury did wrong in classifying them as philosophical instruments. The same thing may be said with regard to Exhibits 7, 9 and 13, which the jury found not to be such instruments. No. 7 was an opera glass; No. 9, a common magnifying glass with a handle, used for examining anything which was desired to be magnified,—fine print, hand writing, pictures, anything. No. 13 was a magnifying glass and stereoscope, for examining photographs, or stereoscopic views, such as are often found on parlor tables.

We also think that the judge committed no error as to the character and classification of the other instruments, respecting which he directed the jury what verdict to render. It is unnecessary to review the evidence in detail with regard to each instrument. Suffice it to say, that whilst there might be some ground for question with regard to particular cases, yet on the whole we think that the proper principle was followed, and [442] that no injustice was done to either party. To illustrate our views we may take one or

two instruments by way of example. Thus, as to Exhibit 12, the witness testified as follows:

"Exhibit No. 12 is an ophthalmoscope. It is a practical instrument used by oculists for examining the interior of the eye and other parts of the body. The principle on which it works is as follows: The light is reflected from a burner in front of the examiner, who holds this object to his eye, into the eye of the patient without penetrating the observer's eye, as there is only a very small hole through which it can enter; and in that way protects the observer's eye from the direct rays of the light. It is peculiarly adapted for physicians' and oculists' use. It may have other uses, but the witness is not acquainted with them. It is used in their profession for the purpose of enabling them to get at the facts by which to treat either the throat or eye, as the case may be, practically."

It is clear from this evidence that this instrument is intended for practical use in the profession of an oculist. It is an implement, a tool, not used for the discovery or contemplation of natural objects for the purpose of attaining or communicating general instruction, but as an implement for carrying on a profession or an art.

Again, take Exhibit No. 20. The witness describes its use as follows:

"Exhibit No. 20 is a Rhumkorf coil. This coil is constructed on the following principle: Around a central core of soft iron is wound a certain number of turns of copper wire, each turn being insulated by a layer of paper or some other insulating material; then on top of this coarser wire is wound in the same direction a large number of layers of very thin wire, each one likewise insulated by a layer of paper or other insulating material, and the fine wires connect with the two poles on top and the coarser wires connect with the lower, with the commutator running from one pole to the other. This box is filled with what is called condenser. The condenser is a series or number of plates of tin foil such as we find wound around tobacco. That stores up electricity
[443] somewhat on the principle of a Leyden jar, and keeps it stored, so that when a person uses it he gets a much greater shock than he would if the condenser were not there. That is used in schools and universities, and also by physicians, and by people who merely use it for their own amusement. It is used practically in colleges and universities to illustrate electrical science, and also by every one who has occasion to generate that kind of electricity. It is also used to explode mines at times, to explode dynamite cartridges, or anything of that kind. It may be used in connection with a battery. It has no practical use in telegraphing. Its main use is for illustrating the laws of electrical induction."

It is plain from this description that the Rhumkorf coil is much more used in the lecture room, and for the purpose of scientific discovery, than for practical use in any art or profession.

Considerable argument is employed by the counsel for both parties to show that the judge was mistaken, on the one side or the other, in his various directions; but it would prolong this opinion to an unreasonable extent to examine all these discussions. We can only refer to one or two, and dispose of the rest in a general way.

The counsel for the government contends, amongst other things, that the judge erroneously classified Exhibit 15 (which was a stereopticon or magic lantern), as a philosohpical instrument. He says: "The stereopticon or magic lantern does not appear to be of much scientific use, and we doubt if one is ever purchased to be used for a purely philosophical purpose. But the instrument is mostly used in giving entertainment by throwing magnified pictures or representations on a screen, or for displaying advertisements from elevated points in the streets of cities, and is hardly 'philosophical' or 'scientific.'"

On the other hand, the witness, after describing the construction of the instrument, says: "This instrument is used for illustrating lectures and instruction in colleges and universities, and for projecting pictures of different subjects upon a wall. It is used in the illustration of natural science."

We think that in this instance the judge committed no error in taking the view plainly suggested by the witness, instead of judicially relying on his own knowledge and experience.

In like manner the counsel for the plaintiff strenuously contends that the judge was wrong in not deciding that the *minimum thermometer* (Exhibit 29) is a philosophical instrument. The witness says it is filled with alcohol, and is used for measuring very low temperatures—temperatures below the freezing point of mercury. It can be used where the mercury thermometer cannot be used. He adds: "It is a scientific instrument, used for scientific purposes." It is, however, in the same class with other thermometers, which the judge, as we think correctly, regards as instruments for daily use in the arts and in common life, and not specially philosophical instruments.

But Exhibit No. 30, the *maximum and minimum thermometer*, which is used for recording temperatures, one side for the day time and the other during the night, is of a different character, and, if not entirely, is more particularly used to ascertain the exact momentary variations of the temperature of the atmosphere for the entire period of twenty-four hours. It is very properly classed amongst philosophical instruments.

But it is unnecessary to pursue the examination. The general principle of classification adopted by the judge at the trial was correct, and we see no misapplication of it which should induce us to reverse the judgment.

Judgment affirmed.

[507] CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Plff. in Err.,
v.
JAMES ARTERY.

(See S. C. Reporter's ed. 507-521.)

Master and servant—Iowa Statute as to liability of railroad companies to employés—impeachment of witnesses—contradictory statements.

1. Under section 1307 of the Iowa Code of 1873, a railroad company is liable to an employé for an injury to him while riding on a small and overcrowded hand-car, caused by its failure to provide the hand-car with appliances for removing snow from the rails, and a proper brake and foot rests, and by reason of the negligent construction of a cattle-guard, such injury being connected with the operation of the railroad within the meaning of said Statute.
2. In order to impeach a witness by showing his contradictory statements on other occasions, his attention must first be called to the time, place and circumstances of the statements—whether they are in writing, or were made orally.
3. A written statement signed by a witness, containing statements different from those testified to by him, can be used on his cross-examination, to impeach him; it is not necessary to call as a witness the person to whom or in whose presence the alleged contradictory statements were made.
4. When the witness' written statement is presented to him, for the purpose of impeachment, he may read it and be inquired of as to the circumstances under which it was signed by him; where a portion of it, containing a material statement, is read to him, and he is asked, "Is that statement correct?" it is an error to exclude his answer to the question.

[No. 91.]

Argued Nov. 25, 1890. Decided Dec. 22, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Iowa, to review a judgment in favor of plaintiff, an employé of a Railroad Company, for an injury to him through the negligence of the Company and its agents. *Reversed.*

The facts are stated in the opinion.

Mr. **John W. Cary,** for plaintiff in error:

There was no negligence on the part of the defendant which caused or tended to produce this injury.

Sullivan v. *Mississippi & M. R. Co.* 11 Iowa, 421; *Peterson* v. *Whitebreast Coal & Min. Co.* 50 Iowa, 673; *Pyne* v. *Chicago, B. & Q. R. Co.* 54 Iowa, 223; *Troughear* v. *Lower Vein Coal Co.* 62 Iowa, 576; *Foley* v. *Chicago, R. I. & P. R. Co.* 64 Iowa, 644–650; *Wilson* v. *Dunreath Redstone Quarry Co.* 77 Iowa, 429–432.

This is not a case within the provisions of the Statute of Iowa relating to injuries resulting from negligence of co-employés connected with the use or operation of any railway on or about which they shall be employed.

Stroble v. *Chicago, M. & St. P. R. Co.* 70 Iowa, 555; *Luce* v. *Chicago, St. P. M. & O. R. Co.* 67 Iowa, 75; *Malone* v. *Burlington, C. R. & N. R. Co.* 65 Iowa, 417; *Potter* v. *Chicago, R. I. & P. R. Co.* 46 Iowa, 399; *Smith* v. *Burlington, C. R. & N. R. Co.* 59 Iowa, 73; *Pierce* v. *Central Iowa R. Co.* 73 Iowa, 140; *Matson* v. *Chicago, R. I. & P. R. Co.* 68 Iowa, 22; *Schroeder* v. *Chicago, R. I. & P. R. Co.* 41 Iowa, 314; *Deppe* v. *Chicago, R. I. & P. R. Co.* 36 Iowa, 52; *Rayburn* v. *Central Iowa R. Co.* 74 Iowa, 637; *Foley* v. *Chicago, R. I. & P. R. Co.* 64 Iowa, 644; *Frandsen* v. *Chicago, R. I. & P. R. Co.* 36 Iowa, 372.

Messrs. **Delos E. Lyon** and *H. B. Fouke* [508] for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the District Court of Dubuque County, in the State of Iowa, by James Artery against the Chicago, Milwaukee and St. Paul Railway Company, a Wisconsin corporation, to recover damages for a personal injury, and removed by the defendant into the Circuit Court of the United States for the Northern District of Iowa.

The petition alleges that the defendant owns and operates a line of railroad from Dubuque in Iowa to La Crosse in Wisconsin and St. Paul in Minnesota, and in the operation of it uses locomotives propelled by steam, hand-cars propelled by hand and cars drawn by its locomotives; that the plaintiff, on March 5, 1883, and for several months prior thereto, was in the employ of the defendant in the use and operation of the road in the County of Allamakee, in Iowa, in working upon its road and road-bed, in keeping the ties in good order, in keeping the road well and properly ballasted, in removing obstructions from its track, in keeping its culverts and crossings in repair, in keeping the iron on the road properly spiked and fastened and in keeping the road-bed fit for use and operation along its line of road and right of way in the County of Allamakee; that in doing such work, cars propelled by steam and hand-cars were used by the plaintiff and others, the cars being furnished by the defendant; that while in [509] such employ, the plaintiff left the Village of Harper's Ferry, in said county, with other employés, under a foreman of the defendant, named Rellehan, and went north some ten miles, making repairs on the road; that, after doing such work, and towards evening, the foreman ordered a start to return to Harper's Ferry, on a small hand-car, on which were placed seven or eight men, and more than the car could or ought to carry; that, when the hand-car was ordered by the foreman to start to Harper's Ferry, it was started at the time that a train of cars was due, of which the plaintiff then had no knowledge; that the snow had been falling and there was snow on the rails, and the foreman ordered the plaintiff to get a shovel and seat himself on the front of the hand-car, and hold the shovel on the top of the rail, in order to move the snow as the hand-car went forward; that on the hand-car there

NOTE.—*As to who are co-employés or co-servants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant,* see *note* to Hough v. Texas & P. R. Co. 25: 612.

As to negligence; responsibility of master to servant for carefulness and competency of co-servants,—see *note* to Wabash R. Co. v. McDaniels, 27: 605.

were no places provided for the feet to rest upon while performing such duty; that the plaintiff was compelled, in order to hold the shovel, to exert all his strength, and by muscular exertion hold up his feet and at the same time guide and hold the shovel; that the hand-car was run ahead of the train then due, at the rate of more than ten miles an hour, being a dangerous speed; that while it was so running, and the plaintiff was holding the shovel, and while it was crossing over a cattle-guard in the road, and without any fault or negligence on his part, his foot was caught and he was thrown off and under the hand-car, his body doubled up, his spine injured and his backbone broken; that by reason thereof he has been confined to his bed ever since, unable to work, and suffering great pain in body and mind; and that all this happened by the negligence of the defendant in furnishing unfit and improper hand-cars, in requiring onerous and dangerous duty from the plaintiff, in running the hand-car at a dangerous rate of speed and in overloading it. Damages are claimed in the sum of $20,000, besides the sum of $1,000 for money paid for board, care and surgical and medical treatment. The petition was afterwards amended by alleging, further, that the hand-car was not constructed with reasonably safe appliances to push the snow off from the rails, [510] which appliances could easily have been furnished by the defendant; that it was wanting in the proper kind of a brake and the proper kind of a foot-rest for doing the kind of work which the plaintiff was ordered to do; that, when the plaintiff was ordered by the foreman to sit down on the front of the hand-car and hold the shovel, he was unaware of any danger therefrom, and had reason to believe and did believe that the hand-car would be run by the foreman at a safe rate of speed; that it was run at an unreasonable and unnecessarily fast and dangerous speed, which the plaintiff could not control, nor could he leave the car while it was in motion; that the cattle-guard was made of three-cornered pieces of wood, placed negligently on top of the ties, across the track instead of lengthwise, and some of the three-cornered pieces stood higher than the surface of the rail, of which fact the plaintiff was not then aware; and that, by reason of such negligent construction of the cattle-guard, the speed of the hand-car, and the dangerous and tiresome position in which the defendant placed the plaintiff, he was injured, either by his foot or feet coming in contact with the rail or the three-cornered pieces, or by the shovel getting caught on the rail or on such pieces, or by all of such circumstances.

The answer of the defendant contains a general denial and an allegation of contributory negligence on the part of the plaintiff. The case was tried by a jury, which rendered a verdict for the plaintiff of $13,500, for which, with costs, he had judgment, to review which the defendant has brought a writ of error.

One of the principal points taken by the defendant is that this was a case of an injury resulting from the negligenec of a co-employé, namely, the foreman Rellehan, in the management and running of the hand-car, and did not fall within the provisions of the Statute of Iowa on the subject.

On the 8th of April, 1862, a Statute was enacted in Iowa (Laws of 1862, chap. 169, sec. 7, p. 198), as follows: "Sec. 7. Every railroad company shall be liable for all damages sustained by any person, including employés of the company, in consequence of any neglect of the agents or by any mismanagement of the engineers or other employés of the corporation to any person sustaining such damage."

This provision was afterwards modified by section 1307 of the Code of Iowa of 1873, which was in force at the time of this accident, and read as follows: "Sec. 1307. Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employés of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers or other employés, when such wrongs are in any manner connected with the use and operation of any railway, on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding." The modification introduced by the later Statute is, that the wrongs for which the corporation is to be liable must be wrongs connected with the use and operation of the railway on or about which the employés are employed.

It is contended by the defendant that, under the decisions of the Supreme Court of Iowa upon this Statute, only employés engaged in operating and moving trains, and who are injured by such trains, and employés who, while in the discharge of their duty, are injured by trains used in operating the railway, are within the Statute, and that, in the present case, the plaintiff was not engaged in operating and moving a train, and was not injured by a train used in operating the railway. But we cannot concur in this view.

In *Deppe* v. *Chicago, R. I. & P. R. Co.*, 36 Iowa, 52, it was held, under the Act of 1862, that the Statute included the case of an employé who was engaged in connection with a dirt train, and was injured while loading a car, by the falling of a bank of earth; and in *Frandsen* v. *Chicago, R. I. & P. R. Co.*, 36 Iowa, 372, that a person employed as a section hand, in the business of keeping a certain part of the road in repair, and going with his co-employés on the track in a hand-car for that purpose, was within the Act of 1862, he being injured through a collision with the engine of a passenger train, which struck the hand-car and threw it against the plaintiff while he was on the ground and engaged in trying to remove the hand-car out of the way of the engine.

The case of *Schroeder* v. *Chicago, R. I. & P. R. Co.*, 41 Iowa, 344, arose under section 1307 of the Code. It was said in that case, that that section applied only to accidents growing out of the use and operation of the

oad, and did not apply to all persons em-
ployed by the corporation, without regard
o their employment, and it was held, there-
fore, that it did not cover the case of Schroed-
er, who was not connected with the opera-
ion of the road, but who, while engaged in
emoving the timbers of an abandoned bridge
nd loading them on cars, was injured by
ome of the timbers which fell from a car.
The same view was held in *Potter* v. *Chi-
ago, R. I. & P. R. Co.*, 46 Iowa, 399, where
Potter, a laborer in the machine shop of the
ompany, was injured by a locomotive driv-
ng-wheel which he and other employés were
noving by hand.

It was held, in *Schroeder* v. *Chicago, R. I.
& P. R. Co.*, 47 Iowa, 375, that where a per-
on was required, in the course of his em-
loyment by the railroad company, to get
pon a train, and did so, he was to be re-
garded as being engaged in its operation,
although his employment might not be con-
nected with the running of the train; and
hat the company was liable to him for in-
juries resulting from the negligence of a
o-employé.

In *Pyne* v. *Chicago, B. & Q. R. Co.*, 54
Iowa, 228, Pyne was employed by the rail-
oad company as a private detective, and,
while walking on the track, in the perform-
ance of his duties, and in obedience to the
orders of the company, was injured, without
negligence on his part, through the negli-
gence of the engineer of a passing train, and
t was held that his case fell within the
provisions of section 1307, and that he was
entitled to recover from the company for the
njuries received by him.

In *Smith* v. *Burlington, C. R. & N. R. Co.*,
69 Iowa, 73, where it appeared that the
plaintiff was only a section-hand, and, when
njured, was engaged in loading a car, and
t did not appear that his service pertained
o the operation of the road, it was held that
he could not recover for an injury which oc-
curred through the negligence of a co-em-
ployé, the court remarking that, under sec-
ion 1307 of the Code, it must be shown that
his employment was connected with the
operation of the railway.

It was held, in *Malone* v. *Burlington, C.
R. & N. R. Co.*, 61 Iowa, 326, that a person
whose duty it was to wipe the company's
engines and do other work about the round-
house, and to open the doors of that house
o as to allow the engines to pass in and out,
and who, while endeavoring to shut those
doors, was injured by the carelessness of
his co-employés who were at the time engaged
with him in the same effort, could not recover
under section 1307, for the injury, because
t was not "in any manner connected with
the use and operation" of the railway, as
contemplated by that section.

In *Foley* v. *Chicago, R. I. & P. R. Co.*, 64
Iowa, 644, it was held that a car-repairer,
whose duty it was to repair cars on the track,
but who had nothing to do with cars in
motion, except to ride on passenger or freight
trains to and from the places where his
services were required, was not engaged in
the operation of a railway, within the
meaning of section 1307, and could not re-
cover of the company for an injury received
while in the discharge of his duties, through
the negligence of a co-employé. Foley was
engaged at the time in making repairs on a
car, and was injured while under the car,
through its being moved improperly.

The *Malone Case* came up again, in 65
Iowa, 417, and it was there held that Ma-
lone, whose duty it was to wipe engines,
open and close the doors of an engine-house
and remove snow from a turn-table and con-
necting tracks, was not, by reason of such
duties, employed in the operation of the
railroad, within the meaning of section 1307;
and that, for an injury received by him
while performing such duties, and through
the negligence of a co-employé, he could not
recover against the company, although he
might have had other duties to perform which
did pertain to the operation of the road.

It was held, in *Luce* v. *Chicago, St. P.
M. & O. R. Co.*, 67 Iowa, 75, that a person
employed in a coal-house of the railroad, [531
and injured by the negligence of a co-em-
ployé while loading coal upon a car, could
not recover from the company under section
1307, because the injury was not in any
manner connected with the use and operation
of the railway.

In *Matson* v. *Chicago, R. I. & P. R. Co.*,
68 Iowa, 22, the plaintiff was a member of a
construction gang on the road, and his duties
required him to ride upon, and to work upon
and about, the company's cars and tracks.
He was injured by the negligence of a co-
employé in throwing a heavy stone upon his
hand, while he was engaged in placing
stones under the ends of the ties. It was
held that the injury was not connected with
the use and operation of the railway, as
contemplated in section 1307, and that the
company was not liable.

It was held, in *Stroble* v. *Chicago, M. &
St. P. R. Co.*, 70 Iowa, 555, that a person,
whose sole duty it was to elevate coal to a
platform convenient for delivering it to the
tenders of engines, was not employed in the
use and operation of the railway, within
section 1307, because he was in no way con-
cerned with the moving and operation of
trains.

In *Pierce* v. *Central Iowa R. Co.*, 73 Iowa,
140, a mechanic from a shop of the company
was working, under orders, upon a ladder
which leaned against one of the cars of a
train. The train-men moved the train back-
ward, without notice to him, the ladder fell
and he was injured. It was held that the
negligence, whether that of the train-men, or
of the foreman in not giving the requisite
information to the train-men, was connected
with the use and operation of the railway,
and was the negligence of someone employed
on it, so as to make the company liable,
under section 1307, for the injury sustained
by the plaintiff, and this although he was
not engaged in the operation of the railway.

It was held, in *Nelson* v. *Chicago, M. &
St. P. R. Co.*, 73 Iowa, 576, that the work-
ing, on the railway, of a ditching machine
which was operated by the movement along
the track of the train of which it formed a
part, was an employment connected with

the use and operation of the railway, within the meaning of section 1307, and made the [515] company liable for injury to an employé through the negligence of a co-employé, although the plaintiff was not engaged in the actual movement of the train, but was only one of the crew necessary for the performance of the work intended to be done by the train and its machinery and appliances.

In *Rayburn* v. *Central Iowa R. Co.*, 74 Iowa, 637, the plaintiff and others were section-hands of the company, engaged in removing snow and ice from the track, when a train of cars loaded with slack came along, moving slowly, and the conductor and others in charge of the train directed them to get upon the train to unload the slack. They requested that the train be stopped, but were told that if it was stopped it could not be started again. In attempting to obey the order, the plaintiff was thrown down by a jerk of the train and injured. It was held that he was not precluded from recovering against the company under section 1307, on the ground that the negligence complained of was not connected with the use and operation of the railway.

From this statement of the decisions of the Supreme Court of Iowa, we are clearly of opinion that, in the present case, the defendant was liable, under section 1307 of the Code, for the injury to the plaintiff caused in the manner set forth in the petition, and in the evidence contained in the bill of exceptions. The plaintiff was upon a moving car propelled by hand-power. The movement of the car, its speed, the position of the plaintiff upon it and the duties he had to discharge in that position, were under the direction of the foreman, who was upon the same car. The injury was directly connected with the use and operation of the railway, in whose common service the foreman and the plaintiff were, and they were co-employés. The injuries to the plaintiff were, by the petition and the evidence, sought to be attributed to the smallness of the hand-car, its being overcrowded, the failure to provide it with contrivances for removing snow from the track, the absence of a proper brake, the want of foot-rests and the arrangement of the cattle-guard. The railway was being used and operated in the movement of the hand-car, quite as much as if the latter [516] had been a train of cars drawn by a locomotive. If a single locomotive be on its way to its engine-house, after leaving a train which it has drawn, or if it be summoned to go alone for service to a point more or less distant, and, in either case, by the negligence of one employé upon it, another employé is injured, the injury takes place in the use and operation of the railway, under section 1307, quite as much as if it takes place while the locomotive is drawing a train of cars. This we understand to be the manifest purport and effect of the decisions of the Supreme Court of Iowa on the subject, as well as obviously the proper interpretation of the Statute.

But, although this is so, we are of opinion that a new trial must be granted, on account of errors in the exclusion of evidence offered by the defendant.

At the trial, one Jerry Artery, a brother of the plaintiff, was called as a witness by him. He was on the hand-car with the plaintiff at the time of the accident and saw all that occurred. He testified as to the speed of the car, and as to its size and its cramped and crowded condition, and as to the fact that there was nothing on it in front upon which the plaintiff could rest his feet while he was holding the shovel, and as to the arrangement of the cattle-guards. In the course of his cross-examination, the following proceedings occurred:

"*Q.* On the 23d of March, 1886, at Harper's Ferry, in the presence of Mr. Buell, did you sign a written statement, stating what you knew about this case and about the accident to your brother, after the written statement had been read over to you? *A.* Yes, sir. *Q.* I will show you now the written statement and ask you whether that is your signature? Written statement shown the witness hereto attached and marked Exhibit A. *A.* That is my signature there. *Q.* In the written statement which I have just shown you you state as follows: 'At the time Jim got hurt we were running from 4½ to 5 miles an hour—certainly not to exceed 5 miles.' Is that statement correct? Objected to by plaintiff; objection sustained.

"The grounds upon which the court sustained the objections to interrogatories to this and other witnesses, based upon a written [5] statement signed by the witness, and to the introduction of the written statements themselves, were, that it appeared that the statements were not volunteered by the witnesses, but that the Company had sent its claim agent, after the happening of the accident, to examine the employés of the Company who were present at the time of the accident, in regard to the transaction; that the statements made by the witnesses were not taken down in full, but only a synopsis thereof made by the agent, the correctness of which is questioned by the witnesses in some particulars, although such written statement was signed by the witness; that, upon the trial of this case, these statements, thus obtained, were sought to be used, not alone as a means of impeaching the witness, but as evidence of the matters therein recited; that it is apparent to the court that, whether so intended or not, these statements become a ready means of confusing and intimidating witnesses before the jury, and that, if it be permitted to parties to thus procure written statements in advance from witnesses, and then use the same in examining such witnesses, it will enable parties to shape and control the evidence in a cause by committing the witnesses to particular statements, couched in the language, not of the witness, but of the person carrying on such *ex parte* examination; that these growing abuses can only be prevented by entirely excluding such statements, thus procured, from being introduced in evidence for any purpose; that, if the party desired to impeach a witness by showing contradictory statements made by

him, the person to whom or in whose presence such alleged contradictory statements were made should be called as a witness, so that opportunity might be afforded of placing before the jury the statements actually made by the witness sought to be impeached, and not a mere synopsis thereof made by another person, and the accuracy of which, in some particulars, was challenged. Exception by defendant."

The following further proceedings took place on the cross-examination of the same witness: "*Q.* On the occasion I have referred to, did you make this statement: 'Six men on a hand-car have plenty of room. We often have had 8 and 10 men on a hand-car of the same size'? Objected to by plaintiff; objection sustained; exception by defendant. *Q.* Did you, on the occasion I have referred to, at Harper's Ferry, say as follows: 'I am a larger man than Jim ever was, and my legs are a great deal longer. I have never had any trouble in keeping my feet up when I sat on the front of the car'? Objected to by plaintiff; objection sustained; exception by defendant. *Q.* On the occasion referred to, did you state as follows: 'If a man is holding a shovel on the rail and he is sitting on the front of a hand-car there is no way for him to get hurt unless he forgets himself and lets his feet drop down'? Objected to by plaintiff; objection sustained; exception by defendant. *Q.* On the occasion referred to, did you state: 'The hand-car was in good condition, nothing broken about it in any way. It was an ordinary car, full size'? Objected to by plaintiff; objection sustained; exception by defendant. *Q.* Did you, on the occasion referred to, state as follows: 'I am foreman at present on section No. 20. The top of the ribbons on the ties of the cattle-guard was about level with the ball of the rail'? *A.* Well, sir, I don't remember whether I did or not say that. *Q.* If you did say that, was it the truth or not? Objected to by plaintiff; objection sustained; exception by defendant."

Subsequently, while the defendant was putting in its evidence, the bill of exceptions says: "Thereupon the defendant offered in evidence, for the purpose of impeachment, the statement under date of March 23, 1886, shown the witness Jerry Artery, and hereto attached, marked Exhibit A, which, on objection by plaintiff, was ruled out by the court; to which ruling the defendant at the time excepted." The court, in sustaining the objection, stated that it deemed the proper method to be to produce the person to whom the alleged statement was made, and to prove by him what the witness may have said on the occasion. Exhibit A, thus referred to, is a paper signed by the witness, and contains the statements set forth in the six questions thus excluded as above.

That the evidence covered by the six questions was material to the issue, is apparent. They related to the speed of the car, to the question of its size and whether it was crowded or not, to the question whether the plaintiff could have kept up his feet without a foot-rest and to the question of the condition of the cattle-guard.

It is an elementary principle of the law of evidence, that if a witness is to be impeached, in consequence of his having made, on some other occasion, different statements, oral or written, from those which he makes on the witness-stand, as to material points in the case, his attention must first be called, on cross-examination, to the particular time and occasion when, the place where and the person to whom he made the varying statements. In no other way can a foundation be laid for putting in the impeaching testimony.

In the present case, it is apparent that the views of the court, as set forth in the bill of exceptions immediately after the exclusion of the first question which is above stated to have been excluded on the cross-examination of the witness Jerry Artery, must have been founded not only upon what had at that time transpired, but also upon the subsequent proceedings at the trial, and were the views of the court upon additional and kindred questions which arose in the case, because, at the time such first question was asked upon cross-examination and excluded, it had not yet appeared in evidence under what circumstances the written statement was made by the witness. Moreover, it was stated by the court that the written statements of the witnesses "were sought to be used not alone as a means of impeaching the witness, but as evidence of the matters therein recited;" whereas, when the statement signed by the witness Jerry Artery was offered in evidence and excluded, it was distinctly offered "for the purpose of impeachment," and it is not otherwise stated in the bill of exceptions that it was offered for any other purpose; and, in excluding it, the court excluded it as so offered.

We think the circuit court erred in laying it down as a rule that a written statement, signed by a witness and admitted by him to have been so signed, cannot be used in cross-examining him as to material points testified to by him; and in announcing it as a further rule that the only way to impeach a witness, [520 by showing contradictory statements made by him, is to call as a witness the person to whom or in whose presence the alleged contradictory statements were made. The foundation must be first laid for impeaching a witness, by calling his attention to the time, place and circumstances of the contradictory statements, whether they were in writing or made orally; and the court, in the present case, excluded that from being done.

The written statement having been presented to the witness, and he having admitted that what purported to be his signature to it was his signature, it was perfectly open to him to read it, and he could have been inquired of as to the circumstances under which it was taken down and signed, so as to advise the jury as to its authenticity and the credit to be given to it. The bill of exceptions does not show that the plaintiff's counsel asked the witness to read the statement, or asked the court to have it read to him, or that the witness did not read it, or did not have it read to him. The exclusion of the first question put to him and excluded, namely, "Is that statement correct?" did not

refer to the entire written statement, but to the statement in it as to the speed at which the car was running. That inquiry was directly pertinent to the issue that was being tried.

The rule of evidence invoked by the plaintiff, and laid down in *The Queen's Case*, 2 Brod. & B. 284, 288, is that, if, on cross-examination, a witness admits a letter to be in his handwriting, he cannot be questioned by counsel as to whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read as the evidence of the existence of the statements. This principle is not applicable to the present case, because the plaintiff did not take the objection that the whole statement was not, but should have been, read as evidence; and the court, with the assent of the plaintiff, excluded it from being read in evidence.

The case of *Vicksburg & M. R. Co.* v. *O'Brien*, 119 U. S. 99 [30: 299], is not in point. In that case, which was a suit against a railroad company to recover for personal injuries received by an accident to a train, 21] a written statement as to the nature and extent of the injuries, made by the plaintiff's physician while treating him for them, was held not to be admissible as affirmative evidence for the plaintiff, even though it was attached to a deposition of the physician, in which he swore that it was written by him and that it correctly stated the condition of his patient at the time referred to. The question was not one which arose on the cross-examination of a witness or in regard to his impeachment.

Nor was the present case one involving the well-established proposition, that incompetent questions are not allowable on cross-examination in order to predicate upon them an impeachment or contradiction of the witness.

The judgment is reversed, and the case is remanded to the Circuit Court, with a direction to grant a new trial.

458] JOHN W. BASS, Presiding Judge of the TAYLOR COUNTY COURT, *Plff. in Err.*,

v.

HARVEY S. TAFT.

(See S. C. Reporter's ed. 458-464.)

Peremptory mandamus, when refused.

Where the county judge of a county in Kentucky answers, to an alternative writ of mandamus commanding him to levy a tax on the property of the county to pay judgments against it on coupons on its bonds, that he has levied such tax and appointed a collector to collect it, and it appears that he has fully discharged his duties in the premises, a peremptory writ of mandamus will not be issued against him to compel him to do more. The judgment of the circuit court directing a peremptory mandamus reversed.

[No. 93.]

Submitted Nov. 26, 1890. Decided Dec. 22, 1890.

IN ERROR to the Circuit Court of the United States for the District of Kentucky, to review a judgment holding the answer of defendant to an alternative writ of mandamus insufficient and sustaining a demurrer and directing a peremptory writ of mandamus. *Reversed.*

The facts are stated in the opinion.

Mr. Phil. B. Thompson, Jr., for plaintiff in error.

No counsel for defendant in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 2d of February, 1887, Harvey S. Taft, a citizen of Michigan, presented a petition for a mandamus to the Circuit Court of the United States for the District of Kentucky. The petition states that John W. Bass, the Presiding Judge of the County Court of Taylor County, in the State of Kentucky, is a citizen of Kentucky, and that Taylor County is a municipal corporation, [459 created under the laws of that State, and a citizen of that State; that in the years 1881 and 1882, Taft recovered two judgments against the County of Taylor, in the Circuit Court of the United States for the District of Kentucky, one for $5,974.98, with interest, and the other for $1,214.96, with interest; that executions were issued on those judgments and returned "no property found;" that the judgments were rendered on coupons for the payment of interest on bonds issued by the County of Taylor in payment of its subscription to the capital stock of the Cumberland and Ohio Railroad Company; that by the Statute authorizing such subscription, the County Court was empowered and directed to levy annually, and cause to be collected, a tax sufficient to pay the interest on the bonds; that, for the purpose of levying and collecting such tax, the powers granted by the Statute were vested in the Presiding Judge of the County Court; that Taft had demanded of Bass that the latter cause to be levied on the taxable property, real and personal, listed for taxation in the County for the year 1887, a tax sufficient to pay the judgments and costs of collection, and that when levied he cause the tax to be collected from the taxpayers of the County; and that Bass refused to make the levy or to cause it to be collected.

The prayer of the petition was that a writ of mandamus issue to such Judge, commanding him to levy on the taxable property in the County, listed for taxation for the year 1887, an *ad valorem* tax sufficient in amount to pay Taft's judgments, with costs of collection, and to cause such tax, when levied, to be collected from the taxpayers of the County and paid into court to satisfy the judgments.

The court granted an alternative writ of mandamus, returnable February 21, 1887. The command of the writ was that Bass cause to be levied and collected a tax sufficient to pay the judgments and the cost of collecting

NOTE.—*When mandamus will issue.* See *note* to M'Cluny v. Silliman, 4: 263.

As to mandamus to control inferior courts; discretion,—see *note* to *Ex parte* Morgan, 29: 135.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see *note* to Davenport v. United States, 19: 704.

the tax, "on all the real estate and personal property in Taylor County subject to taxation under the Revenue Laws of the State of Kentucky, including the amounts owned by the residents of said County, which ought to be given in under the Equalization Laws of said State."

On the return day of the writ, the plaintiff moved the court for a peremptory writ, and the defendant filed his answer to the alternative writ. The answer set forth that the defendant was elected Judge of the County in August, 1882, and entered upon his office September 4, 1882, after the judgments in question were obtained; that, ever since his term of office began, he had caused a tax to be levied, and levied a tax, on all the real and personal property in the County subject to taxation under the Revenue Laws of the State, sufficient to pay all interest coupons on bonds of the County issued in aid of the Cumberland and Ohio Railroad Company, as the same accrued or became due, and sufficient to pay for the collection of the same, and sufficient to pay the plaintiff's judgments and cost of collection; that, in obedience to the alternative writ, he had, on the 7th of February, 1887, caused an order to be entered on the records of the Taylor County Court, making a levy of 86½ cents on each $100 worth of all the property, both real and personal, subject to taxation under the Revenue Laws of Kentucky, in said County, which was shown by the assessor's book of the County to amount to $1,229,274, which levy was amply sufficient to pay the plaintiff's judgments and the cost of collection; and that he entered an order on the records of the Court appointing J. P. Gaddie, collector for Taylor County, who was a citizen of the County and a good and competent man, to collect such tax. It appears by that order that the tax was levied for the purpose of paying the two judgments of the plaintiff and the cost of collection, and that it was levied on the taxable property listed and returned by the assessor of the County for the year 1887.

The answer further set forth that the office of sheriff of Taylor County was then vacant, and had been since the year 1877, and for that reason the defendant made the order appointing Gaddie collector; that the law under which the bonds of the County were issued in aid of the railroad company did not confer upon the defendant, as Presiding Judge of the County, power himself to collect the plaintiff's debt, or to enforce its collection, but only to levy a tax on the taxable property in the County, sufficient to pay the debt, and to appoint a collector to collect it, if the office of sheriff was vacant; and that the defendant had fully discharged his duties in the premises as such Presiding Judge.

The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense.

On the 22d of February, 1887, the plaintiff moved the court to appoint the marshal of the District of Kentucky to execute the mandamus and to collect from the taxpayers of the County the taxes assessed and levied for the purpose of paying the plaintiff's judgments. On the next day the case came on to be heard on the last-named motion and on the demurrer to the answer, and the court entered a judgment that so much of the answer as related to the appointment of a collector was insufficient; that the demurrer to that portion of the answer was sustained; that the motion for a peremptory mandamus against the defendant in relation to the appointment of a collector to collect the levies made by the defendant and described in the answer, was sustained to that extent; that the motion for the court to appoint the United States marshal for the District of Kentucky as collector to collect from the taxpayers and taxable property of Taylor County the amounts severally assessed against them, under the terms of the special levy made in obedience to the writ of mandamus, was sustained; that the marshal was thereby appointed such collector, but such appointment would be suspended or rescinded whenever it was shown by "the said defendant, Taylor County," that it or its appointees were willing and able to execute "this judgment;" that before proceeding to execute "this judgment" the marshal must execute a bond, with sufficient sureties, to be approved by the court, payable to Taylor County, to account for all moneys collected by him under such levies; that the marshal should not proceed to act as such collector until the expiration of ninety days from that date, but if, after the lapse of that period, "the defendant" had not manifested in the meantime "its willingness and ability, through its own officials," to proceed in good faith to execute "this judgment," then the marshal should proceed without further delay to execute it, and should continue the execution thereof until it was fully executed or [462] until his appointment was suspended or rescinded. To review this judgment, the defendant Bass, Presiding Judge of the Taylor County Court, has brought a writ of error, the County of Taylor not being a party to the proceeding or to such writ of error. The plaintiff has not appeared in this court by counsel.

By section 15 of the Act of Kentucky of February 24, 1869 (Laws of 1869, chap. 1578, vol. 1, p. 470), a subscription by Taylor County to the stock of the railroad company in question was authorized, as also the issue of the bonds on which the plaintiff's judgments were founded, and the County Court of the County was authorized and required to levy annually and collect by taxation upon the taxable property in the County, as listed and taxed under the Revenue Laws of the State, a sum sufficient to pay the interest on the bonds as it should accrue, with the cost of collecting the same, and it was also authorized to establish a sinking fund, there being a provision for exchanging the tax receipts for stock, the holders thereof to become stockholders. The railroad company was authorized to pay to the County the amount of tax levied by reason of the bonds, "and thus stop the collection of tax for that year;" and the County Court was empowered to appoint collectors of the tax or to require the sheriff to collect it, the sheriff to have

the same powers, and to proceed in the same way for the collection of such tax, as the sheriff in the collection of the state revenue.

By section 4 of the Act of March 11, 1870 (Laws of Kentucky of 1869–70, chap. 610, vol. 2, p. 226), it was provided that the sheriff of the county in which the tax should be levied should collect it at the same time he collected the state revenue; and that he and his securities on his official bond should be responsible for the same, and for the same damages for the failure to collect or nonpayment of the same, that sheriffs were by law liable for on account of not paying over the state revenue, to be collected in the same way. By section 12 of the same Act, it was provided that the county court should annually levy a tax upon all of the property in the county subject to taxation for state revenue, sufficient to pay the interest on the bonds when due and the principal thereof at maturity.

By section 4 of the Act of February 13, 1872 (Laws of Kentucky of 1871–72, chap. 265, vol. 1, p. 318), it was provided that the sheriff of any county who should collect such taxes should pay over the same to the commissioners of the sinking fund, who should apply the taxes to pay the interest on the bonds.

By section 1 of the Act of March 11, 1873 (Laws of Kentucky of 1873, chap. 375, vol. 1, p. 478), it was made the duty of the county court of any county that might have issued or might thereafter issue bonds in payment of subscriptions to the capital stock of the railroad company, annually, at the April or May Term of the court, to levy a tax on the property of the county subject to taxation for revenue purposes, sufficient to pay one year's interest on the bonds. By section 2 of the same Act it was made the duty of the sheriff to collect the tax and pay over the same to the sinking fund commissioners for the county, he and his securities on his official bond to be liable for a failure to collect or pay over the tax; with a proviso that if the county court should appoint a special collector of the tax, other than the sheriff, and such appointee should qualify, the sheriff should not be required to collect the tax for that year.

By these provisions it was made the duty of the county court to levy the tax annually to pay the interest on the bonds for that year. In view of the provision that the railroad company might pay the interest on the bonds to the county and stop the tax for that year, it is manifest that it was not intended that the interest should be allowed to accumulate and a tax covering several years' interest be levied at one time. Neither was it intended that a separate levy should be made for each bondholder, but only one tax was authorized to be levied by the county court, and such tax was to pay all the interest for the year and such part of the principal as might be proper for the sinking fund.

The presumption under these Statutes is that the County Court of Taylor County had levied annually, for all the years prior to 1887, a tax on the property in the County subject to taxation for state revenue sufficient to pay the interest for each year, and that this tax was collected and paid over to the commissioners of the sinking fund. If this be true, and it is not denied, the defendant Bass was not in default. The county court can do only what is authorized by the Statutes.

The petition does not allege that the County Court, in any year in which the plaintiff's coupons became due, failed to levy an annual tax on the property in the County subject to taxation for state revenue, sufficient to pay the interest on the bonds for that year, nor does it allege that the County had never levied or collected such tax since that time. As it appears that the defendant levied the tax in question and appointed Gaddie a special collector of it, the defendant had exhausted his authority.

These are all the questions which concern the defendant. He has nothing to do with the question of the appointment of the United States marshal as collector, or with so much of the judgment as relates to the County of Taylor as a "defendant," when it is not a defendant. The only matter in which the defendant Bass was interested was as to that part of the judgment which compelled him to perform an alleged duty. It being clear that he had performed all the duty which was enjoined upon him by the Statute, *the judgment of the Circuit Court must be reversed* as to so much of it as holds the answer of the defendant insufficient in regard to the appointment of a collector, and as sustains the demurrer to that part of the answer, and as sustains the motion for a peremptory writ of mandamus against the defendant in relation to the appointment of a collector; and the case is remanded to the circuit court with a direction to take such further proceedings as shall be in conformity with the opinion of this court.

ROBERT G. HOFFMAN ET AL., *Appts.*,
v.
WILLIAM J. OVERBEY, Administrator of JAMES R. MILLNER, Deceased, ET AL.

(See S. C. Reporter's ed. 465–473.)

Admissions by lunatic—fraudulent representation—compromise, when not set aside.

1. What one says in conversation, when he is of

NOTE.—*As to fraud and undue influence in avoidance of deed or will*, see *note* to Harding v. Handy, 6: 429.

As to fraud or illegal consideration, how far to avoid contract, see *note* to Armstrong v. Toler, 6:

As to cancellation of a deed or a contract in equity for fraud, concealment and misrepresentation, see *note* to Neblett v. Macfarland, 23: 471.

As to fraud and false representations in sale of goods waived by suing for the price, or settling, or receiving pay for goods; cause of action for money or goods obtained by false representation, assignability of relief for fraud is barred by assent to transaction, or by election to affirm the contract,—see *note* to Fairmore v. United States, 1: 684.

As to action for deceit, what necessary to sustain, see *note* to Ming v. Wolfolk, 29: 740.

As to what are fraudulent conveyances; when void

unsound mind, cannot be made the basis of a decree against him.

2. A representation by a debtor that he is unable to pay his debt to the plaintiff in full, is not inconsistent with the retention of part of his means for the support of his family or to meet the demand of other creditors.

3. A suspicion of the want of good faith is not sufficient to justify a decree setting aside, upon the ground of fraud, a compromise made as far back as 1873, especially when the party to be affected by such decree has become incapable, from impairment of intellect, to present his side of the question.

[No. 99.]

Argued Dec. 2, 1890. Decided Dec. 22, 1890.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Virginia, dismissing a suit in equity, to declare void releases and conveyances and for reconveyance of property, and for an accounting. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

Hoffman, Lee & Co., merchants of Baltimore, agreed to aid James R. Millner in his business of manufacturing tobacco in Pittsylvania County, Virginia, by advancing to him, when called upon, between the 10th days of March and May, 1871, the sum of fifteen thousand dollars, to be repaid with interest at the rate of six per cent per annum; Millner agreeing that all the tobacco that he worked or caused to be worked during the year 1871 should be shipped to Hoffman, Lee & Co., for sale by them at not less than its market value. To secure the payment of that sum with interest, Millner, February 13, 1871, mortgaged to Hoffman, for his firm, a tract of land in Pittsylvania County containing two hundred acres, with its buildings, improvements and appurtenances, including the tobacco factory situated on it, with the fixtures and appliances thereto belonging.

By deed of May 3, 1872, Millner continued this mortgage in force as security for an additional loan of fifteen thousand dollars, [466] which Hoffman, Lee & Co. agreed to make between that date and June 1, 1872—if he needed that amount, or should call for it, or any part thereof—upon the same terms as those expressed in the first mortgage.

On the 28th day of February, 1873, Millner and Hoffman, Lee & Co. entered into an agreement in writing, which, after reciting

---

when voluntary conveyances are valid; when void,—see *note* to Gaylord v. Kelshaw, 17: 612.

As to settlements or conveyances for benefit of wife and child; when good, or void, as to creditors,—see *note* to Sexton v. Wheaton, 5: 603.

As to evidence; opinions as to sanity,—see *note* to Dexter v. Hall, 21: 73.

As to insanity in avoidance of deeds, see *note* to Harding v. Handy, 6: 429.

As to power of attorney; revoked by insanity of principal,—see *note* to Hunt v. Rousmanier, 5: 589.

Insanity; evidences of; who are insane; appointment of committee; evidence; insane delusions; imbecility; dealings with persons non compos mentis; *when equity will interfere; lunatic, ward of court; inquisition, evidence; witnesses, to prove insanity; contracts of lunatics not binding; conveyances from parent to child, or between other relatives, when set aside.*

When a person conceives something extravagant to exist, which, however, has no existence, but is the creature of his imagination, and he is incapable of being permanently reasoned out of such conception, such person is subject to an insane delusion. Middleditch v. Williams, 4 L. R. A. 738, 45 N. J. Eq. 726.

"Crazy," in popular sense, imports a broken, shattered or deranged mind, rathe than one enfeebled by age or disease. Shaver v. McCarthy, 1 Cent. Rep. 142, 110 Pa. 339.

The words "of unsound mind" include every species of insanity or mental unsoundness. McCamman v. Cunningham, 6 West. Rep. 909, 108 Ind. 545.

Letters of appointment as guardian of an insane person are conclusive, in a collateral action, of the regularity of the proceedings resulting in their issuance, as well as of the insanity of the person upon whose estate they were issued. Minnesota L. & T. Co. v. Beebe, 2 L. R. A. 418, 40 Minn. 7.

Belief in spiritualism is not insanity nor insane delusion. Robinson v. Adams, 62 Me. 369; Brown v. Ward, 53 Md. 376; Otto v. Doty, 61 Iowa, 23; *Re* Smith's Will, 52 Wis. 543; Lyon v. Home, L. R. 6 Eq. 655.

The belief of facts which no rational person would have believed is insane delusion. 1 Wms. Exrs. 35; 1 Redf. Wills, 71; Boughton v. Knight, L. R. 3 Prob. & Div. 64; Dew v. Clark, 3 Adams, Eccl. 79, 2 Eng. Eccl. Rep. 441.

One incapable from imbecility of mind to manage his estate is unable to take care of himself. *Re* Burr, 17 Barb. 14.

There are various shades of mental imbecility, and the court must exercise a sound discretion upon the proofs before it, whether it has come up to the line of legal incapacity to convey or to contract. Sprague v. Duel, Clarke, Ch. 93, 7 N. Y. Ch. L. ed. 61; Gray v. Obear, 59 Ga. 682; Allore v. Jewell, 94 U. S. 506 (24: 260); Stewart v. Flint, 4 New Eng. Rep. 120, 59 Vt. 144.

The possession of spasmodic and abnormal muscular strength, coincident with great and continuous wakefulness, a deranged system, great restlessness, an abnormal bulging of the eye, with a vacant expression, are evidences of insanity. United States v. Ridgeway, 31 Fed. Rep. 144.

A party who believes that he has not slept a moment for more than eight years is suffering from a mental delusion which amounts to a mania on that subject. *Id.*

If a party be not strictly a lunatic or idiot, the inquisition should find him of unsound mind. It is not enough to return that he is so far weakened and impaired in the faculties of his mind as to be mentally incapable of governing himself. *Re* Mason, 3 Edw. Ch. 402, 1 Barb. 441.

Not every case of mental weakness or imbecility will authorize a court of chancery to exercise the power of appointing a committee of the person and estate. The jury must find distinctly that he is of unsound mind. *Re* Morgan, 7 Paige, 237, 4 N. Y. Ch. L. ed. 138.

Courts of equity will watch with most jealous care every attempt to deal with persons *non compos mentis.* But if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, a court of equity will not interfere to set the contract aside, if injustice will thereby be done to the other side, and the parties cannot be placed *in statu quo,* as before the purchase. Young v. Stevens, 48 N. H. 137, 2 Am. Rep. 205; Scanlan v. Cobb, 85 Ill. 299; 1 Story, Eq. § 228; Niell v. Morley, 9 Ves. Jr. 478; Loomis v. Spencer, 2 Paige, 153, 2 N. Y. Ch. L. ed. 852; Baxter

the above mortgages, proceeded: "Whereas, upon a settlement of accounts between the parties respecting the advances secured by said deeds, the said James R. Millner is found indebted to said Hoffman, Lee & Co. in the sum of $15,758.67, which sum it is agreed far exceeds the value of all the property, real and personal, embraced in said mortgage deeds; and whereas the said James R. Millner is unable to pay the said debt in full, and has offered, by way of compromise, to said Hoffman, Lee & Co., that he and his wife will, by a proper deed, surrender and release to said Hoffman, Lee & Co., or to said Robert G. Hoffman for their benefit, all the right, title and interest whatsoever in law and equity, including the wife's contingent right of dower, of them, the said James R. Millner and wife, and to all the property of every kind embraced and described in said deeds of mortgage, except as hereinafter stated, provided the said Hoffman, Lee & Co. will accept the said surrender and release, when perfected by a proper deed, in full satisfaction and discharge of his said debt to them, and will allow him to remain in the occupation of the land described in said mortgage deeds as the tenant of said Hoffman, Lee & Co. until the 1st day of January, 1874, without paying any rent for the same, it being understood that since the date of the last-mentioned deed a portion of the tobacco fixtures of the tobacco factory described in said deed of mortgage has been sold by said James R. Millner to Millner Bros. with written consent of said Hoffman, Lee & Co., and the portion so sold is not included in the present compromise, which includes, however, all the residue of the mortgage property, except that portion of the tobacco fixtures so sold; and whereas the said Hoffman, Lee & Co. have accepted the said offer of compromise: Now, therefore, the parties do agree that the said James R. Millner and his wife shall, without unreasonable delay, proceed to execute and acknowledge a proper deed relinquishing, surrendering and releasing to said Robert G. Hoffman, for the benefit of said Hoffman, Lee & Co., all their right, title and interest whatsoever in law

v. Portsmouth, 5 Barn. & C. 170; Eaton v. Eaton, 37 N. J. L. 108; Molton v. Camroux, 2 Exch. 487; Price v. Berrington, 7 Eng. L. & Eq. 254; Carr v. Holliday, 5 Ired. Eq. 167; La Rue v. Gilkyson, 4 Pa. 375; Beals v. See, 10 Pa. 56; Lancaster County Nat. Bank v. Moore, 78 Pa. 414.

Where it is impossible to exercise the jurisdiction in favor of the lunatic, so as to do justice to the other party, the court will leave the lunatic to his remedy, if any, at law. Canfield v. Fairbanks, 63 Barb. 465; Sprague v. Duel, 11 Paige, 430, 2 N. Y. Ch. L. ed. 205.

From the time of the adjudication of insanity until the restoration to reason has been judicially determined, the person declared to be of unsound mind is the ward of the court; and whether or not any particular part of this time there is an appointee to take personal charge, in no manner affects the legal status of the ward in respect to his capacity to make contracts. Redden v. Baker, 86 Ind. 195; Wadsworth v. Sharpsteen, 8 N. Y. 388; Wadsworth v. Sherman, 14 Barb. 169; Fitzhugh v. Wilcox, 12 Barb. 235; Leonard v. Leonard, 14 Pick. 280; Imhoff v. Witmer, 31 Pa. 243.

The finding of the jury that the plaintiff had been of unsound mind and incapable of taking care of herself or her affairs, without interval for about nine years, is presumptive evidence that she was a lunatic when the judgment was obtained. Demelt v. Leonard, 19 How. Pr. 141, 11 Abb. Pr. 258.

An inquisition in proceedings under the Statute relating to lunatics, etc., declaring the person to be of unsound mind, and to have been so for a time prior to the finding, is only presumptive evidence of incapacity prior to the finding. Banker v. Banker, 63 N. Y. 412.

It is prima facie evidence of incompetency, even as against strangers to the proceedings, who had no opportunity to contest the issue on the proceedings. Griswold v. Miller, 15 Barb. 523; Ousterhout v. Shoemaker, 3 Hill, 513; Hart v. Deamer, 6 Wend. 497; 2 Phillips, Ev. (Cowen & H. *notes*) 942; Shelf. Lun. 63-66; Dane v. Kirkwall, 8 Car. & P. 679; Rogers v. Walker, 6 Pa. 371.

As to acts done by the lunatic or drunkard before the issuing of the commission, and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive, and not conclusive, evidence of incapacity. *Re* Patterson, 4 How. Pr. 35; Gridley v. Boggs, 62 Cal. 201; Lewis v. Jones, 50 Barb. 648; Van Dusen v. Sweet, 51 N. Y. 386; Rider v. Miller, 86 N. Y. 511; Gibson v. Soper, 6 Gray, 285; Hart v. Deamer, 6 Wend. 497; Lamoureaux v. Crosby, 2 Paige, 422, 2 N. Y. Ch. L. ed. 972.

On a question of insanity, witnesses, other than professional men, may state their opinion in connection with the facts on which it was founded. A physician should also state the reasons of his opinion, and the facts upon which it is based. Clark v. State, 12 Ohio, 483.

The contracts and other acts of lunatics and idiots are not binding, either in law or equity; and, although their contracts are not generally absolutely void, but only voidable, the law takes care effectually and fully to protect their interests, and will allow them to plead their disability in avoidance of their conveyances, purchases and contracts. Seaver v. Phelps, 11 Pick. 304; Middleborough v. Rochester, 12 Mass. 365; Jackson v. King, 4 Cow. 417; 2 Kent, Com. 451; Brown v. Jodrell, 3 Car. & P. 30, 1 Moody & M. 105; Pothier, Traite des Obligations, 49; Heineec. Elem. Juris Nat. 1, 14, § 329; Gro. De Jure Belli, bk. 2, chap. 11, § 5; Just. Inst. lib. 3, tit. 20, § 8; Just. Dig. lib. 50, tit. 17, §§ 1, 5. 40; Domat, bk. 1, tit. 2, § 1; Ersk. Inst. bk. 1, tit. 1, 485, tit. 7, 160b, 3; Bracton, lib. 3, chap. 2, § 100; Puffendorf, Law of Nature, bk. 3, chap. 6; Sugd. Powers, chap. 7, § 1; Newland, Cont. 19; Chitty, Cont. 109; Shelf. Lunatics, 255, 263; Baxter v. Portsmouth, 5 Barn. & C. 170, 7 Dowl. & Ry. 614; Ball v. Mannin, 3 Bligh, N. R. 1; Fonbl. Eq. bk. 1, chap. 2; 1 Story, Eq. Jur. 227-237.

A conveyance obtained by children from a father will not be sanctioned by a court of equity, if it appear to have been caused by an abuse of confidence reposed by him in his children, who, for the purpose of procuring it, took advantage of his age, imbecility and partiality for them, the conveyance being also for an inadequate consideration. Whelan v. Whelan, 3 Cow. 537.

A court of equity will interpose its authority and set aside instruments between persons occupying relations in which one party would naturally exercise an influence over the conduct of the other; and, in this case, it appearing that the defendant held, as a brother, close and confidential relations with the plaintiff; that the transaction embraced her entire estate, so that, at the age of sixty and upwards, she was left penniless, and the plaintiff was in great distress of mind and anxious to preserve the house and lot from the control of her husband, with whom she did not live,—the court set aside the conveyance. Case v. Case, 49 Hun, 83.

or equity in and to all the mortgaged property aforesaid, except the portion of the fixtures sold as aforesaid; and upon the delivery of said deed executed and acknowledged as aforesaid, ready to be recorded, said Hoffman, Lee & Co. shall and will accept the same in full satisfaction and discharge of the said debt due to them by said James R. Millner, and will allow him to occupy the land, including the factory and all the buildings upon it, as their tenant, during the remainder of the present year, without paying any rent."

Millner Brothers, a firm composed of John P. Millner and Joseph T. Millner (brothers of James R. Millner), under date of March 5, 1873, entered into a written contract with the appellants, whereby the latter, in consideration of the delivery to them, by Millner Brothers, of 16,000 pounds of twist tobacco, branded "Jas. R. Millner's Extra Goldwin Twist," promised to make title to the former for the property which by the agreement of 28th of February, 1873, was to be conveyed by James R. Millner and wife to Hoffman, Lee & Co.

On the 15th day of March, 1873, James R. Millner and wife, in execution of the agreement of February 28, 1873, made an absolute conveyance to Hoffman, for his firm, of the property covered by the mortgage of February 13, 1871, excepting therefrom certain fixtures previously sold to Millner Brothers with the consent of Hoffman, Lee & Co. This deed contained the recital that the parties agreed that the amount due from James R. Millner to the appellants, $15,758.67, "far exceeds the value of all the said mortgaged property," but that the latter had consented to accept that property, free of all claims at law or in equity of James R. Millner and wife, or either of them, in full satisfaction and discharge of their debt.

The contract of March 5, 1873, having been satisfactorily performed, Hoffman, Lee & Co., by deed of June 10, 1874, conveyed to Millner Brothers the property embraced by the deed from James R. Millner and wife. [468] Subsequently, September 3, 1874, Millner Brothers sold and conveyed it to James R. Millner, the consideration recited in the deed being six thousand dollars paid or secured to be paid.

On the 30th of June, 1885, more than twelve years after the settlement between James R. Millner and Hoffman, Lee & Co., the latter brought the present suit against James R. Millner, John P. Millner and J. D. Blair, administrator of Joseph T. Millner. The suit proceeds upon these grounds, substantially: That in order to induce the plaintiffs to make the settlement of February 28, 1873, James R. Millner represented to them not only that he had faithfully invested and used in the purchase and manufacture of leaf tobacco all the moneys advanced by the plantiffs, and was totally unable to discharge his debts to them, and would surrender "all the property he owned," with a clear title thereto instead of a mere security therein, but that the property held by plaintiffs as security was worth $6,000 to $8,000, and "was all he had on earth," and that, unless they took it and released him, he would avail himself of the Bankrupt Law; that, relying upon such representations, the plaintiffs "consummated the parol agreement to accept the mortgaged property from James R. Millner and release him," and to that end took the deed of March 15, 1873; that the representations so made were false; that the mortgaged property was not worth the sum named by him; that the whole transaction, resulting in the release of James R. Millner, and the sale to Millner Brothers, was pursuant to a plan formed between the three brothers to defraud the plaintiffs; that, in violation of the arrangement under which the plaintiffs advanced moneys to James R. Millner, the latter "systematically set apart and appropriated to himself certain sums from such advances," without the knowledge of the plaintiffs, "until, at the time of said settlement and release, he had thus accumulated the large amount of $12,000, which money he had thus without warrant deducted from the advances and failed to invest and use as agreed;" that at the time of such settlement and release the plaintiffs were not advised that Millner "had so much money," certainly "they never suspected that he had $12,000 of their money in his hands in ready cash, [46 which had been advanced only to be used in the purchase and manufacture of tobacco for them;" that these facts were fraudulently concealed by Millner to enable him to secure his release; that Millner Brothers knew of his having the $12,000, or, at least, knew that he had a large sum rightfully belonging to the plaintiffs; that they also knew of the above settlement and release, and aided James R. Millner therein, taking the conveyance to themselves of the mortgaged property to further said fraud, knowing that the property was to be paid for with tobacco manufactured by using plaintiffs' money; that the money so withheld and concealed was used as common capital between James R. Millner and Millner Brothers, the latter sharing in the general division of the profits arising therefrom; and that the tobacco delivered by them for the property was, in fact, purchased and prepared for sale with the money of the plaintiffs.

The bill also alleges that the plaintiffs, until very recently before the commencement of this suit, rested absolutely upon the finality and good faith of these transactions and settlements, and would have continued to do so, but for the revelation of the above facts made in June, 1885, by James R. Millner himself.

The relief sought is a decree declaring void the above releases and conveyances, and causing the property to be conveyed to the plaintiffs; that an accounting be had between them and the defendants; and that, after all recourse against James R. Millner is exhausted, Millner Brothers and the administrator of Joseph T. Millner be required to reimburse them to the extent of any deficiency that may be found to exist.

During the progress of the cause an answer was filed by the committee of James R. Millner, who was adjudged a lunatic on the 24th of October, 1885, and committed to an

Bank, 78 N. Y. 269; *Ex parte Kelly*, L. R. 11 Ch. Div. 306.

The bankers' lien does not attach to funds impressed with a trust unless the bankers have made advances upon the faith of such funds in ignorance of the trust.

Reynes v. *Dumont*, 130 U. S. 354 (32: 934).

If the rights of the parties are as claimed by the plaintiff in error, a verdict should on the trial have been directed for the defendant below.

Pleasants v. *Fant*, 89 U. S. 22 Wall. 116, 120 (22: 780, 782); *Anderson County* v. *Beal*, 113 U. S. 227, 241 (28: 966, 971); *North Pennsylvania R. Co.* v. *Commercial Bank*, 123 U. S. 727 (31: 287).

Mr. **John M. Bowers**, for defendant in error:

Where the principal is known by the agent to be interested in the money to be transmitted, or the agent is informed as to the purpose for which it is transmitted, he must be understood as contracting with his principal only, upon such terms as he dictates in regard to the delivery.

Southern Exp. Co. v. *Dickson*, 94 U. S. 549 (24: 285); *Sweet* v. *Barney*, 23 N. Y. 335.

If the agent knows that his principal is the owner, he must strictly obey the instructions given to him.

Story, Ag. § 192; *Isaacson* v. *New York Cent. & H. R. R. Co.* 94 N. Y. 278; *Loeb* v. *Hellman*, 83 N. Y. 601; *Maghee* v. *Camden & A. R. Co.* 45 N. Y. 514; *Wilson* v. *Wilson*, 26 Pa. 394; *Walker* v. *Walker*, 5 Heisk. 425; *Sanquer* v. *London & S. W. R. Co.* 16 C. B. 163.

The plaintiff had an undoubted right of action for the defendant's failure to deliver.

Cutler v. *American Exch. Nat. Bank*, 4 L. R. A. 328, 113 N. Y. 593; *North Pennsylvania R. Co.* v. *Commercial Bank*, 123 U. S. 727 (31: 287); *Ellis* v. *Turner*, 8 T. R. 531; *Proctor* v. *Eastern R. Co.* 105 Mass. 512; *Forsythe* v. *Mather*, 9 Pa. 148; *Dunlop* v. *Lambert*, 6 Clark & F. 627; *Swain* v. *Shepherd*, 1 Mood. & R. 223; *Simpson* v. *London & N. W. R. Co.* L. R. 1 Q. B. Div. 277.

This is a case where the party remitting was known to the agent as the owner or interested in the application of the money, and the agent received it and contracted to carry out specific instructions as to time, manner and place of delivery.

Thompson v. *Fargo*, 49 N. Y. 188; *Cooper* v. *Hong Kong & S. Bkg. Corp.* 9 Cent. Rep. 907, 107 N. Y. 282; *Goodrich* v. *Thompson*, 44 N. Y. 325; *Johnson* v. *New York Cent. R. Co.* 33 N. Y. 610; *Scott* v. *Rogers*, 31 N. Y. 676; *Crawford* v. *West Side Bank*, 1 Cent. Rep. 253, 100 N. Y. 50; *Muller* v. *Pondir*, 55 N. Y. 325; *First Nat. Bank* v. *Whitman*, 94 U. S. 343 (24: 229).

The agent cannot defend on the ground that his principal may not have been damaged by the diversion. The 5,000 pounds was lost through the neglect of the plaintiff in error to follow the instructions given by the defendant in error.

Bank of Metropolis v. *New England Bank*, 42 U. S. 1 How. 234 (11: 115); *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 42 (26: 71); *Russell* v. *Hadduck*, 8 Ill. 233, 238; *Fourth Nat. Bank* v. *City Nat. Bank*, 68 Ill. 398; *Ex parte Kelly*, L. R. 11 Ch. Div. 306.

The verdict of the jury settled all the facts in dispute between the parties.

Lancaster v. *Collins*, 115 U. S. 222 (29: 373).

The general rule, that parol evidence is not admissible to vary, alter or contradict a written instrument, has no application here.

McCrea v. *Purmort*, 16 Wend. 460; *Baldwin* v. *United States Teleg. Co.* 45 N. Y. 744; *Mesmore* v. *New York S. & L. Co.* 40 N. Y. 422; *Griffin* v. *Colver*, 16 N. Y. 489; *Hadley* v. *Baxendale*, 9 Exch. 341; *Mobile & M. R. Co.* v. *Jurey*, 111 U. S. 584 (28: 527); *Allen* v. *Pink*, 4 Mees. & W. 140; *Berry* v. *Berry*, 17 N. J. L. 440; *Wiggins* v. *Pryor*, 3 Port. 430; *Dana* v. *Boyd*, 2 J. J. Marsh. 587; *National Bank of Metropolis* v. *Kennedy*, 84 U. S. 17 Wall. 19 (21: 554); *Shore* v. *Wilson*, 9 Clark & F. 566.

A written instrument, thus executed, does not supersede a prior parol agreement.

Hutchins v. *Hebbard*, 34 N. Y. 24; *Johnson* v. *Hathorn*, 3 Keyes, 126; *M'Culloch* v. *Girard*, 4 Wash. C. C. 289; *Mowatt* v. *Lord Londesborough*, 3 El. & Bl. 307; *Barker* v. *Bradley*, 42 N. Y. 319; *Noonan* v. *Bradley*, 76 U. S. 9 Wall. 394 (19: 757).

A party who takes an agreement prepared by another, and upon its faith incurs obligations, or parts with his property, should have a construction given to the instrument favorable to him.

Hooper v. *Wells, Fargo & Co.* 27 Cal. 11; *St. Louis & S. E. R. Co.* v. *Sumck*, 49 Ind. 302; *Menzell* v. *Railway Co.* 1 Dill. 531; *Edsall* v. *Camden & A. R. Co.* 50 N. Y. 661.

Mr. Justice **Brewer** delivered the opinion [47
of the court:

This was an action at law brought by the defendant in error in the Circuit Court of the United States for the Southern District of New York. The trial resulted in a judgment in his favor, and the defendant there has brought such judgment here on error. As the case was tried before a jury, contested facts must be accepted to be as alleged by the plaintiff, because resolved in his favor by the verdict. *Lancaster* v. *Collins*, 115 U. S. 222 [29: 373].

The facts thus established are these: For some years prior to the transaction in controversy, the plaintiff Cooper had had business relations with the firm of Martin, Turner & Co., of Glasgow, Scotland. In consequence of these relations, he had had frequent occasions to remit money to that firm, and many of such transactions had been carried on through the agency of the defendant. He had, on December 14, 1883, drawn
a draft on the firm of Martin, Turner & Co. [4
for five thousand pounds sterling, which became due on the 29th of February, 1884. It was his duty to provide funds for the payment of that draft, and the defendant knew that such was his duty. The duty was his; the moneys therefor were his. The defendant had an office in London, as well as in New York. On the 26th of February Cooper called at the office of defendant in New York, and purchased and paid for a cable transfer of five thousand pounds to Martin,

Turner & Co. The bill which he received was in these words:

"New York, 26th Feb., 1884.

"W. B. Cooper, Jr., Dr., to the agents Bank of British North America, 52 Wall Street, for cable transfer on the Bank of British North America, London, in favor of Martin, Turner & Co., Glasgow, 5,000 pounds, at 4.90½.....$24,525
Cost of cable..... 2

"$24,527"

The cable message was in cipher, and the ciphers theretofore arranged with Cooper represented the following phrases: "Martin, Turner & Co., Glasgow, ac. W. B. Cooper, Jr.," and "Martin, Turner & Co., 3 Market Buildings, 29 Mincing Lane, ac. W. B. Cooper, Jr." Beyond this was an arrangement for transmission by telegraph from London to Glasgow, which involved an additional expense. When Cooper called to purchase this cable transfer, he was asked whether he wished transmission by telegraph or mail, and answered that he wanted a check mailed to Glasgow. So the contract established by the verdict of the jury, in accordance with his testimony, was one for the transmission by mail of a check from London to Glasgow for the five thousand pounds. The cable directing such transfer was sent as ordered; but the London office, instead of forwarding a check to Glasgow, on the 27th of February, deposited the amount in the Bank of Scotland, at London, to the credit of Martin, Turner & Co. It did this on the strength of a request communicated to it by Martin, Turner & Co., some months [3] prior thereto, to deposit with the Bank of Scotland in London all amounts received to their credit. Cooper knew nothing of this request, and relied upon strict compliance with his directions. On the day that the deposit was made with the Bank of Scotland, Martin, Turner & Co. were advised both by wire and by letter thereof, and wrote approving such action. On the 28th or 29th of February, Martin, Turner & Co. suspended in consequence of advices received from India, and the Bank of Scotland appropriated the funds in its possession to the payment of their overdrawn account; so this cabled amount was not applied to the taking up of Cooper's draft, and he was thereafter compelled to pay it. If the money had been sent by mail from London to Glasgow, as directed, the draft would have reached the latter place on the morning of the 28th, and would, as shown by the testimony of some of the members of the firm of Martin, Turner & Co., have been appropriated, as other like drafts then received, to the special purpose for which the transmission was made. In brief, the neglect of the defendant to follow the specific instructions of the plaintiff in regard to the transmission prevented the appropriation of the amount transmitted to the payment of plaintiff's draft, and secured its appropriation to an obligation of Martin, Turner & Co. to the Bank of Scotland. It is true that this disregard of instructions was owing to a special request theretofore made by the payee of the draft; but such special request does not disturb the fact that the instructions of the plaintiff were disregarded, and that he suffered loss in consequence therefrom. It would seem from this general statement that the liability of the defendant could not be doubted. It had no contract with the payee of the draft; its contract obligations were with the sender of the money; and it is the general law of agency that disregard of the explicit instructions of the principal casts upon the agent liability for any loss resulting therefrom.

After the testimony was closed, counsel for the defendant moved to strike from the case all parol evidence tending to affect the legal construction of the bill heretofore quoted, which motion was overruled. The contention now is that that bill stated the contract, with all its terms, and, being in writing, [4 could not be varied or controlled by parol testimony. But this contention begs the question. The mere receipt of a bill of parcels or bill of lading, on payment of money or delivery of goods, is not necessarily an assent to the proposition that such bill of parcels or bill of lading states the contract and the whole contract between the parties. Such bills may or may not be the contract. They may be nothing more, and intended to be nothing more, than memoranda or receipts. Whether they are the entire contract, or simply in the nature of receipts, is not a question of law for the court, but one of fact for the jury. The case of *Mobile & M. R. Co.* v. *Jurey*, 111 U. S. 584 [28: 527], is suggestive. There, on a shipment of goods, it was insisted that a bill of lading voiced the entire contract. The trial court opened the door to inquiry as to the terms of the real contract between the parties, and the circumstances under which the bill of lading was given and received, and left it to the jury to determine whether the bill of lading was or was not the contract. The ruling of that court was affirmed by this. We think, therefore, there was no error in denying this motion, and leaving the question of fact to the determination of the jury. Even if inquiry were limited to the bill itself, the description of the place, Glasgow, therein, certainly suggests that delivery was intended at that place, and may not unreasonably be construed as meaning not merely that it was the place of business of Martin, Turner & Co., but also the place to which the money was to be remitted. *Filley* v. *Pope*, 115 U. S. 213 [29: 372].

A further contention of plaintiff in error is this: The contract between the plaintiff and defendant was to deliver five thousand pounds to Martin, Turner & Co.; in fact, a delivery was made in the manner and at the place requested by Martin, Turner & Co., and the delivery approved by them; and it is urged that if the money was to go to Martin, Turner & Co., and the defendant was instructed to deliver it to them, it might deliver it to them at any place and in any manner they desired. Whatever force there might be in this argument, if the money belonged to Martin, Turner & Co., it is of no weight, inasmuch as the money belonged to [4

Cooper, as was known to the defendant, and was sent by him to take up his own paper. The case of *Southern Exp. Co.* v. *Dickson*, 94 U. S. 549 [24: 285], was properly held by the trial court decisive of this question. 80 Fed. Rep. 171. It is true that that case was one of the consignment of goods; but the principle is the same. There goods belonging to the shipper were handed by him to an express company for transportation to a place mentioned, for delivery there to a person named. At the request of the consignee, the express company made the delivery at another place, in consequence whereof the shipper lost his goods; and the express company was held liable, because, although consigned to a named consignee, they were delivered for transportation to him at a named place, and they were, as known to the express company, the property of the shipper. The failure to obey the specific instructions of the owner and shipper resulted in loss; and it was properly held that the consignee could not interfere with those instructions, and that the company could not recognize him as owner, and obey other instructions than those of the shipper and known owner. So, here, the defendant received these moneys knowing that they belonged to Cooper, and that they were to be used for the payment of his liabilities; and it could not substitute for his instructions the wishes of the parties to whom he was sending the money. It is not the case of one employing the defendant to transfer moneys to a third party, which he owes such third party, in which case the debt of the sender may be discharged whenever the party to whom the money is sent receives it.

Another contention of plaintiff in error is this: Had the money been remitted by mail from London to Glasgow, and reached there on the 28th, how can it be affirmed that Martin, Turner & Co. would have appropriated this money to the payment of the intended draft? Might they not have passed it into the volume of their assets, for equal distribution among their creditors? Of course, no positive affirmation can be made in response. It cannot be absolutely declared that Martin, Turner & Co. would have appropriated the check to the specific purpose intended by the plaintiff. It is true the testi-
[179] mony of the two members of that firm shows that on the 28th moneys transmitted and received for special purposes were appropriated thereto, and indicates that probably a like action would have attended the check if received on the 28th. But we do not understand that the certainty of a different result must be established; on the contrary, the burden of proof is on the defendant. If positive instructions are disobeyed and loss results, prima facie liability for that loss ensues; and the burden is on the defendant, the disobeying agent, to prove that obedience would have brought a like result. The fair conclusion from the testimony is that obedience would have prevented loss. It certainly cannot be affirmed that the same loss would have resulted if the instructions had been obeyed. There can, as a rule, be little hardship, and there is generally great benefit, in holding an agent bound to absolute compliance with the explicit instructions of his principal. In view of the manifold contingencies of business transactions, and the wide range of possibilities that attend any act of a commercial nature, few things could be more unfortunate than to incorporate into established law the right of an agent to disobey specific instructions, and to make a guess as to results an excuse for relief from accruing loss. Uniform recognition and enforcement of certain, settled and clear rules are important. Among them, few are more significant or more essential than that in the relation of principal and agent strict compliance by the latter with the instructions of the former is an unvarying condition of exemption from liability. Loss from disregard thereof must be borne by the agent, unless he establishes that the disregard had no connection with the loss, and that it would certainly have followed whether instructions were obeyed or disregarded.

The verdict of the jury in this case establishes a disregard of instructions. Confessedly, loss resulted, and it cannot be affirmed that the same loss would have resulted if instructions had been obeyed. We conclude, therefore, that *the judgment was right, and it is affirmed.*

Mr. Justice **Gray** did not sit in this case and took no part in its decision.

WILLIAM E. BASSETT, *Plff. in Err.*, [496]
v.
UNITED STATES.

(See S. C. Reporter's ed. 496-507.)

Indictment for polygamy in Utah—wife cannot be witness—polygamy not crime against wife—husband and wife as witnesses—polygamy and adultery.

1. On the trial of an indictment for polygamy the wife of the accused cannot, under the Code of Civil Procedure of Utah, be a witness against him to prove the crime.
2. Polygamy is not, within the language of section 1156 of the Utah Code of Civil Procedure, a crime committed by the husband against the wife.
3. The rule of the common law is that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse; an intention of the Legislature to change such rule should be clear and undoubted.
4. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife.

[No. 110.]

Argued Dec. 10, 1890. Decided Dec. 22, 1890.

NOTE.—*As to competency of witnesses in United States courts in civil cases; how far governed by state laws,*—see *note* to Vance v. Campbell, 17: 168.

That persons jointly indicted cannot be witnesses for each other; exceptions to the rule; when wife of one may be,—see *note* to United States v. Reid, 12: 1023.

IN ERROR to the Supreme Court of the Territory of Utah, to review a judgment of that court affirming a judgment of the First Judicial District Court of Utah, upon an indictment for polygamy, sentencing plaintiff in error to imprisonment and to pay a fine after the verdict by the jury finding him guilty of that crime. *Reversed.*

The facts are stated in the opinion.

Messrs. **Franklin S. Richards** and *Charles C. Richards*, for plaintiff in error:

The wife is not a competent witness.

Greenl. Ev. §§ 334, 337; *Stein* v. *Bowman*, 38 U. S. 13 Pet. 209 (10: 129).

The Statute does not change the rule which makes the wife incompetent.

Utah Code Civ. Proc. §§ 1154, 1156, pp. 420, 421; *People* v. *Mullings*, 83 Cal. 140; *State* v. *Armstrong*, 4 Minn. 342; *Compton* v. *State*, 13 Tex. App. 374; *People* v. *Houghton*, 24 Hun, 501.

This case was not, within the meaning of the Statute, a proceeding for a crime committed by the husband against the wife, nor a case of criminal violence upon her.

Whart. Crim. Ev. 390, 393, 397; *Thomas* v. *State*, 14 Tex. App. 70; *Overton* v. *State*, 43 Tex. 616.

It was error to permit her to disclose a confidential communication.

United States v. *Reid*, 53 U. S. 12 How. 361 (13: 1023); *Tennessee* v. *Davis*, 100 U. S. 257 (25: 648); *Conn. Mut. L. Ins. Co.* v. *Schaefer*, 94 U. S. 458 (24: 252).

Mr. **W. H. H. Miller**, *Atty-Gen.*, for defendant in error.

[1] *Mr. Justice* **Brewer** delivered the opinion of the court:

On November 23, 1886, the grand jury of the First Judicial District Court of Utah found an indictment for polygamy against the plaintiff in error, charging him with having married one Kate Smith on the 14th day of August, 1884, when his lawful wife, Sarah Ann Williams, was still living and undivorced. Upon trial before a jury a verdict of guilty was returned, and he was sentenced to imprisonment for a term of five years and to pay a fine of five hundred dollars. Such sentence, on appeal, was affirmed by the Supreme Court of the Territory, and is now brought to this court for review.

A preliminary question is presented by the Attorney-General. It is urged that there was no proper bill of exceptions as to the proceedings in the trial court, and therefore nothing is presented which this court can review. But we are reviewing the judgment of the Supreme Court of the Territory; and the rule in this court is not to consider questions other than those of jurisdiction, which were not presented to the court whose judgment we are asked to examine. *Clark* v. [2] *Fredericks*, 105 U. S. 4 [26: 938]. Beyond the fact that the proceedings of the trial court were examined and considered by the Supreme Court of the Territory, and are, therefore, presumably reviewable by this court, is this matter, noticed by this court in the case of *Hopt* v. *Utah*, 114 U. S. 488 [29: 183], that a large liberty of review is given by the statutes of Utah to the Supreme Court of the Territory, even in the absence of a formal bill of exceptions. See also *Stringfellow* v. *Cain*, 99 U. S. 610 [25: 421]; *O'Reilly* v. *Campbell*, 116 U. S. 418 [29: 669].

But it is unnecessary to rest upon this recognition by the Supreme Court of the Territory, or the presumptions arising therefrom. The record shows the pleadings, proceedings and exceptions to the charge of the trial judge, all certified properly by T. A. Perkins, the clerk of the trial court. At the close of his certificate, which is of date January 20, 1887, is this statement: "And I further certify that a copy of defendant's bill of exceptions in said cause is not made part hereof because said bill of exceptions is in the possession of defendant's counsel, at the City of Salt Lake, and because I am informed by said counsel that it has been stipulated by and between themselves and the United States district attorney for Utah Territory that the original thereof in place of such copy should be used in the supreme court upon this appeal." The bill of exceptions referred to by him in this statment is signed by the trial judge and thus indorsed: "No. 984. First Dist. Court, Utah. The United States *v.* William E. Bassett. Polygamy. Bill of exceptions. Filed Jan'y 19th, 1887. T. A. Perkins, Clerk;" and also by the clerk of the Supreme Court of the Territory as "Filed Feb'y 2nd, 1887," the date of the filing of the transcript of the proceedings of the trial court. The import of all this is that the bill of exceptions signed by the trial judge was filed in the trial court; and that, for the purposes of economy, time and convenience, such original bill, together with the record of the proceedings, was brought to and filed in the supreme court after having been filed in the trial court. It needs but this suggestion, that if a copy is good the original is equally good. The identification of such bill of exceptions is perfect, vouched by the signatures of the [50 trial judge, the clerk of the district court and the clerk of the supreme court. To ignore such authentication would place this court in the attitude of resting on a mere technicality to avoid an inquiry into the substantial rights of a party, as considered and determined by both the trial court and the Supreme Court of the Territory. In the absence of a statute or special rule of law compelling such a practice, we decline to adopt it.

Passing from this question of practice to the merits, the principal question, and the only one we deem necessary to consider, is this: The wife of the defendant was called as a witness for the prosecution, and permitted to testify as to confessions made by him to her in respect to the crime charged, and her testimony was the only direct evidence against him. This testimony was admitted under the first paragraph of section 1156 of the Code of Civil Procedure, enacted in 1884, section 3878 of the Compiled Laws of Utah 1888, which reads: "A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, with-

out the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other." And the contention is, that polygamy is within the language of that paragraph a crime committed by the husband against the wife. We think this ruling erroneous. A technical argument against it is this: The section is found in the Code of Civil Procedure, and its provisions should not be held to determine the competency of witnesses in criminal cases, especially when there is a Code of Criminal Procedure, which contains sections prescribing the conditions of competency. Section 421 of the Code of Criminal Procedure, section 5197 of the Compiled Laws 1888, is as follows: "Except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife are competent witnesses for or against each other, in a criminal action or proceeding to [504] which one or both are parties." Clearly under that section the wife was not a competent witness. It is true that the Code of Criminal Procedure was enacted in 1878, and the Code of Civil Procedure in 1884, so that the latter is the last expression of the legislative will; but a not unreasonable construction is, that the last clause of this paragraph was inserted simply to prevent the rule stated in the first clause from being held to apply to the cases stated in the last, leaving the rule controlling in criminal cases to be determined by the already enacted section in the Code of Criminal Procedure. This construction finds support in the fact that the same Legislature which enacted the Code of Civil Procedure passed an Act amending various sections in the Code of Criminal Procedure, among them the section following section 421, quoted above, and did not in terms amend such section (Laws of Utah 1884, chap. 48, p. 119), and in the further fact that the same Legislature passed an Act for criminal procedure in justices' courts, and in that prescribed the same rule of competency, and in the same language, as is found in section 421 (Laws of Utah 1884, chap. 54, sec. 100, p. 153). It can hardly be believed that the Legislature would establish one rule of competency for a trial in a justice's court, and a different rule for a trial of the same offense on an appeal to the district court. And there are many offenses of which justices' courts have jurisdiction, which are likely polygamy in their social immorality and their wrong to the wife.

But we do not rest our conclusion on this technical argument. If there were but a single section in force, and that the one found in the Code of Civil Procedure, we should hold the testimony of the wife incompetent. We agree with the Supreme Court of California, when, in speaking of their Codes, which in respect to these sections are identical with those of Utah, it says, in *People* v. *Langtree*, 64 Cal. 259, "we think upon a fair construction both mean the same thing, although the Penal Code is more explicit than the other. On this, as on nearly every other subject to which the Codes relate, they are simply declaratory of what the law would be if there were no Codes." See also *People* v. *Mullings*, 83 Cal. 138.

It was a well-known rule of the common [505] law that neither husband nor wife was a competent witness in a criminal action against the other, except in cases of personal violence, the one upon the other, in which the necessities of justice compelled a relaxation of the rule. We are aware that language similar to this has been presented to the Supreme Courts of several States for consideration. Some, as in Iowa and Nebraska, hold that a new rule is thereby established, and that the wife is a competent witness against her husband in a criminal prosecution for bigamy or adultery, on the ground that those are crimes specially against her. *State* v. *Sloan*, 55 Iowa, 217; *Lord* v. *State*, 17 Neb. 526. While others, as in Minnesota and Texas, hold that by these words no departure from the common-law rule is intended. *State* v. *Armstrong*, 4 Minn. 335; *Compton* v. *State*, 13 Tex. App. 274; *Overton* v. *State*, 43 Tex. 616. This precise question has never been before this court, but the common-law rule has been noticed and commended, in *Stein* v. *Bowman*, 38 U. S. 13 Pet. 209, 222 [10: 129, 135], in which *Mr. Justice* McLean used this language: "It is, however, admitted in all the cases that the wife is not competent, except in cases of violence upon her person, directly to criminate her husband, or to disclose that which she has learned from him in their confidential intercourse." "This rule is founded upon the deepest and soundest principles of our nature, principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence." We do not doubt the power of the Legislature to change this ancient and well-supported rule; but an intention to make such a change should not lightly be imputed. It cannot be assumed that it is indifferent to sacred things, or that it means to lower the holy relations of husband and wife to the material plane of simple contract. So, before any departure from the rule affirmed through the ages of the common law—a rule [506] having its solid foundation in the best interests of society—can be adjudged, the language declaring the legislative will should be so clear as to prevent doubt as to its intent and limit. When a code is adopted, the understanding is that such code is a declaration of established law, rather than an enactment of new and different rules. This is the idea of a code, except as to matters of procedure and jurisdiction, which often ignore the past, and require affirmative description.

We conclude, therefore, that the section

quoted from the Code of Civil Procedure. if applicable to a criminal case, should not be adjudged as working a departure from the old and established rule, unless its language imperatively demands such construction. Does it? The clause in the Civil Code is negative, and declares that the exception of the incompetency of wife or husband as a witness against the other does not apply to a criminal action or proceeding for a crime committed by one against the other. Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder, or robbery, or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this Statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the Statute speaks of crimes against her, it is simply an affirmation of the old, familiar and just common-law
7] rule. We conclude, therefore, that under this Statute the wife was an incompetent witness as against her husband.

Other questions in the record need not be considered, as they will probably not arise on a new trial.

The judgment of the Supreme Court of the Territory of Utah is reversed, and the case remanded, with instructions to order a new trial.

)] DANIEL G. AMBLER ET AL., *Plffs. in Err.*,
v.
ISAAC EPPINGER.

(See S. C. Reporter's ed. 480-483.)

Jurisdiction of circuit court.

The United States circuit court has jurisdiction of an action for damages for wrongfully entering on lands and carrying away the timber thereon, brought by an assignee of the claim, although the assignor could not himself have sued in that court.

[No. 1888.]
Submitted Dec. 1, 1890. Decided Dec. 22, 1890.

IN ERROR to the Circuit Court of the United States for the Northern District of Florida, to review a judgment for plaintiff in an action for damages for entering upon plaintiff's lands and cutting down and removing and converting trees and logs. *Affirmed.*

Statement by *Mr. Justice* **Field:**

This case comes before the court on a writ of error, under the Act of February 25, 1889 (25 Stat. chap. 236, p. 693), to review the decision of the circuit court, upon the question of its jurisdiction. That Act provides that, in all cases where a final judgment or decree shall be rendered in a circuit court of the United States, involving the question of its jurisdiction, the party against whom the judgment or decree is rendered shall be entitled to an appeal to the Supreme Court of the United States, or to a writ of error from it, to review such judgment or decree, without reference to its amount, except that, where that does not exceed the sum of five thousand dollars, the review shall be limited to the question of jurisdiction.

The plaintiff is a citizen of New York, and the action is brought by him in his own right, and as assignee of John K. Russell, against the defendants, who are citizens of Florida, to recover as damages six thousand dollars, the alleged value of three thousand trees and pine logs cut down by the defendants upon the lands of the plaintiff and the said Russell in the years 1885, 1886 and 1887, and carried away and converted to their use. The declaration, after setting forth the entry by the defendants upon the lands of the [481]
plaintiff and Russell, the cutting down of the trees and their removal and conversion, alleges that afterwards, in November, 1887, Russell, for a valuable consideration, sold and assigned to the plaintiff all his right, title and interest in the pine trees and logs thus cut down, removed and converted, and in the claim and demand against the defendants, and that they refused to pay the plaintiff the value of the trees and timber, though payment was often demanded. The declaration contains four counts, but they all proceed for the same trespass and conversion, the facts being stated with some additional particulars in the different counts, not affecting the question presented.

To the declaration the defendants demurred on several grounds, all of which are embraced in this: that it appeared by the declaration that the grievances complained of were on lands at the time jointly owned by the plaintiff and John K. Russell, and that the right of action was, therefore, not the subject of assignment.

The demurrer was overruled; the defendants thereupon pleaded, and issue was joined. They then moved the court to dismiss the action upon the alleged ground that it was shown by the declaration that it had no jurisdiction thereof. This motion was de-

---

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence,* see *note* to Emory v. Greenough, 1: 640.

As to jurisdiction of United States courts over common-law offenses, see *note* to United States v. Coolidge, 4: 124.

As to jurisdiction of state and United States courts, as to territory and offense, see *note* to United States v. Bevans, 4: 404.

nied, and the plaintiff obtained a verdict for eleven hundred dollars. A motion to arrest the judgment on a similar ground was made and overruled. Judgment upon the verdict was thereupon entered, to review which the case is brought to this court.

Mr. **James Lowndes,** for plaintiffs in error:

The circuit court has not jurisdiction of a suit or a claim like this, by an assignee, unless his assignor could have brought suit upon it.

Act of March 3, 1887; *Van Bokkelen* v. *Cook*, 5 Sawy. 587; *Rich* v. *Keyser*, 54 Pa. 86; *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 387 (19: 736); *Bank of United States* v. *Planters Bank*, 22 U. S. 9 Wheat. 904 (6: 244); *Corbin* v. *Black Hawk County*, 105 U. S. 659 (26: 1136); *Shoecraft* v. *Bloxham*, 124 U. S. 730 (31: 574); *Simons* v. *Ypsilanti Paper Co.* 33 Fed. Rep. 19.

The burthen is upon the plaintiff in a suit in a circuit court of showing the necessary jurisdictional facts. They must appear affirmatively on the record. This is so as regards the citizenship of an assignor.

Metcalf v. *Watertown*, 128 U. S. 586 (32: 543); *Brock* v. *Northwestern Fuel Co.* 130 U. S. 341 (32: 905); *Morris* v. *Gilmer*, 129 U. S. 315 (32: 690).

Mr. **H. Bisbee,** for defendant in error:

In actions of trover and trespass one tenant in common may maintain a suit.

Freeman, Co-tenancy (2d ed.) § 353; *Zabriskie* v. *Smith*, 13 N. Y. 337; *Shamburg* v. *Moorehead*, 4 Brewst. 92; *Boobier* v. *Boobier*, 39 Me. 409; *Howard* v. *Snelling*, 28 Ga. 473; *Duff* v. *Bindley*, 16 Fed. Rep. 178.

A tenant in common, who is a citizen of another State, may sue in the circuit court for his portion, although his co-tenants who are citizens of the State where the lands are cannot maintain such a suit.

Browne v. *Browne*, 1 Wash. C. C. 429.

The words "other chose in action," in sec. 629, Rev. Stat., embrace the rights a contract or instrument confer which are capable of enforcement by suit.

Shoecroft v. *Bloxham*, 124 U. S. 730–735 (31: 574, 576); *Corbin* v. *Black Hawk County*, 105 U. S. 659, 666, 667 (26: 1136, 1139); *Deshler* v. *Dodge*, 57 U. S. 16 How. 622–631 (14: 1084, 1088).

A suit by an assignee of a claim for damages for a tort to property, or to recover personal property or its value, is not within the Statute.

Barney v. *Globe Bank*, 5 Blatchf. 107, 114, 115; *Van Bokkelen* v. *Cook*, 5 Sawy. 587–591; *McNichol* v. *Phelps*, 16 Fed. Rep. 8; *Deshler* v. *Dodge*, 57 U. S. 16 How. 622 (14: 1084); *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 387, 391 (19: 736, 738).

Mr. Justice **Field** delivered the opinion of the court:

The record is silent as to the citizenship of Russell, who assigned his interest to the [482] plaintiff, and the defendants below, the plaintiffs in error here, contend that the circuit court was therefore excluded by the Act of March 3, 1887, from jurisdiction of the action, it not appearing that he could have prosecuted in the circuit court a suit upon the claim. That Act, after declaring in its first section that certain suits shall not be brought in the circuit or district courts, adds: "Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 24 Stat. chap. 373, p. 553.

This Act, as appears on its face, does not embrace, within its exceptions to the jurisdiction of those courts, suits by an assignee upon claims like the demand in controversy. The exceptions, aside from suits on foreign bills of exchange, are limited to suits on promissory notes and other choses in action, where the demand sought to be enforced is represented by an instrument in writing, payable to bearer, and not made by a corporation, the words following the designation of choses in action indicating the manner in which they are to be shown. They must be such as arise upon contracts of the original parties, and not founded, like the one in controversy, upon a trespass to property.

The construction given by this court in *Deshler* v. *Dodge*, 57 U. S. 16 How. 622 [14: 1084], to the clause in the eleventh section of the Judiciary Act, which denied to any circuit or district court "cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange," is in harmony with the construction we give to the Act of 1887. It was there held that the exception by that section of the jurisdiction of those courts of suits by an assignee did not extend to a suit on a chose of action to recover possession of a specific chattel or damages for its wrongful caption or deten- [4 tion, although the assignee could not himself sue in that court. And in the subsequent case of *Bushnell* v. *Kennedy*, 76 U. S. 9 Wall. 387 [19: 736], it was said that the exceptions to the jurisdiction applied only to rights of action founded on contracts which contained within themselves some promise or duty to be performed, and not to mere naked rights of action founded on some wrongful act or some neglect of duty to which the law attaches damages.

The judgment below being under five thousand dollars, no other question than that of jurisdiction can be reviewed by this court. The validity of the transfer of Russell's interest in the timber removed and converted to the defendants' use, and the effect of such transfer upon the amount of the plaintiff's recovery, are matters touching the merits of the action, and are not open to consideration here.

Judgment affirmed.

] ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY, *Appt.*,
v.
RANSOM PHELPS.

(See S. C. Reporter's ed. 528-542.)

Grants of land to aid in construction of railroads—construction of—territorial grants—policy of government—Indian lands.

1. Under the Act of 1857, granting lands to the Territory of Minnesota to aid in the construction of railroads, lands which at the date of said Act were in said Territory and of the character and within the limits prescribed by the Act, were granted by said Act, although they lie outside of the limits of the afterward created State of Minnesota and in the State of North Dakota.
2. A territorial corporation, under congressional authority, may construct a railroad in such Territory and obtain its full quota of lands, even though a part of the territory embracing the granted lands should afterwards become a State.
3. Railroad grants by Congress of lands are grants *in præsenti*, and take effect upon the sections of the land when the road is definitely located, by relation, as of the date of the grant.
4. Where a statute is clear and free from all ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what is the policy of the government, even though it may be the settled practice of the department.
5. Lands in the possession of the Indians when the Act of 1857 was passed, and which were included in the lands intended to be granted by said Act, passed to the State for the benefit of the railroad when it was definitely located, and the Indian title extinguished.

[No. 26.]

Argued Nov. 6, 1890. Decided Dec. 22, 1890.

APPEAL from a decree of the Circuit Court of the United States for the District of Minnesota, dismissing a suit in equity brought by the St. Paul, Minneapolis and Manitoba Railway Company, a Minnesota corporation, against Ransom Phelps, to quiet the title to land in Richland County, North Dakota. *Reversed.*

The facts are stated in the opinion.

Mr. **S. U. Pinney** for appellant.

Messrs. **James McNaught, A. H. Garland** and **H. J. May** for appellee.

] *Mr. Justice* **Lamar** delivered the opinion of the court:

This was a suit in equity brought by the St. Paul, Minneapolis and Manitoba Railway Company, a Minnesota corporation, against Ransom Phelps, to quiet the title to about 80 acres of land in Richland County, North Dakota, particularly described as the east half of the southeast quarter of section 13, township 132, range 48, alleged to belong to the plaintiff, and which was claimed by the defendant.

The bill was filed April 29, 1884, and set forth at great length the various steps by which the plaintiff derived its claim of title, averred that the defendant had no valid title to the land, by reason of plaintiff's prior right in the premises, and prayed that its own equitable title be quieted and protected, and the defendant be enjoined from setting up any claim whatever to the land, and for other and further relief, etc. The defendant answered, denying all the material allegations of the bill, and the plaintiff filed a replication. The case was tried upon an agreed statement of facts, and on the 3d of March, 1886, the circuit court announced its decision and opinion in writing, pursuant to which it ordered that the bill be dismissed at complainant's cost. The opinion is reported in 26 Fed. Rep. 569. On the 4th of March, 1886, a final decree was entered, dismissing the bill of complaint, and an appeal to this court was taken and allowed.

The material facts in the case are, briefly, as follows: The plaintiff claims the land in dispute as the present beneficiary under the Acts of Congress approved March 3, 1857 (11 Stat. 195), and March 3, 1865 (13 Stat. 526), making a grant of lands to the Territory of Minnesota, to aid in the construction of railroads. The provisions of the Act of 1857 material to this issue are as follows: [53

"Be it enacted," etc., "That there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads, from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* Saint Cloud and Crow Wing, to the navigable waters of the Red River of the North, at such point as the Legislature of said Territory may determine; from St. Paul and from Saint Anthony, *via* Minneapolis, to a convenient point of junction west of the Mississippi, to the southern boundary of the Territory in the direction of the mouth of the Big Sioux River, with a branch, *via* Faribault, to the north line of the State of Iowa, west of range sixteen; from Winona, *via* Saint Peters, to a point on the Big Sioux River, south of the forty-fifth parallel of north latitude; also from La Crescent, *via* Target Lake, up the valley of Root River, to a point of junction with the last-mentioned road, east of range seventeen, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches; but in case it shall appear that the United States have, when the lines or routes of said roads and branches are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said Territory or future State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached, as aforesaid; which lands (thus selected in lieu of those sold, and to

NOTE.—*As to land grants to railroads*, see *note* to Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

which pre-emption rights have attached as aforesaid, together with the sections and [531] parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the Territory or future State of Minnesota for the use and purpose aforesaid: *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads or branches, and selected for and on account of each of said roads or branches."

Section 3 provides: "That the said lands hereby granted to the said Territory or future State shall be subject to the future disposal of the Legislature thereof for the purposes herein expressed and no other."

Section 4 defines the manner in which the lands granted shall be disposed of by the Territory or future State.

The Act of 1865 enlarged the original grant from six to ten sections per mile on each side of the road, and the indemnity limits from fifteen to twenty miles.

To carry out the provisions of the Granting Act, the Territorial Legislature passed an Act creating the Minnesota and Pacific Railroad Company, and bestowed upon it the lands which had been granted to the Territory; and by the same Act the terminus of the main line of the road was fixed at Breckinridge, at the mouth of the Sioux Wood River, as the point "between the foot of Big Stone Lake and the mouth of the Sioux Wood River," referred to in the Act of Congress.

On the 5th of December, 1857, the company filed with the commissioner of the General Land Office a map showing the definite location of the main line of the road as far west as Breckinridge; but as the public surveys at that time extended only to the west line of range 38—about half the length of the road—it was not accepted as the map of definite location by the land office any further west than the surveys extended. After the surveys had been completed as far west as Breckinridge, the company filed another map of definite location for the remaining part of the road, which was, in reality, a map of the original location made to conform to the public surveys. The exact date of the filing of this latter map and its acceptance by the Land Department does not appear in the record, but it was prior to May 25, 1869.

The railroad was completed to Breckin- [532] ridge within the time limited by the Act of March 3, 1865, *supra*. It is conceded that the tract in controversy is part of an odd section lying within six miles of the line of the road, and that the appellant has succeeded to all the rights and privileges respecting the grant that were originally conferred upon the Territory of Minnesota and by its Legislature conferred upon the Minnesota and Pacific Railroad Company.

The main contention of the appellee is that this land, although within six miles of the line of the road as definitely located and as actually constructed, and otherwise conforming to the description of the lands granted by the Act of 1857, was not granted by that Act, because it lies outside of the limits of the present State of Minnesota, within what is now the State of North Dakota, although at the date of the grant it lay within the limits of Minnesota Territory. This contention is based upon the following theory: At the time the grant of 1857 was made Minnesota was a Territory, whose western boundary was the Missouri River. Five days prior thereto, to wit, February 26, 1857, Congress passed an Enabling Act for the proposed State (11 Stat. 166), which designated the western boundary thereof as follows: "Beginning at the point in the centre of the main channel of the Red River of the North, where the boundary line between the United States and the British possessions crosses the same; thence up the main channel of said river to that of the Bois des Sioux River; thence [up] the main channel of said river to Lake Travers; thence up the centre of said lake to the southern extremity thereof; thence in a direct line to the head of Big Stone Lake; thence through its centre to its outlet; thence by a due south line to the north line of the State of Iowa." Under this Enabling Act the State of Minnesota was organized and admitted into the Union May 11, 1858. 11 Stat. 285. It is said that it has been the settled policy of the government to confine land grants made in aid of railroads wholly within a State or Territory to lands lying within the same State or Territory, and that, therefore, inasmuch as the land in this case is outside of the State of Minnesota, although within the limits of the Territory as it existed at the date of the grant, it cannot be included in [53 the grant to this branch of the road lying wholly within the State.

This was the conclusion reached by the circuit court, in view of the ruling of the Land Department and the refusal of the Secretary of the Interior, in the adjustment of the grant to this branch of the road, to certify to the State any lands lying beyond its western boundary line, which ruling the court expressed itself unwilling to reverse or to jeopardize the rights and large interests (including a prosperous village) that were said to have grown up on the faith of it. Against this conclusion there are strong, and, in our view, unanswerable, objections.

It was admitted that, according to the plain letter of the Statute, the grant would include lands west of the Bois des Sioux River, in Dakota, and that the land in controversy is within that grant. It is also conceded that Congress has the power to grant to a State lands in another State or Territory, to aid in the construction of a railroad wholly within its own limits. But it is argued that the positive and express provision of the law must give way, and be controlled by the presumption founded upon an alleged policy of the government, that Congress, having in view the probable organization of Minnesota Territory into a State, intended to restrict the grant in question to lands within the limits of such future State. We see much in the Act itself and in the circumstances which attended its enactment that repels such presumption. In the first place, what is called the uniform and settled

policy of the government to confine land grants, in the manner described, as far as it exists, was established by the express provisions of statutory enactments, and not by any construction of the Interior and Law Departments of the government, wherein they have assumed to find an opposition between the actual text of the law and the public policy of the government, making the former yield to the latter as expressive of the intent of Congress.

In most if not all of the grants of land made to the various States in aid of railroads within their respective limits, some words of limitation were used to denote that [14] the grant was restricted to lands within each particular State, when such restriction was intended. Thus, in the Act of 1857 now under consideration, the terminus of the second line of road provided for was at "the southern boundary of the Territory," and the terminus of the branch of that road was at the "north line of the State of Iowa." The Act of June 29, 1854 (10 Stat. 302), which was repealed August 4, 1854 (Id. 575), granted lands to the Territory of Minnesota to aid in the construction of certain railroads, one of which was to run from the southern line of the Territory *via* certain mentioned points to the eastern line of the Territory. The Act of June 3, 1856 (11 Stat. 20), granted lands to Wisconsin in aid of a railroad from Fond du Lac northerly to the state line; and an Act of the same date (Id. 21) made a grant of lands to Michigan in aid of a road to run from Little Bay de Noquet *via* certain points to "the Wisconsin state line." The Act of March 3, 1863 (12 Stat. 772), granted lands to Kansas in aid of a railroad to run from Leavenworth *via* certain other points to the "southern line of the State;" and also in aid of a railroad to run from Atchison *via* Topeka to the "western line of the State." The Act of May 5, 1864 (13 Stat. 64), granted to the State of Minnesota to aid in the construction of a railroad from St. Paul to Lake Superior "every alternate section of public land, etc., within Minnesota." The Act of July 4, 1866 (14 Stat. 87), granted lands to Minnesota to aid in the construction of a road from Houston to the "western boundary of the State," and for another road from Hastings to a point on the "western boundary of the State." The Act of July 26, 1866 (14 Stat. 289), granted lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railroad, which was designated to run from Fort Riley *via* certain named points to the "southern line of the State of Kansas." See also the Florida-Alabama grant hereafter referred to; Act of May 15, 1856 (11 Stat. 9), granting lands to the State of Iowa to aid in the construction of certain railroads in that State; Act of May 12, 1864 (13 Stat. 72), granting lands to the State of Iowa to aid in the construction of a railroad in that State; and Act of July 2, 1862 (12 Stat. 503), donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and the mechanic arts.

These Statutes are all in harmony with the construction which we think should be put upon the Act under consideration. In almost the same language in which those Statutes grant lands to States, this Act provides "that there be and is hereby granted to the Territory of Minnesota, for the purpose of aiding in the construction of railroads," and then proceeds, in words no less express and precise than the words of the Statutes above cited, to define the lines of the different roads and branches, to designate the points of their termini, and to declare the terms, extent, location and limitations of the grants, all within the limits of the Territory. Not a word in any section or provision of the Act indicates an intention of Congress to confine the grant within the limits of the contemplated State. The words of the grant are: "Every alternate section of land designated by odd numbers for six [ten] sections in width on each side of each of said roads and branches." Each of what roads and branches? Such as are by the express terms of the Act confined within the proposed boundaries of the future State? The question is answered by the Act itself. It provides for four separate roads and two branches, particularly designating the points from which each is to start, and the limits within which the terminus of each may be fixed. It expressly designates the terminus of the third of these roads (the Winona and St. Peters) at "a point on the Big Sioux River, south of the forty-fifth parallel of north latitude," some 30 or 40 miles beyond the boundary of the State; and that of the one under consideration, which might have been, if so directed by the Territorial Legislature, also fixed beyond the western boundary, and yet be within the terms of the Act. These provisions are all embodied in the same section, and all of them alike constituted legislation in reference to the proposed State, and if one was limited by the presumption of the rule of construction contended for, so were all the others. For they all prescribed, with respect to the extent of the grant, the same terms, putting each grant on the same footing in proportion to [536] the length of the road, *i. e.*, "every alternate section of land designated by odd numbers for six [ten] sections in width on each side of each of said roads and branches." Again, it is to be observed that, after the State of Minnesota was organized and admitted into the Union, with its boundaries fixed by the Enabling Act, Congress passed an Act, May 12, 1864, as to one of these roads, and March 3, 1865, as to all the others, renewing the grant of 1857, and enlarging it from six to ten miles on each side of said roads and branches, and nothing is said in either of them to indicate any restriction to the state limits of the lands originally granted, or those added to the grant. We think that the language of those Acts is too plain and unequivocal to need or even to admit the aid of an extrinsic rule of construction to get at the intent and meaning of Congress. The assumption of the appellee, that the uniform policy of the government, as it is called, arose from the construction put by the administrative department upon railroad grants, and that it arose with respect to the

very first grant made by Congress in aid of a railroad, is erroneous. Counsel for the appellee have failed to bring to our attention any instance of such a construction, except the one now before the court. Had any such cases been presented when the language of the statutes under consideration was dubious and open to different interpretations, the established construction of them by the department charged with their execution would have very great force and generally a controlling one in the formation of the judgment of this court; but where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department.

We have already stated what we think the general policy established by Congress has been in respect to the restriction of land grants made in aid of railroads to be constructed wholly within a State or Territory; but we are of opinion that the alleged general policy of the government in the matter under consideration is hardly so broad as is [537] claimed for it. We do not think it can be safely asserted that it has been a general policy of the United States government to restrict a grant made to a State, in aid of railroads, to lands within such State, where a part of the line of road extended into one of the Territories. As we have already shown, that part of the grant to the Winona and St. Peters division, by the Act of 1857, was never construed to have that effect.

Another case to which we now refer is conclusive upon that question. By the first section of the Act of Congress of July 23, 1866 (14 Stat. 210), there was granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, a Kansas corporation, to aid in the construction of a railroad from Elwood, Kansas, westwardly *via* Marysville in that State, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of the road to the point of intersection. Such point of intersection was in what was then the Territory of Nebraska. The company filed a map of definite location of its line of road to a connection with the Union Pacific Railroad Company in Nebraska, March 25, 1870, and built sections of the road, from time to time, as far as Hastings, Nebraska, where it made a junction with the Burlington and Missouri River Railroad, July 15, 1872. It never made a junction with the Union Pacific Railroad, unless the Burlington Road is a branch thereof. The road as built did not follow its line of definite location, but deviated from it in some places a few rods, in others, several miles. The company filed its articles of incorporation in the office of the secretary of state of Nebraska, April 1, 1873, but did not otherwise attempt to comply with the laws of that State in respect to foreign corporations extending their lines into that State April 13, 1870, which was after the definite location of the road, one Van Wyck entered, at the Beatrice land office in Nebraska, a portion of an odd section of land in that State within ten miles of the road as definitely located and as actually built, and on the 15th of November, 1871, obtained a patent therefor [5 from the United States. The tract, having been claimed by the railroad company, as a part of its grant, was sold by it to one Knevals, who brought suit in the Circuit Court for the District of Nebraska against Van Wyck, and obtained a decree in that court declaring that Van Wyck had received his patent and the title it conveyed in trust for the company, and that at the commencement of the suit he held the lands in trust for the complainant, to whom it was further decreed that he convey them. That decree was affirmed by this court at October Term, 1882, the case being reported as *Van Wyck* v. *Knevals*, 106 U. S. 360 [27: 201]. One of the defenses interposed to the suit was that the company had not complied with the laws of Nebraska allowing foreign railroad corporations to extend their roads into that State. In treating of that point this court said (p. 369): "As to the want of compliance with the conditions imposed by the laws of Nebraska, allowing railroad companies organized in other States to extend and build their roads within its limits, it is sufficient to say that when the grant was made to the company Nebraska was a Territory, and it was entirely competent for Congress to confer upon a corporation of any State the right to construct a road within any of the Territories of the United States. The grant of land and a right of way for the construction of a road to a designated point within the Territory was sufficient authority for the company to construct the road to that point. It may be well doubted whether the State subsequently created out of the Territory could put any impediment upon the enjoyment of the right thus conferred."

Adopting the reasoning of the court in that case, we say that if it was entirely competent for Congress to confer upon a state corporation the right to construct a railroad in any of the Territories, and obtain lands in a Territory in aid thereof, *a fortiori* might a territorial corporation, under congressional authority, construct a railroad in such Territory and obtain its full quota of lands, even though a part of the Territory embracing the granted lands should afterwards become a State.

The counsel for appellee, to sustain their statement as to the ruling and action of the administrative department upon the land-grant legislation, cite the construction given by Attorney-General Crittenden to the Act of September 20, 1850 (9 Stat. 466), granting lands to the States of Illinois, Mississippi and Alabama, in aid of a railroad from Chicago to Mobile. The first section of that Act granted a right of way one hundred feet wide through the public lands to the State of Illinois, for the construction of a railroad through the public lands within the same limits, followed by provisions, in the first

six sections, declaring the terms, limitations and restrictions of the grant, with two other branches.

By the second section there was granted to the State, for the purpose of aiding in the construction of such railroad and branches, every alternate section of public land designated by even numbers, for six sections in width on each side of said road and branches. The third, fourth, fifth and sixth sections detailed the manner in which the grant should be administered, etc., and the seventh section provided as follows: "That, in order to aid in the continuation of said Central railroad from the mouth of the Ohio River to the City of Mobile, all the rights, privileges and liabilities hereinbefore conferred on the State of Illinois shall be granted to the States of Alabama and Mississippi, respectively, for the purpose of aiding in the construction of a railroad from said City of Mobile to a point near the mouth of the Ohio River, and that public land of the United States, to the same extent in proportion to the length of the road, on the same terms, limitations and restrictions in every respect, shall be, and is hereby, granted to said States of Alabama and Mississippi, respectively."

In the adjustment of the grant, the States of Alabama and Mississippi claimed the right to take lands not only for those portions of the road within the boundaries of those States, but also for that portion in Kentucky and Tennessee, and that question was submitted to the Attorney-General for an opinion. In a well-considered and clear opinion that officer held that such claim of those States could not be sustained, and that each grant was confined to the portion of the line within the territorial limits of the grantee State. There is in that opinion not the slightest reference to the settled policy of the government as a rule of construction, or as in any way indicating the intention of Congress; not the slightest hint that the words of the Statute should be controlled by any presumption based on what is termed the public policy of the government, as to the restriction of land grants. His conclusion was based upon the language of the Act, holding that "the meaning and intention of" Congress "as contained in the seven sections of the Act will be expressed and clearly understood" by taking the first six sections of the Act and applying them first to the State of Alabama and then to the State of Mississippi, etc. Quoting some of the words of the Act, he says: "To give to those words a different construction . . . would lead to inexplicable difficulties and to consequences irreconcilable with plain provisions of the Act." 5 Ops. Atty-Gen. 603.

The other case cited arose under the Act of May 17, 1856 (11 Stat. 15), granting lands to the States of Florida and Alabama "to aid in the construction of certain railroads in said States." The claim of the State of Alabama to select indemnity lands lying in Florida was denied by the then Attorney-General upon the authority of the opinion of Attorney-General Crittenden in the Alabama-Mississippi case above referred to. Neither of these cases support the general policy contended for by the appellee, and each is entirely unlike the one under consideration, where the entire line of road and the entire grant of lands claimed by the appellant are within the limits of the Territory to which the grant was made as it then existed.

Furthermore, at the time the grant of 1857 was made, the State of Minnesota had no existence, and there was no absolute certainty of there being such a State before the road was definitely located and built. Congress was therefore very careful as to the terms in which the grant was made. In the granting clause the language is "that there be and is hereby granted to the *Territory of Minnesota*," etc., while in other parts of the Act, even in the same section, the grant is referred to as having been made to the Territory *or* future State. It is thus seen that the language of the Act was framed to provide for [54 the administering of the grant either by the Territory or by the future State. The object to be accomplished was the building of railroads to those parts of the then Territory which were the most thickly settled, and thus give to the settlers so many highways of commerce to the eastern markets; and it was of little concern to Congress whether the then Territory or the future State was the means of accomplishing the object. Now, had the grant been wholly administered by the Territory, the question under consideration would never have arisen. For had no State been created until after the grant was administered, it is not conceived how the question could have arisen. It hardly seems probable that Congress intended the grant to mean one thing if administered by the Territory, and another thing if administered by the State; or, to speak more accurately, that the grant should be of a certain extent if administered by the Territory, and be greatly diminished if administered by the State.

Again, it is settled law that railroad grants, such as the one under construction, are grants *in præsenti*, and take effect upon the sections of land, when the road is definitely located, by relation, as of the date of the grant. *Van Wyck* v. *Knevals*, 106 U. S. 360 [27: 201]. Had this line of road been definitely located before the State of Minnesota was admitted—that is to say, if the right of the road had attached to its granted lands while Minnesota was yet a Territory—would it be seriously contended for an instant that the land now in dispute did not pass under the grant? We think not, and yet such is the legitimate consequence of the appellee's contention.

It is also urged that these lands did not pass under the grant of 1857, because at that time they were in the occupancy of the Sisseton and Wahpeton bands of Indians. The sixth section of the Act, however, made provision for such an emergency. It is there declared as follows: "That, in case any lands on the line of said roads or branches are within any Indian territory, no title to the same shall accrue, nor shall the same be entered upon by the authority of said Territory or State, until the Indian title to the

same shall have been extinguished." By that
42] section the right of Minnesota to lands within the Indian country was made somewhat in the nature of a float, to become vested when the Indian title was extinguished. When the road was definitely located and the Indian title was extinguished, the land passed to the State for the benefit of the road. *Buttz* v. *Northern Pac. R. Co.*, 119 U. S. 55 [30: 330]. The title of the appellant is complete, and neither the appellee nor the Northern Pacific Railroad under which he claims ever had any title to the land in controversy.

It is immaterial that the appellant did not begin its suit at an earlier date. The decision against it by the Secretary of the Interior, in 1871, was not binding as to the law of the case, and the bringing of the suit in 1884 was in time.

Decree reversed, and cause remanded to the Circuit Court with directions to enter a decree in consonance with this opinion.

542] EDWIN A. MERRITT, Collector of the PORT OF NEW YORK, *Plf. in Err.*,
v.
DONALD CAMERON ET AL.

(See S. C. Reporter's ed. 542-552.)

Duties, when liquidated—time of protest by importer—departmental construction of statute.

1. The ascertainment and liquidation of the duties upon merchandise entered in bond for warehouse may take place at any time after the original entry of the merchandise, and need not be delayed until the importer withdraws his goods for consumption.
2. The ten days referred to in section 2931, Rev. Stat., within which the importer is allowed to protest, begin to run upon the ascertainment and liquidation of the duties upon the merchandise imported.
3. A regulation of a department cannot repeal a statute; and a departmental construction of a statute is not conclusive or binding upon the courts unless such construction has been continuously in force for a long time, and then only when the statute is doubtful and ambiguous.

[No. 84.]

Argued Nov. 19, 20, 1890. Decided Dec. 22, 1890.

IN ERROR to the Circuit Court of the United States for the Southern District of New York, to review a judgment for plaintiff in an action to recover duties on merchandise illegally exacted. *Reversed.*

The facts are stated in the opinion.

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, for plaintiff in error.

Mr. **Stephen G. Clarke,** for defendant in error:

Whatever conclusion the court might otherwise come to is controlled by the action of the Treasury Department in its contemporaneous construction of section 2931.

United States v. *Benzon*, 2 Cliff. 512; *Robertson* v. *Downing*, 127 U. S. 607, 613 (32: 269, 271).

In the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect.

Edward v. *Darby*, 25 U. S. 12 Wheat. 210 (6: 604); *United States* v. *State Bank*, 31 U. S. 6 Pet. 29 (8: 308); *United States* v. *Macdaniel*, 31 U. S. 7 Pet. 1 (8: 587); *Surgett* v. *Lapice*, 49 U. S. 8 How. 48 (12: 982); *Smythe* v. *Fiske*, 90 U. S. 23 Wall. 374 (23: 47); *United States* v. *Moore*, 95 U. S. 760 (24: 588); *United States* v. *Pugh*, 99 U. S. 265 (25: 322); *Swift & C. & B. Co.* v. *United States*, 105 U. S. 691, 695 (26: 1108, 1109); *United States* v. *Hill*, 120 U. S. 169, 182 (30: 627, 632); *United States* v. *Philbrick*, Id. 52, 59 (559, 561); *Brown* v. *United States*, 113 U. S. 568, 571 (28: 1079, 1080); *Burge* v. *Smith*, 27 N. H. 332.

Mr. Justice **Lamar** delivered the opinion [543
of the court:

This was an action at law by Donald Cameron and Donald E. Cameron, composing the firm of Cameron & Co., importers, against the Collector of the Port of New York, to recover certain duties alleged to have been illegally exacted on a cargo of sugar and molasses. The only defense that appears to have been pleaded was, that the protest of the importers against such exaction of duties had not been made within ten days from the ascertainment and liquidation of the duties, as required by section 2931 of the Revised Statutes. The case was tried before *Judge* Shipman and a jury, resulting in a verdict and judgment in favor of the importers for the sum of $1,759.84; and the Collector thereupon sued out a writ of error.

The bill of exceptions, made part of the record, shows the following undisputed facts: On the 26th of July, 1880, Cameron & Co. imported into the United States at the Port of New York, from Demerara, by the steamer Restless, a cargo of sugar and molasses, and made entry of the same for warehouse, in bond, under the laws of the United States for the warehousing of merchandise in bond. The estimated duties on the whole cargo amounted to $11,195.11; and, pursuant to law, the importers gave a bond to the United States, in the penal sum of $23,000 (about double the amount of the estimated duties), containing the following condition: "That if, within one year from the said date of original importation, the said goods, wares and merchandise shall be regularly and lawfully withdrawn from public store or bonded warehouse on payment of the legal duties and charges to which they shall then be subject; or if, after the expiration of one year and within three years from the said date of original importation, they shall be so withdrawn upon the like payment, with ten per centum added upon the amount of such duties and charges; or if, at any time within three years from the said date of original importation, they shall be so withdrawn for actual export beyond the limits of the United States,—then the above obligation to be void; otherwise, to remain in full force."

NOTE.—*As to lien of United States for duties, see note* to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see *note* to Greely v. Thompson, 13: 397.

On the 4th of August, 1880, the importers withdrew the sugar from warehouse for consumption, and paid to the Collector the sum of $10,913.55 as the estimated duties thereon, and on account of the duties to be afterwards ascertained and liquidated by him. The appraisement of both the sugar and molasses was made on the 6th of August, and on the 20th of August the Collector ascertained and liquidated the duties on the whole cargo, as imported, fixing them at $12,157.76, and stamped upon the entry "Liquidated, and notified importer August 20, 1880." What was meant by "liquidated," as thus used, was that the entry had been passed regularly through the various divisions of the Collector's office, and the duties thereon had been finally ascertained and fixed by the custom officials. "Notified importer" meant that the fact of the liquidation had been stated on a sheet of paper which was hung up in the custom-house for the information of the importer. On the 10th of September, 1880, the importers withdrew the molasses from the warehouse for consumption, and paid to the Collector the balance of the duties assessed on the whole cargo, to wit, $1,244.21, of which $327.50 was the whole amount of the duty on the molasses, and $916.71 was the balance of the duties assessed on the sugar.

On the 15th of September, 1880, the importers protested in writing against the exaction of the duties on the sugar as excessive and illegal, and on the same day appealed from the decision of the Collector to the Secretary of the Treasury. On the 22d of January, 1881, the Secretary affirmed the Collector's decision, and on the 19th of April, 1881, the importers brought this suit to recover the duties claimed in their protest.

[545] The evidence introduced by the plaintiffs showed that the excess of duties paid by them over and above the legal duties, including interest on such over-payments, amounted to $1,759.84. It also showed that where merchandise, all of which was covered by one bond, was withdrawn from a warehouse, for consumption, in separate quantities, at different times, the duties paid on the several withdrawals conformed to the estimated duties on the original entry, except that the last or final withdrawal was not paid or settled until it was compared with the warehouse ledger to see whether the correct amount of duties had been paid on the merchandise previously withdrawn. If either too much or too little had been paid, it was noted on the last withdrawal, and a settlement was then made on the basis of the duties, as liquidated. The withdrawal entry of the molasses made September 10, 1880, bore the indorsement in red ink, "To close, $1,244.21;" which indorsement meant that that amount of duties, as liquidated, was yet due on the original cargo of merchandise covered by the bond. Evidence was also introduced tending to show that the practice of the custom-house in New York, and the action of the Collector in the case of the importation in suit, were in accordance with the following paragraph of art. 616 of the general regulations under the Custom-House and Navigation Laws of the United States, etc., issued by the Treasury Department, January 1, 1874: "Goods withdrawn for consumption may be taken at average valuation—care being had that on the last withdrawal the entire balance of duties be collected. Should the final withdrawal entry be for export or transportation, and there be any difference between the actual duty and the amount due, to close the sum due on the warehouse entry, the excess, if any, shall be refunded on the last withdrawal for consumption, and the deficiency, if any, collected on amendment to the entry."

At the close of the testimony the plaintiffs moved the court to direct the jury to find a verdict in their favor for the sum of $1,759.84; and the defendant moved for a verdict in his favor, on the ground that the protest of the plaintiffs had not been made within ten days after the ascertainment and liquidation of the duties assessed by him as collector, [546 as required by section 2931 of the Revised Statutes. The court denied the defendant's motion, and granted that of the plaintiffs. The jury, thereupon, under the direction of the court, found a verdict for the plaintiffs for the sum above specified; and judgment having been entered on the verdict, the defendant sued out a writ of error, as before stated.

There is but one question in the case, viz.: Was the protest of the importers made within the time prescribed by section 2931 of the Revised Statutes? That section reads as follows: "On the entry of . . . any merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid . . . on such merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless . . . the owner, importer, consignee or agent of the merchandise . . . shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury."

Inasmuch as the ascertainment and liquidation of the duties in this case was, in fact, made on the 20th of August, 1880, and the protest of the importers was not filed until September 15 of the same year (twenty-six days thereafter), it would seem to have been clearly too late, under the Statute quoted. The contention of the defendants in error, however, seems to be that the ascertainment and liquidation of the duties referred to in section 2931, from which the ten days begin to run, should have been made, under the law, at the date of the last or final withdrawal of the merchandise covered by the bond; and that, as the protest was filed only five days after that date, it was in time. The decision of this court in

Westray v. *United States*, 85 U. S. 18 Wall. 822, 829 [21: 763], and the rulings of the [547] Treasury Department in force at the time the proceedings in this case took place in the custom-house, are relied on as sustaining their view.

It is undisputed that from 1876 to May 2, 1885 (which period embraced the time when the proceedings in this case took place in the custom-house), the ruling of the Treasury Department was that a protest was in time if made within ten days from the last or final withdrawal of the merchandise covered by the bond. That ruling appears to have been based upon some expressions found in the opinion of this court delivered by *Mr. Justice* Strong in *Westray's Case*, *supra*, decided at October Term, 1873. But in that case, as appears from an examination of it, the question as to when the ascertainment and liquidation of the duties should take place was not involved. The case had reference, it is true, to section 14 of the Act of June 30, 1864 (13 Stat. 214), now embodied in section 2931 of the Revised Statutes, and was a suit by the United States on a bond given by the importers on the entry of goods for warehousing, conditioned for the payment of the duties thereafter to be ascertained. The merchandise was withdrawn for consumption before any ascertainment or liquidation of the duties had taken place, upon the payment of the estimated duties. The collector afterwards ascertained and liquidated the duties, and, upon the refusal of the importers to pay the difference between the duties as liquidated and the duties as estimated at the date of the entry, suit was brought on the bond, in the name of the United States, to recover that difference. At the trial, the importers offered to prove that the duties as liquidated were excessive and illegal, and that they had never received any notice of the liquidation of them by the collector. It was held, however, that the law did not require the collector to notify the importer of the liquidation of the duties, but that the latter was under obligation to take notice of the collector's settlement of the amount of them; that, as no protest had been made, and no appeal had been taken to the Secretary of the Treasury, the decision of the collector had become final; and that evidence to prove that the duties as liquidated [548] were excessive and illegal was not admissible. The language of the opinion which the Treasury Department evidently relied upon as authorizing the ruling that the withdrawal of the merchandise from the warehouse for consumption was the liquidation of the entry referred to in section 2931 of the Revised Statutes, and which is relied upon here to sustain the contention of the defendants in error, is as follows: "The Statute, and the treasury regulations established under it, require that the duties must be ascertained whenever an entry is made, whether it be for warehousing or for withdrawal. In practice, it is true, the liquidation at the time of entry for warehousing is little more than an approximate estimate, and it is mainly for the purpose of determining the amount of the bond to be given. It is made, and the bond is given, before the goods are sent to the warehouse, or even to the appraisers' stores, and before they are weighed, gauged or measured. But the importer enters them and gives the bond, the amount of which is regulated by the estimated amount of duties. It is due to his inattention, therefore, if he does not know what that estimate is at the time when it is made. Equally true is it that he has ample means of knowledge of the second or correct liquidation—that made at the time of the withdrawal entry. One of the conditions of his bond is that he pay the amount of duties to be ascertained under the laws then existing or thereafter enacted. He is thus informed that there is to be another liquidation, and that the law requires it to be made at the time when he shall make his withdrawal entry, and when the duties are required to be paid."

But in view of the facts in that case the language referred to can hardly be considered as warranting the view of the defendants in error; for the withdrawal of the merchandise in that case occurred before the final liquidation of the duties thereon, and if the importer be required to protest within ten days from that date, it might follow that his protest would have to be made before the actual liquidation had taken place. That is to say, in order to guard against all contingencies he would be required to protest against a future liquidation which might prove to be satisfactory to him in all particulars. Such a conclusion is not in harmony with the idea [54 and object of the protest. True, as held in *Davies* v. *Miller*, 130 U. S. 284 [32: 932], the clause, "within ten days after the ascertainment and liquidation of the duties," merely fixes the limit beyond which the notice of protest shall not be given, and not the first point of time at which it may be given. That is to say, the notice of protest may be given before the ascertainment and liquidation of the duties (as was specifically ruled in that case), but it is not required to be given until some time within ten days after the liquidation.

Indeed, in another part of the same opinion in *Westray's Case*, the learned justice used language entirely inconsistent with the theory of the defendants in error. After stating that the decision of the collector had become final by reason of no protest having been made and no appeal having been taken to the Secretary of the Treasury, he said: "The same considerations lead to the conclusion that the circuit court correctly refused to rule that the ten days prescribed by the Statute, within which notice of dissatisfaction is required to be given, did not begin to run until notice of the collector's liquidation was given to the plaintiffs in error, or until they had knowledge thereof. The limitation of the right to complain or to appeal commences with the date of the liquidation, whenever that is made. No notice is required, but the importer who makes the entries is under obligation to take notice of the collector's settlement of the amount of duties." And in the syllabus of the case by the reporter it is said: "The

right of the importer to complain or appeal begins with the date of the liquidation, whenever that is made." These quotations abundantly show, we think, that the question as to when the ascertainment and liquidation should take place was not considered by the court at all, further than that it should take place some time after the entry of the merchandise for warehouse.

We find nothing in the statutes or in any of the decisions of this court warranting the construction contended for by the defendants in error, that the ascertainment and liquidation of the duties referred to in section 2931 should be made at the date of the final withdrawal of the merchandise from the bonded warehouse. On the contrary, we think the ascertainment and liquidation of the duties on merchandise entered in bond for warehouse should follow, in the regular course of business, as soon after the entry as is convenient, just as in the case of merchandise entered for immediate consumption. The statutory regulations as to the ascertainment and liquidation of the duties are the same in the one instance as in the other. The measurement, weighing or gauging of the merchandise, the inspection and appraisal of it, and the determination of its dutiable value, are required to be proceeded with exactly the same in each instance. After the ascertainment of those facts in relation to the entry, the collector has to decide what the duties are in each case. His decision at that time is the ascertainment and liquidation of the duties, referred to in section 2931; and there would seem to be no good reason for his delaying that decision in the case of merchandise entered in bond for warehouse until the convenience of the importer shall suggest the removal of the merchandise from the warehouse.

It is urged, however, that section 2970 of the Revised Statutes, when construed *in pari materia* with section 2931, leads to the conclusion that the liquidation of the duties on merchandise entered in bond should be made when the merchandise is withdrawn for consumption. We do not think so. That section is as follows: "Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after the expiration of one year from the date of original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

In our opinion that section was intended to provide for cases in which a change in the rate of duty had been made by statute while the merchandise was in the bonded warehouse. *Fabbri* v. *Murphy*, 95 U. S. 191 [24: 468]; Act of March 14, 1866 (14 Stat. 7). The first clause of the section means simply that if there has been a change in the rate of duty after the merchandise has been entered in bond, and the withdrawal of the merchandise takes place afterwards, and within one year from the date of the importation, the duties to be paid are such as are fixed by the law in force at the date of the withdrawal. The second clause of section 2970 provides that if the merchandise remain in the bonded warehouse more than one year it may be withdrawn for consumption at any time within three years upon the payment of the duties and charges assessed upon the original entry, and ten per centum in addition. The phrase "duties assessed on the original entry," etc., evidently means the duties on the original entry as finally ascertained and liquidated, within the meaning of those terms, as used in section 2931. In either case, if the statute changing the rate of duties goes into effect after the liquidation of the original entry, a reliquidation must necessarily take place. The two clauses of the section differ in one respect only, viz., in a ten per cent increase of duties, where the merchandise remains in the warehouse more than one year, and is withdrawn within three years from the date of importation. This construction renders the two sections of the Statute harmonious.

Upon a careful examination of the question at issue, we are of opinion that the ascertainment and liquidation of the duties upon merchandise entered in bond for warehouse may take place at any time after the original entry of the merchandise, and that it is not required to be delayed until the importer chooses to withdraw his goods for consumption. The ten days referred to in section 2931, within which the importer is allowed to protest, begin to run upon such ascertainment and liquidation of the duties; and, therefore, the protest in the case at bar was too late.

In arriving at this conclusion we are not unmindful of the fact that the defendants in error made their protest in accordance with the regulations of the Treasury Department in force at that time. A regulation of a department, however, cannot repeal a statute; [551
neither is a construction of a statute by a department charged with its execution to be held conclusive and binding upon the courts of the country, unless such construction has been continuously in force for a long time. The cases cited go to that extent and no further. In regard to the law under consideration the construction of it by the Treasury Department has not been uniform. The construction contended for by defendants in error first arose in 1876 and lasted only until 1885, since which time the construction has been the same as in this decision. There is no such long and uninterrupted acquiescence in a regulation of a department, or departmental construction of a statute, as will bring the case within the rule announced at an early day in this court, and followed in very many cases, to wit, that in case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and should not be disregarded without the most cogent and persuasive reasons. *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 206

[6: 603]; *United States* v. *Hill*, 120 U. S. 169, 182 [30: 627, 632]; *Robertson* v. *Downing*, 127 U. S. 607 [32: 269]; and very many other cases.

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with directions to set aside the verdict and grant a new trial.

I am requested to say that *Mr. Justice* **Brewer** dissents from this opinion and judgment, on the ground that the practice of the Department at the time the proceedings in the custom-house took place, and the action of the Secretary of the Treasury in the matter of the protest and appeal, ought to take the case out of what he concedes to be the correct construction of the Statute.

---

[556] BROOKE MACKALL, *Appt.*,
v.
GEORGE W. CASILEAR ET AL.

(See S. C. Reporter's ed. 556–567.)

Suit to decree deed void—effect of compromise—laches—when equity will not aid a party—assertion of a claim.

1. If a deed is void upon its face, the interference of a court of equity in a suit to decree the deed to be null and void is unnecessary.
2. Where one has accepted a deed from his father, completely condoning causes of complaint which he had against his father, he cannot, after his father's death, go behind that final and satisfactory compromise, because, upon some ground outside of anything in dispute between them, his brothers and sisters succeed in defeating the deed in a controversy between him and them.
3. The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale demands.
4. Where the difficulty of doing entire justice by reason of the death of the principal witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence.
5. The mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded.

[No. 97.]

Argued Nov. 26, Dec. 1, 1890. Decided Dec. 22, 1890.

APPEAL from a decree of the Supreme Court of the District of Columbia affirming a decree of the Special Term sustaining a demurrer and dismissing a suit to decree certain deeds null and void, and for an account. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

Brooke Mackall, Jr., filed his bill of complaint in the Supreme Court of the District of Columbia on the first day of June, 1885, against George W. Casilear and wife, Leonard Mackall and wife, Don Barton Mackall, Benjamin Mackall, Louise Owens and husband, Catherine Christy and husband, Edmund Brand and Mary E. Keller, alleging that Leonard, Don Barton and Benjamin were his brothers, and Louise Owens and Catherine [557] Christy his sisters, all being the sole surviving children of Brooke Mackall, Sr., and Martha Mackall, his wife; and that Edmund Brand and Mary E. Keller were the sole surviving children of Louis Brand.

The bill then stated: That on or about December 21, 1863, complainant became owner in fee simple, through a conveyance to him from Charles W. Pairo, George Randolph, executor, and Brooke Mackall, Sr., of lots in the City of Washington, D. C., as follows:

Lot 2, square 5; lots 3 and 7, square 17; lot 3, square 31; lot 15, square 41; lot 2, square 42; lot 5, square 43; lot 12, square 56; lot 10, square 62; lots 13, 14 and 17, square 76; and a copy of the deed was annexed. That on or about May 5, 1866, complainant executed his promissory notes to the order of his father, and a deed of trust to said Brooke Mackall, Sr., as trustee, which deed was acknowledged before the latter as notary public, upon lot 2, square 5; two parts of lot 12, square 56; and lots 14, 17 and part of 13, square 76,—which was recorded June 5, 1867, and a copy whereof was annexed; that there was no consideration for these notes, but they were made for the accommodation of complainant's father for the purpose of borrowing money for the benefit of both, but no money was borrowed, and it was not intended that any claim on the notes should be set up against the complainant, and there was no default in the payment of the same; that about seven years after, a variance occurring between complainant and his father, his father, having possession of the notes, without complainant's knowledge or consent, advertised said property for sale, except one subdivision of lots 13 and 14, square 76, which had in the meantime been otherwise disposed of by complainant; that the advertisement (a copy of which was annexed) was published only on three successive days, though the trust deed required a publication of sixty days; that it was intended that the sale should be kept concealed from complainant, and it was not held on the premises, but at the rooms of the auctioneer: that no bidders were present, and at the instance of his father the property was struck off nominally to one Joseph B. Hill, but really for the benefit of complainant's father, no money being ever paid by Hill, and his name being used that it might not appear that the trustee was a purchaser at his own sale; that this was a scheme devised by the father to devest the son of his property and obtain it himself without paying

---

NOTE.—*As to cancellation of a deed or a contract, in equity, for fraud, concealment or misrepresentation*, see *note* to Neblett v. Macfarland, 23: 471.

As to deed; avoided in equity, by fraud, insanity, drunkenness, duress, undue influence, fraud on marriage; from ward to guardian, from heir to executor, cestui que trust *to trustee; imbecility,*—see *note* to Harding v. Handy, 6: 429.

As to Statute of Limitations, in case of fraud, in equity, see *note* to Stearns v. Page, 12: 928.

As to Statutes of Limitations as applicable to equity cases, see *note* to Thomas v. Brockenbrough, 6: 287.

anything whatever for it; that in pursuance of such scheme, a deed (a copy of which was annexed) was executed by Brooke Mackall, Sr., as trustee, to Hill, for the nominal consideration of $2,000, though Hill paid nothing; and complainant charged that the deed was void and of no effect. This deed was dated June 26, and recorded July 2, 1873.

The bill further averred that on or about March 13, 1867, complainant conveyed to one Morsell (a copy of which deed was attached) lot 15, square 41, and lot 5, square 43, in trust to secure complainant's promissory note for $1,000, payable one year after date, to the order of his father, which note was indorsed over to Mills and wife, and was paid in full and so admitted to be paid by a deed conveying the same property dated July 14, 1868, by Morsell, Mills and wife and complainant to Louis Brand to secure in trust complainant's promissory note for $2,000, payable to his father's order one year after date (a copy of which instrument was attached); that the $2,000 note was an accommodation note and made to raise money for the common benefit of both parties, but no money was raised, and there was no consideration for the note; that about five years thereafter, there occurring a variance between father and son, the father, in pursuance of a similar scheme as that charged as to the other parcels, procured Brand to advertise the property for sale, and though publication for three weeks was required, the advertisement was published only four times successively, and for three days; that this was without the consent or knowledge of complainant, and without written request as prescribed, and the place of sale was at the private rooms of the auctioneer; that there were no bidders at the sale, but at the request of Brooke Mackall, Sr., lot 15, square 41, and sublots 2, 3, 4 and 5, lot 5, square 43, were struck off to Hill at the nominal sum of $2,000, he paying no money, and Brooke Mackall, Sr., being the real purchaser, and no payment or account was made to complainant, whereupon a conveyance in the handwriting of Brooke Mackall, Sr., was executed by said Louis Brand, trustee, to Hill, a copy of which was annexed, showing that the deed was recorded July 28, 1873; and complainant charged that the sale and deed were void. Complainant further averred that on the 4th of August, 1873, Hill executed a conveyance (a copy of which was annexed) to John C. McKelden and Edward McB. Timoney, as trustees, to secure a note of $3,000 of B. Mackall, Sr., to F. A. Casilear, due in one year from the date thereof; that said trustee and said Casilear had full knowledge of the defects of title herein mentioned, and were not bona fide purchasers or creditors; that in October, 1874, default having been made by B. Mackall, Sr., in payment of the note of $3,000, the trustees McKelden and Timoney advertised the property secured in the deed of trust to them for sale, and thereupon the complainant, at the date and place of sale so advertised, and before the sale, read a notice and caused copies thereof to be served upon Timoney and McKelden, and Williams, the auctioneer, which notice was attached to the bill, and was to the effect that Timoney, McKelden and Williams had no authority to sell the premises, and that Mackall, Jr., would insist upon all his legal rights to the premises against them and against any purchaser or purchasers thereof, and protested against the sale; that the trustees proceeded to sell, and thereupon Casilear bid in the property at $2,722.95, and a deed was given by McKelden and Timoney, as trustees, of sublots 2 and 3 of lot 5, square 43; lot 17, square 76, and two parts of lot 12, square 56; that on the 13th day of January, 1874, Hill, as trustee and in his own right, and B. Mackall, Sr., joined in a conveyance to Leonard Mackall, as trustee, of lot 15, in square 41; sublots 2, 3, 4 and 5 of lot 5, square 43; lots 13, 14 and 17 in square 76, and two parts of lot 12, square 56, for the use and benefit of Mackall, Sr., and subject to his absolute control and disposal; that Mackall, Sr., departed this life February 28, 1880, and the brothers and sisters of complainant claim the property so conveyed to Leonard Mackall as trustee, as his heirs and devisees: that Casilear claims title to lot 17, square 76, and two parts of lot 12, square 56, as derived from the deed of Mackall, Sr., to Hill, and to sublots 2 and 3 of lot 15, square 43, as derived from the deed of Brand to Hill; that complainant's brothers and sisters claim title to lots 13, 14 and 17, square 76, and two parts lot 12, square 56, as derived from the deed of B. Mackall, Sr., to Hill, and lot 15, square 41, and sublots 2, 3, 4 and 5, square 43, as derived from the deed of Louis Brand to Hill, which two deeds of B. Mackall, Sr., are declared to be void, but a cloud upon the property; and that complainant, though not having the legal title, but being equitably entitled thereto, was entitled to have such deeds with all subsequent claims of title decreed null and void. Complainant further stated that some of the reasons for the delay which had occurred in his not before having filed a bill to set aside the said conveyances were as follows: [560]

"As to Casilear, he at all times has protested against his claim, notifying him at the time of his purchase that he should not submit to the sale, and he has since then been engaged in negotiations from time to time with him, orally and by mutual correspondence in writing, which he has hoped would result in a settlement and adjustment of their differences in regard to the property held by him. He has received large amounts by way of rents and profits of said property and has made no substantial improvements thereon.

"As to the remainder of such property, he says that soon after the execution of the deeds made in 1874 the said B. Mackall, Sr., became reconciled to complainant, they living together and sharing the benefit of all property possessed by each in common. He, said B. Mackall, Sr., constantly assured complainant that he would rectify all that was wrong in said conveyances to the best of his ability, which assurance was relied upon by complainant and was satisfactory to him.

"Said B. Mackall Sr., drew up forms of reconveyance to complainant of such property or parts thereof, one of which he signed and delivered to complainant, and which are now in possession of complainant.

"In Feb'y, 1880, he did execute a reconveyance of all his interests in said property, which was entirely satisfactory to the complainant, though such reconveyance was attacked by his said brothers and sisters, and a decree was made adjudging the same to be void as to the property herein claimed by complainant, from which decree, however, they claim to have taken an appeal to the Supreme Court of the United States, and which appeal they claim is now pending, though such claim is not admitted by complainant. While such litigation was pending, however, there was, as believed by complainant, no propriety in bringing suit to enforce what he claimed to have been sufficiently performed by the execution of said deed of his father's to him of Feb'y 28th, 1880, and such litigation was pending at a very recent date."

[561]

Complainant prayed process and that the defendants might answer the bill under oath; that the two deeds of B. Mackall, Sr., trustee, and Brand, trustee, to Hill be adjudged and decreed to be null and void, together with all deeds, etc., under the same; that complainant be adjudged to be the owner of the property free and clear of all claims and demands of the defendants, and entitled to an account; and that an account be taken; and for general relief.

To this bill the defendants Casilear and wife demurred upon the ground of multifariousness, laches and want of equity, and the other defendants also demurred upon the ground of prior decree, multifariousness, etc. The latter demurrer was sustained January 19, 1886, and the bill dismissed. On the 28th day of January it was stipulated on behalf of the Casilears that the bill might be considered as amended by adding the averments: "That the complainant had no knowledge of the sales to Hill or either of them at the time of the conveyance to McKelden and McB. Timoney;" that "the fair value of the property sold by McKelden and McB. Timoney, trustees, to Casilear was $7,500;" and that "Brooke Mackall, Sr., left complainant only one dollar by his will, giving all the rest of his estate to his other children," etc. The demurrer on behalf of the Casilears was then sustained and the bill dismissed. The cause was taken from the special to the general term of the court and the decree of the special term affirmed. Thereupon an appeal was taken to this court.

Messrs. **Samuel Shellabarger** and *Jeremiah M. Wilson* for appellant.

Messrs. **J. J. Darlington** and **S. S. Henkle** for appellees.

[563] *Mr. Chief Justice* **Fuller** delivered the opinion of the court:

Apart from the prayers for process, an account and for general relief, the specific relief sought is that the two deeds of B. Mackall, Sr., trustee, and Louis Brand, trustee, to Joseph B. Hill be decreed to be null and void, together with all deeds, written instruments and claims of title whatever derived through the same, and that complainant be adjudged to be the owner of the property, free and clear from all claims and demands of the defendants or either of them.

The deed of complainant to Mackall, senior, was dated May 5, 1866, and recorded June 5, 1867. The deed of Mackall to Hill was dated June 26, and recorded July 2, 1873. Brand's title was derived through a conveyance by complainant to Morsell, dated March 13, 1867, and the conveyance of Morsell, Mills and complainant to him, dated July 14, 1868. The deed from Brand to Hill was dated and acknowledged July 29, 1873, and presumably recorded the same day, though the record gives the date as July 28. The bill was filed June 1, 1885. The death of Mackall, Sr., was stated to have occurred February 28, 1880. This attack was delivered, then, more than nineteen years after the deed to Mackall, about seventeen after that to Brand and nearly twelve years after the other two deeds were recorded.

It is charged that the deed of May 5, 1866, was given to secure complainant's two notes, amounting to nearly $600 in the aggregate, for the purpose of borrowing money for the use of father and son, but that no money was ever borrowed thereon; and that the deed to Brand was given to secure a note for $2,000 payable to Mackall, Sr., for the same purpose, likewise not carried out.

Counsel for complainant insisted upon the argument that the deed from Mackall, Jr., to Mackall, Sr., was void, because Mackall, Sr., took the acknowledgment, and that the sales made by Brand and Mackall, Sr., to Hill were invalid by reason of the omission to advertise for the time prescribed, and the want of publicity in the conduct of the sales, and because these transactions were merely covers for the purchase by Mackall himself in fraud of complainant's rights.

If the general rule that an acknowledgment is not essential to the validity of a deed as between the parties applies here, the fact that a grantee cannot take the acknowledgment of a conveyance to himself would be immaterial in this case. The execution of this deed to Mackall was expressly averred by complainant and its delivery conceded, but he alleged that it was given to secure notes for the purpose of borrowing money for himself and his father, and that this was not done.

There is no prayer for specific relief in relation to it, nor do we think the averments such as would entitle complainant to resort to the prayer for general relief, to set it aside, by reason of the want of acknowledgment, if that were a proper ground; and, if void upon its face, as now contended, the interference of a court of equity would seem to be unnecessary. *Phelps* v. *Harris*, 101 U. S. 370, 375 [25: 855, 856]. We shall not, therefore, review the various Statutes of Maryland, Acts of Congress and authorities referred to by counsel as tending to justify the position that in the District of Columbia

a deed is not operative, even as between the parties, notwithstanding delivery, unless it be acknowledged and recorded.

As already stated, nineteen years after the conveyance to Mackall, Sr., seventeen after that to Brand, twelve after the deeds to Hill and five after Mackall's death, the son charges the father with what his counsel calls "actual, active and intense fraud;" and, in explanation of the delay in seeking to be relieved from the consequences of this conduct on his father's part, says that "soon after the execution of the deeds made in 1874" (the conveyances by Hill and Mackall, Sr., to Leonard Mackall, and by McKelden and Timoney to Casilear, were in 1874), his father became reconciled to him, and they lived together and shared the benefit of all property possessed by each in common, and his father constantly assured him that he would rectify all that was wrong in said conveyances to the best of his ability, which assurance was relied upon by complainant and was satisfactory to him; that his father drew up forms of reconveyance to him of such property or parts thereof, one of which he signed and delivered to complainant; and that "in February, 1880, he did execute a reconveyance of all his interests in said property, which was entirely satisfactory to complainant, though such reconveyance was attacked by his said brothers and sisters, and a decree was made adjudging the same to be void as to the property herein claimed by complainant, from which decree, however, they claim to have taken an appeal to the Supreme Court of the United States, and which appeal they claim is now pending, though such claim is not admitted by complainant. While such litigation was pending, however, there was, as believed by complainant, no propriety in bringing suit to enforce what he claimed to have been sufficiently performed by the execution of said deed of his father's to him of February 28, 1880, and such litigation was pending at a very recent date."

As complainant did not appeal from the decree passed against him in favor of his brothers and sisters in relation to this property, it must still stand as a bar, and it is not easy to see why, under the circumstances stated by complainant, that litigation did not include the same matters and things which are drawn in controversy in this suit.

Supposing that the bill of the complainant's brothers and sisters attacked the deed of February 28, 1880, upon the ground that its execution was secured by undue influence, would it not devolve upon the defendant in that case, the complainant herein, to set up that he was in fact the owner of the property; that his father had obtained the conveyance from him under circumstances constituting a fraud upon him; and that the deed of February, 1880, was given by the deceased in order to restore to the defendant, complainant here, what he had been wrongfully deprived of? And as complainant contends such were the facts, why was not that defense set up? If such were not the facts, what becomes of the complainant's bill?

But, assuming that the matters relied on here are not necessarily inconsistent with that decree, then, according to his own contention, complainant occupies this position: Having accepted a deed from his father completely [56 condoning the causes of complaint which he alleges he had against him, he now, after his father's death, seeks to go behind that final and satisfactory compromise, because upon some ground, outside of anything litigated in this suit, his brothers and sisters succeeded in defeating the deed in a controversy between him and them. This we think he cannot do; nor can we admit complainant's ideas of propriety in bringing this bill, while that was pending, or in declining to litigate these matters in that action, as furnishing any satisfactory explanation of the laches which has characterized his conduct. If that laches could in any respect be held to be excused by reason of his expectations from his father, we cannot allow him to plead that, because those expectations in part failed of realization through some external cause, therefore he is any the less bound, so far as his dead father is concerned, by a delay which would otherwise be fatal.

The doctrine of laches is based upon grounds of public policy, which requires for the peace of society the discouragement of stale demands. And where the difficulty of doing entire justice by reason of the death of the principal witness or witnesses, or from the original transactions having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence. *Jenkins* v. *Pye*, 27 U. S. 12 Pet. 241 [9:1070]; *McKnight* v. *Taylor*, 42 U. S. 1 How. 161, 168 [11:86, 88]; *Godden* v. *Kimmell*, 99 U. S. 201 [25:431]; *Landsdale* v. *Smith*, 106 U. S. 391 [27:219]; *Le Gendre* v. *Byrnes*, 44 N. J. Eq. 372, 12 Cent. Rep. 815; *Wilkinson* v. *Sherman*, 45 N. J. Eq. 413.

The time for this son to have attacked his father on the ground of fraud was prior to that father's death; yet no movement was made to set aside these alleged fraudulent conveyances, until five years after that event transpired. The father died testate, and by his will the property in controversy, subject to the Casilear conveyances, passed to the brothers and sisters of complainant, as the father's devisees, who were natural objects of the bounty of the testator, and, so far as this record shows, entitled to his consideration. The allegations of the bill fall far [56 short of discharging the burden, which rested on the complainant, of satisfying the court that his delay had not operated to the prejudice of these parties.

Without regard to the deed of February, 1880, the rule in question would forbid relief, and, so far as that deed is concerned, complainant could not elect to take under it and then claim that delay was excused while he experimented in trying his case by piecemeal. Of course it must be admitted that an affectionate son would feel a natural reluctance to make a charge of fraud against his father, but where the time consumed in

overcoming this is prolonged as in this instance, we cannot recognize the relationship as sufficient explanation of the laches.

These views are applicable to the defendants Casilear. Casilear purchased at a sale under a trust deed given to secure a note for $3,000, in respect to which there is no allegation that the note was not for value received. The excuse for the delay is that complainant protested against Casilear's claim and notified him that he would not submit to the sale; but the mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded. It is said, however, that complainant had been engaged in negotiations from time to time with Casilear, orally and by mutual correspondence in writing, which complainant hoped would result in a settlement and adjustment of their differences in regard to the property held by him; but the bill does not state that Casilear gave any encouragement to such hopes, or ever promised any settlement or adjustment, or ever conceded that his purchase was in any respect doubtful, or ever in any way recognized the claims of the complainant.

Under the circumstances we entertain no doubt that the demurrers were properly sustained, and *the decree is affirmed.*

---

[521] R. CARTER WELLFORD ET AL., *Appts.*,
v.
WILLIAM TAYLOE SNYDER, Trustee.

(See S. C. Reporter's ed. 521-528.)

Will—absolute bequest—connecting clauses.

1. Where a testator bequeaths to his four daughters $20,000 apiece, to be invested in stock or securities, which he directs his executors to hold in trust for his said daughters respectively, and apply the income thereof, as it shall accrue, to their several use and benefit, each daughter has the absolute property in that sum, which will pass by her will.

2. The subsequent provisions of the will that from and after the intermarriage of any of his daughters, his executors shall hold the stock or securities belonging to said daughter so marrying in trust for the maintenance of herself and husband for life, and, after the death of both, for such issue as she may leave at her death, and if she shall die without issue, then for her surviving sisters and the issue of any deceased sister, do not affect the absolute title of a daughter who never marries.

[No. 105.]

Argued Dec. 5, 8, 9, 1890. Decided Dec. 22, 1890.

APPEAL from a decree of the Supreme Court of the District of Columbia, in favor of a legatee of Virginia Tayloe, and construing the will of her father as making an absolute bequest to her. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was a bill in equity, in the nature of a bill of interpleader, for the construction of the will, dated July 1, 1824, of John Tayloe, by which, after providing for his wife, giving an annuity of $1,200 to a daughter-in-law, making a devise to a grandson, and devising and bequeathing the greater part of his lands and personal property to his six sons, he provided for his daughters as follows:

"Having, at the time of the intermarriage of my daughter Mrs. Henrietta Hill Key, settled upon her ten thousand dollars, I give and bequeath to the said Henrietta ten thousand dollars more to be settled upon her, to her own separate use during her life, and after her death upon her children and their descendants. I wish, however, to be taken, as a part of the ten thousand dollars now bequeathed, about fifteen hundred and seventy-two dollars ninety and a half cents, which I paid on account of her husband a short time since, and for which a settlement of slaves has already been made upon her; and also any other sums of money which I have heretofore paid, or may hereafter pay or become liable for on account of her said husband. These sums are to form a part of the ten thousand dollars hereby directed to be settled, and are not to be taken in addition thereto.

"I give and bequeath to my daughters Catharine, Elizabeth M., Virginia and Anne O. Tayloe twenty thousand dollars apiece, to be vested in United States Bank stock or in government securities, which stock or securities I do hereby direct that my executors hereinafter named shall hold in trust for my said daughters respectively, and shall apply the dividends, interest or profits of the said stock or securities to the use and benefit of my said daughters Catharine, Elizabeth M., Virginia and Anne O. Tayloe severally and respectively, as the said dividends, interest and profits shall accrue; and from and after the intermarriage of any of them, then my said executors shall hold the said bank stock or other securities belonging to the said daughter so marrying, in trust for the following purposes, that is to say, in trust for the maintenance of her and her husband during their joint lives, then in trust for the survivor of the said husband and wife during his or her life, and after the death of such survivor, then in trust for such issue as she may leave at the time of her death. And in case she shall die without leaving such issue, then in trust for her surviving sisters (my other daughters) and the issue of any deceased sister—such issue taking such share as the deceased sister whom they represent would have taken, had she been alive to take. And it is my intention that the said stock and securities, as also the dividends, interest or profits thereof, shall be utterly free from the power or control of the husbands of my said daughters. And the better to secure the payment of these my daughters' fortunes, I do hereby direct that,

NOTE.—*As to interpretation of wills; intention of testator to govern,*—see *note* to Pray v. Belt, 7: 309.

As to conditions precedent and subsequent; who may perform, and their effect; implication; unperformed,—see *notes* to Taylor v. Mason, 6: 101; United States v. Clarke, 9: 89.

if the funds hereinafter particularly appropriated for the payment of debts and legacies shall be insufficient for payment of debts and legacies, my estate generally must be charged to make up the deficiency to my said daughters."

He then set apart, as a fund for the payment of debts and legacies, certain real and personal estate, and all the residue of his estate of every kind not specifically devised or bequeathed; and gave to his sons any surplus of this fund remaining after payment of debts and legacies.

By a codicil, dated March 4, 1825, he provided as follows: "James Baker, Esq., having intermarried with my daughter Catharine, I have given him, in part of the fortune intended to be bequeathed to my said daughter, the sum of five thousand dollars, and my said son-in-law having expressed a wish that all the rest of the fortune intended for his said wife should be settled upon her, I have annexed this codicil for the purpose of carrying that wish into effect, and do hereby declare that all estate and interest whatsoever bequeathed by my said will to my said daughter Catharine (except the five thousand dollars given as aforesaid in part thereof) shall be taken and received to be in trust to my said daughter Catharine to her separate use and to her representatives, as designated and limited in that clause of my will in which I have made provision for my daughters, it being my intention that no further part of the said Catharine's fortune shall be enjoyed by the said James Baker, but as the separate estate of his wife."

The will and its codicils were admitted to probate March 14, 1828.

[524] The case was set down for hearing on bill and answers, and was as follows: John Tayloe's daughters Catharine, Elizabeth M. and Anne O. married and died, leaving children or grandchildren. His daughter Virginia died unmarried, leaving a will by which she bequeathed the sum of $20,000, bequeathed to her by her father, to a daughter of Anne O. The question presented to the court was whether by the will of John Tayloe this sum vested in his daughter Virginia so as to pass by her will, as her legatee and administrator contended; or, as contended by the grandchildren of Elizabeth M., went, upon the death of Virginia unmarried and without issue, to her sisters or their issue.

The court entered a decree in favor of Virginia Tayloe's legatee. 5 Mackey, 443. The grandchildren of Elizabeth M. appealed to this court.

Mr. **Leigh Robinson,** for appellants:

If a testator gives an absolute interest in lands or personalty and afterwards shows that he means the donee to take a less estate, the prior gift will be so restricted.

Sheets' Estate, 52 Pa. 257; 3 Cruise, Real Prop. (Greenl. ed.) 343; *Urich's App.* 86 Pa. 386; *Terry* v. *Wiggins*, 47 N. Y. 512; *Bell* v. *Warn*, 4 Hun, 406; *Collier* v. *Grimesey*, 36 Ohio St. 22; *Baxter* v. *Bowyer*, 19 Ohio St. 490; *Smith* v. *Bell*, 31 U. S. 6 Pet. 76 (8: 325).

A court of equity will look to the clear intention of the testator.

Lucas v. *Lockhart*, 10 Smedes & M. 466; *Woodruff* v. *Woodruff*, 32 Ga. 361; *Barrus* v. *Kirkland*, 8 Gray, 514; *Butler* v. *Gray*, L. R. 5 Ch. 26; *Dean* v. *Hart*, 62 Ala. 309; *Pillow* v. *Wade*, 31 Ark. 683; *Snyder* v. *Baker*, 5 Mackey, 458.

In construing a will grammatical accuracy may be disregarded; and it should be read with a view to the situation and circumstances of the testator.

Kelly v. *Bronson*, 26 Minn. 361; *O'Neall* v. *Boozer*, 4 Rich. Eq. 22; *Keith* v. *Perry*, 1 Desaus. 353; *Roberts* v. *Watson*, 4 Jones, L. 319; *Boston Safe Deposit & Trust Co.* v. *Coffin* (Mass.) 8 L. R. A. 740; *Ross* v. *McHose*, 26 Mo. 590.

A gift to a trustee of personal property, without words of limitation, vests in him the whole estate subject to the trust.

Hanson v. *Worthington*, 12 Md. 418; *Bentley* v. *Kauffman*, 86 Pa. 99; *Prewett* v. *Land*, 36 Miss. 495.

The rule which gives an absolute interest in the fund, where there is a general gift of the income, is not a very strong rule.

Blann v. *Bell*, 5 De G. & Sm. 663, 2 De G. McN. & G. 781; *Innes* v. *Mitchell*, 6 Ves. Jr. 466; *Wetherell* v. *Wetherell*, 4 Giff. 59; *Hamilton* v. *Lloyd*, 2 Ves. Jr. 415.

The placing of property, whether real or personal, in the hands of a trustee, upon a distinct trust to pay over the income to the beneficiary, but with equal clearness not to pay over the principal, gives to the beneficiary a vested equitable estate for life.

Brandon v. *Robinson*, 18 Ves. Jr. 429; *Dick* v. *Pitchford*, 1 Dev. & B. Eq. 480; *Havens* v. *Healy*, 15 Barb. 301; *Bacon's App.* 57 Pa. 504-514; *Akers* v. *Akers*, 23 N. J. Eq. 31.

The bequest in controversy amounts to no more than a bequest to an unmarried woman and her children, in which case she takes a life estate, with remainder to her children, if any.

Dean v. *Hart*, 62 Ala. 308; *Fales* v. *Currier*, 55 N. H. 392; Perry, Trusts, § 363; Lewin, Trusts, 105; *Bain* v. *Lescher*, 11 Sim. 397; *Newman* v. *Nightingale*, 1 Cox, 341; *Hollister* v. *Shaw*, 46 Conn. 248; *Hatfield* v. *Sohier*, 114 Mass. 48.

A gift over of the legacy or share of a legatee dying under certain circumstances only takes effect if the death happens in the testator's lifetime.

Varley v. *Winn*, 2 Kay & J. 700; *McKinnon* v. *Peach*, 2 Keen, 555; *Home* v. *Pillans*, 2 Myl & K. 15; *Salisbury* v. *Petty*, 3 Hare, 86; *Edwards* v. *Edwards*, 15 Beav. 357; *Whitney* v. *Whitney*, 45 N. H. 311; *Briggs* v. *Shaw*, 9 Allen, 516; *Hill* v. *Hill*, 5 Gill & J. 87.

If, however, the bequest be in remainder after a life interest, the gift over is not restricted to death in the testator's lifetime, but operates during the continuance of the life interest.

Herve v. *McLaughlin*, 1 Price, 264; *Galland* v. *Leonard*, 1 Swanst. 163; *DaCosta* v. *Keir*, 3 Russ. 360; *Johnston* v. *Antrobus*, 21 Beav. 558; *Edwards* v. *Edwards*, 15 Beav. 364.

Personal property may be limited over after a life estate, but not after a gift of the absolute property.

2 Kent, Com. 352; *Cuthbert* v. *Purrier*, 1 Jac.

415, 4 Cond. Eng. Ch. 415; *Jackson* v. *Bull*, 10 Johns. 20; *Jackson* v. *Robins*, 16 Johns. 537; *Ide* v. *Ide*, 5 Mass. 504; *Burbank* v. *Whitney*, 24 Pick. 155.

Where the first taker of an interest in lands has an absolute estate therein, a limitation over by the way of executory devise is void.

Hoxsey v. *Hoxsey*, 37 N. J. Eq. 21; *Reinders* v. *Koppelmann*, 68 Mo. 482; *Wead* v. *Gray*, 78 Mo. 65.

The limitation over after the fee is void.

Karker's App. 60 Pa. 141; Fearne, Cont. Rem. 401; *Lassence* v. *Tierney*, 1 McN. & G. 551; *Armstrong* v. *Kent*, 21 N. J. L. 509.

Messrs. **Wm. Pinkney Whyte** and **Henry Wise Garnett**, for appellee:

The intention of a testator is to be collected from the words of the will.

Bowly v. *Lammot*, 3 Har. & J. 4; *Dougherty* v. *Monett*, 5 Gill & J. 459; *Chamberlain* v. *Owings*, 30 Md. 454.

A devise over of personal property must be done by express words or necessary implication.

Evans v. *Iglehart*, 6 Gill & J. 185; *Cassilly* v. *Meyer*, 4 Md. 10; *Edelen* v. *Middleton*, 9 Gill, 161.

A gift of personal estate without words of limitation is sufficient to pass the absolute interest, and a bequest of the income or annual produce of a fund is equivalent to a gift of the principal.

Hawkins, Wills, 123.

An indefinite bequest of the dividends gives the absolute property of stock.

Page v. *Leapingwell*, 18 Ves. Jr. 463.

Gift of the interest of the capital sum of $1,000 to wife for her sole use and benefit, free from debts or control of any husband, is held absolute gift of capital.

Humphrey v. *Humphrey*, 1 Sim. N. S. 536; *Kerry* v. *Derrick*, Cro. Jac. 104.

Devise of the rents of an estate is held to pass the fee.

2 Redf. Wills (2d ed.) 329; *Manning* v. *Craig*, 4 N. J. Eq. 436.

A bequest of the interest or produce of a fund, without limitation as to the extent of its duration, is a bequest of the fund itself.

Garret v. *Rex*, 6 Watts, 14; *Pennsylvania Co's App.* 83 Pa. 312; *Millard's App.* 87 Pa. 457; *Collier* v. *Collier*, 3 Ohio St. 369; Jarman, Wills, 257, 784.

A gift of personalty to trustees, to pay the interest to A, is an absolute gift of the principal.

Elton v. *Shephard*, 1 Bro. Ch. 532 (App.); *Haig* v. *Swiney*, 1 Sim. & Stu. 487; *Adamson* v. *Armitage*, 19 Ves. Jr. 416.

When the interest or produce of a fund is bequeathed to a legatee, or in trust for him, without any limitation as to continuance, the principal will be regarded as bequeathed also.

Craft v. *Snook*, 13 N. J. Eq. 121; *Gulick* v. *Gulick*, 27 N. J. Eq. 498; *Earl* v. *Grim*, 1 Johns. Ch. 494, 1 N. Y. Ch. L. ed. 220; *McMichael* v. *Hunt*, 83 N. C. 344; *Sproul's App.* 105 Pa. 438; *Smith's App.* 23 Pa. 9; *Sheriff* v. *Brown*, 3 Cent. Rep. 772, 5 Mackey, 172.

A gift of income or produce of a fund, unaccompanied by words limiting the duration of the benefaction, confers an absolute estate.

Philips v. *Chamberlaine*, 4 Ves. Jr. 53; *Rawlins* v. *Jennings*, 13 Ves. Jr. 39; *Adamson* v. *Armitage*, 19 Ves. Jr. 416; *Stretch* v. *Watkins*, 1 Madd. 253; *Clough* v. *Wynne*, 2 Madd. 188; *McLoskey* v. *Reid*, 4 Bradf. 341.

Mr. Justice **Gray** delivered the opinion [525] of the court:

The decision of this case depends upon the true construction of that paragraph in John Tayloe's will by which he bequeaths to [526] four of his daughters the sum of $20,000 each. Neither the other paragraphs of the will, nor the codicils, appear to us to have any material bearing.

The testator begins by giving and bequeathing to each of these four daughters the sum of $20,000 apiece, to be invested in United States Bank stock or government securities, which he directs his executors to hold in trust for his said daughters respectively, and to apply the income thereof, as it shall accrue, to their several use and benefit. Had the testator stopped here, there could be no doubt that the bequest to each daughter of the principal sum and of the income thereof vested in her the absolute property in that sum, which would pass by her will, or, if she died intestate, to her representatives. *Page* v. *Leapingwell*, 18 Ves. Jr. 463, 467; *Adamson* v. *Armitage*, 19 Ves. Jr. 416, 1 Coop. 283; *Garret* v. *Rex*, 6 Watts, 14; *Fairfax* v. *Brown*, 60 Md. 50. The last sentence of the paragraph, by which the testator, if a fund afterwards appropriated for the payment of debts and legacies shall be insufficient, charges his whole estate with the payment of "these my daughters' fortunes," and "to make up the deficiency to my said daughters," tends to the same conclusion.

The operation of such general words to pass an absolute title may doubtless be restricted by a context manifesting an intention that the legatee shall take an estate for life only. *Wetherell* v. *Wetherell*, 4 Giff. 51, and 1 DeG. J. & S. 134; *Sheets' Estate*, 52 Pa. 257. The real question, therefore, is how far the intermediate provisions, in the paragraph under consideration, restrict the effect of the general words of bequest to the four daughters.

The testator introduces those provisions by directing that "from and after the intermarriage of any of them" his executor shall hold the stock or securities "belonging to the said daughter so marrying, in trust for the following purposes," expressed in three sentences: 1st. For the maintenance of her and her husband and the survivor of them for life, and after the death of both "for such issue as she may leave at the time of her death." 2d. "And in case she shall die without leaving such issue," then for her surviving sisters and the issue of any deceased sister. 3d. The testator declares it [5 to be his intention that both principal and income "shall be utterly free from the power or control of the husbands of my said daughters."

By the order and connection of these sentences, and by the natural and grammatical meaning of the words used, none of them apply to daughters who never marry. The preliminary supposition or postulate, that "from and after the intermarriage of any of

them" the executor shall hold the stock or securities "belonging to the said daughter so marrying, in trust for the following purposes," underlies and attends all the provisions by which those purposes are defined. Of those provisions, as above classified, the first and the third, making mention of husbands, cannot possibly apply except to married daughters; and immediately after the last words of the first, by which upon the death of a married daughter and her husband her share is to go to "such issue as she may leave at the time of her death," follow the words, "And in case she shall die without leaving such issue," which define the event in which the second provision shall take effect. In this connection, the word "she" in the singular, and the words designating her issue, relate grammatically, as well as naturally, to the married daughter and her issue, just mentioned, and not to the four daughters, married or unmarried, and to issue of unmarried ones. The three provisions, whether viewed separately and according to the letter, or as a whole and according to the manifest spirit and intent, all have one aim, and one only, that the share of any married daughter (the income only being received by herself and her husband for life) shall never pass into the husband's ownership or control, but shall vest in her issue, if she leaves any, otherwise in the testator's other daughters or their issue.

The general design of the testator is manifest to give all his daughters equal portions; the provisions with regard to the shares of those who marry are not inconsistent with this design, but are intended to preserve the benefit of the bequest to the daughters and their children; and those provisions do not affect the absolute title of a daughter who never marries.

This conclusion is in accord with a long
[8] line of English decisions of high authority in similar cases. *Whittell* v. *Dudin*, 2 Jac. & W. 279; *Hulme* v. *Hulme*, 9 Sim. 644; *Winckworth* v. *Winckworth*, 8 Beav. 576; *Gompertz* v. *Gompertz*, 2 Phill. 107; *Lassence* v. *Tierney*, 1 Macn. & G. 551, 2 Hall. & T. 115; *Corbett's Trusts*, H. R. V. Johnson, 591; *Kellett* v. *Kellett*, L. R. 3 H. L. 160, 168, 169. See also *Gulick* v. *Gulick*, 25 N. J. Eq. 324, and 27 N. J. Eq. 498.

The court below, therefore, rightly held that the principal of the sum bequeathed to Virginia Tayloe, who never married, vested in her absolutely, and went to her legatee.

Decree affirmed.

---

[3] JOHN CADWALADER, Collector, *Plf. in Err.*,

v.

ARTEMUS PARTRIDGE ET AL.

(See S. C. Reporter's ed. 553-555.)

Duties—protest, when filed—decision of secretary.

1. A protest against the illegal exaction of duties on goods imported must be filed within ten days after the ascertainment and liquidation of the duties, or it will be too late; it is not sufficient that such protest shall be filed within ten days from the time the goods are withdrawn from the warehouse for consumption. Where the protest is filed too late, the decision of the collector as to the duties becomes final.

2. A decision by the Secretary of the Treasury, or by a court, reversing a previous erroneous ruling of the department, is of no aid to an importer who has not duly protested against a similar ruling with respect to another importation.

[No. 311.]

Submitted Nov. 25, 1890. Decided Dec. 22, 1890.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment in favor of plaintiff in an action to recover duties illegally exacted on merchandise imported. *Reversed.*

The facts are stated in the opinion.

Mr. **Wm. H. Taft**, *Solicitor-Gen.*, for plaintiff in error.

Mr. **Frank P. Prichard** for defendants in error.

Mr. Justice **Lamar** delivered the opinion of the court:

This was an action at law by Artemus Partridge and Thomas D. Richardson, trading as Partridge & Richardson, against John Cadwalader, Collector of Customs for the District of Philadelphia, to recover back certain alleged illegal and excessive duties exacted on merchandise imported at that port by them.

The only defense set up by the Collector was that the protest of the importers against the assessment of the duties was not filed with him within ten days from the ascertainment and liquidation of them, as required by section 2931 of the Revised Statutes.

The case was tried by the court and a jury, which returned a special verdict, substantially as follows: On June 28 and July 22, 1886, the plaintiffs, who were merchants in Philadelphia, imported into that port three [554
cases of buttons, which were duly entered for warehouse, in bond, the proper bonds being given on each entry. On the 27th of July and the 14th of August, 1886, respectively, the Collector liquidated the duties on the entries, at the sum of $139.50, being at the rate of 45 per cent *ad valorem*, as brass buttons, under section 6 of the Act of March 3, 1883, which rate was in accordance with the instructions of the Treasury Department then in force. No protests were made by the plaintiffs against these liquidations, and no appeal was taken from those decisions of the Collector. On November 6, December 4 and December 8, 1886, the plaintiffs withdrew the buttons from the warehouse for consumption. In the mean time, the Treasury Department had decided that the proper rate of duties on buttons of the character of those imported was but 25 per cent *ad valorem*, as buttons not specially enumerated or provided for. When the buttons were withdrawn from the warehouse for consumption, at the dates aforesaid, the plaintiffs were compelled to pay the duty as assessed and liquidated by

NOTE.—*As to lien of United States for duties*, see *note* to United States v. 350 Chests of Tea, 6: 702.

As to action to recover back duties paid under protest; protest, how made, and its effect,—see *note* to Greely v. Thompson, 12: 397.

the Collector, to wit, $139.50. Within ten days from the date of such withdrawals, the plaintiffs protested against that exaction of duty, and afterwards appealed to the Secretary of the Treasury, who, on Feburary 25, 1887, affirmed the Collector's decision. This suit was brought on March 15, 1887. The amount of the duty exacted, over and above the amount claimed by the plaintiffs to be due, was $62.

The verdict concludes as follows: "And the said jurors say that they are ignorant, in point of law, on which side they ought, upon the facts, to find the issue; but that if the court should be of opinion that plaintiffs were obliged to protest against the liquidation made at the time of the entry of the goods for warehouse, in order to take advantage of the legality of the exaction of the duties at the time of the entry for consumption and application to withdraw from the warehouse, then they find for defendant; but that if the court should be of opinion that plaintiffs' protest, made within ten days of the defendant's refusal to allow the goods to be withdrawn from the warehouse, except [555] upon payment of the duties in accordance with the liquidation made at the time of entry for warehouse, was in time, then they find for the plaintiffs in the sum of $62, with interest from December 8, 1886." On this verdict the circuit court, on the 28th of October, 1887, entered a judgment for $62 in favor of the plaintiffs, and the Collector thereupon sued out this writ of error.

This case is similar in all essential features to *Merritt* v. *Cameron* [*ante*, p. 772], just decided, except that the proceedings in the custom-house in this case took place after May 2, 1885, when the Treasury Department adopted the rule that protests should be filed within ten days after the ascertainment and liquidation of the duties; and we are not confronted, therefore, with a treasury ruling at variance with the construction we have put upon section 2931 of the Revised Statutes. The protests in this case, as appears from the facts above set forth, were too late, and the decision of the Collector upon the ascertainment and liquidation of the duties thus became final.

We do not think the change in the ruling of the Treasury Department, whereby merchandise such as is involved in this case was held dutiable at a greatly reduced rate, makes any material difference between this case and *Merritt* v. *Cameron*. On this point we are inclined to adopt the view of the solicitor-general that "a decision by the Secretary, or by a court, reversing a previous erroneous ruling of the Department, is of no aid to an importer who has not duly protested against a similar ruling with respect to another importation."

The judgment of the Circuit Court is reversed, and the case is remanded to that court, with a direction to set aside the verdict and grant a new trial.

BALTIMORE AND POTOMAC RAILROAD COMPANY, *Plff. in Err.*, [56
v.
FIFTH BAPTIST CHURCH OF WASHINGTON, D. C.

SAME
v.
SAME.

(See S. C. Reporter's ed. 568–576.)

Corporation de facto—*misnomer—expression of opinion upon the facts, by judge in charging jury—judgment for nuisance.*

1. It is only necessary to prove that the plaintiff is a corporation *de facto*, to enable it to maintain an action against anyone, other than the State, who has contracted with the corporation, or who has done it a wrong.
2. A misnomer, or mere mistake in the name, of a corporation plaintiff, which does not affect its capacity to sue in the right name, is pleadable in abatement only, and is waived by pleading to the merits.
3. The expression of an opinion upon the facts by the judge to the jury, in any court of the United States, is within the discretion of the judge, and, when no rule of law is incorrectly stated, and all matters of facts are submitted to the jury, cannot be reviewed on writ of error.
4. A judgment recovered in a former action for damages for a nuisance cannot bar a subsequent action for the continuance of the same nuisance, nor diminish the measure of damages to be recovered for such continuance.

[Nos. 121, 122.]
Argued Dec. 18, 19, 1890. Decided Jan. 5, 1891.

IN ERROR to the Supreme Court of the District of Columbia, to review judgments in favor of the plaintiff, the Fifth Baptist Church of Washington, against the Baltimore & Potomac Railroad Company, defendant, in an action for the continuance of a nuisance to the plaintiff's use of its house of public worship. *Affirmed.*

The facts are stated in the opinion.

Mr. **Enoch Totten,** for plaintiff in error:

The plaintiff was never incorporated, and never was a body corporate, as alleged in its declaration.

Doyle v. *Miener*, 42 Mich. 332; *Baptist Church of Washington* v. *Baltimore & P. R. Co.* 4 Mackey, 43; *First Baptist Soc.* v. *Rapalee*, 16 Wend. 605; *Mokelumne Hill Canal & Min. Co.* v. *Woodbury*, 14 Cal. 424; *Harris* v. *McGregor*, 29 Cal. 124; *People* v. *Selfridge*, 52 Cal. 331;

NOTE.—*As to measure of damages for nuisance*, see *note* to Baltimore & P. R. Co. v. Fifth Baptist Church, 27: 739.

As to who may maintain action for public nuisance, and when; special damage necessary; method of abatement,—see *note* to Georgetown v. Alexandria Canal Co. 9: 1012.

When injunction will be granted against a nuisance. See *note* to Irwin v. Dixion, 18: 25.

Bigelow v. *Gregory*, 73 Ill. 197; *Indianapolis Furnace & Min. Co.* v. *Herkimer*, 46 Ind. 142; *Burt* v. *Farrar*, 24 Barb. 519; *Ferraria* v. *Vasconcelles*, 23 Ill. 456; *Williams* v. *Franklin Twp. Asso.* 26 Ind. 316; *Fire Department* v. *Kip*, 10 Wend. 266; 1 Redf. Railways, 64; *McIntire* v. *McLain Ditching Asso.* 40 Ind. 107; *Heinig* v. *Adams & W. Mfg. Co.* 81 Ky. 300; *Stowe* v. *Flagg*, 72 Ill. 397; *Utley* v. *Union Tool Co.* 11 Gray, 139; *Unity Ins. Co.* v. *Cram*, 43 N. H. 636, 641; *Re Devereaux*, 54 Ga. 673; *McCallion* v. *Hibernia S. & L. Soc.* 70 Cal. 163; *Childs* v. *Hurd*, 32 W. Va. 66; *Day* v. *Mill Owners Mut. F. Ins. Co.* 75 Iowa, 694; *First Cong. Church* v. *Webber*, 54 Mich. 571.

The documentary evidence admitted to prove user was incompetent for that purpose.

Baltimore Cemetery Co. v. *First Independent Church*, 13 Md. 117; *Moulor* v. *American L. Ins. Co.* 111 U. S. 335 (28: 447).

The actions were not brought in the name and style assumed as the corporate name, and the plea denying the existence of the corporation is a good defense here for that reason.

People v. *Fulton*, 11 N. Y. 94; *Robertson* v. *Bullions*, Id. 243, 9 Barb. 64; *First Baptist Soc.* v. *Rapalee*, 16 Wend. 605; 1 Chitty, Pl. 256; *Buncombe Turnp. Co.* v. *Newland*, 4 Dev. L. 463; *Illinois Insane Hospital* v. *Higgins*, 15 Ill. 185; *Bundy* v. *Birdsall*, 29 Barb. 35; *Bradford* v. *Water Lot Co.* 58 Ga. 280; *Burnham* v. *Strafford County Sav. Bank*, 5 N. H. 446; *Chubb* v. *Upton*, 95 U. S. 666 (24: 523).

The plea denying the incorporation is a good plea, and puts in issue the existence of the corporation.

Boston T. & S. Foundry v. *Spooner*, 5 Vt. 93; *Christian Society* v. *Macomber*, 3 Met. 235; *Methodist Church* v. *Wood*, 5 Ohio, 286; Ang. & A. Corp. 633; *Ætna Ins. Co.* v. *Wires*, 28 Vt. 93; *Rheem* v. *Naugatuck Wheel Co.* 33 Pa. 356; *Proprietors of Southould* v. *Horton*, 6 Hill, 504; *Society for Propagation of Gospel* v. *Pawlet*, 29 U. S. 4 Pet. 480 (7: 927); *Indianapolis Furnace & Min. Co.* v. *Herkimer*, 46 Ind. 142.

Messrs. **M. F. Morris, J. J. Darlington** and *G. E. Hamilton*, for defendant in error:

When there has been on the part of an association a bona fide attempt to organize as a body corporate under a law under which the powers assumed might lawfully be created or exercised, followed by user of the rights claimed to be thereby conferred, at least a corporation *de facto* results, whose validity only the State by a direct proceeding can assail, and which it is not open to third parties to attack collaterally.

Whitney v. *Wyman*, 101 U. S. 392 (25: 1050); *Union Nat. Bank of St. Louis* v. *Matthews*, 98 U. S. 621 (25: 188); *Fritts* v. *Palmer*, 132 U. S. 282 (33: 317); *Bank of Toledo* v. *International Bank*, 21 N. Y. 542; *Methodist E. U. Church* v. *Pickett*, 19 N. Y. 482; *Eaton* v. *Aspinwall*, 19 N. Y. 119; *Buffalo & A. R. Co.* v. *Cary*, 26 N. Y. 75; *Mead* v. *Keeler*, 24 Barb. 20; *Holmes* v. *Gilliland*, 41 Barb. 568; *Caryl* v. *McElrath*, 3 Sandf. 176; *Merrick* v. *Reynolds E. & G. Co.* 101 Mass. 381; *Searsburgh Turnp. Co.* v. *Cutler*, 6 Vt. 315; *Keene* v. *Van Reuth*, 48 Md. 184; *Lord* v. *Essex Bldg. Asso.* 37 Md. 327; *Taggart* v. *Western Maryland R. Co.* 24 Md. 596; *Tarbell* v. *Page*, 24 Ill. 46; *Rice* v. *Rock Island & A. R. Co.* 21 Ill. 93; *Cincinnati, L. & C. R. Co.* v. *Danville & V. R. Co.* 75 Ill. 113; *Ewing* v. *Robeson*, 15 Ind. 26; *Heaston* v. *Cincinnati & Ft. W. R. Co.* 16 Ind. 275; *Gaines* v. *Bank of Mississippi*, 12 Ark. 769; *Thompson* v. *Candor*, 60 Ill. 244; *Spring Valley Water Works* v. *San Francisco*, 22 Cal. 434; *Stockton & L. G. Road Co.* v. *Stockton & C. R. Co.* 45 Cal. 680; *Perse & B. Paper Works* v. *Willett*, 1 Robt. 131.

Mr. Justice **Gray** delivered the opinion of the court:

These two actions are in the nature of actions on the case for the continuance of a nuisance to the plaintiff's use and enjoyment of its house of public worship, by the noise, smoke, cinders, ashes and vapors from the defendant's adjoining engine house, repair shop and locomotive engines, and by the obstruction of access to the plaintiff's building [569
by the defendant's unlawful use of its side track in front of it.

The plaintiff heretofore brought in the court below a similar action against the defendant for maintaining the same nuisance from April 1, 1874, to March 22, 1877, and at the trial thereof on the general issue recovered a verdict and judgment for $4,500, which was affirmed by this court, and the amount thereof, with interest, was paid by the defendant. *Baltimore & P. R. Co.* v. *Fifth Baptist Church*, 108 U. S. 317 [27: 739].

The present actions were brought and tried separately; one of them was brought March 24, 1880, for damages since March 24, 1877, and resulted on March 24, 1886, in a verdict and judgment for $6,000; and the other was brought June 11, 1883, for damages since June 11, 1880, and resulted on April 22, 1886, in a verdict and judgment for $7,000. In each of these two actions there were the following proceedings:

The declaration was headed "The Fifth Baptist Church of Washington, D. C., by its Trustees, *v.* The Baltimore and Potomac Railroad Company," and alleged that the plaintiff was a body corporate in the District of Columbia, under and by virtue of the General Corporation Act of May 5, 1870, chap. 80, § 2 (16 Stat. 99, 100); Rev. Stat. D. C. §§ 533-544.

The defendant pleaded in bar: 1st. "That the said plaintiff was not at the time of the commencement of this suit, and never was, a body corporate or politic, as set forth and alleged in and by said declaration." 2d. Not guilty. The plaintiff joined issue on these pleas.

The plaintiff, upon the issue presented by the first plea, and to prove its user of corporate rights, offered the following evidence, which was admitted against the defendant's objection and exception:

1st. The original of the following certificate of incorporation, signed and sealed by the six persons named therein:

"We, C. C. Meador, George M. Kendall, John N. Henderson, Samuel M. Yeatman, James C. Deatley and Samuel S. Taylor, of Washington City in the District of Columbia, do hereby certify that we have been duly elected 'Trustees of the Fifth Baptist Church of Washington City, D. C.' (commonly called 'the Island Baptist Church'), [57

and that this certificate is made, signed and sealed for the purpose of obtaining corporate rights and privileges for the said 'Fifth Baptist Church,' a religious society worshiping at present in their church edifice on D Street South, between Four-and-a-half and Sixth Streets in said City of Washington, under the provisions of an Act of Congress approved May 5, 1870, entitled 'An Act to Provide for the Creation of Corporations in the District of Columbia by General Law.'

"In testimony whereof we hereunto set out hands and affix our seals this twenty-fourth day of August, in the year of our Lord one thousand eight hundred and seventy-one."

Annexed to this paper were a notary public's certificate of its acknowledgment on the same day by these six persons; an affidavit of one of them, dated May 1, 1885, that the statements in the certificate of incorporation were true; a memorandum of the recorder that the paper was recorded September 5, 1871; and another memorandum that it was recorded May 1, 1885.

2d. A recorder's copy of the certificate of incorporation, acknowledgment and affidavit, as recorded May 1, 1885.

3d. That in the year 1871 it became necessary for the plaintiff, in order to complete its church edifice, to borrow money upon a mortgage of its land; and that to promote this object, and upon the recommendation of its finance committee, a special meeting was called, and was held on July 2, 1871, at which the Church (which had been known as the Island Baptist Church) resolved to become incorporated under the name stated in the above certificate of incorporation, and elected as its trustees the six persons named therein, and fixed their term of office at three years; and thereupon that certificate was prepared and signed by the trustees and recorded.

4th. Three deeds, respectively dated September 26, 1871, September 18, 1872, and November 10, 1874, from the six persons named in the above certificate of incorporation, describing themselves as "trustees of the Fifth Baptist Church of Washington City, D. C.," reciting its incorporation under the General Corporation Act, and its resolution authorizing them to execute the deeds, and conveying the church building and land, in trust and by way of mortgage, to secure the payment of various sums of money.

571]

5th. Two deeds of release of the same building and land, dated November 9, 1874, from the grantees to the grantors in the first two of the trust deeds aforesaid.

6th. The record of the judgment in the former action between these parties.

The plaintiff also introduced, without objection, evidence tending to show "that its present church edifice was begun about the year 1866 and was completed at a cost of about $22,000, exclusive of the ground; that the property is worth about $30,000, and has been occupied and used by the plaintiff's society or congregation since the year 1867 as its place of religious worship; and that during the period covered by this suit its actual church membership, consisting, as *in all* Baptist churches, of persons who have been baptized after a profession of faith, numbered about four hundred persons, exclusive of the persons attending services there as members of the congregation who were not members of the Church."

It may be that, as held by the court below in 4 Mackey, 43, at a former stage of one of these cases, the original certificate of incorporation, not stating the date of election or the term of office of the trustees, nor supported by affidavit, as required by statute, was not sufficient of itself to prove the plaintiff's existence as a corporation, either *de jure* or *de facto;* and that the adding of an affidavit to the certificate, and recording it anew, since the commencement of these actions, could not avail the plaintiff.

But the certificate of incorporation, as originally drawn up, taken in connection with the other evidence now introduced, and especially the record of the former action in which this plaintiff as a corporation recovered judgment against this defendant without any objection being taken to the plaintiff's capacity to sue, is clearly competent and sufficient, as between these parties, to prove that the plaintiff had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation *de facto,* which is all that is necessary to enable it to maintain an action against anyone, other than the State, who has contracted with the corporation, or who has done it a wrong. *Bank of United States* v. *Dandridge*, 25 U. S. 12 Wheat. 64, 72 [6: 552, 555]; *Conard* v. *Atlantic Ins. Co.* 26 U. S. 1 Pet. 386, 450 [7: 189, 217]; *Chubb* v. *Upton*, 95 U. S. 665 [24: 528]; *Williamsburg City F. Ins. Co.* v. *Frothingham*, 122 Mass. 391; *Searsburgh Turnp. Co.* v. *Cutler*, 6 Vt. 315; *Cincinnati, L. & C. R. Co.* v. *Danville & V. R. Co.* 75 Ill. 113; *Stockton & L. G. Road Co.* v. *Stockton & C. R. Co.* 45 Cal. 680.

[57

It is objected that the evidence admitted, if sufficient to prove that the plaintiff was a corporation, did not prove that it was the corporation which brought this action; because the evidence was that the corporate name was "The Fifth Baptist Church of Washington, D. C.," whereas the action, as stated in the declaration, was brought by "The Fifth Baptist Church of Washington, D. C., by its Trustees."

It may well be doubted whether the words "by its Trustees," as here used, are part of the name of the plaintiff. They may have been inserted, like "by attorney" or "by next friend," to indicate by whose agency, and not in whose behalf, the action is brought. By the General Corporation Act, both the title in real estate, and the right to sue, are vested in the trustees "by the name and style assumed as aforesaid," that is to say, in the name and behalf of the corporation. Act of May 5, 1870, chap. 80, § 2 (16 Stat. 99, 100); Rev. Stat. D. C. §§ 534, 539, 540.

But if these words in the declaration can be taken as part of the plaintiff's name, the most that is shown is a mistake in that name. While *nul tiel corporation*, or that the plaintiff is not and never was a corporation, is a good plea in bar, because it goes to show that the plaintiff can never maintain any ac-

tion whatever, yet *misnomer*, or mere mistake in the name of a corporation plaintiff, which does not affect its capacity to sue in the right name, is pleadable in abatement only, and is waived by pleading to the merits. Bro. Abr. *Misnomer*, 73; *Society for Propagation of Gospel* v. *Pawlet*, 29 U. S. 4 Pet. 480, 501 [7: 927, 934]; *Christian Society* v. *Macomber*, 3 Met. 235, 237; Gould, Pl. chap. 5, § 79.

Upon the issue of not guilty, the plaintiff and the defendant respectively further introduced evidence similar to that given at the trial of the former action and stated in 108 U. S. 318-320 [27: 739].

The court at the plaintiff's request gave the following instructions to the jury, to each of which the defendant excepted:

"If the jury find from the evidence that the church property of the plaintiff described in the declaration was acquired and held as a place of religious worship by said plaintiff before the engine house and repair shop of the defendant were built, and that said engine house and repair shop, during the three years immediately preceding the filing of the declaration, as they were used by the defendant, rendered it impossible for the plaintiff to occupy its building with comfort as a place of public worship; that the hammering in the shop, the rumbling of the engines passing in and out from the engine house, the blowing off of steam, and the smoke from the chimneys, with its cinders, dust and offensive odors, created during said period a constant and serious disturbance of the religious exercises of the Church; that the noise was frequently so great that the voice of the pastor while praying or preaching could not be heard; that the chimneys of the engine house were, during the three years embraced in this suit, allowed to continue lower in height than the windows of the Church, and that smoke and cinders from them were thrown into the Church in such quantities as to cover the seats with soot and soil the garments of the worshipers; that disagreeable odors, added to the noise, smoke and cinders, rendered the place uncomfortable as a place of worship and unsuitable for the purposes to which it was devoted,—then the plaintiff is, as a matter of law, entitled to recover, and it is the duty of the jury to measure in damages the extent of the injury suffered by the plaintiff from these various grievances during the three years immediately preceding the bringing of this suit."

"In the estimate of damages, the plaintiff is entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, if you find such inconvenience and discomfort to have been occasioned, thus tending necessarily to destroy the use of the building for the purposes for which it was erected and dedicated. The congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house; and it is the discomfort and annoyance in its use for those purposes for the three years covered by this suit which is the primary consideration in allowing damages. There may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure."

It is objected to these instructions that the evidence did not warrant the assumption that the use of the defendant's engine house and repair shop rendered it "impossible" for the plaintiff to occupy its building with comfort; or that the noise, smoke and cinders created a "constant" disturbance; or that the voice of the preacher, while praying and preaching, "could not be heard;" or that the smoke and cinders were thrown into the Church in such quantities as to "cover the seats with soot;" or that there had been inconvenience and discomfort caused to the congregation, "tending necessarily to destroy" the use of the building for the purposes for which it was erected and dedicated.

But all the expressions objected to were taken from the opinion of this court in the former case, and are open to no just exception in matter of law. 108 U. S. 329, 335 [27: 743, 745]. And if they can be construed as expressing an opinion upon the facts, the expression of such an opinion is within the discretion of the judge presiding at a trial by jury in any court of the United States, and, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 545 [30: 257]; *United States* v. *Philadelphia & R. R. Co.* 123 U. S. 113 [31: 138]; *Lovejoy* v. *United States*, 128 U. S. 171 [32: 389].

The only other point relied on arises upon the defendant's request for an instruction to the jury, in the second of the present actions, that if they should be satisfied from the evidence that the plaintiff was entitled [575] to a verdict, then in estimating damages they might take into consideration the payment by the defendant to the plaintiff of the judgment in the former action, and the judgment against the defendant in the first of the present actions. The court refused so to instruct the jury, except with this qualification: "But the fact of such previous recoveries against the defendant is not admissible for the purpose of reducing the amount of damages, if any, to which the jury may find the plaintiff is justly entitled in the present action." The defendant excepted to this instruction, as well as to the refusal to give the instruction requested.

The instruction, as given, was quite favorable enough to the defendant. The design of the request, as avowed in the brief of its counsel, "was to give the jury an opportunity to equalize the verdicts, should they deem either of the other two either too high or too low, and to do justice according to their notions."

But the jury in the last case had nothing to do with the assessment of damages in either of the earlier cases. The three actions were brought to recover damages for injuries during distinct and successive periods of three years each. The former action was not for damages which were the necessary or natural effect of the erection of the defend-

ant's structures, which might be recovered once for all; but it was for the injury suffered before the commencement of that action by reason of the wrongful use of those structures. And each of the present actions was brought, not for damages consequential upon the injury for which the plaintiff had already recovered judgment, but for damages caused by the new injury from the continuance of the nuisance, which could only be recovered in each action for the three years before its commencement. The judgments recovered in the former action and in the first of the present actions could not therefore have any effect to bar the last action, or to diminish the measure of the damages to be recovered by it. *Troy* v. *Cheshire R. Co.* 23 N. H. 83, 102; *Warner* v. *Bacon*, 8 Gray, 397, 402, 405, 406; *Fowle* v. *New Haven & N. Co.* 107 Mass. 352, 355, 112 Mass. 334.

[576] The cases at bar afford a good illustration of the rule of law, and of its application, as stated by Blackstone: "Indeed every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it." 3 Bl. Com. 220.

If the damages assessed by the jury in either of these two actions were thought excessive, the defendant's only remedy was by motion for a new trial in the court below, and that has already been resorted to without success. 5 Mackey, 269.

Judgments affirmed.

---

[576] ABRAHAM LLOYD, *Plff. in Err.*,
v.
JOHN McWILLIAMS, Collector.

(See S. C. Reporter's ed. 576, 577.)

Findings of fact, when necessary for review.

Where the case was tried by the court, a trial by jury being duly waived, but there is no finding upon the facts, there is no question that can be reviewed in this court; and if the circuit court had jurisdiction the case will be affirmed.

[No. 109.]

Argued Dec. 10, 1890. Decided Dec. 15, 1890.

IN ERROR to the Circuit Court of the United States for the District of Rhode Island, to review a judgment for defendant in an action to recover back duties illegally exacted upon merchandise imported. *Affirmed.*

The facts are stated in the opinion.

Messrs. Chas. Levi Woodbury and **J. P. Tucker** for plaintiff in error.

Court declined to hear further argument.

Mr. Wm. A. Maury, Assistant Atty-Gen., for defendant in error.

Fuller, *Ch. J.:*

[577] In this cause, trial by jury was waived by agreement of the parties in writing, duly filed, and the case was tried by the court. But the record discloses no finding upon the facts, either general or special, in accordance with the Statute (Rev. Stat. §§ 649, 700), and no questions are therefore open to our revision as an appellate tribunal.

As the circuit court had jurisdiction of the subject matter and the parties, *its judgment must be presumed to be right, and on that ground affirmed.*

DAVID PRESTON ET AL., *Plffs. in Err.*, [
v.
JAMES B. PRATHER ET AL.

(See S. C. Reporter's ed. 604-615.)

Case, practice on—deposit in bank of bonds—duty of bank—banker, when liable for bonds deposited, and stolen by cashier—damages.

1. Where a case was heard by the court below without a jury, and its special findings cover all questions of fact, and there are no exceptions, the only question before this court is whether the facts found are sufficient to support the judgment.
2. Where bonds are received by bankers for safe keeping, without compensation, for the benefit of the owner, their obligation is to exercise such reasonable care of the bonds as men of common prudence usually exercise over their own property.
3. Where bonds are deposited with a banker, and held by him as collateral to loans made to the owner, the banker must give such care over the bonds as a prudent owner would extend to his own property, and is liable for the loss of the bonds, if caused by his own neglect, though not amounting to gross negligence.
4. Where a banker knows that his cashier, who has no property except his salary, and has access to the securities deposited with the bank, has been speculating in grain, and makes no examination to ascertain whether such cashier has been using such securities, but retains him in his position, such banker is guilty of negligence, and is responsible for bonds deposited in the bank, which are stolen by such cashier.
5. Where bonds are stolen from a bank with which they are deposited, under such circumstances as to render the bank liable for their loss, the measure of the recovery against it is the value of the bonds at the time they were stolen.

[No. 115.]

Argued Dec. 11, 1890. Decided Jan. 5, 1891.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment for bonds deposited with defendants, bankers, and stolen by their cashier. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John P. Wilson, P. S. Grosscup,** *W. P. Fennell* and *M. D. Brainard*, for plaintiffs in error:

The stolen bonds were held as a special deposit at the date when they were stolen.

Reynes v. *Dumont*, 130 U. S. 354 (32: 934);

NOTE.—*As to liability of bailee for loss by theft or robbery*, see *note* to Boyden v. United States, 20: 527.

As to liability of bank for general deposits, see *note* to Planters Bank of Tennessee v. Union Bank of Louisiana, 21: 473.

As to special deposits, responsibility of bank for, see *note* to First Nat. Bank of Carlisle v. Graham, 25: 750.

Duncan v. *Brennan*, 83 N. Y. 487; *Wyckoff* v. *Anthony*, 90 N. Y. 442; *Neponset Bank* v. *Leland*, 5 Met. 259.

The bonds being held on special deposit, plaintiffs in error would be liable for their loss only in the event of such loss being caused by their gross negligence.

Foster v. *Essex Bank*, 17 Mass. 479; *Giblin* v. *McMullen*, L. R. 2 P. C. 317; *Whitney* v. *First Nat. Bank of Brattleboro*, 55 Vt. 154; *First Nat. Bank of Allentown* v. *Rex*, 89 Pa. 308; *Tompkins* v. *Saltmarsh*, 14 Serg. & R. 275; *First Nat. Bank* v. *Graham*, 100 U. S. 699 (25: 750).

The facts found by the court are insufficient to sustain the judgment, even if the bonds were held under an agreement that the same should be collateral for overdrafts.

Smith v. *First Nat. Bank of Westfield*, 99 Mass. 605; *First Nat. Bank of Allentown* v. *Rex*, 89 Pa. 308: *Scott* v. *National Bank of Chester Valley*, 72 Pa. 471.

Messrs. **Huntington W. Jackson** and *Robert Hervey*, for defendants in error:

Plaintiffs in error are liable, first, as bailees for reward; second, as gratuitous bailees.

Tyng v. *Grinnell*, 92 U. S. 467 (23: 733); *Baltimore Third Nat. Bank* v. *Boyd*, 44 Md. 47; *Dearborn* v. *Union Nat. Bank of Brunswick*, 61 Me. 372; *Cutting* v. *Marlor*, 17 Hun, 573; *Second Nat. Bank of Erie* v. *Ocean Nat. Bank*, 11 Blatchf. 362, 369; *Archer* v. *Walker*, 38 Ind. 472: Story, Bailm. § 23; *Erie Bank* v. *Smith*, 3 Brewst. 9; *First Nat. Bank* v. *Graham*, 100 U. S. 699 (25: 750); *Lancaster County Nat. Bank* v. *Smith*, 62 Pa. 47; *Maury* v. *Coyle*, 34 Md. 235; *Pattison* v. *Syracuse Nat. Bank*, 80 N. Y. 82; *Ganley* v. *Troy City Nat. Bank*, 98 N. Y. 487; *Skelley* v. *Kahn*, 17 Ill. 170; *United Society* v. *Underwood*, 9 Bush, 621.

Naked bailees are guilty of gross negligence who retain in office one whose integrity may be reasonably suspected; if he is known to be a speculator, to indulge in stock and gamble, that alone should disqualify him from holding a place of trust.

Scott v. *National Bank of Chester Valley*, 72 Pa. 471; *Giblin* v. *Mullen*, L. R. 2 P. C. 327; *Tracy* v. *Wood*, 3 Mason, 132.

If it appears that a bailee was not diligent in keeping his own property, that would be no excuse for negligence in keeping the property of others intrusted to him.

Erie Bank v. *Smith*, 3 Brewst. 15; *Pattison* v. *Syracuse Nat. Bank*, 80 N. Y. 99; *Doorman* v. *Jenkins*, 2 Ad. & El. 256; *Tracy* v. *Wood*, 3 Mason, 132; Story, Bailm. §§ 64, 337, 338.

Mr. Justice **Field** delivered the opinion of the court:

The plaintiffs below, the defendants in error here, are citizens of Missouri, and for many years have been copartners, doing business at Maryville, in that State, under the name of the Nodaway Valley Bank of Maryville. The defendants below are citizens of different States, one of them of Michigan and the others of Illinois, and for a similar period have been engaged in business as bankers at Chicago, in the latter State. In 1878 the plaintiffs opened an account with the defendants, which continued until the Spring of 1883. The average amount of deposits by them with the defendants each year during this period was between two and four hundred thousand dollars. Interest was allowed at the rate of two and one-half per cent on the deposits above three thousand dollars, but nothing on deposits under that sum.

On the 7th of July, 1880, the plaintiffs purchased of the defendants four per cent [606 bonds of the United States to the nominal amount of twelve thousand dollars, but the bonds being at a premium in the market the plaintiffs paid for them, including the accrued interest thereon, thirteen thousand and five dollars. The purchase was made upon a request by letter from the plaintiffs; and all subsequent communications between the parties respecting the bonds, and the conditions upon which they were to be held, are contained in their correspondence. The letter directing the purchase concluded with a request that the defendants send to the plaintiffs a description and the numbers of the bonds, and hold the same as a special deposit. In the subsequent account of the purchase rendered by the defendants the plaintiffs were informed that the bonds were held on special deposit subject to their order. The numbers of the bonds appear upon the bond register kept by the defendants, and the bonds remained in their custody until some time between November, 1881, and November, 1882, when they were stolen and disposed of by their assistant cashier, one Ker, who absconded from the State on the 16th of January, 1883. The present action is brought to recover their value.

By the defendants it was contended below [607 in substance, and the contention is renewed here, that the bonds being placed with them on special deposit for safe-keeping, without any reward, promised or implied, they were gratuitous bailees, and were not chargeable for the loss of the bonds, unless the same resulted from their gross negligence; and they deny that any such negligence is imputable to them.

On the other hand, the plaintiffs contended below, and repeat their contention here, that, assuming that the defendants were in fact simply gratuitous bailees when the bonds were deposited with them, they still neglected to keep them with the care which such bailees are bound to give for the protection of property placed in their custody; and [608 further, that subsequently the character of the bailment was changed to one for the mutual benefit of the parties.

Much of the argument of counsel before the court, and in the briefs filed by them, was unnecessary—indeed, was not open to consideration—from the fact that the case was heard, upon stipulation of parties, by the court without the intervention of a jury, and its special findings cover all the disputed questions of fact. There is in the record no bill of exceptions taken to rulings in the progress of the trial, and the correctness of the findings upon the evidence is not open to our consideration. Rev. Stat. sec. 700. The question whether the facts found are sufficient to support the judgment is the only one of inquiry here.

Undoubtedly, if the bonds were received by the defendants for safe-keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions. The exercise of reasonable care is in all such cases the dictate of good faith. An utter disregard of the property of the bailor would be an act of bad faith to him. But what will constitute such reasonable care will vary with the nature, value and situation of the property, the general protection afforded by the police of the community against violence and crime, and the bearing of surrounding circumstances upon its security. The care usually and generally deemed necessary in the community for the security of similar property, under like conditions, would be required of the bailee in such cases, but nothing more. The general doctrine, as stated by text-writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping. But gross negligence in such
309] cases is nothing more than a failure to bestow the care which the property in its situation demands; the omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a question of fact for the jury to determine, or by the court where a jury is waived. See *The New World* v. *King*, 57 U. S. 16 How. 470, 474, 475 [14: 1020-1022]; *New York Cent. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 383 [21: 627, 641]; *Milwaukee & St. P. R. Co.* v. *Arms*, 91 U. S. 489, 494 [23: 374, 376]. The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own employés and officers, though their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment.

Thus, in *Foster* v. *Essex Bank*, 17 Mass. 479, the bank was, in such a case, exonerated from liability for the property intrusted to it, which had been fraudulently appropriated by its cashier, the Supreme Judicial Court of Massachusetts holding that he had acted without the scope of his authority, and therefore the bank was not liable for his acts any more than it would have been for the acts of a mere stranger. In that case a chest containing a quantity of gold coin, which was specified in an accompanying memorandum, was deposited in the bank for safe-keeping, and the gold was fraudulently taken out by the cashier of the bank and used. It was held, upon the doctrine stated, that the bank was not liable to the depositor for the value of the gold taken.

In the subsequent case of *Smith* v. *First Nat. Bank of Westfield*, 99 Mass. 605, 611, the same court held that the gross carelessness which would charge a gratuitous bailee for the loss of property must be such as would affect its safe-keeping, or tend to its loss, implying that liability would attach to the bailee in such cases, and to that extent qualifying the previous decision.

In *Scott* v. *National Bank of Chester Valley*, 72 Pa. 479, 480, the Supreme Court of Pennsylvania asserted the same doctrine as that in the Massachusetts case, holding that a bank, as a mere depositary, without special contract or reward, was not liable for the loss of a government bond deposited with it for safe-keeping, and afterwards stolen by one of its clerks or tellers. In that case it was stated that the teller was suffered to remain in the employment of the bank after it was known that he had dealt once or twice in stocks, but this fact was not allowed to control the decision, on the ground that it was unknown to the officers of the bank that the teller gambled in stocks until after he had absconded, but at the same time observing that:

"No officer in a bank, engaged in stock gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters whose peculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step, which ends in ruin to himself and to those whose confidence he has betrayed."

As stated above, the reasonable care which persons should take of property intrusted to them for safe-keeping without reward will necessarily vary with its nature, value and situation, and the bearing of surrounding circumstances upon its security. The business of the bailee will necessarily have some effect upon the nature of the care required of him, as, for example, in the case of bankers and banking institutions, having special arrangements, by vaults and other guards, to protect property in their custody. Persons therefore depositing valuable articles with them expect that such measures will be taken as will ordinarily secure the property from burglars outside and from thieves within, and that whenever ground for suspicion arises an examination will be made by them to see that it has not been abstracted or tampered with; and also that they will employ fit men, both in ability and integrity, for the discharge of their duties, and remove those employed whenever found wanting in either of these particulars. An omission of such measures would in most cases be deemed culpable negligence, so [6
gross as to amount to a breach of good faith, and constitute a fraud upon the depositor.

It was this view of the duty of the defendants in this case, who were engaged in business as bankers, and the evidence of their

neglect, upon being notified of the speculations in stocks of their assistant cashier, who stole the bonds, to make the necessary examination respecting the securities deposited with them, or to remove the speculating cashier, which led the court to its conclusion that they were guilty of gross negligence. It was shown that about a year before the assistant cashier absconded the defendant Kean, who was the chief officer of the banking institution, was informed that there was someone in the bank speculating on the Board of Trade at Chicago. Thereupon Kean made a quiet investigation, and the facts discovered by him pointed to Ker, whom he accused of speculating. Ker replied that he had made a few transactions, but was doing nothing then and did not propose to do anything more, and that he was then about a thousand dollars ahead, all told. It was not known that Ker had any other property besides his salary. His position as assistant cashier gave him access to the funds as well as the securities of the bank, and he was afterwards kept in his position without any effort being made on the part of the defendants to verify the truth of his statement, or whether he had attempted to appropriate to his own use the property of others.

Again, about two months before Ker absconded, one of the defendants, residing at Detroit, received an anonymous communication, stating that someone connected with the bank in Chicago was speculating on the Board of Trade. He thereupon wrote to the bank, calling attention to the reported speculation of some of its employés, and suggesting inquiry and a careful examination of its securities of all kinds. On receipt of this communication Kean told Ker what he had heard, and asked if he had again been speculating on the Board of Trade. Ker replied that he had made some deals for friends in Canada, but the transactions were ended. The defendants then entered upon an examination of their books and securities, but made no effort to ascertain whether the special deposits had been disturbed. Upon this subject the court below, in giving its decision (29 Fed. Rep. 498), after observing that the defendants knew that Ker had been engaged in business which was hazardous and that his means were scant, and after commenting upon the demoralizing effect of speculating in stocks and grain, as seen in the numerous peculations, embezzlements, forgeries and thefts plainly traceable to that cause, and the free access by Ker to valuable securities, which were transferable by delivery, easily abstracted and converted, and yet his being allowed to retain his position without any effort to see that he had not converted to his own use the property of others, or that his statements were correct, held that it was gross negligence in the defendants not to discharge him or place him in some position of less responsibility. In this conclusion we fully concur.

The second position of the plaintiffs is also well taken, that, assuming the defendants were gratuitous bailees at the time the bonds were placed with them, the character of the bailment was subsequently changed to one for the mutual benefit of the parties. It appears from the findings that the plaintiffs subsequently to their deposit had repeatedly asked for a discount of their notes by the defendants, offering the latter the bonds deposited with them as collateral, and that such discounts were made. When the notes thus secured were paid, and the defendants called upon the plaintiffs to know what they should do with the bonds, they were informed that they were to hold them for the plaintiffs' use as previously. The plaintiffs had already written to the defendants that they desired to keep the bonds for an emergency, and also that they wished at times to overdraw their account, and that they would consider the bonds as security for such overdrafts. From these facts the court was of opinion that the bonds were held by the defendants as collateral to meet any sums which the plaintiffs might overdraw; and the accounts show that they did subsequently overdraw in numerous instances.

The deposit, by its change from a gratuitous bailment to a security for loans, became a bailment for the mutual benefit of both parties; that is to say, both were interested in the transactions. For the bailor it obtained the loans, and to that extent was to his advantage; and to the bailee it secured the payment of the loans, and that was to his advantage also. The bailee was therefore required, for the protection of the bonds, to give such care as a prudent owner would extend to his own property of a similar kind, being in that respect under an obligation of a more stringent character than that of a gratuitous bailee, but differing from him in that he thereby became liable for the loss of the property if caused by his neglect, though not amounting to gross negligence. [613

Two cases cited by counsel, one from the Court of Appeals of Maryland and the other from the Court of Appeals of New York, declare and illustrate the relation of parties under conditions similar to those of the parties before us.

In the case from Maryland (*Baltimore Third Nat. Bank* v. *Boyd*, 44 Md. 47), it appeared that a firm by the name of William A. Boyd & Co. was a large customer of the Third National Bank of Baltimore, and on the 5th of February, 1866, was indebted to it in about $5,000. Subsequently, the senior member of the firm, pursuant to an agreement between him and the president of the bank, deposited with the bank certain bonds and stocks as collateral security for the payment of all obligations of himself and of the firm then existing or that might be incurred thereafter, with the understanding that the right to sell the collaterals in satisfaction of such obligations was vested in the officers of the bank. Some of the bonds were subsequently withdrawn and others deposited in their place. While these collaterals were with the bank the firm kept a deposit account, having an average of about $4,000, and from time to time, as it needed, obtained on the security of the collaterals

discounts ranging from three to fifteen thousand dollars. The firm was not indebted to the bank subsequently to July, 1872, when it paid its last indebtedness; the bonds, however, were not then withdrawn, but left in the bank under the original agreement. In August, 1872, the bank was entered by burglars and certain of the bonds were stolen. In an action by the senior partner against the bank to recover the value of the bonds [614] stolen, it was held: "First. That the contract entered into by the bank was not a mere gratuitous bailment. Second. That the original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the plaintiff's debt had been paid. Third. That the defendant was responsible if the bonds were stolen in consequence of its failure to exercise such care and diligence in their custody and keeping as banks of common prudence in like situation and business usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of the property, and should have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant. Fourth. That the proper measure of damages was the market value of the bonds at the time they were stolen. Whether due care and diligence have been exercised by a bank in the custody of bonds deposited with it as collateral security, is a question of fact exclusively within the province of the jury to decide."

In the case from New York (*Cutting* v. *Marlor*, 78 N. Y. 454), it appeared that the defendant, as collateral security for a loan made to him by a bank, delivered to it certain securities, which were taken and converted by the president to his own use. In an action by the receiver of the bank to recover the amount loaned it was found that the trustees of the bank left the entire management of its business with the president and an assistant, styled manager; that they received the statements of the president without question or examination; that they had no meetings pursuant to the by-laws, and made no examination of the securities, and exercised no care or diligence in regard to them; also, that the president had been in the habit of abstracting securities and using them in his private business, most of them being returned when called for; and that the manager, who had knowledge of this habit, did not take any means to prevent it, nor did he notify the trustees. It was held that the bank was chargeable with negligence, and that the defendant was entitled [615] to counterclaim the value of the securities; that the bailment was for the mutual benefit of the parties; that the bailee was bound, for the protection of the property, to exercise ordinary care, and was liable for negligence affecting the safety of the collaterals, distinguishing the case from the liability of a gratuitous bailee, which arises only where there has been gross negligence on his part.

It follows, therefore, that whether we regard the defendants as gratuitous bailees in the first instance, or as afterwards becoming bailees for the mutual benefit of both parties, they were liable for the loss of the bonds deposited with them. And the measure of the recovery was the value of the bonds at the time they were stolen.

Judgment affirmed.

ELIZA S. SMITH, Executrix, *Appt.*, [578]
v.
ARTEMAS GALE ET AL.

(See S. C. Reporter's ed. 577, 578.)

Motion to dismiss.

In computing the two years within which a writ of error must be brought or an appeal taken, the day of the entry of the judgment, decree or order appealed from should be excluded.

[No. 580.]

Submitted Dec. 22, 1890. Decided Jan. 5, 1891.

APPEAL from a decree of the Supreme Court of the Territory of Dakota.

On motion to dismiss because appeal taken too late. *Denied.*

Messrs. **Park Davis** and **A. G. Safford**, for appellees, in favor of motion to dismiss.

Mr. **Enoch Totten**, for appellant, against motion.

Fuller, *Ch. J.:*

In computing the two years after the entry [578] of a final judgment, decree or order, sought to be reviewed in this court, within which the writ of error must be brought or the appeal taken, the day of the entry of such judgment, decree or order should be excluded. *Credit Co.* v. *Arkansas C. R. Co.* 128 U. S. 258 [32: 448].

The motion to dismiss the appeal in this cause is therefore denied.

THOMAS A. GREEN, *Plff. in Err.*, [615]
v.
SAMUEL H. ELBERT ET AL.

(See S. C. Reporter's ed. 615–624.)

When transcript of record must be filed—when docketed—remedy for omission—clerk's fees—scandalous argument.

1. The transcript of the record may be filed at any day during the term succeeding the taking of an appeal or the bringing of a writ of error, if appellee or defendant in error has not in the mean time had the cause docketed and dismissed; but it cannot be filed after the expiration of such term.
2. When a return is made and the transcript seasonably deposited in the clerk's office, jurisdiction is not lost by the lapse of the term, but the cause may still be docketed, if the circumstances justify the court in exercising its discretion to that effect.
3. Where the plaintiff in error or appellant is entirely free of laches or want of diligence, and is prevented from obtaining the transcript by the

fraud of the other party, the order of the court or the contumacy of the clerk, the court may grant relief appropriate to the case.

4. Where the plaintiff in error is a member of the bar of this court, and notifies the clerk in transmitting the transcript that the case is one of his own, his appearance is properly entered when the record is filed and the case docketed; it is a condition precedent to the filing of the record and docketing of the case that security should be given to or a deposit made with the clerk, and where that is omitted, without excuse, for twenty months, the writ of error will be dismissed.

5. Where the printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court, it will be stricken from the files.

[No. 1099.]

Submitted Dec. 15, 1890. Decided Jan. 5, 1891.

IN ERROR to the Circuit Court of the United States for the District of Colorado, to review a judgment for defendant in an action for a conspiracy to disbar plaintiff.

On motion to dismiss or affirm. *Dismissed.*

616] Statement by *Mr. Chief Justice* **Fuller:**

On the 20th day of January, 1887, Thomas A. Green brought his action at law in the Circuit Court of the United States for the District of Colorado against Samuel H. Elbert, William E. Beck, Joseph C. Helm, Merrick A. Rogers, Lucius P. Marsh and J. Jay Joslin claiming damages in the sum of $50,000. April 18th, 1887, he filed his amended complaint in said cause, alleging a conspiracy on the part of defendants Rogers, Marsh and Joslin to bring about a disbarment of plaintiff for filing a bill in equity, in the discharge of his duties as solicitor of one Mrs. Newton and her husband, against Joslin, making certain charges against defendants Rogers and Marsh; and that the defendants Elbert, Beck and Helm, who were at the time judges of the Supreme Court of Colorado, confederated and conspired with defendants Rogers, Marsh and Joslin to carry out and consummate the original conspiracy, and entered judgment disbarring the plaintiff accordingly.

The complaint purported to be brought and was claimed to be sustainable under sections 1979, 1980 and 1981 of the Revised Statutes, in connection with section 5407, Rev. Stat. 1878, pp. 347, 348, 1047.

617] Demurrers were filed on behalf of defendants Elbert, Beck and Helm, and also of defendants Rogers, Marsh and Joslin, which, upon argument, were sustained by the court, and judgment entered for the defendants, July 27, 1887.

On the third of October, 1887, plaintiff filed his bond, which was duly approved, and a writ of error was allowed and issued, and on the same day he filed a stipulation that the record might be filed in this court, and the cause be docketed at any time during the October Term, 1887, of the court. Citation, returnable to October Term, 1887, was taken out and served. On the 20th of April, 1888, the plaintiff filed in the circuit court in said cause his *precipe* for transcript of record, which was accordingly made out, as directed, and certified by the clerk of that court May 5, 1888. On that day plaintiff wrote to the clerk of this court, as follows: "I herewith send you a record in a case of my own. Will send you a docket fee and a stipulation to submit under Rule 20 in a few days. Please send me two blanks for entering the appearance of attorneys for both parties." This letter and the transcript reached the clerk May 10, 1888, and he replied: "Yours of the 5th inst., also transcript of record in case of *Green* v. *Elbert et al.*, duly received. I inclose two blank orders for appearance as requested. I notice what you say as to furnishing deposit on account of costs and sending stipulation to submit case under the 20th Rule." Nothing further appears to have been done in the premises until on January 7, 1890, plaintiff in error wrote to the clerk as follows: "I find on looking over my books at New Year's that I had forgotten to send you a docket fee in the case of *Thomas A. Green* v. *Samuel Elbert, William E. Beck, Joseph C. Helm, Merrick A. Rogers, Lucius P. Marsh and J. Jay Joslin.* This record was sent up from the U. S. Circuit Court for the District of Colorado, a year or more ago, on writ of error. If you have not docketed the case please do so at once, and inform me by return mail. I herewith send you draft on New York for $25." Upon the receipt of this letter, January 13, 1890, the transcript of record was filed, and the clerk wrote on the 15th: "Yours of the 7th inst., inclosing draft on N. Y. for $25, on account of deposit in case of *Green* v. *Elbert et al.*, duly re- [6
ceived, and I have docketed the case No. 1541 for Oct. Term, 1889, entering your appearance of counsel for pl'ff in error." To this plaintiff in error replied January 20: "Yours of the 15th inst. at hand. I have signed and herewith return my appearance in the case of *Thomas A. Green* v. *Samuel E. Elbert et al.*, No. 1541."

November 17, 1890, defendants in error filed a motion to dismiss, with which was united a motion to affirm, and a brief in support thereof, and gave notice to plaintiff in error that such motion would be submitted on the 15th day of December. On the 13th of December a lengthy affidavit of plaintiff in error was filed in the cause, stating that plaintiff "is now and has been for many years past a member of the bar of the United States Circuit Court for the District of Colorado, and also a member of the bar of the Supreme Court of the United States;" that he had been attending to this suit in the circuit court and in the supreme court in person; that on or about the 5th day of May, 1887 [1888], he caused the transcript of the record, the writ of error, citation and bond, duly certified, to be forwarded to the clerk of the supreme court in accordance with a stipulation that the record and writs might be returned at any time during the October Term, 1887, of the supreme court; and, "as he now remembers and believes, that he requested the clerk of the supreme court, at the City of Washington, to file said record

as soon as the same should reach him; and affiant further states that he has not now any remembrance or recollection of having neglected anything at all on his part which was necessary for him to do in order to have said record filed in the clerk's office of the Supreme Court of the United States as soon as the same reached the said clerk in the City of Washington;" that he resides more than two thousand miles from the capital, and never has been and is not now familiar with the rules and customs of the clerk and with the manner in which business is transacted by him in his office, and that if he did not comply with all the requirements of the clerk with regard to the filing of the record, it was because he did not understand the same; and that he never has at any time knowingly and intentionally neglected anything whatever pertaining to the sending and filing of the record or the prosecution of the suit, but always intended to use all due diligence in having the record sent and filed and in vigorously prosecuting his suit; that he has had no time or opportunity, living at the distance he does and being compelled to prepare a brief and argument on the motion to dismiss, to investigate the reason why said record was not duly filed as soon as sent to the clerk; that whatever may have been the reason, affiant has not intentionally in any manner neglected what he supposed and believed was necessary for him to do in order to have the record filed, and has no knowledge or information why it was not filed "from early in May, 1887 [1888], until the 13th day of January, 1890," and that if the clerk had any good reason for not filing the record, or if affiant neglected anything that was necessary for him to do to secure it, this was the result of mistake and ignorance and not of intentional neglect or delay, and he does not believe himself to be in any manner to blame; that defendants in error made no effort to have the case dismissed until nearly one year after the record had been filed, and did not, during the time the record remained unfiled in the office, "if there ever was any such time;" that for at least one year past affiant has been watching said case with great care and diligence, and had just forwarded a complete assignment of errors, and had said case prepared so far as he could prepare the same, at the time he received notice of the motion to dismiss, and was awaiting the usual time when the record in said case should be printed and he could file his brief and argument and be ready to submit the case as soon as reached on the docket; that he has several times attempted to get the attorney for the defendants in error to submit the case under Rule Twenty, but said attorney has informed him that the defendants in error would not consent to anything of the kind or agree to anything whatever that would speed the final hearing; "that he supposed it was a matter of course, upon the return of the writ of error to the Supreme Court of the United States from a circuit court of the United States, that the clerk of the said supreme court would immediately, on such return of such writ and a transcript of the record, together with the necessary citation and bond, all regularly prepared, at once docket said cause without further delay or without anything more to be done on the part of affiant. Affiant does not now remember whether or not he sent to said clerk a docket fee, and affiant states that he may not at that time have known [or] regard [ed] it as absolutely necessary to do so before a record on the return of the writ of error would be filed in said office; but affiant states that according to the best of his remembrance that he has sent the said clerk the said docket fee, and that he sent the same just so soon as he knew the amount thereof and the said clerk demanded the same; and affiant further states that if there was any delay whatever in this regard, it was not at all intentional on his part and was a mere matter of mistake; and affiant further states that he does not now remember that there was any delay or any mistake made by him in sending said docket fee."

Affiant further says that he has prepared full and elaborate printed briefs, on the merits as well as on the motion, which he asks the court carefully to examine; and reiterates inadequacy of time to investigate the cause or reason why the record was not filed in the time required, if such was the case, as the motion "does not state anything at all to explain why said record was not filed in that time, but simply states that the filing mark upon said record shows that the same was filed in the clerk's office on the 13th day of January, 1890."

"Affiant further states that he has made this affidavit wholly from his remembrance of what he has done and intended to do touching the filing of said record, and from what he understands or did not understand in regard to such matters in the office of the clerk of the said supreme court, and if anything in this affidavit should turn out not to be wholly correct it is because affiant has not now and does not remember having had any information or knowledge to the contrary of what he has stated above in this affidavit."

Mr. **George A. King,** for defendants in error, in favor of motion:

The writ of error was returnable to the October Term, 1887. The transcript of record was required to be filed in the office of the clerk of this court, and the cause docketed within the first thirty days of that term. The cause was not docketed, however, during that term. This was fatal to the jurisdiction of this court, and the writ of error on this ground must be dismissed.

The Virginia v. *West*, 60 U. S. 19 How. 183 (15: 594); *Castro* v. *United States*, 70 U. S. 3 Wall. 46 (18: 163); *Grigsby* v. *Purcell*, 99 U. S. 505 (25: 354); *The S. S. Osborne*, 105 U. S. 447 (26: 1065); *Hilton* v. *Dickinson*, 108 U. S. 165, 168 (27: 688, 689); *The Tornado*, 109 U. S. 110 (27: 874); *New Jersey* v. *Demarest*, 110 U. S. 400 (28: 191); *Killian* v. *Clark*, 111 U. S. 784 (28: 599); *United States* v. *Burchard*, 125 U. S. 176 (31: 662); *Hill* v. *Chicago & E. R. Co.* 129 U. S. 170 (32: 651); *Small* v. *Northern Pac. R. Co.* 134 U. S. 514 (33: 1006).

Mr. **T. A. Green,** *in propria persona*, against motion.

1] *Mr. Chief Justice* **Fuller** delivered the opinion of the court:

The transcript of the record may be filed at any day during the term succeeding the taking of an appeal or the bringing of a writ of error, if appellee or defendant in error has not in the meantime had the cause docketed and dismissed. But this cannot be done after the expiration of the term, because the writ of error has then become *functus officio*, and the appeal has spent its force. *Credit Co.* v. *Arkansas C. R. Co.* 128 U. S. 258 [32: 448]; *Evans* v. *State Nat. Bank*, 134 U. S. 330 [33: 917]. Remedies may be found where the plaintiff in error or appellant is entirely free from laches or want of diligence, and is prevented from obtaining the transcript by the fraud of the other party, the order of the court or the contumacy of the clerk. *United States* v. *Gomez*, 70 U. S. 3 Wall. 752, 763 [18: 212, 215]; *Ableman* v. *Booth*, 62 U. S. 21 How. 506 [16: 169]; *Grigsby* v. *Purcell*, 99 U. S. 505 [25: 354].

When, however, a return is made, and the transcript seasonably deposited in the clerk's office, jurisdiction is not lost by the lapse of the term, but the cause may still be docketed, if the circumstances are such as to justify the court in exercising its discretion to that effect. *Edwards* v. *United States*, 102 U. S. 575 [26: 293]; *Richardson* v. *Green*, 130 U. S. 104 [32: 872]. This we cannot be called upon to do arbitrarily. To the proper conduct of the business of this court rules are necessary, and, having been prescribed, reasonable compliance with them is expected and must be insisted upon. When they are disregarded, dispensation from the consequences can only be extended where the circumstances furnish adequate excuse. Were this otherwise, our regulations might become more honored in the breach than the observance, and the recognition of due procedure would be seriously weakened and impaired.

The writ of error in this case bears date October 3, 1887, and was filed on that day in the circuit court. It was returnable to October Term, 1887, of this court, which term closed by adjournment on May 14, 1888. The transcript reached the clerk May 10, 1888, and if then docketed would have been in time. And as jurisdiction was kept alive 2] by the delivery of the record, this court had power to direct it to be subsequently placed upon the docket, or to treat the act of the clerk in docketing it as providently done.

The transcript was filed and the cause docketed January 13, 1890. The judgment sought to be revised was entered July 27, 1887, and it thus appears that the case was not docketed until the expiration of considerably more than two years after the entry of such judgment, the statutory limitation upon the bringing of the writ of error. Rev. Stat. § 1008.

The defendants in error filed their motion to dismiss on November 17, 1890, and gave notice that it would be submitted December 15 following. They were not bound to docket and dismiss the case if they did not choose to do so, and the plaintiff in error occupies no position entitling him to complain because they did not. Nor did they wait until the two years had run before making their motion. On the contrary, that time had expired some months before the transcript was filed. The motion may be made at any time before hearing, or the objection be availed of by the court *sua sponte* (*Grigsby* v. *Purcell*, 99 U. S. 505 [25: 354]), although delay in presenting the point has sometimes been referred to as an element, in combination with others, justifying leniency in its disposition.

By Rule 9, the appearance of counsel for the party docketing the case must be entered upon the filing of the transcript. As the plaintiff in error was a member of this bar, and notified the clerk in transmitting the transcript that the case was one of his own, we think his appearance was properly entered when the record was filed, and might have been so on May 10, 1888, if the case had then been docketed. By Rule 10, the plaintiff in error, or appellant, is required, on docketing a case and filing the record, to enter into an undertaking with the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise to satisfy the clerk in that behalf. The practice, since the Act of March 3, 1883 (22 Stat. 631), has been for parties to deposit the sum of $25 in lieu of a fee bond, and the rule provides for the subsequent advance of the cost of printing the record and the fee for its preparation. The fee for docketing a case and filing and indorsing the transcript of the record is fixed [6 by the rule at five dollars, and the twenty-five dollars above referred to covers that sum and the estimated costs up to the time for printing.

The plaintiff in error was a member of this bar, and especially bound to know the rules, and that it was a condition precedent to the filing of the record and docketing of the case that security should be given to or that a deposit should be made with the clerk. But knowledge need not be imputed, for by his letter of May 5, 1888, accompanying the record, plaintiff in error showed actual knowledge of the necessity for the deposit, and assured the clerk that it would be forwarded, while at the same time he requested blanks for the entry of appearance of counsel on both sides. In view of this letter, it is impossible for us to doubt that the plaintiff in error was, as every member of our bar should be, sufficiently acquainted with our rules and the conduct of business in the clerk's office. But he forwarded no deposit or fee bond, nor paid the specified fee for filing the transcript, nor transmitted a formal appearance, though blanks had been sent him May 10, 1888, as requested.

On January 7, 1890, a year and eight months after his letter of May 5, 1888, the plaintiff in error remitted to the clerk the sum of $25, which is the deposit required, and wrote that he found, on looking over his books at New Year's, that he had forgotten to send "a docket fee" in the case, and requested the case to be docketed at once if that had not already been done. The transcript was accordingly filed and the cause docketed January 13, 1890, as already stated, and plaintiff in error informed thereof.

We regard the laches of plaintiff in error as too gross to be passed over. We cannot treat his omission to forward the deposit soon after May 5, 1888, nor the twenty months' neglect that thereupon ensued, as attributable to ignorance or inadvertence, or as excusable upon any ground heretofore deemed sufficient. Mere carelessness in the inception may have finally resulted in forgetfulness; but we cannot, therefore, absolve him from the penalty legitimately attaching to this disregard of our rules. The writ of error must be dismissed.

[624] We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court. It is our duty to keep our records clean and free from scandal.

The brief of the plaintiff in error will be stricken from the files and the writ of error dismissed, and it is so ordered.

---

[324] *Ex parte:*

In the Matter of EUGENE M. CONVERSE, *Appt.*

(See S. C. Reporter's ed. 624-632.)

Constitutional law—14th Amendment—state conviction of embezzlement.

1. A State cannot be deemed guilty of violating the constitutional provision against depriving a person of liberty "without due process of law," because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction, —as in a conviction and judgment for embezzlement.
2. The Fourteenth Amendment was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State.
3. The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging appellant's privileges or immunities, or depriving him of the law of the land of his domicil, by convicting him of embezzlement under sec. 9151 of Howell's Annotated Statutes of Michigan, upon his plea of guilty to embezzlement as attorney-at-law, the highest judicial tribunal of that State having decided that the word "agent" in said section applies to attorneys-at-law.

[No. 1283.]

Argued and Submitted Dec. 18, 1890. Decided Jan. 5, 1891.

APPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Michigan, denying an application for a writ of habeas corpus. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:** This was a petition for a writ of habeas corpus upon the ground that the petitioner is "deprived of his liberty without due [625] process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States." It appears from the record annexed to the petition that petitioner was arraigned in the Circuit Court for the County of Calhoun in the State of Michigan, upon an information in the words and figures following, to wit: "Herbert E. Winsor, prosecuting attorney for the County of Calhoun aforesaid, for and in behalf of the People of the State of Michigan, comes into said court, in the December Term thereof, A. D. 1887, and gives here to understand and be informed that Eugene M. Converse, late of the City of Battle Creek, in the County of Calhoun and State of Michigan, heretofore, to wit, on the twenty-eighth day of July, in the year one thousand eight hundred and eighty-five, at the City of Battle Creek, in said County of Calhoun and State of Michigan, being then and there agent to John E. Dunning and Daniel W. Hall, the executors of the last will and testament of Rice Hall, deceased, and being then and there the agent of them, the said John E. Dunning and Daniel W. Hall, executors of the last will and testament of Rice Hall, deceased, and not being then and there an apprentice nor other person under the age of sixteen years, did, by virtue of his said employment, then and there and whilst he was such agent as aforesaid, receive and take into his possession certain moneys to a large amount, to wit, to the amount of four thousand dollars, of the value of four thousand dollars, of the property of the said John E. Dunning and Daniel W. Hall, as such executors, and which said money came to the possession of the said Eugene M. Converse by virtue of said employment, and the said money then and there fraudulently and feloniously did embezzle and convert to his own use without the consent of the said John E. Dunning and Daniel W. Hall, as such executors as aforesaid, his said employers, and that so the said Eugene M. Converse did then and there, in manner and form aforesaid, the said money, the property of the said John E. Dunning and Daniel W. Hall, as executors as aforesaid, his said employers, from the said John E. Dunning and Daniel W. Hall, as such executors as aforesaid, feloniously did steal, take and carry away, contrary to [626] the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Michigan;" and thereupon filed the following "memorandum of plea:" "As an attorney-at-law I am guilty of embezzlement of thirty-five hundred ($3,500) dollars, that being the amount collected and received by me less my reasonable fees, as such attorney, for collecting the money;" which plea was entered by the circuit judge thus: "Eugene M. Converse, the respondent in this cause, having been duly arraigned at the bar in open court and the information being read to him by Herbert E. Winsor, prosecuting attorney, pleaded thereto 'guilty of embezzlement of money to the amount of three thousand five hundred dollars.'"

NOTE.—*As to what is due process of law, see note* to Pearson v. Yewdall, 24: 436.

On the 12th of December, 1887, judgment was entered in these words:

"Eugene M. Converse, the respondent in this cause, having been upon his plea of guilty duly convicted of the crime of embezzlement, as appears by the record thereof, and the said court having examined into the facts of the case, and having also privately examined the respondent concerning the circumstances which induced him to plead guilty, and having therefrom ascertained that said plea was made freely, with full knowledge of the nature of the accusation and without undue influence, and the respondent thereafter having been, on motion of the prosecuting attorney, brought to the bar of the court for sentence, and having then and there been asked by the court if he had anything to say why judgment should not be pronounced against him, and alleging no reason to the contrary: therefore it is ordered and adjudged by the said court, now here, that said Eugene M. Converse be confined in the state prison at Jackson, Michigan, at hard labor, for the period of five years from and including this day."

Petitioner was thereupon committed to the state prison in accordance with the terms of said judgment.

September 11, 1888, this order was entered by the Calhoun Circuit Court:

"In this cause a motion to amend the respondent's plea by inserting the following words, 'As an attorney-at-law I am guilty of embezzlement of thirty-five hundred ($3,500) dollars, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money,' having been duly entered, and after reading and filing affidavits, and after hearing John C. Patterson, of counsel for respondent, in favor of said motion, it is ordered by the court, now here, that said motion be, and the same is hereby, denied."

Application having been made to the Supreme Court of Michigan in that behalf, the following order was entered by the Calhoun Circuit Court on the 3d of December, 1888:

"Pursuant to an order of the supreme court made on the ninth day of October, eighteen hundred and eighty-eight, and on motion of John C. Patterson, attorney for the defendant for the purpose of this motion, it is ordered that the entry of the arraignment and plea of the said defendant in said cause, entered on the fifth day of December, in the year one thousand eight hundred and eighty-seven, upon journal number twelve of this court, at page 568, be, and the same is hereby, corrected now as of the date last named, so as to read as follows, to wit:

"Eugene M. Converse, the respondent in this cause, having been duly arraigned at the bar in open court and the information having been read to him by Herbert E. Winsor, prosecuting attorney, pleads thereto in the following words, to wit: 'As an attorney-at-law I am guilty of embezzlement of thirty-five hundred dollars, that being the amount collected and received by me, less my reasonable fees as such attorney for collecting the money.'"

The case was then taken to the Supreme Court of Michigan by writ of error, the following errors being assigned: "First. The court erred in rendering the judgment in said cause upon the plea of the defendant pleaded therein. Second. There is no sufficient plea in said cause to form a legal basis for the judgment rendered thereon. Third. The judgment is for a felony and the plea is for a misdemeanor only, and the judgment is broader than the plea, and the penalty imposed is unauthorized by the plea and Statute. Fourth. The judgment against the defendant is for embezzlement in the capacity of agent, and the defendant never pleaded guilty of such crime and he has never been convicted of such crime by a jury. Fifth. The information does not allege the money converted was the property of any private person or partnership within the Statute, but avers it to be the property of the executors of an estate:" and upon due consideration the judgment was affirmed by that court. The opinion of the court was delivered by Sherwood, *Ch. J.*, Champlin, Morse and Long, *JJ.*, concurring, and Campbell, *J.*, dissenting, and will be found reported in 74 Mich. 478.

The petition for the writ of habeas corpus alleged, among other things, that the information charged an offense under section 9151 of Howell's Annotated Statutes of Michigan, and that the petitioner had never pleaded guilty to that offense in manner and form as charged, but that he had pleaded guilty of an offense or misdemeanor under section 9152 of said Statute, and that the Calhoun Circuit Court had no authority or constitutional right to render the judgment against the petitioner which was rendered.

The sections referred to are as follows:

"Section 9151. If any officer, agent, clerk or servant of any incorporated company, or of any city, township, incorporated town or village, school district or other public or municipal corporation, or if any clerk, agent or servant of any private persons, or of a copartnership, except apprentices and other persons under the age of sixteen years, shall embezzle or fraudulently dispose of or convert to his own use, or shall take or secrete with intent to embezzle and convert to his own use, without consent of his employer or master, any money or other property of another, which shall have come to his possession, or shall be under his charge, by virtue of such office or employment, he shall be deemed, by so doing, to have committed the crime of larceny."

"Section 9152. If any attorney-at-law, solicitor in chancery or other person holding himself out to the public to perform the services usually performed by attorneys or solicitors, in the management of causes, and the collection of judgments, decrees or other demands, or any register in chancery, clerk of any court of record, sheriff, constable, justice of the peace or any other officer, shall collect or receive in such capacity any money belonging to another, and shall neglect or

refuse to pay the same to the person entitled thereto within a reasonable time after demand thereof, the person so neglecting or refusing shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding four times the amount of money so received, or both, at the discretion of the court." 2 How. Ann. Stat. Mich. 2220.

The petition further set forth—

"That due process of law in the State of Michigan is provided for and prescribed by the Constitution and statutes of said State in part by the following sections, to wit: 'In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than twelve men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and have the assistance of counsel for his defense.' State Constitution, article VI. section 28.

"'No person shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property without due process of law.' State Const. article VI. section 32.

"'No person indicted for an offense shall be convicted thereof, unless by confession of his guilt in open court, or by admitting the truth of the charge against him, by his plea or demurrer, or by the verdict of a jury, accepted and recorded by the court.' 2 Howell's Annotated Statutes of Mich. page 2205, sec. 9069.

"'No person who is charged with any offense against the law shall be punished for such offense, unless he shall have been duly and legally convicted thereof, in a court having competent jurisdiction of the cause and of the person.' 2 Howell's Annotated Statutes of Mich. page 2205, section 9071.

[30] "'When any person shall be arraigned upon an indictment, it shall not be necessary, in any case, to ask him how he will be tried; but if, on being so arraigned, he shall refuse to plead or answer, or shall not confess the indictment to be true, the court shall order a plea of not guilty to be entered, and thereupon the proceedings shall be the same as if he had pleaded not guilty to the indictment.' 2 Howell's Annotated Statutes of Mich. page 2293, section 9518."

The application for the writ was heard by *Judge* Brown, holding the Circuit Court of the United States for the Eastern District of Michigan, and denied (his opinion being reported, 42 Fed. Rep. 217), whereupon the cause was brought to this court by appeal.

Mr. **John C. Patterson,** for appellant:

The information did not allege that the appellant was an attorney, which was necessary to make out a case under section 9152 of the Michigan Statutes.

People v. *Tryon*, 4 Mich. 665; *People* v. *Converse* (dissenting opinion) 74 Mich. 484.

An arraignment and plea to the information filed are required to be entered in the record of a conviction for a criminal offense.

Grigg v. *People*, 31 Mich. 471; *Douglass* v. *State*, 3 Wis. 820; *Territory* v. *Chartrand*, 1 Dak. 363.

It is the duty of the courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection.

Hill v. *People*, 16 Mich. 351, 357, 358; *People* v. *Harding*, 53 Mich. 48, 58.

The word "agent," as used in the Michigan Constitution, is not synonymous with "attorney" as used in the Statutes.

Cobb v. *Grand Rapids Superior Court Judge*, 43 Mich. 289.

A failure of attorneys to pay over the balance to their employers upon collections will not, under the ordinary circumstances attending such agency, subject them to the heavy penalties of the crime of embezzlement.

Com. v. *Libbey*, 11 Met. 64; *Com.* v. *Stearns*, 2 Met. 344; *State* v. *McLane*, 43 Tex. 404; *Reg.* v. *Newman*, L. R. 8 Q. B. Div. 706; *Reg.* v. *Cooper*, L. R. 2 C. C. 123.

The state court has not given any construction of the Statute and this court is free to decide it as a new question for itself.

Burgess v. *Seligman*, 107 U. S. 33 (27: 365); *Venice* v. *Murdock*, 92 U. S. 501 (23: 585); *Pique Branch Bank* v. *Knoop*, 57 U. S. 16 How. 369, 391 (14: 977, 986); *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244, 256 (27: 922, 926); *Wright* v. *Nagle*, 101 U. S. 791 (25: 921); *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 436 (17: 173).

All federal questions must be decided by the courts of the United States for themselves.

Delmas v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 661, 668 (20: 757, 759); *Walker* v. *State Harbor Comrs.* 84 U. S. 17 Wall. 648, 651 (21: 744, 745); *Yick Wo* v. *Hopkins*, 118 U. S. 356 (30: 220).

The judgment may be questioned on habeas corpus.

Ex parte Neilsen, 131 U. S. 176 (33: 118); *Ex parte Siebold*, 100 U. S. 376 (25: 719); *Ex parte Lange*, 85 U. S. 18 Wall. 163 (21: 872); Church, Habeas Corpus, §§ 78, 80, 228, 245, 351, 362, 368–378.

Circuit courts may discharge a prisoner held in violation of the Constitution of the United States.

Rev. Stat. U. S. §§ 751, 753; *Ex parte Royall*, 117 U. S. 249 (29: 870); *Re Neagle*, 135 U. S. 1 (34: 55); *Re Loney*, 134 U. S. 372 (33: 949); *Re Medley*, 134 U. S. 160 (33: 835); *Ex parte Siebold*, 100 U. S. 376 (25: 719).

Mr. **B. W. Huston,** *Atty-Gen.*, for the State of Michigan.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Supreme Court of Michigan held that the information charged the respondent with the crime of embezzlement; that the defendant was called upon to plead to this charge when arraigned; that he pleaded guilty of embezzlement, and undoubtedly understood when he made his plea that he was pleading guilty to the felony charged; that this conclusion was fortified by the private examination required by statute to be made by the

judge before sentencing upon a plea of guilty, which was shown to have been had in this case; that the fact that the respondent collected the money as an attorney was immaterial; that if the act contained all the elements of embezzlement, he was guilty of the crime and was properly convicted; that an attorney, when he collects money for his client, acts as the agent of his client as well as his attorney, and if after making the collection he appropriates the money to his own use with the intention of depriving the owner of the same, he is guilty of the crime of embezzlement; that the conviction was warranted by the plea; and that the judgment should therefore be affirmed. As remarked by *Judge* Brown, it is no defense to an indictment under one statute that a defendant might also be punished under another. And as the highest judicial tribunal of the State of Michigan ruled that the word "agent" in section 9151 of the Statutes of that State applied to attorneys-at-law, and as the information charged the defendant with embezzlement under that section, and he pleaded guilty to embezzlement as an attorney-at-law, the affirmance of the conviction necessarily followed. In the view of the Statute taken by the court, the plea admitted the truth of the charge.

It is not our province to inquire whether the conclusion reached and announced by the supreme court was or was not correct, for we are not passing upon its judgment as a court of error, nor can we consider the contention that the decision was not in harmony with the State Constitution and laws.

The single question is whether appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State thereby deprives him of liberty without due process of law, for there is no pretense of an abridgment of his privileges and immunities as a citizen of the United States, nor of a denial of the equal protection of the laws. But the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction. And conceding that an unconstitutional conviction and punishment under a valid law would be as violative of a person's constitutional rights as a conviction and punishment under an unconstitutional law, we fail to perceive that this conviction and judgment are repugnant to the constitutional provision. Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of the State. The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging appellant's privileges or immunities or depriving him of the law of the land of his domicil. *Arrowsmith* v. *Harmoning*, 118 U. S. 194 [30: 243]; *Baldwin* v. *Kansas*, 129 U. S. 52 [32: 640]; *Re Kemmler*, 136 U. S. 436 [34: 519].

Judgment affirmed.

RED RIVER CATTLE COMPANY, [631
Plff. in Err.,
v.
R. H. NEEDHAM ET AL.

(See S. C. Reporter's ed. 632-636.)

Jurisdiction as to amount—when affidavits as to amount will be received.

1. Where the demand is not for money, but the nature of the action requires the value of the thing demanded to be stated in the pleadings, affidavits will not be received here to vary the value as appearing upon the face of the record, in order to give this court jurisdiction.
2. Nor will the filing of such affidavits be ordinarily permitted where evidence of value has been adduced below on both sides, and the proofs have been transmitted either with or without the announcement of a definitive conclusion deduced therefrom.
3. But where the writ of error is brought or appeal taken without question as to the value, and the latter is nowhere disclosed by the record, affidavits may be received to establish the jurisdictional amount, and counter affidavits may be allowed if the existence of such value is denied in good faith.

[No. 1862.]

Argued Dec. 15, 1890. Decided Jan. 5, 1891.

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment in favor of plaintiffs in an action of trespass to try the title to land.

On motion to dismiss. *Dismissed.*

The facts are stated in the opinion.

Mr. **W. Hallett Phillips,** for defendants in error, for motion:

In cases where the value is stated in the pleadings or proceedings of the court below, affidavits will never be received to vary or enhance it in order to give jurisdiction.

Richmond v. *Milwaukee*, 62 U. S. 21 How. 392 (16: 72); *Wells* v. *Wilkins*, 116 U. S. 393 (29: 671); *Bennett* v. *Butterworth*, 49 U. S. 8

NOTE.—*As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution,* see *notes* to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws,—see *notes* to Hart v. Lamphire, 7: 679; Commercial Bank v. Buckingham, 12: 169.

How. 129 (12: 1016); *Talkington* v. *Dumbleton*, 123 U. S. 745 (31: 313).

If affidavits to show jurisdiction were permissible, those introduced by the plaintiff in error were insufficient for that purpose, and are negatived by opposing affidavits.

Wilson v. *Blair*, 119 U. S. 387 (30: 441).

Mr. **Sawnie Robertson**, for plaintiff in error, against motion.

[633] *Mr. Chief Justice* **Fuller** delivered the opinion of the court:

This was an action of trespass to try title brought by Needham and others against the Red River Cattle Company in the Circuit Court of the United States for the Northern District of Texas.

The petition alleged the land to be of the reasonable value of $4,400. Defendant pleaded not guilty and the Statute of Limitations. A verdict was rendered in favor of plaintiffs for an undivided one-half interest in the land sued for, and judgment was entered thereon January 24, 1890. A motion for new trial was overruled on the 10th of February, and on that day the defendant filed three affidavits, tending to show that the half interest had a value in excess of $5,000, whereupon a writ of error was allowed.

On the 22d of February, plaintiffs filed a motion to set aside the allowance of the writ of error (stating want of notice of the application for it), accompanied by four affidavits and a letter from the county where the land was situated, tending to establish that the value of one half was far less than $5,000, upon which the circuit court entered the following order: "On this day came on to be heard the motion of the plaintiffs to set aside the writ of error granted herein; and the court having heard and considered said motion, and being of the opinion that the question of the value of the land in controversy is a question that the trial judge is [634] not called upon to decide, but one to be determined in the supreme court on the affidavits, if they see fit to consider them, in order to determine their jurisdiction, it is ordered by the court that said motion be refused."

The record having been filed in this court, and notice of a motion to dismiss given, plaintiff in error, without leave first obtained, submits, with its brief upon the motion, eight additional affidavits in reference to value, and defendants in error ask that, if these are considered, time may be given to them to produce counter affidavits.

As stated by *Mr. Chief Justice* Taney, in *Richmond* v. *Milwaukee*, 62 U. S. 21 How. 391 [16: 72], in cases in which the value does not, according to the usual forms of proceeding, appear in the pleadings or evidence in the record, affidavits have been received to show that the value is large enough to give jurisdiction to this court (*Course* v. *Stead*, 4 U. S. 4 Dall. 22 [1: 724]; *Williamson* v. *Kincaid*, 4 U. S. 4 Dall. 19 [1: 723]); but "in *Rush* v. *Parker*, 9 U. S. 5 Cranch, 287 [3: 103], *Mr. Justice* Livingston expressed his opinion strongly against giving time to file affidavits of value, and the court refused to continue the case for that purpose." And the chief justice added that a practice to postpone or reinstate a case in order to give the party time to furnish such affidavits "would be irregular and inconvenient, and might sometimes produce conflicting affidavits, and bring on a controversy about value occupying as much of the time of the court as the merits of the case." The rule was then declared that "where the value is stated in the pleadings or proceedings of the court below, affidavits here have never been received to vary it or enhance it, in order to give jurisdiction."

In *Talkington* v. *Dumbleton*, 123 U. S. 745 [31: 313], it was accordingly held that when the value of the property in dispute was necessarily involved in the determination of the case in the court below, this court would not, on a motion to dismiss for want of jurisdiction, consider affidavits tending to contradict the finding of that court in that respect; and *Mr. Chief Justice* Waite remarked: "In *Zeigler* v. *Hopkins*, 117 U. S. 683, 689 [29: 1019, 1021], where affidavits were submitted, the finding of the court below as to value was not a material question in the case upon its merits, but was more in the nature [63 of an inquiry for the purpose of determining whether an appeal should be allowed, as in *Wilson* v. *Blair*, 119 U. S. 387 [30: 441]. Here, however, the value of the property was one of the questions in the case and necessarily involved in its determination."

In *Zeigler* v. *Hopkins*, this court treated the finding of the court below upon the question of value as entitled to well nigh conclusive weight; while, in *Wilson* v. *Blair*, it was declared to be good practice for the circuit court to allow affidavits and counter affidavits of value to be filed, as calculated to save trouble to the parties and to the court. There, as in the case at bar, the district judge holding the circuit court, without the formality of deciding the question of value, allowed the writ of error, thus sending the case here on the affidavits free from any decision whatever as to their effect.

In *Gage* v. *Pumpelly*, 108 U. S. 164 [27: 668], the appeal was allowed after a contest as to the value of the matter in dispute, *Judge* Blodgett, who held the circuit court, filing an opinion upon the question; and *Mr. Chief Justice* Waite, speaking for the court, said: "When an appeal has been allowed, after a contest as to the value of the matter in dispute, and there is evidence in the record which sustains our jurisdiction, the appeal will not be dismissed simply because upon examination of all the affidavits we may be of the opinion that possibly the estimates acted upon below were too high."

The result of the cases may be fairly stated to be: (1.) Where the demand is not for money, but the nature of the action requires the value of the thing demanded to be stated in the pleadings, affidavits will not be received here to vary the value as appearing upon the face of the record. (2.) Nor will the filing of such affidavits be ordinarily permitted where evidence of value has been adduced below on both sides, and the proofs have been transmitted either with or without the announcement of a definitive conclusion

deduced therefrom. (3.) But where the writ of error is brought or appeal taken without question as to the value, and the latter is nowhere disclosed by the record, affidavits may be received to establish the jurisdictional amount, and counter affidavits may be allowed if the existence of such value is denied in good faith.

The practice of permitting affidavits to be filed in this court arose from instances of accidental omission, where the value was not really in dispute, and it should not be encouraged to the extent of requiring us to reach a result upon that careful weighing of conflicting evidence, so frequently involved in determining issues of fact. If there be a real controversy on the point, let it be settled below in the first instance and on due notice; not here, upon *ex parte* opinions, which may embody nothing more than speculative conclusions.

In the case in hand, the value of the whole property was alleged in the petition, but was not an issuable fact, and the circuit court allowed the writ of error upon the prima facie showing made by the defendant, and on plaintiffs subsequently presenting evidence to the contrary, the controversy was referred to this court. This being the attitude of the case, we do not think it proper to allow affidavits to be filed here as if the question were now raised for the first time. Upon an examination of the record as returned, we are clear that the jurisdictional value is not made out by a preponderance of evidence. The motion to dismiss will therefore be sustained.

Writ of error dismissed.

HENRY B. SIRE, *Plff. in Err.*,

v.

ELLITHORPE AIR BRAKE COMPANY.

(See S. C. Reporter's ed. 579-583.)

Jurisdictional amount—exceptions to evidence—insufficient bill of exceptions.

1. Where plaintiff recovers in an action $2,485, exclusive of interest and cost, and defendant fails to recover anything on account of his counterclaim of $6,000 set up in his answer, and the defendant brings a writ of error, the aggregate amount is sufficient to give this court jurisdiction.
2. Where the bill of exceptions shows objections and exceptions by defendant to questions put by plaintiff to a witness, but the bill of exceptions fails to show the character of the evidence which previously had been put in, so that it is impossible intelligently to pass upon the propriety of the questions admitted, the judgment will not be reversed by reason of the admission of the evidence.
3. A paper filed in the circuit court eight days after the opinion and findings of the court were filed, which paper forms no part of the bill of exceptions signed by the judge, but is signed only by the attorney for defendant, and purports to be exceptions to findings of facts made by the judge and to his conclusion based upon such findings, cannot be regarded as a bill of exceptions signed by the judge, although it is contained in the record.

[No. 1479.]

Submitted Dec. 15, 1890. Decided Jan. 5, 1891.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiff for damages for breach of a contract.

On motion to dismiss or affirm. *Affirmed, with damages at the rate of 10 per cent, as the writ of error appears to have been sued out merely for delay.*

The facts are stated in the opinion.

Mr. **Samuel Ashton,** for defendant in error, for motion:

The burden of showing jurisdiction is on the plaintiff in error.

Wilson v. *Blair*, 119 U. S. 387 (30: 441).

But if the record shows upon its face jurisdiction, then it is clearly frivolous, and would entitle the defendant in error to a dismissal of the writ of error or affirmance of the judgment for want of jurisdiction.

Rule 6, part 5; *Micas* v. *Williams*, 104 U. S. 556 (26: 842); *Chanute* v. *Trader*, 132 U. S. 210 (33: 345); *Greenleaf* v. *Birth*, 30 U. S. 5 Pet. 134 (8: 73); *Nailor* v. *Williams*, 75 U. S. 8 Wall. 107 (19: 348); *Campbell* v. *Wilcox*, 77 U. S. 10 Wall. 423 (19: 974).

No questions of fact or law decided by the court below can be re-examined or reviewed in the supreme court.

Campbell v. *Boyreau*, 62 U. S. 21 How. 223 (16: 96); *Andes* v. *Slauson*, 130 U. S. 438 (32: 991); *Paine* v. *Central Vt. R. Co.* 118 U. S. 152 (30: 193); *Boogher* v. *New York L. Ins. Co.* 103 U. S. 90 (26: 310); *Stanley* v. *Albany County*, 121 U. S. 547 (30: 1002); *Dean* v. *Mason*, 61 U. S. 20 How. 198 (15: 876).

Messrs. **Chauncey Shaffer, Albert I. Sire** and **J. Hubley Ashton,** for plaintiff in error, against motion:

There can be no question but that the plaintiff in error has the legal right to appeal, the amount involved being more than $5,000. The complaint demands judgment for $7,000. Judgment was entered for the plaintiff in the sum of $2,978.65. The counterclaim of the defendant was entirely disallowed.

Shucker v. *Hartford F. Ins. Co.* 93 U. S. 241 (23: 862); *First Nat. Bank* v. *Hughes*, 106 U. S. 523 (27: 268); *Hilton* v. *Dickinson*, 108 U. S. 165 (27: 688); *Bradstreet Co.* v. *Higgins*, 112 U. S. 227 (28: 715).

The bill of exceptions is sufficient.

Sickles v. *Flanagan*, 79 N. Y. 224; N. Y. Code Civ. Proc. § 993.

A party permitting the completion of the performance of a contract, after the time for the performance has expired, does not thereby forfeit his right to damages for the breach of the contract as to time.

Ruff v. *Rinaldo*, 55 N. Y. 664.

The contractor failing in part cannot recover

NOTE.—*As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution,* see *notes* to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws,—see *notes* to Hart v. Lamphire, 7: 679; Commercial Bank v. Buckingham, 12: 169.

for the other part for the benefit thereof received by the employer.

Cunningham v. *Jones*, 20 N. Y. 486; *Tipton* v. *Feitner*, 20 N. Y. 423.

Error can be assigned in this court on an exception to the exclusion of oral proof of facts, although the record does not show any witness was actually called to the stand to give the evidence.

Scotland County v. *Hill*, 112 U. S. 183 (28: 692); *Graham* v. *Bayne*, 59 U. S. 18 How. 60 (15: 265).

No bill of exceptions is necessary where the error alleged is apparent upon the record.

Young v. *Martin*, 75 U. S. 8 Wall. 354 (19: 418).

This court will not decide motions to dismiss before the record is printed, when there is a question as to the facts.

St. Louis Nat. Bank v. *United States Ins. Co.* 100 U. S. 43 (25: 547).

The motion to affirm cannot be entertained unless there appears on the record at least some color of right to a dismissal.

Crane Iron Co. v. *Hoagland*, 108 U. S. 5 (27: 630).

This court cannot dismiss a case on motion simply on the ground that it has been brought here for delay only.

Amory v. *Amory*, 91 U. S. 356 (23: 436).

Nor by reason of failure to return an assignment of errors.

Gumbel v. *Pitkin*, 113 U. S. 545 (28: 1128).

Questions of law upon the trial of an issue of fact cannot be made part of a bill of exceptions, unless the trial is by jury, or by the court after waiver of a jury trial.

Andes v. *Slauson*, 130 U. S. 435 (32: 989).

Although a bill of exceptions is imperfectly drawn, this court may proceed to decide the case instead of sending it back.

United States v. *Morgan*, 52 U. S. 11 How. 154 (13: 643); *Waterville* v. *Van Slyke*, 115 U. S. 290 (29: 406); *Richards* v. *Mackall*, 113 U. S. 539 (28: 1132); *Whitney* v. *Cook*, 99 U. S. 607 (25: 446).

On motion to dismiss merely, the merits of a case cannot be considered.

Bohanan v. *Nebraska*, 118 U. S. 231 (30: 71).

Where the question of jurisdiction cannot be determined without looking into the merits, the motion to dismiss for want of jurisdiction will be denied, with permission to argue it upon the hearing.

Lynch v. *De Bernal*, 19 U. S. L. ed. 395, not elsewhere reported; *Hecker* v. *Fowler*, 66 U. S. 1 Black, 95 (17: 45); *Semple* v. *Hagar*, 71 U. S. 4 Wall. 431 (18: 402); *Garland* v. *Davis*, 45 U. S. 4 How. 131 (11: 907).

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action at law, brought in the Circuit Court of the United States for the Southern District of New York, by the Ellithorpe Air Brake Company, an Illinois corporation, against Henry B. Sire. The plaintiff is engaged in the business of constructing elevators and putting them into buildings. The complaint sets forth a contract between the plaintiff and the defendant for the plaintiff to furnish and erect for the defendant two hydraulic passenger elevators and two safety steam passenger elevators, in buildings in the City of New York, in eighty to ninety days from the date of the receipt of approved plans, for $6,750, one half to be payable when the machines were in the buildings, and the other half when the elevators were in running order, with a provision that if the defendant should delay the plaintiff in shipping or erecting the elevators, then both of the payments should be due on the date named for completion, and that any deferred payment should bear interest. The complaint further alleges that the plaintiff caused the elevators to be constructed, ready for shipment, within the time specified, and to be set up, in running order, in the buildings, in accordance with the contract; that the two hydraulic elevators were duly shipped, and within the time specified the machinery was placed in the buildings, and one of them was set up in running order, and the other one was very nearly set up, when the plaintiff and its workmen were stopped and prohibited by the defendant from further proceeding with the work; that, after the two safety steam elevators were ready for shipment, and were about to be shipped, the defendant requested the plaintiff not to ship them, as he was not ready for them and desired to make some changes, and he directed it to hold them in store until further orders from him, all of which the plaintiff caused to be done; that the defendant refused to accept the same or permit the plaintiff to ship them or set them up; that the plaintiff is and always has been willing to carry out its agreement to furnish and erect all of the elevators; that the defendant has refused to permit the plaintiff to perform its contract, or to allow the elevators to be erected, or to make the payments therefor, except the sum of $1,900 on account; that, in consequence, the elevators have become wholly lost to the plaintiff, and it has sustained damage to the amount of $6,750 and the interest thereon, no part of which has been paid, except the $1,900; that the plaintiff has sustained additional loss by way of special damage, and has been compelled to employ extra workmen and to do extra work and labor in the buildings, and to incur other expenses, amounting to $2,500, to the damage of the plaintiff in all of $7,000, for which amount, with interest from the commencement of the suit, it asks judgment.

The answer of the defendant sets up a general denial, except that he admits that he has paid $1,900; and avers that the contract between the parties, in respect to the four elevators, was in writing; and that the plaintiff has failed to perform the provisions of the contract, while the defendant has observed them. It also sets up a counterclaim, and claims $6,000 damages for the failure of the plaintiff to perform the contract, alleging that by reason thereof the defendant has been prevented from renting the buildings or occupying part of them himself.

Under a written stipulation duly filed, the case was tried before the court, held by *Judge* Shipman, without a jury; and he, on the 6th of March, 1890, made his findings and decision (41 Fed. Rep. 662), in pursuance of which a judgment was entered in favor of

the plaintiff for $2,485, with $158.60 interest from March 14, 1889, amounting in all to $2,643.60, and $330.05 costs, making a total of $2,973.65. To review this judgment, the defendant has brought a writ of error. The plaintiff now moves to dismiss such writ or to affirm the judgment.

One of the grounds alleged for the motion to dismiss is, that this court has no jurisdiction of the case, because of informalities in the bill of exceptions, the only exceptions presented thereby being alleged errors in rulings admitting evidence. The bill of exceptions does not set forth any part of the evidence on which the questions which were admitted were based. The propriety of the admission of the questions depended entirely upon the state of the evidence, and the bill of exceptions fails to show that. It is further contended, in favor of the motion to dismiss, that deducting the $1,900 from the $6,750 left only the sum of $4,850, with the special damage claim of $2,500; that the plaintiff's judgment amounted only to $2,485; and that, although the defendant set up a counterclaim for $6,000, the record fails to disclose any evidence sustaining it, and therefore the actual amount in controversy between the parties was only $2,485, with interest.

We think, however, that inasmuch as the defendant loses by the judgment $2,485, exclusive of interest and costs, and in addition to that does not recover anything on account of his counterclaim of $6,000, the aggregate amount is sufficient to give this court jurisdiction.

[32] We think, also, that there was sufficient color for the motion to dismiss, to warrant us in considering the motion to affirm; and that the judgment ought to be affirmed.

The bill of exceptions shows objections and exceptions by the defendant to six questions put by the plaintiff to one of its witnesses; but, as before stated, inasmuch as the bill of exceptions fails to show what the character of the evidence was which previously had been put in, it is impossible intelligently to pass upon the propriety of the questions admitted. They related to what was done by the plaintiff with regard to fulfilling the contract, after the plaintiff's proposal to erect the elevators was accepted by the defendant; to the market value of two of the elevators; to what was said between the general manager of the plaintiff and the defendant in regard to those two elevators; to the purpose of the general manager in coming to New York as the representative of the plaintiff; to the value of the work that was done in respect of another elevator; and to the market value of the two hydraulic elevators. It cannot be seen that these questions were improper, or that the answers to them caused any injury or disadvantage to the defendant.

There is no finding of facts by the circuit court, separate from that which is contained in the opinion of the judge; but that finding is very full, and is introduced by the words: "Upon said trial, the following facts were found to have been proved and to be true." The facts as found clearly justified the conclusion of law drawn by the court. In its opinion, the court states that neither party complied with the contract, and the plaintiff did not complete the elevators in one of the buildings within the specified time, but that this noncompliance was fully waived by the defendant; that the defendant broke the contract, and there was no willful abandonment of the work on the part of the plaintiff; that the loss of rent by the defendant [58 was attributable to his own conduct; that upon the counterclaim no loss or damage was proved for which the plaintiff was liable; that the plaintiff was at all times ready and willing to perform its part of the contract, except in the matter of time, which breach was waived by the defendant; that the plaintiff having in good faith built and completed one of the elevators, though not within the time specified by the contract, and the defendant having accepted the work, the plaintiff could recover the value of that elevator; and that, in regard to another of the elevators, as the plaintiff had delivered it to the defendant, and nearly completed the work of setting it up, and was prevented, without its fault, by the defendant, from completing the performance of the contract, it was entitled to recover its loss, which was its outlay, and amounted to $2,050, and also damages for the virtual refusal of the defendant to have the contract carried out in regard to the steam elevators.

There is in the record a paper filed in the circuit court eight days after the opinion and findings of the court were filed, which paper forms no part of the bill of exceptions which is signed by the judge, but is a paper signed only by the attorney for the defendant, and purports to be exceptions to certain findings of fact made by the judge and to his conclusion based upon such findings. This paper cannot be regarded as a bill of exceptions, or as part of the bill of exceptions signed by the judge, irrespectively of the point that this court cannot review the findings of fact.

Judgment affirmed, with damages at the rate of ten per cent, as the writ of error appears to have been sued out merely for delay.

F. H. AYERS ET AL., *Plffs. in Errr.*, [5

v.

A. E. WATSON.

(See S. C. Reporter's ed. 584-604.)

Field-notes of survey, when evidence—marked trees—foot-steps of surveyor—reversing the calls—refusing new trial—judge's charge.

1. A certified copy of the map and of the original field-notes of a survey of land, under a grant of

---

NOTE.—*That patents for land may be set aside for fraud*, see *note* to Miller v. Kerr, 5: 361.

As to errors in surveys and descriptions in patents for lands; how construed,—see *note* to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see *note* to Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co. 28: 794.

the government of Coahuila and Texas, filed in the General Land Office of Texas, are competent evidence to identify and fix the boundaries of the land.

2. In ascertaining the lines of land, the tracks of the surveyor, so far as discoverable on the ground with reasonable certainty, should be followed; and marked trees, designating a corner or a line on the ground, should control both courses and distances.

3. Where the survey of land has been actually run and measured, and ascertained monuments are referred to in it, the foot-steps of the surveyor may be traced backward as well as forward; and any ascertained monument in the survey may be adopted as a starting point, where difficulty exists in ascertaining the lines of the survey as actually run.

4. The beginning corner of a survey does not control more than any other corner actually ascertained, and it is not necessary to follow the calls of the grant in the order they stand in the field-notes, but they may be reversed and the lines traced the other way whenever by so doing the land embraced will more nearly harmonize all the calls and objects of the grant; but where to reverse the calls would not have that effect, the courses and distances of the survey should be followed.

5. In the United States Supreme Court, error does not lie for the granting or refusing by the court below of a new trial.

6. A judge is not bound to adopt the categorical language which counsel choose to put into his mouth; if the case is fairly put to the jury, it is all that can be asked.

[No. 1356.]

Argued Dec. 4, 1890. *Decided Jan. 5, 1891.*

IN ERROR to the Circuit Court of the United States for the Northern District of Texas, to review a judgment for plaintiff in an action to recover land in Texas. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wm. E. Earle** for plaintiff in error.

Mr. **W. Hallett Phillips** for defendant in error.

85] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case has been before us on two former occasions, in October Term, 1884 (*Ayers* v. *Watson*, 113 U. S. 594 [28: 1093]), and in October Term, 1889 (*Ayers* v. *Watson*, 132 U. S. 394 [33: 378]). It has had six trials by jury, in three of which the juries disagreed, and in the other three verdicts were found for the plaintiff.

The case comes before us, as heretofore, on a bill of exceptions, and the first assignment of error relates to a matter of a preliminary character. When the cause came on for trial, the defendant below, Ayers, asked leave to file an amendment to his application for the removal of it from the state court, for the purpose of making additional allegations as to the amount in controversy, as to the citizenship of the parties, etc. The court refused to allow such amendment, and the defendant excepted to this ruling. The allowance of such an amendment (if allowable at all) is a matter of discretion, and error cannot be assigned upon the decision. When the cause was here the first time, one of the errors assigned was that the court below had refused to remand the cause to the state court. We then held that in this refusal there was no error, and we do not see how this question can be further litigated between the parties.

The principal facts of the case, as elicited by the evidence and shown in the bill of exceptions, are stated in the reports above referred to, and only so much will be repeated as is necessary to an understanding of the points now raised.

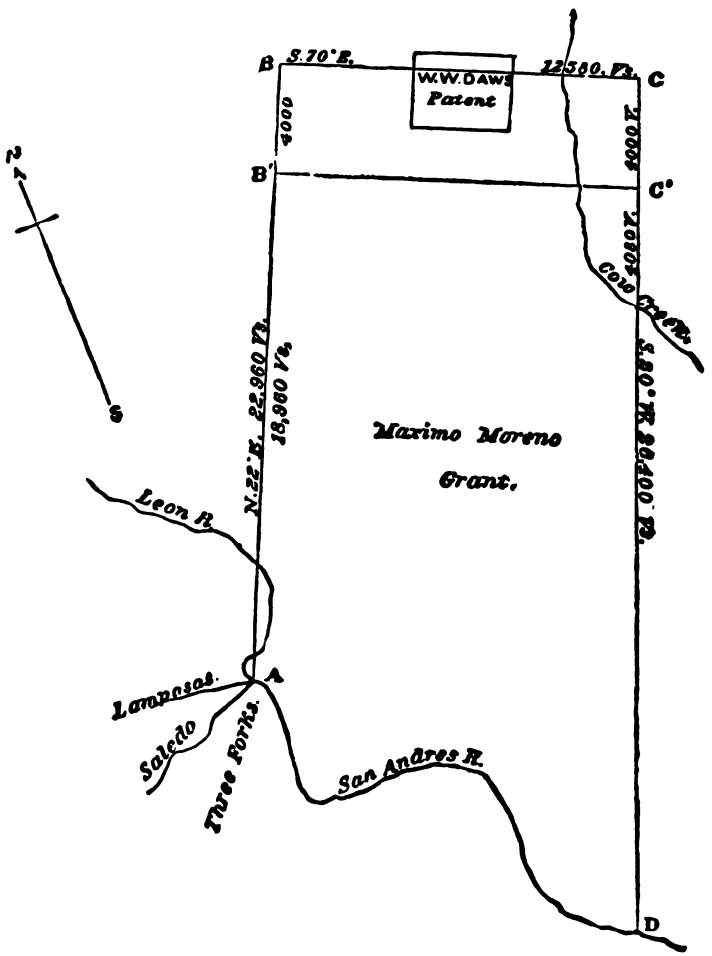
The plaintiff, Watson, claimed title to one third of a league of land situated in Bell County, Texas, being a rectangular tract granted by patent of the State of Texas to the heirs of Walter W. Daws, September 16, 1850, the location and boundaries of which are not disputed; and, on the trial, it was agreed by the parties that the plaintiff was entitled to all the right, title and interest granted by said patent. The defendant, Ayers, claimed title under a grant of the government of Coahuila and Texas to one Maximo Moreno, dated October 18, 1833, for a tract containing eleven leagues of land; and it was admitted on the trial that the de- [58
fendant held and owned all the right, title and interest created by the said grant. This being the older title, the verdict should have been for the defendant if he had shown that the Moreno grant covered the Daws tract owned by the plaintiff; and whether it did or not was the question in controversy in the cause. The Maximo Moreno grant lies on the north side of the River San Andres, with a perpendicular breadth, easterly and westerly, of about seven miles, and extending back into the country, north-northeasterly, about fourteen miles. The Daws tract, owned by the plaintiff, is situated near the north end of the Maximo Moreno grant, about midway between the eastern and western lines of the same, and the question is, whether the north boundary line of the Maximo Moreno grant is situated so far to the north as to include the plaintiff's land, or whether it runs southwardly of it.

The field-notes of the Moreno grant, embodied in the grant itself, are in the Spanish language, and, translated into English, are as follows:

"Situated on the left margin of the River San Andres, below the point where the creek called Lampasas enters said river on its opposite margin, and having the lines, limits, boundaries and landmarks following, to wit: Beginning the survey at a pecan (nogal) fronting the mouth of the aforesaid creek, which pecan serves as a landmark for the first corner, and from which 14 varas to the north 59° west there is a hackberry 24 in. dia., and 15 varas to the south 34° west there is an elm 12 in. dia.; a line was run to the north 22° east 22,960 varas, and planted a stake in the prairie for the second corner; thence another line was run to the south 70° east, at 8,000 varas crossed a branch of the creek called Cow Creek, at 10,600 varas crossed the principal branch of said creek, and at 12,580 varas two small hackberries serve as landmark for the third corner; thence another line was run to the south 20° west, and at 3,520 varas crossed the said Cow Creek, and at 26,400 varas to a tree (palo) on the afore-

said margin of the River San Andres, which
[7] tree is called in English 'box elder,' from which 7 varas to the south 28° west there is a cottonwood with two trunks, and 16 varas to the south 11° east there is an elm 15 in. dia.; thence, following up the river by its meanders, to the beginning point, and comprising a plane area of eleven leagues of land, or 275 millions of square varas."

The annexed sketch shows the outline of the tract, and the relative location and size of the Daws patent owned by the plaintiff: the position of the westerly line, A B, the first line of the survey. The difficulty is to locate the back, or northerly, line. The defendant, as owner of the Moreno grant, contends for the line from B to C, which includes the greater part of the plaintiff's tract; and the plaintiff contends for the line from B′ to C′, which passes south of his land. If either the northwest or northeast corner were known, the controversy would be at an end; but they are not fixed by any monuments which the parties agree on. The northwest corner, at the end of the first line in the field-notes,



A. Beginning corner—well known.
D. S.E. corner—well known.
B. N.W. corner, as claimed by defendant.
B′. N.W. corner, as contended by plaintiff.
C. N.E. corner, as claimed by defendant.
C′. N.E. corner, as contended by plaintiff—2 hackberries.
C′ D. Marked line, well known, 14 miles long.

The beginning corner, A, opposite the mouth of the Lampasas Creek, and the southeast corner, D, at the "box elder," or "double cottonwood," on the bank of the river, are well-known and conceded points; and the location of the long easterly line, C′ D, is fixed by marked trees, concurred in by both parties; and there is no controversy about was a mere stake set in the prairie, and, of course, soon disappeared. The northeast corner, at the end of the second line, was marked by "two small hackberries;" but no such trees have been found at, or near, the point C, where the north line, run by compass and chain according to the survey, would meet the easterly line. In 1854 one

Samuel Bigham, a surveyor, under an order of the District Court of Bell County, surveyed the Maximo Moreno grant, commencing at the beginning corner, A, and following the field-notes to the end of the second line, and was unable to find the northeast corner, or the easterly line. Some months afterwards he tried again, and by running across the front of the survey, the distance usually taken for an eleven-league front (13,750 varas), he found the eastern line, marked with blazes, which led him to the southeastern corner of the grant (D), when [588] he found and identified the trees called for in the field-notes. From this point, following the line back N. 20° E., he found the line plainly marked with old blazes for 26,400 varas (the length called for in the field-notes), crossing Big Elm or Cow Creek at the exact distance from the S. E. corner required by the field-notes; and proceeding onward about 560 varas further, on the same course, he found two small hackberries in Cow Creek bottom, at which point, as he testifies, the line gave out. The line passed between these hackberries, and they were each marked on the inside with old blazes facing each other. He took those hackberries to be the identical ones called for in the grant, and fixed upon that point as the northeast corner of the survey. This is the point which the plaintiff claims to be the true northeast corner, and is marked C′ in the sketch. A line run from this point N. 70° W., the reverse of the line called for in the survey, would be the line B′ C′ on the map, and would fall to the south of the plaintiff's land. But B′, the point at which this line would intersect the west line of the survey, would be only about 18,700 varas from the beginning corner, instead of 22,960 varas, as called for in the field-notes, or a deficiency of over 4,000 varas.

On the other hand, if the field-notes are followed, by running the first line from the S. W. corner, N. 22° E., 22,960 varas, and the second line thence S. 70° E., 12,580 varas, the upper line, B C, would be followed, but the distance, 12,580 varas, would fall short of the eastern line at C by about 570 varas, the true distance from B to C being 13,150 varas instead of 12,580. Then, running from C to D, the whole distance is found to be about 30,400 varas instead of 26,400 (as called for in the grant), or about 4,000 too much; and the distance from C to Cow Creek is found to be 7,500 or 8,000 varas, instead of 3,520, as called for in the field-notes, or 4,000 too much. So that the northeast corner of the tract, as fixed by Bigham at the two hackberries, corresponds very nearly with the several distances called for on the east line, but makes the west line 4,000 varas too short; whilst the northeast corner, as fixed by running the west line its full length, as called for by the field-notes, and then running the north line as directed therein, [590] and extending it so as to meet the easterly line, makes the easterly line 4,000 varas too long.

The truth is, the original survey must in some parts have been imperfectly executed, or errors must have crept into the field-notes. Frank W. Johnson was the surveyor—long well known as principal surveyor of the Austin and Williams colony. His deposition was taken in 1878, and again in 1880, forty-five and forty-seven years after the survey was made. He does not say what time of the year he made the survey, but William Duty, his chain-bearer, says it was in the Spring. Both say that it was made in 1833, and was never made but once. Johnson is positive that he followed the courses and distances designated in the field-notes of the grant for the first two lines, but that the last line, the easterly one of the tract, though run and marked, was not measured, but only estimated as to length or distance. But the field-notes give the distance from the N. E. corner to Cow Creek 3,520 varas, and from the N. E. corner to the San Andres River 26,400 varas, which would make the distance from Cow Creek to the San Andres 22,880 varas, which, by subsequent surveys, is found to be precisely accurate. This correspondence for such a long distance (over 12 miles) could hardly have been the result of conjecture; and the evidence of the chain-bearer is that the easterly line, as well as the westerly and northerly lines, was actually measured by chaining. If this was so (and it was for the jury to determine whether it was or not), the judge was entirely right in charging that the footsteps of the original surveyor might be traced backward as well as forward; and that any ascertained monument in the survey might be adopted as a starting point for its recovery. This is always true where the whole survey has been actually run and measured, and ascertained monuments are referred to in it. *Ayers* v. *Harris*, 64 Tex. 296; *Ayers* v. *Lancaster*, Id. 305; *Scott* v. *Pettigrew*, 72 Tex. 321.

On the question of the true location of the northern boundary line of the Moreno grant, evidence was adduced by both parties. The defendant showed by surveyors who had recently gone over the lines that there were old marked trees in the north line of the [591] survey claimed by him, and that the easterly line was continued to that line by old marked trees extending northerly from the two hackberries discovered by Bigham. The plaintiff, in rebuttal, adduced evidence to show that by blocking these trees the marks and blazes relied on were found to be of comparatively recent origin, not more than 18 or 20 years old in 1886.

Duty, the chain-bearer, who was examined several times on the subject, and contradicted himself a good deal, on his last examination, taken by deposition in 1886, testified that the two hackberries found by Bigham, and established by him as the northeast corner, appeared to him (Duty) to be in a location like that where the northeast corner was established in 1833, and that the northeast corner, as claimed by the defendant, is in a location entirely different from that in which said corner was established in the original survey. He also said that the corner was made not in the prairie but in the bottom timber, and that he does not think that the corner is a hundred varas from the place claimed by the plaintiff.

The testimony of this witness is not en-

titled to much weight, but being corroborated by the existence of the two hackberries discovered by Bigham, and by the distances from that point to Cow Creek and to the San Andres River, it may be regarded as not so entirely worthless as to be absolutely rejected. The testimony of several other witnesses, including surveyors, was taken to show the situation of the different lines and points named in the grant, and the condition of the marked trees claimed by the respective parties to be indicative of the true location.

In addition to the two hackberries, relied on by the plaintiff as fixing the position of the N. E. corner and the northerly line of the Moreno survey, he contended that the respective distances of the creeks and watercourses, called for by the field-notes on said line, corresponded with the actual distances found on the line run from said hackberries, and did not correspond with the actual distances found on the line claimed by the defendant. To show this more clearly, the plaintiff offered in evidence a certified copy of certain field-notes in a field-book on file in the General Land Office of Texas, as the original English field-notes of the Moreno survey made by Frank W. Johnson. In his deposition, Johnson had testified that his field-notes of the survey were made in English, and reported to the empressario, and by him transcribed and translated into Spanish, and thus carried into the title. C. W. Pressler, chief draughtsman of the General Land Office, testified that these field-notes were claimed to have been made by Johnson. DeBray, Spanish clerk in the land office, testified that he had heard Johnson claim that this field-book was written by him. There was also a map or sketch of old surveys, including the Moreno survey, bound up in an atlas, regarded as the work of Johnson, and which had been in the General Land Office as far back as the witnesses had knowledge of it. Pressler testified that it was claimed by Johnson to have been filed by him, and that he (Pressler) had known it to have been in the land office since December, 1850, and that the words and figures on it resembled Johnson's handwriting. A certified copy of this map, and the said certified copy of the original field-notes of the Moreno eleven-league survey, as also a photographic copy of the latter, were admitted in evidence against the objection of the defendant.

The following is a copy of the field-notes referred to:

"Sunday, 21st, surveyed for Samuel Sawyer 11 leagues of land, beginning on the N. side of San Andres, opposite the mouth of Lampasas, at a pecan 18 in. diam., bearing N. 59 W.—vs. from a hackberry 24 in. and S. 34 W. 15.2 vs. from an elm 12 in.; thence N. 22 E. 22,960 vs. to the corner, a stake in the prairie; thence S. 70 E. 1,690 vrs. to a branch of Cow Creek, 4,500 vrs. to 2nd branch, 8,000 vrs. to 3rd branch, 11,060 vrs. to Cow Creek, 12,580 vrs. to the corner, two small hackberries; thence S. 20 W. 3,520 vrs. to Cow Creek; 7,500 to N. W. corner of 2nd tract, a stake bearing N. 77 E. 93.3 vrs. from a hackberry 8 in. to Spring Branch 23,640 vrs., 23,700 vs.; to bottom prairie 24,360 vs.; crossed same branch to the corner, a box elder, 26,400 vs., bearing S. 48 W. 7.2 vs. from a forked cottonwood 48 in., and S. 11 E. 16.4 vrs. from an elm 15 in."

These are evidently the field-notes of the same survey that was carried into the grant. It seems that it was made for one Sawyer, and afterwards used for the Moreno grant, which was not issued until October, 1833. Duty, the chain-bearer, says the survey was made in the Spring of that year; and the 21st of April came on Sunday in the year 1833. These notes are more full than the field-notes in the grant, as they call for four streams crossing the north line, whilst the grant mentions only two of them. The four are as follows: 1,690 varas from the N. W. corner to a branch of Cow Creek; 4,500 varas to a second branch; 8,000 varas to a third branch; 11,060 varas to the Cow Creek itself. The witness Turner, for many years county surveyor of Bell County, who was employed by the defendant to trace the eastern and northern lines of the Moreno grant in 1880, testifies that by running the north line westerly from the two hackberries the first stream is reached at the distance called for in the field-notes; that the distance between the first and second is also right; between the second and third the distance is too great; but between the third and fourth, and between the fourth stream and the N. W. corner (as claimed by the plaintiff), the distances agree with the field-notes; whilst the north line, as claimed by the defendant, crosses only three creeks, and none of them are in any way near the distances called in any of the field-notes. As rivers and streams are natural monuments, entitled to weight in any survey, it is manifest that these English field-notes of Johnson must have had an important bearing in the trial.

The map or sketch, as before observed, contained an outline of the Moreno eleven-league tract, and of the streams which traverse it, with notes in Spanish of the courses and distances of the different lines. These notes begin with the easterly line, which is described as "Norte 20° Este, 26,400" [N. 20 E. 26,400]. The north line is partially obliterated, but enough of the notation remains to show that it was measured from east to west. The west line is described as "18,400 Sur 22° Oeste" [*i. e.*, 18,400 S. 22° W.]. This shows that the length of the west line was therein made what it should be to correspond with the length of the east line as called for in all the surveys, and, so far as it goes, is evidence of a survey beginning at the southeast corner and running north, and then west, and then south, the reverse of the course which Johnson says he pursued. When it is recollected that his testimony was given forty-five years after the survey was made, and that the field-notes, which he undoubtedly had regard to, may have been written out in reverse order after the outdoor work was done, the fact that this old map or sketch exhibits a survey entirely consistent in all its parts, which the field-notes do not, gives it considerable interest and value as independent evidence.

The admission of the field-notes and map is one of the errors assigned on the present hearing; and the question of their admissibility will be now considered. These very field-notes were admitted in evidence in a recent case in Texas, in an action between the appellant Ayers, as plaintiff, and Harris and others, defendants, and their admission was sanctioned by the Supreme Court of Texas on appeal. *Ayers* v. *Harris*, 77 Tex. 108. The court, in its opinion, says:

"The evidence, we think, places it beyond doubt that the survey mentioned in the field-book as made for Samuel Sawyer was a survey of the same land that was titled to Maximo Moreno, and the only survey that was ever made of it. It cannot be doubted, upon this evidence, that Johnson, having made the survey for Sawyer a few months before, adopted it when ordered to make a survey for Moreno, without making a resurvey.

"The memorandum made by him at the time of the survey and deposited in the General Land Office at the same time that the title itself was deposited there, and carefully preserved ever since, is spoken of by its custodians and produced as an archive. In the case of *Cook* v. *Dennis*, 61 Tex. 248, a similar document was spoken of by this court as an archive and held to be admissible in evidence.

"Even if it cannot strictly be held an archive of the General Land Office and admissible as such, it was clearly proved in this case to be a memorandum of the survey made by the surveyor at the time the work was done, and as such we think it was clearly admissible to aid in proving the actual footsteps of the surveyor when making the survey.

[595] "Very great difficulty existed in ascertaining where the lines of the survey were actually run. Aided by all the evidence that could be secured, and guided by all the rules recognized as being proper to be observed in such cases, repeated trials of the question have been had with conflicting results.

"It is a well-recognized rule that the declarations of the surveyor may be proved under the circumstances existing at the time of the trial of this cause. Such evidence can certainly rank no higher and cannot be so safe or satisfactory as evidence written down by the surveyor at the time. The only difference that we can see between the field-notes taken from the field-book and those contained in the title is with regard to the number and distances of some of the objects called for, and we think the notes contained in the field-book could not have had any other tendency than to aid in showing where the north line of the Moreno survey was actually placed by the surveyor.

"The photographic copy was admissible for what it was worth on the question as to whether the west line of the survey was actually measured.

"The charge requested and refused would have tended to destroy the effect of the evidence."

By reference to the case of *Cook* v. *Dennis*, 61 Tex. 246, cited in the above quotation, it seems that similar evidence in all respects was received in that case, and its admission approved by the supreme court. The court said:

" . . . To aid in the identification of the land, appellant offered to read as evidence a certified copy of the original field-notes of the survey. It seems that these field-notes were made out in the English language, and passed to the commissioner for extending grants; that they were translated into the Spanish language, and, as thus translated, were incorporated into the grant. The courses and distances along the meanders of the river, as given in the original, were omitted in the translation. Therefore, it was to supply the omission and to aid the grant that the certified copy was offered in evidence. These original field-notes were archives in the General Land Office, and would ordinarily be admissible in aid of the grant. But the objections urged in this case, and upon which the court acted in excluding the evidence, were these: The survey was made some five months prior to extending the grants, and was made prior to the order of survey. At that early period, the practice of making the survey, and afterwards obtaining the order of survey, generally prevailed. While such proceedings might not have been strictly regular, such irregularity has never been considered as affecting the validity of the survey or the grant based thereon. The commissioner for extending grants having recognized the survey by extending the grant, it was not a valid objection to the admission of the certified copy that the survey was made before the order of survey, and previous to extending the grant. This rejected evidence would, to some extent, at least, tend to establish the identity of the land embraced in the grant, and ought to have been admitted."

It thus appears that these original field-notes deposited in the General Land Office, though not forming a part of the documentary title, are nevertheless regarded by the Supreme Court of Texas as competent evidence for the purpose of aiding the grant in regard to the identification and boundaries of the granted premises. Courts have always been liberal in receiving evidence with regard to boundaries which would not be strictly competent in the establishment of other facts. Old surveys, perambulation of boundaries, even reputation, are constantly received on the question of boundaries of large tracts of land. The declarations of surveyors made at the time of making a survey have been admitted; and at all events it seems to be now a recognized rule of the Land Law of Texas that field-notes of surveyors, especially if deposited in the General Land Office, are to be received as evidence on this subject. If we had any hesitation on the admissibility of such evidence as a general question, we should be largely influenced in the present case by the decisions of the Supreme Court of the State. In our opinion, therefore, the admission of this evidence was not error. In this country a liberal rule on the subject has been

adopted in most of the States. The point was considerably discussed by *Mr. Justice* Lamar in delivering the opinion of the court in *Clement* v. *Packer*, 125 U. S. 309 [31: 721], a case arising in Pennsylvania, in which, in view of the law prevailing in that State, we held that the declarations of a deceased surveyor, whilst making a survey, were admissible to identify a monument pointed out by him as a corner of the same survey, established in making the original survey many years before, in which he had participated. In *Hunnicutt* v. *Peyton*, a Texas case, 102 U. S. 333 [26: 113], we held that by the decisions of that State such declarations, to be admissible, must be made on the spot whilst running or pointing out the line, or doing something with regard to it, and not at a different place, where it was only spoken of incidentally. *Mr. Justice* Strong, however, who delivered the opinion in that case, showed that the Texas decisions had gone the length of admitting the evidence of declarations of a deceased surveyor, whilst making a survey of the tract in question, and of a deceased chain-bearer who had pointed out to the witness the place of a corner. (See the subject quite fully discussed by *Mr. Justice* Field, when chief justice of California, in *Morton* v. *Folger*, 15 Cal. 275, 279, 282). But the recent decisions of the Supreme Court of Texas, above cited, are sufficient to control our views in the present case.

The evidence being concluded, the judge delivered his charge, and the jury rendered a verdict for the plaintiff. Before examining the errors assigned in relation to the charge and refusals to charge as requested, the third assignment of error may be disposed of. This was the refusal of the court to grant a new trial. And as to this, we have only to repeat what we have so often endeavored to impress upon counsel, that error does not lie for granting or refusing a new trial.

Although no errors are expressly assigned on argument upon the charge itself, but only upon the refusal of the judge to give certain instructions asked for by the defendant, yet in order to show the general view of the case which was taken by the judge, and the bearing of the instructions asked and refused, we give below the principal portion of the charge actually given. The judge said:

"Our purpose and your duty is to follow the tracks of the surveyor, so far as we can discover them on the ground with reasonable certainty, and where he cannot be tracked on the ground we have to follow the course and distance he gives, so far as not in conflict with the tracks we can find that he made; and you will constantly bear in mind, in considering the proof in this case, that in fixing the boundaries of a grant the rule requires that course shall control distance as given in the calls of the field-notes of the survey, and that marked trees, designating a corner or a line on the ground, shall control both course and distance. In order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground the corner called for in the grant as the 'beginning' corner does not control more than any other corner actually well ascertained, nor are we constrained to follow the calls of the grant in the order said calls stand in the field-notes there recorded, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant.

"There has been proof given you tending to show where the two small hackberries called for as the intersection of the eastern and north lines of the grant actually stood at a distance from the lower corner on the river corresponding to the length of the eastern line of said grant; and if the proof satisfies you that the two hackberries mentioned in the testimony of the witnesses Sam. and Pat. Bigham were the hackberries called for and marked by the original surveyor as a corner of said grant, in that case a line drawn from the point where said hackberries stood N. 70 W. until it intersects the western line of said grant will bound the eleven-league grant upon the north, and if the Daws one third of a league is situated wholly north of this line it does not conflict with said eleven-league grant, and you will find for the plaintiff.

"If the proof does not satisfy you that the two hackberries mentioned in the testimony of the witnesses were the two hackberries called for by the original surveyor to serve as a landmark for corner at the intersection of the back (or north) line with the east line of said grant, and if a consideration of the whole proof satisfies you that the original surveyor began the survey at the 'cottonwood' [599 corner (the S. E. corner) and marked and measured the east line and did not actually trace and measure the west line of said grant, you should follow these footsteps of the surveyor, and from the point where you find his footsteps stop (for it is not disputed that this line is marked to a greater distance than the distance called for in the grant as the length of this line)—from this point where you find the footsteps stop you will run a line N. 70 W. to the west line of said grant for the north or back line; and if this line so run will fall wholly south of the Daws survey you will find for the plaintiff.

"If from the proof you are not able to fix the place where the two hackberries called for in the grant as a landmark to designate the N. E. corner of the Moreno grant then stood, and the proof does not satisfy you that to reverse the calls and trace the lines the other way would most nearly harmonize all the calls with the footprints left by the surveyor, you will fix the boundaries of the Moreno grant by the courses and distances of the first and second lines of the survey, extending the second line so as to meet the recognized east line, extended on its course to the point of intersection with the extended second or north line; and if the north line so fixed will embrace in the Moreno grant any part of the Daws survey, you will find for the defendant."

In our judgment this charge was justified by the testimony in the cause, and, on the

whole, gave a correct view of the questions to be solved. The general rules laid down at the commencement are undoubtedly sound. The judge was also correct in saying, as we have already remarked, that the beginning corner does not control more than any other corner actually ascertained, and that we are not constrained to follow the calls of the grant in the order they stand in the field-notes, but may reverse them and trace the lines the other way, whenever by so doing the land embraced would more nearly harmonize all the calls and the objects of the grant.

The next paragraph, relating to the two small hackberry trees, and instructing the jury that, if the proof satisfied them that they were the hackberries called for in the [600] original survey, the north line must be drawn from them, and the verdict must be for the plaintiff, was undoubtedly correct.

The third paragraph, which directed the jury if the hackberries were not sufficiently proved, and they were satisfied, from a consideration of all the proof, that the original surveyor began the survey at the S. E. corner and marked and measured the east line, and did not actually trace and measure the west line of the grant, they should trace his footsteps, and where they found them to stop they should run a line N. 70° W. for the north line, was, in our view, also correct. There was some evidence to show that the surveyor did commence the survey at the S. E. corner. The old map or sketch clearly showed this; and the correspondences of distances and other evidence showed that the east line must have been actually measured, contrary to the recollection of Mr. Johnson, the surveyor.

The last paragraph directed the jury, if not able to identify the hackberries as the original corner, and not satisfied that to reverse the calls would more nearly harmonize all the calls with the footprints left by the surveyor, they must follow the courses and distances of the survey, which, of course, would give the land to the defendant. This direction was clearly correct. And taking the whole charge together, it covers the whole case.

The first error assigned in regard to the charge is for the refusal of the judge to give the following instruction requested by the defendant, to wit:

"If the proof satisfies you that there are old blazes along the east line above the hackberries said to have been found by Bigham in 1854, and that such blazes extend to a distance of 4,000 varas to the point of intersection with the course of the north or back line as run from the northwest corner as established by its calls, and that such back or north line is also marked with old blazes, and that these lines were so run and marked by the original surveyor in 1833, then in that case you will find for the defendant."

This instruction was substantially given, with proper qualifications, in the first para- [601] graph of the charge, declaring it the duty of the jury to follow the tracks of the surveyor, so far as discoverable on the ground, with reasonable certainty; and declaring that marked trees, designating a corner or a line on the ground, should control both courses and distances. This gave the defendant the benefit of all he could legitimately ask for in the instruction which he requested, and gave it in a form which better comported with the judge's view of the impression due to the evidence on the subject. A judge is not bound to adopt the categorical language which counsel choose to put into his mouth. Nothing would be more misleading. If the case is fairly put to the jury, it is all that can reasonably be asked. The instruction as requested, if given as an independent proposition, without qualification, was calculated to mislead the jury and draw their attention away from other marks and monuments equally or more controlling. The most controlling evidence of all, if the jury believed it, was that which identified the two hackberries discovered by Bigham as the original trees at the N. E. corner of the tract. Believing that, it ended the controversy. Believing that, the marked trees found farther north in the same easterly line, and the marked trees found in the northerly line, must be considered as having been marked at a later period, as several witnesses who examined them testified. It would not have been fair, therefore, to have put forward the instruction asked as a naked independent proposition; for though it be strictly true that, if those trees were marked by the original surveyor, they denoted the position of the true line, there were so many considerations affecting the determination of the truth on that point, that an unqualified statement of the proposition as an independent one was not proper. It would have ignored, not only the hackberries, but the Cow Creek bottom, in which there was much evidence to show that the N. E. corner was originally located; and the stream crossings on the north line itself. Of course, it may be said that all these circumstances would affect the belief of the jury in the identity of the marked trees referred to with those marked by the original surveyor. But the instruction as proposed would have tended to withdraw the minds of the jury from a consideration of this evidence. We think [6 the charge was more correct as the judge delivered it, than it would have been if he had adopted the instruction as proposed by the defendant.

The last paragraph of the charge also gave the defendant the benefit of the lines sought to be established by him, by directing the jury to follow the courses and distances of the survey contained in the grant, if they were not satisfied as to the identity of the two hackberries with those called for in the grant, nor that the original survey was commenced at the S. E. corner. This direction would have led the jury to the identical marked trees referred to in the instruction.

We think there was no error in its refusal.

The fifth assignment of error is for the refusal of the judge to give the following instruction:

"The jury are charged that the field-notes

which entered into and formed part of the title originally made to Maximo Moreno are those which are to control them in their findings in respect to the work of the surveyor in the field: that they will not consider any field-notes of a survey purporting to have been made for Sawyer unless the evidence should show that the field-notes last mentioned entered into and were incorporated in the grant made to Moreno, and unless the proof shows that the Sawyer field-notes are those which entered into and formed part of the title to Moreno; otherwise they will disregard the Sawyer field-notes, and look only to the field-notes in the title issued to Moreno."

We think that the refusal was justifiable. The direction that the field-notes in the title should control the jury in their findings would have been too absolute and unqualified. There is no real contradiction between the original field-notes found in the General Land Office and the field-notes contained in the title. The former are only somewhat fuller than the latter in specifying the water-courses crossed by the survey, some of which were omitted in the title; and if the jury were satisfied that the field-notes produced from the land office were genuine, they would have a right to take them into consideration, and not be governed wholly by the field-notes in the title.

The sixth assignment of error is for refusing to give the following instruction:

"If the testimony is not sufficient to identify the two hackberries claimed by the plaintiff as the northeast corner of the Maximo Moreno grant with those called for in the grant, and the jury cannot fix the northeast corner nor the back line by any other marks or monuments, then they shall fix it by the courses and distances of the first and second lines of the survey, except that the second line shall be extended so as to meet the recognized east line, as marked and extended beyond the hackberries; and in that case they shall find for the defendant."

This charge was substantially contained in the last paragraph of the charge actually given by the judge, with this qualification, that the jury should not be satisfied that the original survey was commenced at the S. E. corner of the tract. We think that the qualification was correctly made, and that the charge was right, and that in the refusal to give the instruction asked for there was no error.

The seventh assignment relates to the refusal to give the following instruction:

"If the testimony is not sufficient to identify the two hackberries claimed by the plaintiff as the northeast corner of the Maximo Moreno grant with those called for in the grant, and the jury believe from the evidence that the Maximo Moreno survey was actually made on the ground by commencing at the beginning corner as called for in the grant and actually running out and tracing with a chain the upper or western line as called for (except the offset to avoid crossing the river), and that the northwest corner was fixed at a point on the course called for in the grant at the end of the northwest corner so established, the surveyor did actually run out and trace with a chain on the course called for to the northeast corner, they must find for the defendant."

This instruction was also substantially given in the last paragraph of the charge, and is involved in the whole charge taken together. We think there was no occasion for it, and no error in refusing to give it.

The last assignment of error relates to the refusal of the following instruction, to wit:

"It would not be proper to reverse the calls [604]
of the grant made to Maximo Moreno and to run in reverse course from the southeast corner for the purpose of ascertaining where the northeast corner would be found by the measurement called for in the grant, if the evidence satisfies the jury that the surveyor actually began the survey at the corner called the beginning corner in the field-notes and from that corner ran and measured the western and northern lines on the ground."

We think the instruction was properly refused. As already intimated, the judge was right in holding as he did, and in instructing the jury, that the beginning corner of a survey does not control more than any other corner actually well ascertained, and that we are not constrained to follow the calls of the grant in the order said calls stand in the field-notes, but are permitted to reverse the calls and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant. If an insurmountable difficulty is met with in running the lines in one direction, and is entirely obviated by running them in the reverse direction, and all the known calls of the survey are harmonized by the latter course, it is only a dictate of common sense to follow it.

The judgment is affirmed.

UNITED STATES, *ex rel.* AMASA A. REDFIELD, *Plff. in Errr.*, [636]
v.
WILLIAM WINDOM, Secretary of the Treasury.

(See S. C. Reporter's ed. 636-647.)

Mandamus, when issued—ministerial act—when Secretary of Treasury will not be compelled by mandamus to issue draft—disputed questions—valid contract.

1. The writ of mandamus may issue to a public officer to enforce the performance of a duty plainly ministerial where the right of the party applying for it is clear and he is without any other

NOTE.—*As to when mandamus will issue*, see *note* to M'Cluny v. Silliman, 4: 263.

As to mandamus to control inferior courts; discretion,—see *note to Ex parte* Morgan, 29: 135.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see *note to* Davenport v. United States, 19: 704.

adequate remedy; but it cannot issue where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion.

2. The writ of mandamus will not be issued to compel the performance of even a purely ministerial act, where the case is one of doubtful right, or where the relator has another adequate remedy and the granting of the writ will affect persons who are not parties, or where it will be attended with manifest hardship and difficulties.

3. A writ of mandamus will not issue to compel the Secretary of the Treasury to deliver a treasury draft for labor and material in constructing and repairing government buildings, where the draft was prepared for delivery upon condition that a part thereof should be applied to the claims of laborers and materialmen, and the petitioner refuses to perform that condition, and where he has incurred penalties for delays, which would not have been remitted but for said condition, agreed to by him, to pay such laborers and materialmen out of said draft.

4. A mandamus will not be issued to compel the Secretary of the Treasury to deliver and pay a draft where the return of the Secretary raises disputed questions of law and fact which ought not to be tried in the proceedings to obtain the writ.

5. An agreement between a government contractor who has incurred penalties for delays, and the accounting officers of the Treasury Department, that those penalties shall be waived upon condition that the amount thereof, if allowed to him, should go to the payment of the laborers and the materialmen on the work, is valid.

[No. 1301.]

Argued Dec. 18, 1890. Decided Jan. 12, 1891.

IN ERROR to the Supreme Court of the District of Columbia, to review a judgment dismissing relator's petition for a peremptory writ of mandamus against the Secretary of the Treasury, commanding him to deliver a treasury draft. *Affirmed.*

The facts are stated in the opinion.

Mr. **Franklin H. Mackey**, for the relator, plaintiff in error:

The assignment was valid and passed to the relator the title to the draft.

Hobbs v. *McLean*, 117 U. S. 567 (29: 940); *Erwin* v. *United States*, 97 U. S. 392 (24: 1065); *Goodman* v. *Niblack*, 102 U. S. 556 (26: 229).

Duress cannot be predicated of a legal duty discharged under compulsion.

Knapp v. *Hyde*, 60 Barb. 80; *Shephard* v. *Watrous*, 3 Caines, 168; *Eddy* v. *Herrin*, 17 Me. 338; *Clark* v. *Turnbull*, 47 N. J. L. 265; *Stouffer* v. *Latshaw*, 2 Watts, 167; *Alexander* v. *Pierce*, 10 N. H. 494; *McVane* v. *Williams*, 50 Conn. 548; *State* v. *Davis*, 79 N. C. 603; *Meek* v. *Atkinson*, 1 Bailey (S. C.) 84; *Dickerman* v. *Lord*, 21 Iowa, 338; *Green* v. *Scranage*, 19 Iowa, 461; *Diller* v. *Johnson*, 37 Tex. 47; *Graydon* v. *Church*, 7 Mich. 36.

The relator sues as assignee, not as receiver, and therefore the court has jurisdiction of the case.

Booth v. *Clark*, 58 U. S. 17 How. 332 (15: 168); *Pond* v. *Cooke*, 45 Conn. 126; *Clark* v. *Connecticut Peat Co.* 35 Conn. 303; *Crapo* v. *Kelly*, 83 U. S. 16 Wall. 610 (21: 430).

The duty of the respondent to deliver the draft to the relator is purely ministerial.

Moses, Mand. 214; *People* v. *Kilduff*, 15 Ill. 492; *People* v. *Harris*, 9 Cal. 571.

The return is insufficient.

Green v. *African M. E. Soc.* 1 Serg. & R. 254; *Reg.* v. *Lane*, Ld. Raym. 1304; *Rex* v. *York*, 5 T. R. 66.

Mr. **Wm. A. Maury**, *Assistant Atty-Gen.*, for defendant in error:

There is a plain and adequate remedy at law.

People v. *Thompson*, 25 Barb. 73; *Com.* v. *Johnson*, 2 Binn. 275; *Apgar* v. *School Dist. No. 4*, 34 N. J. L. 308; *State* v. *Holliday*, 8 N. J. L. 205; *Nichols* v. *Comptroller*, 4 Stew. & P. 154.

The Secretary of the Treasury has a discretion in the matter which cannot be controlled by mandamus.

Clark v. *Barnard*, 108 U. S. 437 (27: 780).

The contractor Mitchell is insolvent and the only hope of satisfaction for the lienholders is in the Secretary's holding on to the fund until the rights to it are settled in court.

Milnor v. *Metz*, 41 U. S. 16 Pet. 221 (10: 943); *Phelps* v. *McDonald*, 99 U. S. 307 (25: 476); *Bayard* v. *United States*, 127 U. S. 246 (32: 116); *Porter* v. *White*, 127 U. S. 235 (32: 112); *Spain* v. *Hamilton*, 68 U. S. 1 Wall. 604 (17: 619).

Applications for mandamus are addressed to the sound discretion of the court.

New York L. & F. Ins. Co. v. *Wilson*, 33 U. S. 8 Pet. 302 (8: 953); *Com.* v. *Mitchell*, 2 Penr. & W. 517; High, Extr. Leg. Rem. § 9, and cases cited; *People* v. *Forquer*, 1 Ill. 68; *Oakes* v. *Hill*, 8 Pick. 47; *Danley* v. *Whiteley*, 14 Ark. 687.

Mr. Justice **Lamar** delivered the opinion [63
of the court:

This is a writ of error to the Supreme Court of the District of Columbia, to reverse a judgment of that court dismissing the relator's petition for a peremptory writ of mandamus against the respondent, William Windom, Secretary of the Treasury, commanding him to deliver to the relator a treasury draft for $12,536, which had been lawfully assigned to the relator by William Mitchell, the payee.

The petition and its amendments allege [63
that William Mitchell, in pursuance of a contract made with the United States on the third of September, 1886, furnished certain material and performed certain labor for the Life Saving Service, in the construction and repair of seven houses on the coast of Long Island in the State of New York; that his account therefor was adjusted on the 11th of February, 1888, by the Treasury Department, as shown by a letter from the commissioner of customs to Mitchell, stating that the sum of $12,536 was due to Mitchell, and adding, "draft will be remitted;" that the account having been so adjusted nothing remained to be done by the treasury officials but the ministerial duty of issuing a warrant and remitting to Mitchell a draft for the amount so found to be due; and that a draft, dated the 15th of February, 1888, was issued to Mitchell, but instead of being delivered to him or paid, it was sent to Captain George W. Moore, of the life-saving service, at New York, with instructions not to deliver said draft, nor to pay its amount to Mitchell, until Mitchell should pay certain claims presented against him, at the Treasury Depart-

ment, to persons alleging his indebtedness to them for materials and labor. The petition further averred that there was no discretion residing in the respondent, the Secretary of the Treasury, or in any other government officer, as to the delivery of said draft; that none of those officers had any right or authority to interfere with Mitchell's private business, or to adjust any claims against him; that such an attempt on their part was a violation of Mitchell's rights and of the rights of the relator as his assignee; that Moore, in pursuance of the Secretary's instructions, did not deliver the draft or pay the amount of it to Mitchell, but returned it to the Secretary of the Treasury, who still retains the same in his possession, and still refuses to deliver it or to pay any part thereof to either Mitchell or the relator; that the said claims against Mitchell are unjust, and amount to $12,503, or within $33 of the amount of said draft; that even if they were not unjust the relator has no authority, under the terms of the assignment, to pay them, and has no means to pay them until the said draft is either delivered or paid to him; that the respondent does not deny the correctness of the account, the amount found to be due to Mitchell, but bases his refusal to deliver the draft simply upon the ground that Mitchell has not paid the sums demanded of him by the persons who presented their claims at the Treasury Department; that about the 27th day of February, 1888, Mitchell, under certain proceedings under the laws of New York, set forth the indebtedness of the United States to him, and the detention of the draft as herein stated; that the Supreme Court of the City and County of New York, in the course of those proceedings, appointed the relator receiver of all of Mitchell's property, debts, equitable rights, interests and effects, real and personal; that he, the relator, was duly qualified, and, by virtue of said order, was entitled to demand and to receive the said draft for $12,536; and that Mitchell, for the purpose of enabling the relator to demand and receive said draft, and to apply the proceeds thereof according to the order appointing him receiver, assigned said draft to relator, giving him thereby full power to demand and receive it or the amount expressed in it.

By an amendment, the petition further alleged that "a general appropriation was made by Act of Congress to provide for the payment of work to be done in the building and repairing of life-saving stations prior to the performance of the work done under the said contract of September 3, 1886, and that there is sufficient money now in the Treasury of the United States applicable to the payment of the said work so done under said contract." The prayer is for a writ of mandamus against Hon. William Windom, Secretary of the Treasury, commanding him to deliver or cause to be delivered to the relator the said draft, or show cause at an early date, and that such further order may be made in the premises as law and justice may require, or show cause, etc.

This petition and the order to show cause having been agreed by stipulation to be taken as the alternative writ, a demurrer was interposed, which was overruled by the court, and the respondent ordered to make return. Before the return was made, the relator was allowed to make further amendments, designed to reply to what was expected to be [64 set forth in the return.

The facts stated in the return are averred mainly upon information and belief, as they occurred under a former Secretary, the predecessor of the respondent. It admits that an account was stated by the accounting officers of the Treasury Department on the 11th of February, 1888, under his predecessor, but that said account was stated and a draft prepared for delivery upon condition, and under the circumstances expressed in the letters of certain officials of the Treasury Department which are filed by the relator as exhibits. It then sets out in substance, though not in the order as here stated, that the respondent is advised and believes that the said amount of $12,536 is not justly due and owing by the United States to Mitchell, or his lawful assignee, for the work done and materials furnished; that the account referred to in the petition was adjusted, and a draft prepared for delivery, upon the condition previously agreed to by Mitchell, that part of the $12,536, so allowed, should be applied to the satisfaction of the claims of certain mechanics, laborers and materialmen, by whose work and materials the houses were built and repaired; that Mitchell, under his contract with the government, was liable to a penalty of thirty dollars per day for any delay in completing the work within the time stipulated; that he had actually incurred penalties for delays amounting to $6,240; that the remission of these penalties would not have been approved or recommended, and said adjustment of the account would not have been made, and said draft would not have been prepared, but for the above-mentioned conditions agreed to by Mitchell, that he should allow the disbursing officer, to whom the draft was sent, to pay the sub-contractors and workmen out of the proceeds of the draft; that the conditions of the proposed waiver were not complied with by Mitchell, or the relator; that the government has the right to insist upon them, and deduct the penalties from the amount of said account; and that it is the legal right of the respondent to secure a restatement of said account, to cancel said draft or to take such other course to secure said penalties and forfeitures [64 to the government as the laws and regulations of the Treasury Department may require. He further averred that to leave the relator to his remedy at law would enable the government to avail itself of the said forfeitures, or other just damages in the premises.

On the hearing, the court discharged the rule and denied the writ.

The main assignment of error is, that the court erred in not deciding that the duty of the Secretary to deliver the draft was purely a ministerial duty of which the court should enforce the performance by a writ of mandamus. In order to determine whether the case presented by the record is a proper one for a mandamus, it is necessary to recur to

certain statutory provisions bearing upon the powers and duties of the Secretary of the Treasury respecting the accounts to be settled in that Department, and especially upon his relations to the accounting officers thereof.

The Act of June 18, 1878 (20 Stat. 163), to organize the life-saving service, and that of May 4, 1882 (22 Stat. 55), to promote its efficiency, provide that the keepers of life-saving stations, and the superintendents thereof, shall have the powers and perform the duties of inspectors of customs. The sections of the Revised Statutes material to be considered are the following:

Section 277 provides that—

"The first auditor shall receive and examine all accounts accruing in the Treasury Department relating to the receipts from customs, including accounts of collectors, *and other officers of the customs* . . . and after examination of such accounts, relating to the receipts from customs, including the accounts of collectors and other officers of the customs, he shall certify the balances and transmit the same, with the vouchers and certificates, to the *commissioner of customs for his decision thereon*, and he shall certify the balances of all *other* accounts, and transmit the same in like manner, to the first comptroller for his decision thereon."

Sec. 317 provides that—

"The commissioner of customs shall examine all accounts settled by the first auditor relating to the receipts from customs, including accounts of collectors and other officers of the customs, and certify the balances arising thereon to the register [and shall perform all the acts and exercise all the powers relating to the receipts from customs and the amounts of collectors, and the other officers of the customs as connected therewith, devolved by section two hundred and sixty-nine upon the first comptroller in regard to other receipts and other accounts]."

642]

"Sec. 191. The balances which may from time to time be stated by the auditor and certified to the heads of departments by the commissioner of customs, or the comptrollers of the treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of departments, but shall be conclusive upon the executive branch of the government, and be subject to revision only by Congress or the proper courts. The head of the proper department, before signing a warrant for any balance certified to him by a comptroller, may, however, submit to such comptroller any facts in his judgment affecting the correctness of such balance, but the decision of the comptroller thereon shall be final and conclusive, as hereinbefore provided."

The contention of the counsel for the relator is, that Mitchell performed his contract with the United States to construct and repair certain houses for the life-saving service; that his account for the work done and the materials furnished was examined by the proper accounting officer; that a balance was found in Mitchell's favor in the amount of $12,536; that this balance was certified by the commissioner of customs to the Secretary of the Treasury; and that the Secretary did not dispute this indebtedness of the United States to Mitchell, nor submit to the proper accounting officers any facts affecting the correctness of the said balance, but assented to its correctness by issuing a warrant and having prepared a draft for its payment. It is insisted that the Secretary after issuing this warrant has no power to change or modify the balance thus found and certified; but that his duty to deliver the draft to Mitchell, or his assignee, is purely a ministerial one, and that the writ of mandamus should issue to compel the performance of that duty.

[64

This argument would be conclusive as to the right of the relator to the remedy prayed for if the facts which it assumes comprised all the facts presented by the record. The Statutes which we have quoted are very explicit in designating the officers to whom the right and duty belong of examining and auditing the accounts therein referred to, and of certifying and transmitting the balances of the same to the commissioner of customs for his decision thereon; and they expressly provide that when those accounts are examined by those accounting officers in successive grades, the balances stated by the auditor and certified to the heads of department by the commissioner shall be conclusive upon the executive branch of the government. There is nothing in the language of these provisions which expressly or by implication vests in the Secretary the power to revise or disallow any part of these accounts. On the contrary, it is clearly his duty to issue a warrant for the payment of any balance without any change or modification, except that, before issuing a warrant for any balance certified to by a comptroller, he may submit to such comptroller any facts in his judgment affecting the correctness of such balance; but the decision of the comptroller thereon shall be final and conclusive.

The principles upon which persons holding public office may be compelled by a writ of mandamus to perform duties imposed by law have been distinctly defined and strictly adhered to in a great number and variety of cases before this court. *Marbury* v. *Madison*, 5 U. S. 1 Cranch, 137 [2: 60]; *Kendall* v. *United States*, 37 U. S. 12 Pet. 524 [9: 1181]; *Decatur* v. *Paulding*, 39 U. S. 14 Pet. 497 [10: 559]; *Brashear* v. *Mason*, 47 U. S. 6 How. 92, 101 [12: 357, 360]; *United States* v. *Guthrie*, 58 U. S. 17 How. 284 [15: 102]; *Ex parte De Groot*, 78 U. S. 6 Wall. 497 [18: 887]; *Georgia* v. *Stanton*, 73 U. S. 6 Wall. 50 [18: 721]; *Gaines* v. *Thompson*, 74 U. S. 7 Wall. 347 [19: 62]; *United States* v. *Seaman*, 58 U. S. 17 How. 225, 230 [15: 226, 227]; *Ex parte Bradstreet*, 32 U. S. 7 Pet. 634 [8: 810]; *Harrington* v. *Holler*, 111 U. S. 796 [28: 602]; *Reeside* v. *Walker*, 52 U. S. 11 How. 272, 290 [13: 693, 700]; *United States* v. *Schurz*, 102 U. S. 378, 394, 395 [26: 167, 171]; *Butterworth* v. *United States*, 112 U. S. 50 [28: 656]; *United States* v. *Black*, 128 U. S. 40 [32: 354].

That principle is that the writ of mandamus may issue where the duty, which the court [6

is asked to enforce, is plainly ministerial, and the right of the party applying for it is clear and he is without any other adequate remedy; and it cannot issue in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. The doctrine to be gathered from these cases, as well those in which mandamus was granted as those in which it was refused, especially from the two leading cases, *Kendall* v. *United States*, *supra*, and *Decatur* v. *Paulding*, *supra*, is thus enunciated in *United States* v. *Black*, *supra*, by *Mr. Justice* Bradley, who delivered the opinion of the court:

"The court will not interfere by mandamus with the executive officers of the government in the exercise of their ordinary official duties, even where those duties require an interpretation of the law, the court having no appellate power for that purpose; but when they refuse to act in a case at all, or when, by special statute, or otherwise, a mere ministerial duty is imposed upon them, that is, a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them."

It is proper here to remark, as applicable to the determination of this case, that, in the extreme caution with which this remedy is applied by the courts, there are cases when the writ will not be issued to compel the performance of even a purely ministerial act. In a case, for instance, where the intention of the officer, though acting within the scope of his duty, had been frustrated by a clerical mistake (*United States* v. *Schurz*, *supra*); or where the case is one of doubtful right (*New York L. & F. Ins. Co.* v. *Wilson*, 33 U. S. 8 Pet. 291, 302 [8: 949, 953]); or in a case where the relator having another adequate remedy, the granting of the writ may in this summary proceeding affect the rights of persons who are not parties thereto, or where it will be attended with manifest hardship and difficulties. *People* v. *Forquer*, 1 Ill. 68; *Van Rensselaer* v. *Sheriff of Albany*, 1 Cow. 501, 512; *Oakes* v. *Hill*, 8 Pick. 47. In *Rex* v. *Lords Commissioners of the Treasury*, 4 Ad. & El. 295, *Lord* Denman, *Chief Justice*, said: "If, as has been suggested, it should on any occasion be unsafe, with reference to the public service, to make a payment of this kind, the fact may be stated on return to the mandamus. There might perhaps be occasions on which the lords commissioners would be bound to apply the money to particular purposes of a more pressing nature."

We repeat that, if we confine our view of this case, as the counsel for appellee contends that we should, to the adjustment of the account of Mitchell, as stated by the auditor, the certificate of the balances of the commissioner of customs to the Secretary of the Treasury, the issue of the warrant by the latter for the payment of the balance so certified, the preparation of the draft, its transmission to the disbursing officer, the subsequent withholding of it by the Secretary of the Treasury and his refusal to deliver it either to Mitchell or his assignee, the relator, the case is clearly one of ministerial duty. But the facts, circumstances and conditions set forth in the return of the Secretary of the Treasury place the matter in another and quite a different light. He states in his return that, under the contract of Mitchell with the United States, Mitchell had actually incurred, by defaults, penalties and forfeitures to a large amount, the deduction of which from the amount of his account, as rendered, would reduce that amount largely; that the entire adjustment of that account, including the waiver of the penalties incurred, the certification of the balances and the issuing of the warrant and preparation of the draft for delivery, was upon the condition, agreed to by Mitchell, that out of the sum thus allowed by the Department the claims of the mechanics, sub-contractors, laborers and materialmen, for work and material furnished by them in the erection of the station buildings, should be satisfied; that an essential part of this agreement with Mitchell was that the control of the money to be paid was not to be given up until these claims of the aforesaid parties should, in some way, be settled; that the draft for the amount agreed upon should be sent to the officer of the life-saving service at New York, by whom, with Mitchell, these parties, at some appointed time, were first to be paid or satisfied out of said draft; and that, if this was not done, the draft was not to be delivered to Mitchell. He further states that Mitchell refused to perform this condition; and that the penalties would not have been waived but for that agreement; and says: [646

"In the opinion of the respondent said forfeitures and penalties may legally be insisted upon by the government and the amount thereof deducted from said draft, and it is the legal right of the respondent, in his opinion, to secure a restatement of said account, or to cancel said draft, or to take such other course to secure said penalties and forfeitures to the government as the laws and the regulations of the Treasury Department may require; and he avers that to leave the relator to his remedy at law would, in the respondent's opinion, enable the government to avail itself of the said forfeitures or other just damages in the premises."

We think that this return showed sufficient cause for a discharge of the rule and a refusal to issue the writ. It certainly raises disputed questions of law and fact as to the amount of the actual indebtedness of the United States to Mitchell; as to his agreement that the draft should not be delivered until the claims of the sub-contractors, mechanics and materialmen should be satisfied out of the proceeds of said draft; as to whether the remission of the forfeiture was absolute or conditional; as to the validity of such agreement, and as to the legal effect of Mitchell's nonfulfillment of the contract. We concur with the court below that these disputed questions of law and fact should not be tried in this proceeding, and that this is not a case in which the power of the court should be exercised.

We have given due consideration to the ingenious argument of counsel for appellee to show that the return in terms does not assert that the remission of the penalties was conditioned as stated by the court below; and that if such condition was agreed to between the accounting officers and Mitchell, such agreement was illegal and void. We think neither of these points is well taken. As to the first, the court below correctly stated the substance of the return, as we have also at-
[47] tempted to do. The objection really is that the averments of the return, upon this point, lack the essential requisites of good pleading. It does not appear that any such ground was taken in the court below. As to the second point, it is our opinion that the agreement between Mitchell and the accounting officers, as stated in the return, was lawful, and if carried out by Mitchell would have been fair and proper. It was simply that the amount which would otherwise have been excluded by reason of Mitchell's default from the balance certified and from the warrant for payment, should go in part to the payment of the men by whose labor and means the houses of the life-saving service had been built for the United States.

The judgment of the court below is affirmed.

---

[692] WILLIAM CALDWELL, *Plf. in Err.*,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 692–699.)

Constitutional question—indictment—criminal practice.

1. No question of repugnancy to the Federal Constitution can arise when the inquiry of the state courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and there is nothing special, partial or arbitrary, or in violation of fundamental principles, in the law of the State in accordance with which the indictment was found, and as applied in passing upon its sufficiency.
2. When no title, right, privilege or immunity under the Constitution of the United States was specially set up or claimed in the court below except after judgment and upon the petition for a rehearing, the claim comes too late.

[No. 1541.]

Submitted Dec. 15, 1890. Decided Jan. 12, 1891.

IN ERROR to the Court of Appeals of the State of Texas, to review a judgment of that court affirming a judgment of the District Court of Harris County, Texas, entered upon a verdict of guilty of murder in the first degree against William Caldwell and awarding the punishment of death.

Upon motion to dismiss. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller:**

William Caldwell was arraigned upon the following indictment found by the grand jury of Fort Bend County, Texas:

"In the name and by the authority of the [693] State of Texas.

"The grand jurors, good and lawful men of the State of Texas, County of Fort Bend, duly tried on oath by the judge of the District Court of said County touching their legal qualifications as grand jurors, elected, impaneled, sworn and charged to inquire into and true presentments make of all offenses against the penal laws of said State committed within the body of the county aforesaid, upon their oaths present in the District Court of said County that William Caldwell, late of the County of Fort Bend, laborer, on or about the first day of August, in the year of our Lord one thousand eight hundred and eighty-eight, with force of arms, in the said County of Fort Bend and State of Texas, did then and there, unlawfully and with express malice aforethought, kill one J. M. Shamblin by shooting him with a gun, contrary to the form of the statutes in such case made and provided and against the peace and dignity of the State."

The venue was subsequently changed to Harris County, Texas, and on trial of the case, upon Caldwell's plea of not guilty, before a jury duly impaneled, a verdict was found against him of guilty of murder in the first degree, and awarding the punishment of death.

A motion for a new trial was made and overruled, and judgment entered on the verdict, from which an appeal was taken to the Court of Appeals of the State of Texas, which affirmed the judgment, the opinion being delivered by Willson, *J.* *Caldwell* v. *State*, 28 Tex. App. 566. Application for a rehearing was subsequently made upon the ground that "the indictment is fatally and fundamentally defective and void under the Constitution of the State, and does not, either in form or substance, set out a valid charge of murder or any other offense known to the criminal law of the State, and is not due process of law under the 14th Amendment to the Constitution of the United States." This motion was heard on oral and printed arguments on both sides, and overruled. The opinion was delivered by Hurt, *J.* (28 Tex. App. 576), and stated that but one ground was urged for rehearing, namely, the sufficiency of the indictment, the objections to which were that it failed to charge that the [69 accused murdered the deceased; that it omitted to charge the time and place of the alleged shooting; and the infliction of a mortal wound; and the date of the wounding and that of the death; and that the shooting was done unlawfully and with malice aforethought; and was fatally defective for want of certainty. The court held that as the indictment charged that Caldwell on the first day of August, A. D. 1888, in the County

---

NOTE.—*As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution,* see *notes* to Martin v. Hunter, 4: 97; Matthews v. Zane, 2: 654; Williams v. Norris, 6: 571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws,—see *notes* to Hart v. Lamphire, 7: 679; Commercial Bank v. Buckingham, 12: 169.

of Fort Bend, unlawfully and with express malice aforethought, killed Shamblin by shooting him with a gun, it charged all of the acts constituting murder, and with the requisite particularity, and that consequently the indictment was sufficient; and said: "Now, we have held that the Legislature of this State has no authority to prescribe a form of indictment, and make the same sufficient, which fails to contain all of the elements of the crime. But we have never held that the Legislature could not prescribe a form for indictment which would not be good if the facts constituting the crime sought to be charged are contained in the form. If the offense is sufficiently particularized as to come within the rule of pleading, we would hold that such form would not be obnoxious to constitutional objections, either federal or state."

A writ of error was sued out from this court and allowed by the presiding judge of the Court of Appeals of Texas, and the case comes on upon a motion to dismiss. .

Section 10, article I., of the Constitution of Texas reads: "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or counsel, or both, shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger."

By art. 605 of the Texas Penal Code, "murder" is thus defined:

"Every person with a sound memory and discretion who shall unlawfully kill any reasonable creature in being within this State, with malice aforethought, either express or implied, shall be deemed guilty of murder. Murder is distinguishable from every other species of homicide by the absence of the circumstances which reduce the offense to negligent homicide or manslaughter, or which excuse or justify the homicide." Willson's Cr. Tex. Stat. pt. I. p. 203.

The Code of Criminal Procedure of Texas provides:

"Art. 416. All felonies shall be presented by indictment only, except in cases specially provided for."

"Art. 419. An indictment is the written statement of a grand jury accusing a person therein named of some act or omission, which, by law, is declared to be an offense.

"Art. 420. An indictment shall be deemed sufficient if it has the following requisites: 1. It shall commence 'In the name and by the authority of the State of Texas.' 2. It must appear therefrom that the same was presented in the district court of the county where the grand jury is in session. 3. It must appear to be the act of a grand jury of the proper county. 4. It must contain the name of the accused, or state that his name is unknown, and in case his name is unknown give a reasonably accurate description of him. 5. It must show that the place where the offense was committed is within the jurisdiction of the court in which the indictment is presented. 6. The time mentioned must be some date anterior to the presentment of the indictment, and not so remote that the prosecution of the offense is barred by limitation. 7. The offense must be set forth in plain and intelligible words. 8. The indictment must conclude 'Against the peace and dignity of the State.' 9. It shall be signed officially by the foreman of the grand jury.

"Art. 421. Everything should be stated in an indictment which it is necessary to prove, but that which it is not necessary to prove need not be stated.

"Art. 422. The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it, in bar of any prosecution for the same offense." [696]

"Art. 428. In an indictment for a felony it is not necessary to use the words 'felonious' or 'feloniously.'" Willson's Cr. Tex. Stat. pt. II. p. 109 *et seq.*

Sections 1, 4, 11, 12 and 17 of an Act of the Legislature of Texas of March 26, 1881, entitled "An Act to Prescribe the Requisites of Indictments in Certain Cases," are as follows:

"Section 1. That an indictment for any offense against the penal laws of this State shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment; and in no case are the words 'force and arms,' or 'contrary to the form of the statute,' necessary."

"Sec. 4. An indictment for an act done with intent to commit some other offense may charge in general terms the commission of such act with intent to commit such other offense, without stating the facts constituting such other offense."

"Sec. 11. The following forms of indictments in cases in which they are applicable are sufficient, and analogous forms may be used in other cases: . . .

"Form No. 2: Murder. A. B. did with malice aforethought kill C. D. by shooting him with a gun, or, by striking him with an iron weight, or, by poisoning him, etc." . . .

"Sec. 12. Nothing contained in the 11th section of this Act shall be construed to dispense with the necessity for proof of all the facts constituting the offense charged in an indictment, as the same is defined by law."

"Sec. 17. An indictment shall not be held insufficient, nor shall the trial, judgment or other proceedings thereon be affected, by reason of any defect or imperfection of form in such indictment, which does not prejudice [697] the substantial rights of the defendant." Laws Tex. 1881, p. 60 *et seq.*, and Willson's Cr. Tex. Stat. pt. II. p. 115.

It is stated in Willson's Cr. Tex. Stat., pt. II., p. 115, § 1969, that this Statute is in force, so far as it has not been held unconstitutional, as some of the forms prescribed have been and as others seem to the annotator to be. The differences between the indictment in this case and that authorized by the Statute of 1881 will be detected upon comparison.

The following errors were assigned in this court: "That the form of indictment in this case, as authorized by the Act of the Legislature of Texas of March 26, 1881, before cited, is not 'due process of law' under either the Constitution of the State or that of the United States, and that the Act referred to, establishing said form of indictment, is violative of the provision of the Fourteenth Amendment of the Constitution of the United States, which ordains that 'no State shall deprive any person of life, liberty or property without due process of law,' and therefore is null and void."

Messrs. **James S. Hogg** and **Richard H. Harrison**, for defendant in error, for motion:

The sufficiency of an indictment under the State Constitution is a question for the decision of the state courts alone.

Hurtado v. *California*, 110 U. S. 516 (28: 232); *Spies* v. *Illinois*, 123 U. S. 131 (31: 80); *Brooks* v. *Missouri*, 124 U. S. 394 (31: 454); *Baldwin* v. *Kansas*, 129 U. S. 56 (32: 641); *Walker* v. *Sauvinet*, 92 U. S. 92 (23: 679); *Kennard* v. *Louisiana*, 92 U. S. 480 (23: 478).

To vest this court with jurisdiction to revise the judgment of a state court, the record must show that in the trial court some right, title, privilege or immunity under the Constitution, laws or treaties of the United States was specially set up and denied. To give this court jurisdiction of this case, it must appear that a federal question was actually decided, or that the judgment as rendered could not have been given without deciding it.

De Saussure v. *Gaillard*, 127 U. S. 233 (32: 132); *Brown* v. *Atwell*, 92 U. S. 327 (23: 511); *Citizens Bank* v. *Board of Liquidation*, 98 U. S. 140 (25: 114); *Adams County* v. *Burlington & M. R. R. Co.* 112 U. S. 123 (28: 678); *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133 (29: 118); *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18 (31: 607).

A federal question, not presented until after the decision of the state court of last resort has been rendered, arises too late to give this court jurisdiction of the case.

Susquehanna Boom Co. v. *West Branch Boom Co.* 110 U. S. 57 (28: 69); *Clark* v. *Pennsylvania*, 128 U. S. 397 (32: 487); *Chappell* v. *Bradshaw*, 128 U. S. 184 (32: 370); *Warfield* v. *Chaffe*, 91 U. S. 690 (23: 383).

Mr. **J. Randolph Burns**, for plaintiff in error, against motion.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the Fourteenth Amendment the powers of the States in dealing with crime within their borders are not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent, Com. 13. And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235, [6 244 [4: 559, 561]. The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary. *Hurtado* v. *California*, 110 U. S. 516, 535 [28: 232, 238]. No question of repugnancy to the Federal Constitution can be fairly said to arise when the inquiry of the state courts is directed to the sufficiency of an indictment in the ordinary administration of criminal law, and the statutes authorizing the form of indictment pursued are not obviously violative of the fundamental principles above adverted to.

The case before us is destitute of the elements of a federal question, since there was nothing special, partial or arbitrary, or in violation of fundamental principles, in the law of the State in accordance with which the indictment was found, and as applied in passing upon its sufficiency. The plaintiff in error was not denied the equal protection of the laws, nor deprived of the process due by the law of the land. The Constitution of Texas secured to him the right to demand the nature and cause of the accusation against him, and the state court determined, as was its province, that this demand was satisfied by the indictment in question. His objections were in effect to the technical sufficiency of the indictment, but not that his rights had been determined by any other rules than those applied to the rest of the community, nor that the court had done more than commit errors in the disposition of a subject within its jurisdiction.

No title, right, privilege or immunity under the Constitution of the United States was specially set up or claimed in the trial court, or in the court of appeals, except as the petition for rehearing may be held to have constituted such claim. The validity of the existence of the court and its jurisdiction over the crime named in the indictment and over the person of the defendant were not drawn in question, nor was the validity of the laws of the State, except after judgment and upon the petition for a rehearing. The usual rule is that a contention thus delayed comes too late, but if this should be treated as an exception, on the ground that the court of appeals permitted argument on the question and delivered a decision and opinion [6 upon it, yet, where the misconception of the application of the Fourteenth Amendment is

so obvious, we are unwilling to retain the cause for further argument, and may avail ourselves of the rule ordinarily applicable to the afterthoughts of counsel.

The writ of error is dismissed.

31] GEORGE F. PACKER, *Plff. in Err.*,
v.
JAKE BIRD ET AL.

(See S. C. Reporter's ed. 661-673.)

A patent of the United States, describing the eastern boundary of the land as commencing at a point on a navigable river, which was on the right and west bank, and running southerly on its margin, does not embrace an island within it, and does not carry the title of the plaintiff holding under it to the middle of the stream, nor beyond the edge of the stream.

[No. 111.]

Submitted Dec. 3, 1890. Decided Jan. 19, 1891.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming a judgment of the Superior Court of the County of Colusa in favor of defendants in an action of ejectment brought by George F. Packer to recover possession of a tract of land commonly called Packer's Island, in the Sacramento River, California. *Affirmed.*

The facts are stated in the opinion.

Mr. **W. C. Belcher**, for plaintiff in error:

If the river mentioned in the patent were not navigable in law, the lands granted, being bounded by the "margin" of the river, would extend to the thread of the stream.

Ex parte Jennings, 6 Cow. 518; *Jones* v. *Soulard*, 65 U. S. 24 How. 41 (16: 604); *Howard* v. *Ingersoll*, 54 U. S. 13 How. 381 (14: 189).

This river is navigable and the grant in question extends to the stream, with the right of access to the channel.

St. Paul & P. R. Co. v. *Schurmeier*, 74 U. S. 7 Wall. 287 (19: 78); *St. Clair County* v. *Lovingston*, 90 U. S. 23 Wall. 46, 68 (23: 59, 62); *Graves* v. *Fisher*, 5 Me. 69.

Mr. **Chas. N. Fox** for defendants in error.

Mr. Justice **Field** delivered the opinion of the court:

32] This is an action for the possession of an island, embracing about eighty acres of land, in the River Sacramento, within the County of Colusa, in the State of California. The plaintiff alleges ownership of the premises in 1867, and their continued ownership afterwards; the entry of the defendants thereon in January, 1883, without right or title, and their continued unlawful possession thereof ever since, to his damage of two hundred dollars. The answer of the defendants is a general denial of the allegations of the complaint. The issues were tried by the court, without the intervention of a jury, by stipulation of the parties. The court found for the defendants, and directed judgment in their favor. A motion for a new trial was denied, and on appeal to the Supreme Court of the State the judgment and the order refusing a new trial were both affirmed. To review that judgment the case is brought to this court.

The River Sacramento is navigable from its mouth or outlet to a point above the premises in controversy. Indeed, it is one of the great rivers of the State, and is navigable over two hundred and fifty miles.

The muniments of title, introduced by the plaintiff, consisted of a patent of the United States, issued in December, 1857, to Francis Larkin and others, for a tract of land in the County of Colusa, known as the rancho of Larkin's children; a decree partitioning the land among the patentees, and intermediate conveyances from one of them to the plaintiff. In June, 1857, a survey of the land covered by the patent was made by the proper officers of the United States, pursuant to a decree of the District Court of the United States for the Northern District of California, rendered in January, 1856, confirming an imperfect Mexican grant of the tract, and ascertaining and determining its location. That decree describes the land as follows: [663

"Commencing at the northerly boundary line of said rancho, at *a point on the Sacramento River*, just two leagues northerly from the rancheria called Lojot, and running southerly *on the margin of said river*, to a point which is five leagues south of the place of beginning; thence west two leagues; thence north in a parallel line with said river, and two leagues therefrom, five leagues; and thence east two leagues to the place of beginning, and so as to contain the area of ten square leagues within said lines."

The survey, which is incorporated in the patent, describes the eastern boundary line of the tract as commencing at a certain oak post "on the right bank of the Sacramento River," and thence "traversing the right bank of the Sacramento River down stream" certain courses and distances.

Among other things the court found that from 1853 to 1858, and both prior and subsequent thereto, the waters of the Sacramento River divided into two streams at the upper or northerly end of the island in controversy; that one of the streams flowed through a channel extending around the easterly side of the island, and the other through a channel extending around the westerly side; that during this period both of the channels were plain and well defined, and had high banks, and the waters of the river flowed and still continue to flow through both of them at all seasons of the year; that the two channels and streams of water reunited at the lower or southerly end of the island; and that each of the channels and streams constituted a part of the Sacramento River, which was navigable, "both in fact and by statute;" that during the greater portion of each year the channel on the westerly side of the land in dispute was navigable, and was during the period

---

NOTE.—*That patents for land may be set aside for fraud*, see *note* to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands; how construed,—see *note* to Watts v. Lindsey, 5: 423.

As to land grants to railroads, see *note* to Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co. 23: 794.

mentioned actually navigated; but that the usual and most direct route for steamers was along the channel running east of the island.

The question presented is, whether the patent of the United States, describing the eastern boundary of the land as commencing *at a point on the river*, which was on the right and west bank, and running southerly *on its margin*, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption.

It is undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark. The title to land below that mark in such cases is vested in England in the crown, and in this country in the State within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with
667] the interest of the public at large in their use for purposes of commerce. In England this limitation of the right of the riparian owner is confined to such navigable rivers as are affected by the tides, because there the ebb and flow of the tide constitute the usual test of the navigability of the streams. No rivers there, at least none of any considerable extent, are navigable in fact, which are not subject to the tides. In this country the situation is wholly different. Some of our rivers are navigable for many hundreds of miles above the limits of tide-water, and by vessels larger than any which sailed on the seas when the common-law rule was established. A different test must therefore be sought to determine the navigability of our rivers, with the consequent rights both to the public and the riparian owner, and such test is found in their navigable capacity. Those rivers are regarded as public navigable rivers in law which are navigable in fact. And, as said in the case of *The Daniel Ball*, 77 U. S. 10 Wall. 557, 563 [19: 999, 1001], "they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

The same reasons, therefore, exist in this country for the exclusion of the right of private ownership over the soil under navigable waters, when they are susceptible of being used as highways of commerce in the ordinary modes of trade and travel on water, as when their navigability is determined by the tidal test. It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon them, and consequently to the exclusion of private ownership, either of the waters or the soils under them. The common-law doctrine on this subject prevailing in England is held in some of the States, but in a large number has been considered as inapplicable to the navigable waters of the country, or even if prevailing for a time has given way, or been greatly modified, under the different conditions there.

It has been adopted in most, if not all, of the New England States. In New York, in the earlier cases, it was considered as in [6
force; and in *Ex parte Jennings*, 6 Cow. 518, was formally declared. There a patent of lands by the State, bounded *on the margin of a river* above tide-water, was held to carry the land granted to the middle of the stream, the court stating that the rule was otherwise where the land was bounded on a navigable river, but adding that by the term "navigable river," the law did not mean such as is navigable in common parlance; that the smallest creek might be so to a certain extent as well as the largest river, without being legally a navigable stream; and that the term has in law a technical meaning, and applies to all streams, rivers or arms of the sea where the tide ebbs and flows. This doctrine was modified and finally overruled in subsequent cases.

In *People* v. *Canal Appraisers*, 33 N. Y. 461, 499, the whole subject of the rights of riparian owners on navigable streams, whether affected or not by the ebb and flow of the tide, was elaborately considered, with a careful examination of the adjudged cases in the different States, and the conclusion reached was against the applicability of the common-law rule in this country. The court in its opinion refers to the great embarrassment experienced by courts, judges and text-writers in applying the principles of the common law to the waters of this continent, the variant conclusions reached by them and the contradictory and unsatisfactory reasons given for the results arrived at; and after tracing the progress of judicial discussion of the doctrine of the common law on the subject, it expresses satisfaction that the discussion had culminated in the decision by the court of ultimate appeal repudiating the applicability of the doctrine to the rivers of that State, and establishing what it terms "the better doctrine of the civil law."

In Pennsylvania the common-law doctrine was never recognized. In *Monongahela Bridge Co.* v. *Kirk*, 46 Pa. 112, 120, the Supreme Court of that State, in holding that the River Monongahela was a navigable stream, and that its soil up to low-water mark, and the river itself, were the property of the Commonwealth, said:

"We are aware that by the common law of England such streams as the Mississippi, the Missouri, the Rivers Amazon and Platte, the [6
Rhine, the Danube, the Po, the Nile, the Euphrates, the Ganges and the Indus were not navigable rivers, but were the subject of private property, whilst an insignificant

creek in a small island was elevated to the dignity of a public river, because it was so near the ocean that the tide ebbed and flowed up the whole of its petty course. The Roman law, which has pervaded Continental Europe, and which took its rise in a country where there was a tideless sea, recognized all rivers as navigable which were really so, and this common-sense view was adopted by the early founders of Pennsylvania, whose province was intersected by large and valuable streams, some of which are a mile in breadth."

In the courts of the Western States there is much conflict of opinion, some, like the courts of Illinois, adopting the common-law rule to its fullest extent; and others, like the courts of Iowa, repudiating its application in determining the navigability of the great rivers, and the rights of riparian owners upon them. A very elaborate consideration of the adjudged cases on the subject is found in *McManus* v. *Carmichael*, 3 Iowa, 1. Indeed, the opinion of the Supreme Court of Iowa in that case, and the opinion of the Court of Appeals of New York in *People* v. *Canal Appraisers*, above cited, contain an exhaustive and instructive consideration of the whole subject, with a careful review of the decisions of the courts of the States. In this case we accept the view of the Supreme Court of California in its opinion as expressing the law of that State, "that the Sacramento River being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream." *Lux* v. *Haggin*, 69 Cal. 255.

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the State, either to low or high water mark, or will extend to the middle of the stream. It is therefore important to ascertain and determine what view will be taken by the courts of the United States in the construction of grants of the general government in conferring ownership, when they embrace lands bordering on navigable waters above the influence of the tide. How far will such grants be deemed to extend into the water, if at all? From the conflicting decisions of the state courts cited, it is evident that there is no such general law on the subject as will be deemed to control their construction.

In the courts of the United States the rule of the common law in determining the navigability of rivers, and the effect thereof upon the jurisdiction of the court, has been disregarded since the decision of the case of *The Genesee Chief*, 53 U. S. 12 How. 443, 455 [13: 1058, 1063]. This court there said that there was nothing in the ebb and flow of the tide which made a stream suitable for admiralty jurisdiction, nor anything in the absence of the tide that rendered it unfit; that if a stream was a public navigable water, on which commerce was carried on between different States and nations, the reason for the jurisdiction was precisely the same; and that any distinction made on that account was merely arbitrary, without any foundation in reason, and indeed would seem to be inconsistent with it. The eminent chief justice who delivered the opinion in that case explained how in England the ebb and flow of the tide became the test of the navigability of a stream, as we have stated it above; that there tide-waters, with a few small and unimportant exceptions, meant nothing more than public rivers as contradistinguished from private ones; and that hence arose the doctrine of admiralty jurisdiction, which was confined to the ebb and flow of the tide; in other words, to public navigable waters. He then added: "As the English definition was adopted in our courts, and constantly used in judicial proceedings and forms of pleading, borrowed from England, the public character of the river was in process of time lost sight of, and the jurisdiction of the admiralty treated as if it was limited by the tide. The description of a public navigable river was substituted in the place of the [671] thing intended to be described. And under the natural influence of precedents and established forms, a definition originally correct was adhered to and acted on, after it had ceased, from a change in circumstances, to be the true description of public waters."

In *Barney* v. *Keokuk*, 94 U. S. 324 [24: 224], the same subject in some of its features was under consideration in this court, and the language used is especially applicable to cases like the one before us. That action was against the City of Keokuk and a steam packet company, to recover the possession of certain premises occupied by them with railroad tracks, buildings and sheds on the bank of the Mississippi River, and in that city. The court, in considering the question presented, observed that "the confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island and that of the American Continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many States of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principle was laid down in *Martin* v. *Waddell*, 41 U. S. 16 Pet. 367 [10: 997]; *Pollard* v. *Hagan*, 44 U. S. 3

How. 212 [11: 565], and *Goodtitle* v. *Kibbe*, 50 U. S. 9 How. 471 [13: 220]. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief*, 53 U. S. 12 How. 443 [13: 1058], has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navi-
372] gable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water."

The legislation of Congress for the survey of the public lands recognizes the general rule as to the public interest in waters of navigable streams without reference to the existence or absence of the tide in them. As early as 1796, in an Act providing for the sale of such lands in the territory northwest of the River Ohio and above the mouth of Kentucky River, Congress declared "that all navigable rivers within the territory to be disposed of by virtue of the Act shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both." Act of May 18, 1796, § 9 (1 Stat. 468).

In *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. 7 Wall. 272, 288 [19: 74, 78], the court said that in view of this legislation and other similar Acts it did not "hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter; but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways." The same rule applies when the survey is made and the patent is issued upon a confirmation of a previously existing right or equity of the patentee to the lands, which in the absence of such right or equity would belong absolutely to the United States, unless the claim confirmed in terms embraces the land under the waters of the stream.

The language of the decree of confirmation describing the tract confirmed, and the language of the survey incorporated in the patent, both clearly indicate that the margin of the river was intended as the eastern boundary
673] of the tract confirmed, and we find nothing either in any Act of Congress or in any decision of the federal courts which would enlarge the effect of the grant. The title of one claiming under the patent does not, therefore, extend beyond the edge of the stream.

The judgment of the court below is accordingly affirmed.

EDWARD D. EGAN, *Appt.*, [654]
v.
JAMES T. CLASBEY.

(See S. C. Reporter's ed. 654-661.)

Want of exceptions.

Where there are no exceptions in the record, and the only error assigned is that the court erred in not giving judgment in favor of the plaintiff, and the pleadings and findings fully sustain the judgment, it will be affirmed.

[No. 117.]

Submitted Dec. 1, 1890. Decided Jan. 19, 1891.

APPEAL from a judgment of the Supreme Court of the Territory of Utah in favor of defendant in an action to recover the value of shares of stock in a mining company. *Affirmed.*

Statement by *Mr Justice* **Lamar**:

This was an action at law, brought in one of the Territorial Courts of Utah Territory, by Edward D. Egan against James T. Clasbey, to recover the value of 1,475 shares of stock of the Bannock Gold and Silver Mining Company, a corporation organized under the laws of that Territory, which, it was alleged, had been received by the defendant, in excess of the number to which he was entitled, under the following agreement:

"Salt Lake City, 11th Sept., 1885.

"This agreement, entered into on this the eleventh day of September, 1885, by and between Ed. D. Egan, party of the first part, and James T. Clasbey, party of the second part, and both of Salt Lake City and County, Utah Territory:

"That said Ed. D. Egan, party of the first part, does hereby agree to deliver to James T. Clasbey, party of the second part, stock in the mining claim at present known as Martin's Horn silver mine, and situated near Lava Beds, Idaho Territory.

"The amount of said stock to be of the value of five thousand ($5,000) dollars, at its original cost; and it is further agreed that if said stock is not issued the said Ed. D. Egan, party of the first part, does agree to deliver to said James T. Clasbey, party of the second part, a [6
deed for a portion of the aforesaid mining property, said deed to be equivalent to stock of the amount of five thousand ($5,000) dollars.

"E. D. Egan.
"J. T. Clasbey.

"Witness: H. J. Love.

"$5,000. Salt Lake City, 11th Sept., 1885.

"Received of James T. Clasbey the sum of five thousand ($5,000) dollars.

"This sum is in payment for the stock or deed mentioned in an agreement signed by me this day. E. D. Egan."

The complaint alleged that on the 15th of September, 1885, said corporation was formed, as contemplated, between the owners of the other three fourths of said mine, and the plaintiff and defendant as the owners of the remaining one fourth; that the amount of the capital of said corporation was $10,000,000, divided

into 100,000 shares of the face or par value of $100 each, making one-fourth interest in said mining property represent 25,000 shares; that the original cost of said stock was sixty-two and one half cents per share, being $62,500 in the aggregate for such entire stock; that plaintiff was entitled under said agreement to 17,000 shares of such stock, and the defendant to 8,000 shares thereof, being together one fourth of the entire stock, and it being agreed by the two parties that such was the cost and proper division between them of such stock; but that in the articles of incorporation, by a mistake and inadvertence on the part of the draftsman of the instrument, 15,000 shares were erroneously set down as subscribed by plaintiff, Egan, and 10,000 shares by defendant, Clasbey; that after said instrument was read to plaintiff he refused to sign the same as written on account of the mistake therein, but upon the distinct agreement and understanding between defendant and plaintiff that the mistake should be corrected, as between themselves, so that plaintiff should receive 17,000 and defendant only 8,000 shares of stock, the plaintiff, in consideration of the defendant's promise to turn over to him 2,000 shares of the 10,000 so allotted to him, signed said articles, and the stock was issued according to the terms of the articles of incorporation as executed; and that afterwards defendant did turn over to plaintiff 525 shares of said excess, leaving a balance of 1,475 shares, which the defendant retained and refused to turn over, and still refuses, although the plaintiff has demanded the same of him.

The plaintiff farther averred the value of the stock to be $3 per share at the date of the suit, and asked judgment against the defendant for $4,425, "with interest from the date hereof at the rate of ten per cent per annum."

The defendant denied on his part the making of any agreement with the plaintiff other than that first set forth in the complaint. He further denied that the original cost of said mining property, or of its equivalent, the capitalized stock, was $62,500, and averred that it was only $50,000. He denied that he ever agreed that such was the cost of said stock, and that the proper division thereof was as stated in the complaint. He denied that there was any mistake in drafting said articles of incorporation, or that there was any agreement between himself and plaintiff to transfer any portion of the stock allotted to him in said articles to plaintiff, and averred that at the time of making said contract plaintiff held an option to purchase one fourth of said mining property, but that, being without means to perfect on his part the purchase under said option, plaintiff applied to defendant to contribute $5,000 to the purchase thereof, with the understanding that the defendant should share in such purchase in such proportion as the $5,000 should bear to the cost of such purchase, and thereupon he paid plaintiff the $5,000, and said contract of September 11, 1885, was executed; that thereupon the plaintiff perfected said purchase, and at once thereafter said corporation was formed, but that defendant did not then know the actual cost of said property, or of such stock, and no agreement as to any definite number of shares had been made between them; that afterwards, and before defendant was aware of the cost of said property or of such stock, he delivered to the plaintiff 525 shares of said stock, not as a conceded right or in settlement of any claim of plaintiff, but at [65 plaintiff's request, in order to enable him to fulfill contracts of sale made by him; that after learning that the actual original cost of said property and stock was only $50,000, and that he, defendant, under his contract, was entitled to have 10,000 shares, and that plaintiff was entitled to 15,000 shares, he demanded of plaintiff 525 shares of stock, which plaintiff refused, and claimed that the original cost was sixty-two and one half cents per share; that the claim of plaintiff is unjust; that the defendant is entitled to 525 shares, which plaintiff has converted to his own use; that the stock is worth $8 per share; and he therefore prayed judgment against the plaintiff for the sum of $1,575.

A jury having been waived, the case was tried by the court upon the pleadings and proofs, both oral and documentary.

The following findings of fact and conclusions of law by the trial court clearly set forth the material facts in the case:

"1. The plaintiff and defendant, on the 11th day of September, 1885, entered into the written contract exhibited in the complaint, whereby plaintiff, in consideration of the sum of $5,000, then delivered to him by the defendant toward the purchase of one fourth undivided of the Martin's Horn silver mine, at Era, Idaho, agreed to deliver to the defendant stock in such mining claim in amount equal to $5,000, at its original cost; and, further, that if such stock was not issued he would deliver to defendant a deed to be equivalent to stock of the amount of $5,000.

"2. Plaintiff and others bought an option on said mine, paying therefor $6,000, from one Chambers (such price including $5,000 paid by Chambers to Martin, the owner of the mine, on said option, and $1,000 expenses incurred by Chambers), and on the 12th of September, 1885, paid to Martin $5,000, the balance of the purchase money.

"3. On the 15th of September, 1885, a corporation was organized by the purchasers and others associated with them to work said mine, called the Bannock Gold and Silver Mining Company of Idaho, on a basis of 100,000 shares of capital stock, one fourth of which (25,000 shares) were to be allotted to plaintiff and de- [65 fendant, to be divided between them according to their said contract.

"4. Plaintiff contributed one fourth of the $6,000 paid to Chambers and one fourth of the $50,000 paid to Martin, using, with his own money, the said $5,000 delivered to him by defendant.

"5. On the organization of the corporation the mine was conveyed to it, and plaintiff and four other corporators voluntarily loaned and advanced to the corporation $2,000, of which sum plaintiff contributed $500.

"6. Soon after the organization of the corporation, by consent and on motion of the plaintiff, the corporation assumed and paid a debt of $5,000 to one McMasters, which had been incurred by plaintiff and one Thum, the original holders of said option, and afterward

the corporation paid a claim for labor on the mine pending the option, which claim was estimated at $1,500, but the amount actually paid thereon to Martin was $2,127, paid by the corporation through plaintiff, its superintendent. The corporation also, in November, 1885, out of its net earnings refunded to the contributors the $6,000 paid to Chambers and the $2,000 advanced as aforesaid, of which the plaintiff received $2,000, the portion advanced by him. The advances and loan thus repaid and debts assumed and paid by the corporation amount to $14,127, leaving the sum of $50,000 as the actual outlay by plaintiff and the other purchasers of the mine.

"7. Of the $50,000 so paid by the purchasers the plaintiff paid one fourth, or $12,500 (using for that purpose the $5,000 delivered to him by defendant).

"8. The actual original cost of the 25,000 shares of stock was fifty cents per share.

"9. When the corporation was about to be organized the plaintiff claimed that the cost of stock was 62½ cents per share, and that he was entitled to subscribe for and hold 17,000 shares and the defendant only 8,000 shares, but there was no agreement or settlement between defendant and plaintiff as to the claim and the matter was left for future adjustment by plaintiff and defendant.

[659] "10. About the month of December, 1885, defendant, at request of plaintiff, delivered to plaintiff 500 shares of stock to enable the latter to fill a sale, and 25 shares which plaintiff desired to give to another person. This stock was delivered to plaintiff subject to the adjustment of their stock account.

"11. The parties never agreed upon the cost of the stock. Plaintiff demanded 1,475 shares of stock from defendant, but defendant refused to comply, and plaintiff brought this action. After this, and before answering, defendant demanded of plaintiff the return of the 525 shares delivered as aforesaid, which was refused by plaintiff.

"12. The value of said stock when the action was brought and when defendant made his said demand was and is now three dollars per share.

"As conclusions of law the court doth find:

"1. That the plaintiff was entitled to subscribe for and hold 15,000 shares of said stock, and defendant was entitled to subscribe for and hold 10,000 shares.

"2. That plaintiff is not entitled to recover in this action, but the defendant is entitled to judgment against the plaintiff.

"3. That on his counterclaim the defendant is entitled to recover from the plaintiff the value of 525 shares of said stock, viz., $1,575, together with his costs, to be taxed."

Judgment was accordingly entered in favor of the defendant for the sum of $1,575. That judgment having been affirmed by the Supreme Court of the Territory of Utah, the present appeal was prosecuted.

Mr. **J. L. Rawlins** for appellant.
Mr. **Samuel A. Merritt** for respondent.

Mr. Justice **Lamar** delivered the opinion of the court:

We find no exceptions in the record, and the only error assigned is that the court erred in not giving judgment in favor of the plaintiff, as a necessary legal conclusion from the findings of [660] fact, the pleadings and the proper interpretation of the contract sued on. We think the findings of fact conclusively negative this contention. It seems that both parties agree (and it is the only point on which they are agreed) that according to the terms of the contract of the 11th of September, 1885, the share of Clasbey, the defendant, in the 25,000 shares of stock in the mining corporation was to be determined by the original cost of that stock. In other words, that if it was sixty-two and one-half cents per share, Clasbey was entitled to a subscription of only 8,000 shares, and the plaintiff Egan to 17,000, in which case the allotment to Clasbey in the articles of incorporation was put there by the mistake and inadvertence of the draftsman, and subject to correction in a future adjustment between those two parties; but if it was fifty cents a share, then the defendant Clasbey was entitled to 10,000 shares and the plaintiff to 15,000 shares, in which case the defendant was under no obligation, in any future adjustment of stock between them, to turn over any part of his said shares to plaintiff.

The decisive question, therefore, to be determined is, What was the original cost of the 25,000 shares that, under the contract, were to be divided between the parties to this suit? The eighth finding of fact says: "The actual original cost of the 25,000 shares was fifty cents per share." This, in our opinion, is absolutely conclusive against the claim of the plaintiff. Such a finding cannot be twisted and turned into a conclusion of law. Nor do we consider as well taken the proposition of counsel for the appellant, that, as a finding of fact, it is inconsistent, in effect, with the other findings respecting the original cost of either the mining property or its equivalent, the capitalized stock of the company. It is insisted that these findings show that, in addition to the original price of $50,000, the plaintiff, with other members of the company, advanced divers sums that increased the amount upwards of $62,000. The reply to this is, that the findings of fact show that those sums were advances and loans made to the corporation, were treated as such by the plaintiff and those who contributed with him, and were refunded to them out of the net earnings of said corporation, leaving the sum of [661] $50,000 as the actual outlay by plaintiff and the other purchasers of the mine. They cannot, therefore, be included in the estimate of the original cost as between the two parties to this suit.

Equally conclusive, in our opinion, is the 10th finding of facts, taken in connection with the 8th, upon the question of the defendant's counterclaim. It appears from that finding that the defendant, at the request of the plaintiff, delivered to plaintiff 500 shares of stock to enable the latter to fill a sale, and 25 shares which the plaintiff desired to give to another person. This stock was delivered to plaintiff, subject to the adjustment of their stock account. We think the pleadings and findings in this case fully sustain the judgment of the Supreme Court of Utah Territory, and *it is therefore affirmed.*

47] ISABELLA DUNCAN, *Appt.*,
v.
NAVASSA PHOSPHATE COMPANY,
WALTER B. MCATEE, Receiver.

(See S. C. Reporter's ed. 647-654.)

Guano Islands Act—does not confer dower on widow of discoverer—estate at will—Act of April 2, 1872.

1. Under the Guano Islands Act of August 18, 1856, the discoverer of the deposit of guano on the Island of Navassa had not such an estate or interest as to entitle his widow to dower.
2. The whole right conferred by said Act upon the discoverer and his assigns is a license to occupy the island for the purpose of removing the guano; this right cannot last after the guano is removed.
3. The interest of the discoverer, the husband, if it can possibly be considered as an estate in land, is an estate at the will of the United States, from whom it was derived, and is therefore not subject to dower at common law.
4. The petitioner's claim of dower is not aided by the Act of Congress of April 2, 1872, chap. 81, by which the provisions of the Act of 1856 are extended to the widow, heirs, executors or administrators of such discoverer, because her husband had died before its passage, and because the assignment of his right to Cooper had been recognized by the United States in the proclamation of the President.

[No. 1203.]

Submitted Jan. 9, 1891. Decided Jan. 19, 1891.

APPEAL from a decree of the Circuit Court of the United States for the District of Maryland, dismissing on demurrer the petition of Isabella Duncan for the assignment to her of dower from the interest of her husband in the Island of Navassa, a guano island. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Victor Smith** and *D. Eldridge Monroe*, for appellant:

The fact that the right to work guano beds was a right of *profit a prendre* from the soil makes it realty.

Washb. Easem. 13; *Massot* v. *Moses*, 3 S. C. 194; *Chapman* v. *School Dist. No. 1*, 1 Deady, 113.

A license to dig, coupled with authority to take away, is an incorporeal hereditament.

McSwinney, Mines, 249, 252, 263.

Exclusive use or dominion over land carries the land itself.

3 Washb. Real Prop. 406; Wade, Mines, § 72.

The right to develop and work mines is property, and it may be sold, mortgaged and inherited.

Forbes v. *Gracey*, 94 U. S. 767 (24: 314).

It is subject to the laws of descent as other property and regarded as real estate.

Harris v. *Equator Min. & S. Co.* 3 McCrary, 14; *Hughes* v. *Devlin*, 23 Cal. 501; *Houtz* v. *Gisborn*, 1 Utah, 173; *Hauswirth* v. *Butcher*, 4 Mont. 299; *Gropper* v. *King*, Id. 367; *Hopkins* v. *Noyes*, Id. 550; *Campbell* v. *Rankin*, 99 U. S. 262 (25: 436).

NOTE.—*In what lands widow is dowable; what seisin of husband is necessary to confer the right.* See *note* to Mayburry v. Brien, 10:646.

As to dower, how barred, see *note* to Barrett v. Failing, 28:505.

Right of dower—requisites of—seisin of husband—death of husband—effect of divorce—alienage—in what things dower may be had.

Instantaneous seisin creates no right of dower in the wife of vendee, so as to defeat the vendor's lien. Elliott v. Plattor, 1 West. Rep. 25, 43 Ohio St. 198.

A momentary seisin will not confer a right of dower. Pouder v. Ritzinger, 1 West. Rep. 565, 102 Ind. 571.

A widow is not entitled to dower in land unless her husband, while they were married, was beneficially seised of it. Fontaine v. Dunlap, 82 Ky. 321.

The wife of a devisee is entitled to one third of the share to which her husband was entitled in remainder. Rev. Stat. 1881, §§ 2491, 2508; Foltz v. Wert, 1 West. Rep. 852, 103 Ind. 404.

Widow proving possession during coverture is entitled to dower unless defendant disproves title. Stark v. Watson, 24 S. C. 215.

The right of dower being a legal right, and favored by the courts, the wife cannot be deprived of it by a testamentary disposition in her favor, in the nature of a jointure, so as to put her to her election, unless the testator has declared the same to be in lieu of dower, either in express words or by necessary implication. Church v. Bull, 2 Denio, 430; 1 Pom. Eq. Jur. 541; Chapin v. Hill, 1 R. I. 446; Hall's Case, 1 Bland, Ch. 208; Collins v. Carman, 5 Md. 503; Wiseley v. Findlay, 3 Rand. 361; Ambler v. Norton, 4 Hen. & Mun. 23, 44; Higginbotham v. Cornwell, 8 Gratt. 83; Dixon v. McCue, 14 Gratt. 540; Pickett v. Peay, 3 Brev. 545; Gordon v. Stevens, 2 Hill, Ch. 46; Brown v. Caldwell, 1 Speers, Eq. 322; Snelgrove v. Snelgrove, 4 Desauss. 274, 294; Tooke v. Hardeman, 7 Ga. 20; Worthen v. Pearson, 33 Ga. 385; Stewart v. McMartin, 5 Barb. 446; Wood v. Wood, 5 Paige, 506, 3 N. Y. Ch. L. ed. 844; Tompkins v. Fonda, 4 Paige, 448, 3 N. Y. Ch. L. ed. 510; Reed v. Whitney, 7 Gray, 533.

The right to dower is a title paramount to that of the husband; and when he devises the land, though without any qualifying words, an exception of the wife's right to dower is implied. Havens v. Sackett, 15 N. Y. 372; 1 Pom. Eq. Jur. 534.

It requires a strong, unequivocal expression or indication of an intent on the part of the testator to bestow the entire property, and not simply his own interest in it, or to bestow the property freed from its incumbrances and charges, in order to raise the necessity for an election. Vernon v. Vernon, 53 N. Y. 351; Lefevre v. Lefevre, 59 N. Y. 434; Reed v. Dickerman, 12 Pick. 146; Morrison v. Bowman, 29 Cal. 337, 347; Peck v. Brummagin, 31 Cal. 440, 447; DeGodey v. Godey, 39 Cal. 157, 164; *Re* Buchanan's Estate, 8 Cal. 507; Beard v. Knox, 5 Cal. 252; Burton v. Lies, 21 Cal. 91; *Re* Silvey's Estate, 49 Cal. 211; 1 Pom. Eq. Jur. 533.

The wife's contingent right of dower is not devested by an assignee's sale in bankruptcy of her husband's interest in the land. Lazear v. Porter, 87 Pa. 513; Porter v. Lazear, 109 U. S. 84 (27: 865).

Nor does it make any difference whether the property is sold free of incumbrance or subject to liens—the right of dower still remains. Kelso's Appeal, 102 Pa. 7; Koons v. Hartman, 7 Watts, 20; Dollar Sav. Bank v. Burns, 87 Pa. 491; Hansell v. Lutz, 20 Pa. 284.

In the District of Columbia, a widow is not dowable of an equity of redemption. *Re* Thompson's Estate, 13 Cent. Rep. 459, 6 Mackey, 536.

A widow is entitled to dower in land of which her husband was in possession, and for which he had a contract that might be specifically enforced. Young v. Young, 45 N. J. Eq. 27.

Under Tenn. Code, §§ 3244, 3249, a widow has a

The right of dower is a vested interest.

Johnston v. *Vandyke*, 6 McLean, 422; *Betts* v. *Wise*, 11 Ohio, 219; *O'Ferrall* v. *Simplot*, 4 Iowa, 381; *May* v. *Rumney*, 1 Mich. 4; *Tameling* v. *United States Freehold & E. Co.* 93 U. S. 663 (23: 1003); *Ryan* v. *Carter*, 93 U. S. 78 (23: 807); *Rutherford* v. *Greene*, 15 U. S. 2 Wheat. 196 (4: 218).

Assignee cannot dispute title of grantor.

2 Scrib. Dow. 231, 251; *Bowne* v. *Potter*, 17 Wend. 164; 1 Washb. Real Prop. 191; 2 Herm. Estop. §§ 49, 849.

Widow need only show that husband was in possession during coverture, claiming title.

2 Scrib. Dow. 212, 214; *note* to *Thompson* v. *Morrow*, 1 Lead. Cas. Am. Law Real Property (Shars. & B.) 316, 317.

Under Oregon Donation Act, four years' residence constitutes an estate inheritable and alienable.

Johnson v. *United States*, 2 Ct. Cl. 391; *United States* v. *Fitzgerald*, 40 U. S. 15 Pet. 407 (10: 785).

From the date of discovery, the discoverer has certain rights that are indefeasible.

Noyes v. *Mantle*, 127 U. S. 351 (32: 169); *McKay* v. *Freeman*, 6 Or. 449; *Fremont* v. *United States*, 58 U. S. 17 How. 559 (15: 246); *Wilcox* v. *Jackson*, 38 U. S. 13 Pet. 498 (10: 264); *Johnson* v. *United States*, 2 Ct. Cl. 391; *Stark* v. *Starr*, 73 U. S. 6 Wall. 413 (18: 928); *Gibson* v. *Chouteau*, 80 U. S. 13 Wall. 101 (20: 537); *O'Reilly* v. *Campbell*, 116 U. S. 422 (29: 670).

A widow is entitled to dower in all estates of inheritance of which her husband had at any time during coverture been seised, and in all corporeal hereditaments and incorporeal hereditaments savoring of realty.

1 Bishop, Married Women, § 256.

She is dowable in mines on husband's land and in mines of husband on lands of another, if opened during husband's lifetime.

2 Scrib. Dow. 30; Tudor, Lead. Cas. (3d ed.) 68; *Stoughton* v. *Leigh*, 1 Taunt. 410; *Bishop* v. *Bishop*, 5 Jur. 931.

Mr. **S. T. Wallis** for appellees.

---

dower right in land of which her husband was a tenant in common. Clift v. Clift, 87 Tenn. 17.

A widow is not entitled to dower in land fraudulently conveyed to her by her husband in his lifetime, although her deed may be set aside and the land subjected to the husband's debts. Hopkins v. Bryant, 85 Tenn. 520.

The right of the wife to dower is paramount to and does not arise from the estate of the heir, but is a continuation of that of the husband. Love v. McClure, 99 N. C. 290.

A widow cannot take both dower and homestead, but must elect which she will take. Thomas v. Thomas, 73 Iowa, 657.

There can be no dower in a trust estate. King v. Bushnell, 11 West. Rep. 571, 121 Ill. 656.

A wife has no estate in the lands of her husband during his life, which she may convey to another. Witthaus v. Schack, 7 Cent. Rep. 257, 105 N. Y. 332.

Dower cannot be aliened until assigned. Best v. Jenks, 13 West. Rep. 281, 123 Ill. 447.

The right of a widow to dower, until it is assigned, is a mere chose in action, which is not the subject of a sale upon execution at law. Witthaus v. Schack, 7 Cent. Rep. 259, 105 N. Y. 332.

An absolute sale of an equitable interest in land by the husband alone, during his life, will bar all claim to dower. Rabbitt v. Gaither, 7 Cent. Rep. 383, 67 Md. 94.

The three requisites of dower at common law are marriage, seisin of the husband at some time during the existence of the coverture, and death of the husband. 1 Greenl. Cruise, 154; Stevens v. Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205; Denton v. Nanny, 8 Barb. 618; Co. Litt. 23*a*.

To entitle a widow to dower, the husband must have been seised of the estate at some time during coverture. But a seisin in law will be sufficient (Butler v. Cheatham, 8 Bush, 594; Poor v. Horton, 15 Barb. 485; Leach v. Leach, 21 Hun, 381; Atwood v. Atwood, 22 Pick. 283; Galbraith v. Green, 13 Serg. & R. 85; Durando v. Durando, 23 N. Y. 331); and he must have been seised of a present freehold interest. Pritts v. Ritchey, 29 Pa. 71; Co. Litt. 31*a*; Stevens v. Smith, 4 J. J. Marsh. 64, 20 Am. Dec. 205; Mann v. Edson, 39 Me. 25; Welch v. Buckins, 9 Ohio St. 331; Atwood v. Atwood, 22 Pick. 283; Dennis v. Dennis, 7 Blackf. 572; Henry's Case, 4 Cush. 257; Weir v. Tate, 4 Ired. Eq. 264; Torrence v. Carbry, 27 Miss. 697; Foxworth v. White, 5 Strob. L. 113; Thomas v. Thomas, 10 Ired. L. 123.

Otherwise, however, if the seisin be merely instantaneous, and the husband, by the same act or by the same conveyance by which he acquires the seisin, parts with it. Holbrook v. Finney, 4 Mass. 566, 3 Am. Dec. 243; Gully v. Ray, 18 B. Mon. 107; Gilliam v. Moore, 4 Leigh, 30, 24 Am. Dec. 704; Slaughter v. Culpepper, 44 Ga. 319; Fontaine v. Boatman's Sav. Inst. 57 Mo. 552; Reed v. Morrison, 12 Serg. & R. 18; Stow v. Tifft, 15 Johns. 458, 8 Am. Dec. 266.

The wife is entitled to dower although the husband aliens the land on the day of his marriage. Stewart v. Stewart, 3 J. J. Marsh. 48.

If a husband immediately before marriage make a conveyance of his lands, unknown to his wife, and for the purpose of defeating her right of dower, which fact was known to the grantee, it will be no bar to her right. Brewer v. Connell, 11 Humph. 500; Babcock v. Babcock, 53 How. Pr. 97; Petty v. Petty, 4 B. Mon. 215; Swaine v. Perine, 5 Johns. Ch. 489, 1 N. Y. Ch. L. ed. 1152; Youngs v. Carter, 10 Hun, 194; Cranson v. Cranson, 4 Mich. 230; Killinger v. Reidenhauer, 6 Serg. & R. 531; Pomeroy v. Pomeroy, 54 How. Pr. 228. But compare Jenny v. Jenny, 24 Vt. 324; Baker v. Chase, 6 Hill, 482.

No title to dower, at common law, attaches on a joint seisin. Mayburry v. Brien, 40 U. S. 15 Pet. 21 (10: 646); Co. Litt. 30.

But the rule is otherwise in those States where, by statute, the *jus accrescendi* is abolished. Tabler v. Wiseman, 2 Ohio St. 207; Weir v. Tate, 4 Ired. Eq. 264; Walker v. Walker, 6 Coldw. 571; Davis v. Logan, 9 Dana, 186; Holbrook v. Finney, 4 Mass. 566.

And the widows of tenants in common are entitled to dower in virtue of the seisins of their husbands. Hudson v. Steere, 9 R. I. 106; Mosher v. Mosher, 32 Me. 412; Smith v. Smith, 6 Lans. 313; Potter v. Wheeler, 13 Mass. 504; Sutton v. Rolfe, 3 Lev. 84.

By the natural death of the husband, the wife's right of dower becomes consummate. Sutliff v. Forgey, 1 Cow. 89; Riddick v. Walsh, 15 Mo. 519; Wheatley v. Calhoun, 12 Leigh, 264.

During the life of the husband this right is merely inchoate and is subject to be modified, changed or even abolished by legislative enactment. Moore v. New York, 4 Sandf. 456, 8 N. Y. 110; Wait v. Wait, 4 N. Y. 95; Barbour v. Barbour, 46 Me. 9.

A divorce *a vinculo matrimonii* bars the right to dower, but in those States where such divorce is authorized by statute, provision is made for preserving the dower right of the wife, unless the divorce be granted for her misconduct. McCraney v.

50] *Mr. Justice* **Gray** delivered the opinion of court:

It has been decided, at the present term, that the Guano Islands Act of August 18, 1856, chap 164 (11 Stat. 119), re-enacted in title 72 of the Revised Statutes, is constitutional and valid; and that under that Act, and by the action of the President, as appearing in documents of the Department of State, and of which this court is bound to take judicial notice, the Island of Navassa must be considered as appertaining to the United States. *Jones* v. *United States*, 137 U. S. 202 [34: 691].

51]

The question now presented is whether Peter Duncan, the discoverer of the deposit of guano on that island, had such an estate or interest as to entitle his widow to dower. This question is brought before us by her appeal from a decree of the Circuit Court for the District of Maryland, which dismissed on demurrer her petition against the Navassa Phosphate Company and its receivers, which prayed an assignment of dower, or an allowance of a gross sum in commutation therefor.

Duncan's only interest in the island or in the guano thereon, asserted in the petition of his widow, or shown in the public documents relating to the matter, was derived from the United States, and is defined in section 2 of the Act aforesaid, which provides that "the said discoverer or discoverers, or his or their assigns, being citizens of the United States, may be allowed, at the pleasure of Congress, the exclusive right of occupying said island," "for the purpose of obtaining said guano, and of selling and delivering the same to citizens of the United States, for the purpose of being used therein," at certain rates specified.

By the subsequent sections, the President is empowered to employ the land and naval

---

McCraney, 5 Iowa, 232; Dobson v. Butler, 17 Mo. 87; Whitsell v. Mills, 6 Ind. 229; Burdick v. Briggs, 11 Wis. 126; Miltimore v. Miltimore, 40 Pa. 151; Rice v. Lumley, 10 Ohio St. 596; Schiffer v. Pruden, 64 N. Y. 47; Forrest v. Forrest, 6 Duer, 102; McCafferty v. McCafferty, 8 Blackf. 218; Davol v. Howland, 14 Mass. 219; Gleason v. Emerson, 51 N. H. 405; Gould v. Crow, 57 Mo. 200; Calame v. Calame, 24 N. J. Eq. 440; Lakin v. Lakin, 2 Allen, 45; Wait v. Wait, 4 N. Y. 95; Kade v. Lauber, 16 Abb. Pr. N. S. 288; 48 How. Pr. 382; Young v. Gregory, 46 Me. 475.

A divorce *a mensa et thoro* is not a bar of dower. Clark v. Clark, 6 Watts & S. 85; Crain v. Cavana, 36 Barb. 410; Dean v. Richmond, 5 Pick. 461; Gee v. Thompson, 11 La. Ann. 657; Watkins v. Watkins, 7 Yerg. 283; Walsh v. Kelly, 34 Pa. 84; Thayer v. Thayer, 14 Vt. 107; Bryan v. Batcheller, 6 R. I. 546; Seagrave v. Seagrave, 13 Ves. Jr. 443.

By statute in the various States, alienage is no longer an impediment to the wife's dower. Greer v. Sankston, 26 How. Pr. 471; Luhrs v. Eimer, 80 N. Y. 171; Whiting v. Stevens, 4 Conn. 44; Buchanan v. Deshon, 1 Har. & G. 280; Moore v. Tisdale, 5 B. Mon. 352; Stokes v. O'Fallon, 2 Mo. 32; Stemple v. Herminghouser, 3 G. Greene (Iowa) 408.

Under the California Statute, no estate is allowed to the husband as tenant by the curtesy, nor any estate in dower to the wife. But upon the death of either, the survivor takes one half of the common property of the deceased; and if there are no descendants, the whole goes to the survivor. Beard v. Knox, 5 Cal. 252. See Cal. Civ. Code, § 173.

And by provision of Act of Congress, the widow of a citizen of the United States, whether native or naturalized, is entitled to dower in her husband's land, irrespective of the nativity of the widow. 10 U. S. Stat. at L. 604; U. S. Rev. Stat. § 1994; Luhrs v. Eimer, 80 N. Y. 171; Burton v. Burton, 26 How. Pr. 474, 1 Keyes, 373; Kelly v. Owen, 74 U. S. 7 Wall. 496 (19: 283).

A widow is entitled to dower in all mines opened and worked by her husband during the coverture, or by their heir before dower is assigned. Moore v. Rollins, 45 Me. 493; Billings v. Taylor, 10 Pick. 460; Stoughton v. Leigh, 1 Taunt. 402; Quarrington v. Arthur, 10 Mees. & W. 335.

If improvements were made by a purchaser of the land from the husband, dower should be estimated according to the value of the land at the time of alienation, and not at the time of the death of the husband. Dibble v. Clapp, 31 How. Pr. 420; Tod v. Baylor, 4 Leigh, 498; Mosher v. Mosher, 15 Me. 371; Thompson v. Morrow, 5 Serg. & R. 289, 9 Am. Dec. 358; Dunseth v. Bank of United States, 6 Ohio, 76; Lawson v. Morton, 6 Dana, 471; Doe v. Gwinnell, 1 Q. B. 682; Boyd v. Carlton, 69 Me. 200, 31 Am. Rep. 268.

Where insured buildings standing on lands in which a widow has a dower right are burned, she is entitled to her portion of the insurance. Campbell v. Murphy, 2 Jones, Eq. 357.

It is very generally held in this country that the dower rights of widows extend to equities of redemption. Fish v. Fish, 1 Conn. 559; Moore v. Rollins, 45 Me. 493; Daniel v. Leitch, 13 Gratt. 195; Van Duyne v. Thayre, 14 Wend. 233; Snyder v. Snyder, 6 Mich. 470; Henagan v. Harllee, 10 Rich. Eq. 285; Titus v. Neilson, 5 Johns. Ch. 452, 1 N. Y. Ch. L. ed. 1139; Mills v. Van Voorhis, 23 Barb. 125, 20 N. Y. 412; Taylor v. McCrackin, 2 Blackf. 262; Harrow v. Johnson, 3 Met. (Ky.) 578; Bell v. New York, 10 Paige, 49, 4 N. Y. Ch. L. ed. 881; Barbour v. Barbour, 46 Me. 9.

By the common law, dower does not attach to an equity of redemption. Dixon v. Saville, 1 Bro. Ch. 326; Mayburry v. Brien, 40 U. S. 15 Pet. 21 (10: 646); Cheek v. Waldrum, 25 Ala. 152; McIver v. Cherry, 8 Humph. 713.

Wheat growing upon land set off to a widow as her dower belongs to her and not to the heirs of her husband. Ralston v. Ralston, 3 G. Greene (Iowa) 533.

And where, as in Kentucky, stock in a railroad company is held to be real estate, it is subject to the widow's rights of dower. Copeland v. Copeland, 7 Bush, 349; Price v. Price, 6 Dana, 107; Johns v. Johns, 1 Ohio St. 350; McDougald v. Hepburn, 5 Fla. 568.

A widow is not dowable of land taken by the right of eminent domain for a railroad. French v. Lord, 69 Me. 537.

And if a deed be absolute on its face, but is in fact a mortgage, the widow of the grantee is entitled to dower in the premises so conveyed. Turbeville v. Gibson, 5 Heisk. 585.

The wife of an heir who takes as tenant in common has an inchoate dower right in the share of her husband, because he is seised of an estate of inheritance (Jourdan v. Haran, 56 N. Y. Super. Ct. 185; Moore v. New York, 8 N. Y. 110; Denton v. Nanny, 8 Barb. 618; Sutliff v. Forgey, 1 Cow. 89; Forgey v. Sutliff, 5 Cow. 713); otherwise of joint tenancy.

The unassigned dower of a widow is a mere chose in action, and she cannot by the execution of a mortgage create a charge upon the lands to which her right attaches. Payne v. Becker, 87 N. Y. 153; Pope v. Mead, 99 N. Y. 201; Bostwick v. Beach, 5 Cent. Rep. 388, 103 N. Y. 414; Aikman v. Harsell, 98 N. Y. 186; Lawrence v. Miller, 2 N. Y. 245; Scott v. Howard, 3 Barb. 319; Marvin v. Smith, 46 N. Y. 571; Mutual L. Ins. Co. v. Shipman, 50 Hun, 578.

forces of the United States to protect "the rights of the said discoverer or discoverers, or their assigns, as aforesaid;" the criminal laws of the United States, and the laws regulating the coasting trade, are extended to guano islands; and nothing contained in the Act is to be construed as obligatory on the United States to retain possession of the islands after the guano shall have been removed. Congress has not legislated concerning any civil rights upon the guano islands, but has left such rights to be governed by whatever laws may apply to citizens of the United States in countries having no civilized government of their own.

The whole right conferred upon the discoverer and his assigns is a license to occupy the island for the purpose of removing the guano; this right cannot last after the guano is removed; and by the express terms of the Act it may be terminated at any time "at the pleasure of Congress." The Act, as well observed by Mr. Dana in his notes to Wheaton, "secures to citizens the usufruct of unoccupied guano deposits, which they have discovered and peacefully occupied, beyond the jurisdiction of any foreign state, upon certain terms as to the sale and exportation of the guano, and stipulates for nothing beyond the usufruct while the guano remains." Wheaton's International Law (8th ed.) *note 104* to § 176.

It is a matter of grave doubt, to say the least, whether such a license, if irrevocable, could be treated as creating an estate subject to dower at common law, and whether the common law upon the subject could be held to be in force in the Island of Navassa.

But it is unnecessary to decide either of those questions, because, if both of them should be answered in the affirmative, there remains the insurmountable obstacle to the petitioner's claim, that the interest of her husband, if it can possibly be considered as an estate in land, is an estate at the will of the United States, from whom it was derived, and is therefore not subject to dower at common law. Even a copyhold, which was practically an estate of inheritance, yet, because it was legally an estate at the will of the lord, was not liable to dower, except by and according to local custom. 2 Bl. Com. 132; 1 Scribner on Dower (2d ed.) 369.

It is argued that, even if Duncan was only a tenant at will, yet the Navassa Phosphate Company, claiming under Cooper, the original assign of Duncan, by mesne assignments, among which were a reconveyance of the island by Cooper to Duncan, and a second conveyance by Duncan to Cooper, is estopped to deny that Duncan had an inheritable estate in the island. The conclusive answer to this argument is that the petition alleges that the Navassa Phosphate Company holds the island under and through the title of Duncan, and through no other title; and does not show that either of the two conveyances from Duncan to Cooper, or the intermediate reconveyance by Cooper to Duncan, or any of the mesne assignments under which the Navassa Phosphate Company claims, purported to be of an estate in fee, or of any other or greater interest than the right secured by the Act of Congress, and recognized by the proclamation of the President, referred to in the petition, and set forth in *Jones* v. *United States*, 137 U. S. 206 [34: 693]. The question, argued by counsel, and upon which there is a conflict of authority, whether a grantee, accepting a deed purporting to convey a greater estate than the grantor actually had, is thereby estopped to deny, as against the grantor's widow, that he had such an estate, does not arise.

The petitioner's claim of dower is not aided by the Act of Congress of April 2, 1872, chap. 81, by which the provisions of the Act of 1856 are "extended to the widow, heirs, executors or administrators of such discoverer, where such discoverer shall have died before perfecting proof of discovery or fully complying with the provisions of said Act;" "provided, that nothing herein contained shall be held to impair any rights of discovery, or any assignment by a discoverer, heretofore recognized by the government of the United States." 17 Stat. 48; Rev. Stat. §§ 5572, 5574.

The petitioner claims, and can claim, no rights under that Act, both because her husband had died before its passage, and because the assignment of his right to Cooper had been recognized by the United States in the proclamation of the President, above mentioned.

It is argued for the petitioner that the Act of 1872 is "in the nature of a statutory recognition of the widow's derivative right, and the widow's only right at common law is dower."

But the Statute does not purport to secure the right of the discoverer to his widow and heirs only. It mentions his "widow," who might be entitled to dower in his real estate, and to a share of his personal estate under the Statute of Distributions of his domicil; his "heirs," who as such would take real estate only, but as next of kin might take personal property; and his "executors or administrators," who would take personal property only, and no interest in real estate. Whether the Statute intends that the whole right shall pass either to the widow, or to the heirs, or to the executors and administrators, in the order named, or that it shall be distributed among them under whatever law may regulate the succession to his estate, according to its nature as realty or personalty, might be a question of some difficulty. But it is impossible to find in this Act any manifestation of an intention of Congress that the interest of the discoverer should be subject to dower, or even that it should be considered as real estate rather than as personal property.

Decree affirmed.

UNITED STATES, *Appt.*,

v.

SALLY E. PAGE, Executrix of FRANK A. PAGE, Deceased.

(See S. C. Reporter's ed. 678-682.)

Judgment of President dismissing army officer —court-martial.

1. The judgment of the President, confirming a

NOTE.—*As to naval courts-martial; jurisdiction of, as to persons and offenses; how constituted,*—see *note* to Wilkes v. Dinsman, 12: 618.

sentence of a court-martial of dismissal of an officer of the army, need not be attested by the President's sign manual in order to be effectual; a written statement, signed by the Secretary of War, attesting the President's determination confirming a sentence of dismissal, is sufficient.

2. Where the record discloses that the proceedings of a court-martial embracing its sentence of dismissal of an officer have been laid before the President for his orders in the case, the orders subsequently issued thereon are presumed to be his.

[No. 1249.]

Submitted Jan. 5, 1891. Decided Jan. 19, 1891.

APPEAL from a judgment of the Court of Claims in favor of claimant for pay of Frank A. Page as second lieutenant in the army. *Reversed.*

Statement by *Mr. Chief Justice* **Fuller:**

Frank A. Page filed his petition in the Court of Claims on the 31st day of August, 1887, stating:

"I. That he is a citizen of the United States and a resident of the District of Columbia. II. That on the 18th day of January, A. D. 1865, he was duly appointed and commissioned as a second lieutenant in the veteran reserve corps of the volunteer army of the United States, and served as such officer until the 20th day of September, A. D. 1866, when he was honorably mustered out of such military service of the United States. III. That on the 3d day of October, A. D. 1866, he was duly appointed and commissioned as a second lieutenant in the Forty-fourth Regiment of Infantry of the army of the United States, to rank as such from the 28th day of July, A. D. 1866, and that he accepted such appointment on the 3d day of October, 1866. IV. That he served in said capacity until the 3d day of August, 1870, when he was transferred to the Tenth Infantry. V. That he continued to serve in said last-named regiment until the 22d day of September, 1871, when, by order of the President, he was, upon the recommendation of the retiring board of the U. S. army, retired from active service, and was placed upon the retired list of the army as such second lieutenant. VI. That from said last-mentioned date to the date of the filing of this petition he has ever since remained a second lieutenant upon the said retired list, subject to all the regulations and orders governing officers upon the retired list; yet, notwithstanding, ever since the 27th day of May, 1874, he has been refused all pay and emoluments to which he is lawfully entitled, by reason, as alleged, of a certain order issued by the adjutant-general of the army, dated War Department, Adjutant-General's Office, May 27, 1874, and purporting to be General Court Martial Orders No. 42, wherein and whereby, by paragraph III. of said order, it is asserted that your petitioner ceases to be an officer of the army from the date of said order, by reason whereof the proper officers of the pay department of the army have refused to pay to your petitioner the pay and emoluments to which he is lawfully entitled. VII. Your petitioner avers that the said order, so far as the same purports to dismiss him from the army of the United States, or to deprive him of his said office, is null and void, and that he is entitled to receive his lawful pay, and to have and retain the said office, notwithstanding the said order; that the court-martial proceedings upon which the said order was predicated were never submitted to or approved by the President of the United States, and without such approval no power existed in the adjutant-general or the Secretary of War to deprive him of his commission or his lawful pay as such second lieutenant.

"And your petitioner claims the sum of seventeen thousand eight hundred and thirty-five dollars and sixty cents ($17,835.60) as and for his pay as such second lieutenant for the period from the 28th day of May, 1874, to the 30th day of June, 1887."

Petitioner subsequently departed this life testate, and the suit was revived in favor of Sally E. Page, as executrix, and, by leave of court, she amended the petition "so as to claim pay for said deceased as second lieutenant for the period from the 28th day of May, 1874, to the 12th day of October, 1889, being the sum of $20,816.33." [675

The findings of fact and conclusion of law of the Court of Claims were as follows:

"Findings of Fact.

"I. On January 18, 1865, the claimant was mustered in as a second lieutenant in the veteran reserve corps of volunteers, and served as such till September 20, 1866, when he was honorably mustered out.

"October 3, 1866, he was appointed second lieutenant in the Forty-fourth Regiment of Infantry, U. S. army, and accepted the appointment the same day.

"August 3, 1870, he was transferred to the Tenth Regiment of Infantry.

"September 29, 1871, by order of the President, he was retired from active service and placed on the retired list of the army, on account of wounds received in battle, *i. e.*, the loss of his right arm.

"II. April 29, 1874, a court-martial was convened at New York City, by virtue of Special Orders No. 73, dated April 7, 1874, Headquarters Military Division of the Atlantic, for the trial of Second Lieutenant Frank A. Page (retired). Before this court-martial Lieut. Page was arraigned and tried on the following charges and specifications."

[Here follow three charges, there being one specification under charge I., one specification under charge II. and three specifications under charge III. To these charges and specifications the accused pleaded not guilty. The court found him guilty of the specification under charge I., excepting as to certain words, for which it substituted others, but not guilty of the charge; guilty of charge II. and the specification; guilty of charge III. and of the second and third specifications thereunder, and guilty of the first specification, excepting as to certain words, and as to those not guilty. The sentence was, "to be dismissed the service of the United States." The charges, specifications, findings and sentence are set forth at length in finding II. of the Court of Claims.]

"III. The proceedings, findings and sentence [67

were transmitted to the Secretary of War, who wrote upon the record the following order, viz.:

"War Department,
"Washington City, May 27, 1874.

"In conformity with the 65th of the Rules and Articles of War, the proceedings of the general court-martial to the foregoing case have been forwarded to the Secretary of War, and by him submitted to the President.

"The proceedings and the findings upon the second charge and specification, and upon the third charge under its second and third specifications, are approved.

"With regard to the other findings, the remarks noted by Major-General Hancock, who convened the court, are concurred in as follows:

" 'The finding to the first specification is not approved. The sale of Lieutenant Page's pay accounts and right of pay to the Piedmont and Arlington Life Insurance Company is not sustained by the evidence. The transaction was unquestionably a pledge as collateral security. But the court having found that it was a sale, it is difficult to account for the rest of the finding to this specification, which describes the subsequent presentation of a claim against the United States for the same pay as false and fraudulent, although it acquits Lieutenant Page of knowing that it was such.

" 'In order to constitute fraud there must be a knowledge that the property belongs to another and a design to deprive him of it. If these are wanting it is not fraud. So the word "false," used in this connection, implies an intent to cheat or defraud. Moreover, if the transaction with the Piedmont and Arlington Life Insurance Company was a sale, as the court found it to be, how could the accused, knowing that he had made such a sale, present a claim for the same pay without knowing that it was false and fraudulent? By its finding to the specification the court convicts the accused of presenting a claim against the United States for his pay which was false and fraudulent, and yet acquits him of the charge of "presenting for payment a false and fraudulent claim against the United States." The finding to the first charge is therefore likewise disapproved.

677]

" 'Again, having by its finding to the specification of the 1st charge characterized the presenting of a claim for pay as false and fraudulent, the court, by its finding to the 1st specification of the 3d charge, say that he did not do it "fraudulently and dishonorably," nor "knowing that he had no right or property in said claim or payment," and this, notwithstanding that he is by the same finding found guilty of 'defrauding the United States.'

" 'The finding to this specification, however, convicts the accused of the facts upon which it is based.'

"The sentence is approved.

"Second Lieut. Frank A. Page (retired) accordingly ceases to be an officer of the army from the date of this order.

"Wm. W. Belknap,
"Secretary of War."

"The said Secretary also issued, May 27, 1874, General Court-Martial Order No. 42, announcing the sentence of the court-martial, and that 'Second Lieut. Frank A. Page (retired) ceases to be an officer of the army from the date of this order.' From the date of this order the claimant's name has not been borne on the Army Register, and he has received no pay as an officer of the army since that time.

"*Conclusion of Law.*

"Upon the foregoing facts, the court determines that the claimant is entitled to recover the sum of $11,572.75.

"That amount being the sum due the decedent within the Statute of Limitation of six years before the commencement of the suit."

Judgment was rendered in favor of the claimant accordingly, and the case brought to this court by appeal.

Mr. **Wm. H. Taft**, *Solicitor-Gen.*, for appellant.

Messrs. **Jos. E. McDonald** and **John C. Fay** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court: [6

It is contended that the sentence of dismissal was a nullity because it does not sufficiently appear from the record of the court-martial proceedings and the indorsements thereon that the findings and sentence were approved by the President.

The 65th Article of War (2 Stat. 367, chap. 29), which was in force at the time of these proceedings, provided:

"Any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial, whenever necessary. But no sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court-martial, in time of peace, extending to the loss of life, or the dismission of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case. All other sentences may be confirmed by the officer ordering the court to assemble, or the commanding officer for the time being, as the case may be."

Undoubtedly the action required of the President under this article is judicial action. He decides personally, and the judgment is his own personal judgment, and not an official act presumptively his. But that judgment need not be attested by his sign manual in order to be effectual. This was so held by Attorney-General Wirt (2 Ops. Atty-Gen. 67), Attorney-General Cushing (7 Ops. Atty-Gen. 473) and Attorney-General Devens (15 Ops. Atty-Gen. 290); and in the opinion of the latter, numerous instances of the attestation of the President's determination by the Secretary of War are given.

It is argued that the President was required by paragraph 896 of the Army Regulations of 1863, then in force, to affix his signature to the [6

statement of his decision. That paragraph provided: "The judge advocate shall transmit the proceedings, without delay, to the officer having authority to confirm the sentence, who shall state, at the end of the proceedings in each case, his decision and orders thereon." But the next paragraph, 897, read: "The original proceedings of all general courts-martial, after the decision on them of the reviewing authority, and all proceedings that require the decision of the President under the 65th and 89th Articles of War, and copies of all orders confirming or disapproving, or remitting, the sentences of courts-martial, and all official communications for the judge advocate of the army, will be addressed to 'The Adjutant-General of the Army, War Department,' marked on the cover, 'Judge Advo[illegible].'"

This provision, as is pointed out by Attorney-General Devens (15 Ops. Atty-Gen. 292), "shows that paragragh 896 was intended to embrace proceedings other than those requiring the decision of the President, namely, proceedings which may be confirmed by the officer who ordered the court to assemble, or the commanding officer for the time being, as the case may be." And the Attorney-General concludes that: "In the case of the confirmation of a sentence of dismissal by a court-martial, no formality appears to be prescribed by law for attesting the determination of the President; and as, in cases of that sort, the attestation of such determination by a written statement, signed by the Secretary of War, is in accordance with long usage, that mode of attesting the President's action, confirming a sentence of dismissal, is to be considered as sufficient." We are satisfied that this view is correct.

Since, therefore, it appeared by the order of the Secretary of War, written upon the record of the court-martial in controversy, that the proceedings had "been forwarded to the Secretary of War, and by him submitted to the President," and that the proceedings and findings upon certain charges and specifications were approved, and that the sentence was approved, the only possible conclusion to be drawn from such statement is that the approval was by the President, in whom alone was reposed the authority to act. The Secretary of War declared that he had submitted the proceedings in conformity with the 65th of the Rules and Articles of War; and the 65th article required the whole proceedings to be laid before the President for his confirmation or disapproval, and orders, in the case. By what process of reasoning can the conclusion be justified that, although these proceedings were laid before the President for his confirmation or disapproval, yet the findings and sentence were approved by someone else, who had no authority to act in the premises? On the contrary, where the record discloses that the proceedings have been laid before the President for his orders in the case, the orders subsequently issued thereon are presumed to be his, and not those of the Secretary by whom they are authenticated; and this must be the result here, where the approval follows the submission in the same order.

In *Runkle* v. *United States*, 122 U. S. 543 [30:1167] the record failed to show the vital fact of the submission of the proceedings to the President. The findings of the Court of Claims in that case upon this point were that the proceedings, findings and sentence of the court-martial were transmitted to the Secretary of War, who wrote upon the report that such proceedings, findings and sentence were approved. But it was not found, nor did the Secretary's indorsement show, that the whole proceedings had been submitted to the President. The Secretary did, indeed, conclude his order with the statement that, in view of the unanimous recommendation by the members of the court and the previous good character of the accused, and in consideration of evidence by affidavit (as to his physical condition, presented to the War Department since the trial, and credible representations as to his inability to pay the fine imposed, the President was pleased to remit all of the sentence, except so much thereof as directed cashiering; but this court held that the order was capable of division into two separate parts, one relating to the approval of the proceedings and sentence, and the other to the executive clemency which was invoked and exercised; and that it was only in relation to the latter that the President seemed to have exercised a personal power under the [68 Constitution, the power, namely, of granting pardons, while the former indicated on its face departmental action only. And this conclusion was fortified, in the judgment of the court, by the order of President Hayes stating that the record of official action showed that the approval of the proceedings of the court was by the Secretary; that Runkle had presented a petition to President Grant on the day the order cashiering him was issued, averring that the proceedings had not been approved by the President; that this petition was referred to the judge advocate-general for review and report, and that this report was made; and by which order President Hayes, taking up the matter as unfinished business, and acting as though the proceedings had never been approved, disapproved of the same. "Under such circumstances," said *Mr. Chief Justice* Waite for the court, "we cannot say it positively and distinctly appears that the proceedings of the court-martial have ever in fact been approved or confirmed in whole or in part by the President of the United States, as the Articles of War required, before the sentence could be carried into execution." And he closed the opinion in these words:

"Such being our view of the case it is unnecessary to consider any of the other questions which were referred to the Court of Claims. Neither do we decide what the precise form of an order of the President approving the proceedings and sentence of a court-martial should be, nor that his own signature must be affixed thereto. But we are clearly of opinion that it will not be sufficent unless it is authenticated in a way to show otherwise than argumentatively that it is the result of the judgment of the President himself, and that it is not a mere departmental order which might or might not have attracted his personal attention. The fact that the order was his own should not be left to inference only."

Inasmuch as it did not affirmatively appear that the whole proceedings had been laid before

the President, and it was argued that this must have been so because of the exercise of executive clemency, though the latter was declared to have been influenced by matters subsequent to the trial, it was thought that the order of approval could not be presumed to have been made by the President upon the strength of an inference drawn from the remission of a part of the sentence. The inference that the President had personally acted could, indeed, be properly drawn from the substantive fact of the submission of the proceedings to him, if that had appeared, but presumption could not supply that fact, and then a presumption upon that presumption be availed of to make out that the approval was the President's personal act. This, as the chief justice remarked, would leave the fact that the order was his own to inference only.

The judgment of the Court of Claims is reversed and the cause remanded, with directions to dismiss the petition.

---

[682]

GEORGE H. COPE, *Appt.*, v. JANET COPE ET AL.

(See S. C. Reporter's ed. 682-689.)

Statute of Utah, that illegitimate children shall inherit, valid—succession of estates—power of Territories—Anti-Polygamy Act—repeal—Edmunds-Tucker Law.

1. The Territorial Statute of Utah of 1852, which provides that illegitimate children and their mothers inherit in like manner as legitimate from the father, was valid; so that an illegitimate child, whose father died in 1864 in Utah, inherits from the father.
2. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the Territorial Legislature to deal with as it saw fit, in the absence of an inhibition by Congress.
3. Such Statute was not abrogated nor annulled by the Anti-Polygamy Act of Congress of July 1, 1862 (12 Stat. at L. 501).
4. No statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction.
5. The Edmunds-Tucker Law of March 3, 1887 (24 Stat. at L. 635), is the first disapproval by Congress of the legislation of Utah recognizing the inheritable capacity of the issue of polygamous marriages, and that Act excepts all children declared legitimate by the 7th section of the Act of 1852, and all illegitimate children born within twelve months after the passage of the Act.

[No. 1327.]

Submitted Dec. 22, 1890. Decided Jan. 19, 1891.

APPEAL from a decree of the Supreme Court of the Territory of Utah, affirming a decree of the District Court of the Third Judicial District of Utah, affirming the decree of the Probate Court of Salt Lake County, that George H. Cope is not an heir of Thomas Cope, deceased, and not entitled to any share of Thomas Cope's estate. *Reversed.*

Statement by *Mr. Justice* **Brown:**

This was an appeal from a decree of distribution, originally pronounced by the Probate Court of Salt Lake County, affirmed by the District Court of the Third Judicial District of Utah, and again by an equal division of the Supreme Court of the Territory.

The sole question presented for consideration was, whether George H. Cope, the illegitimate child of Thomas Cope, was, under the facts of the case, the heir of Thomas Cope, deceased. The finding of facts, so far as the same are material, was as follows:

1. That Thomas Cope, deceased, died at Salt Lake County, Utah Territory, intestate, on the — day of August, 1864, leaving certain real estate therein, the description of which is immaterial.

2. That said Thomas Cope left at the time of his death surviving him, Janet Cope, his lawful wife, Thomas H. Cope, his only legitimate son, and George H. Cope, his illegitimate son by Margaret Cope, his polygamous or plural wife, and that the marriage of the said deceased with Margaret Cope was contracted while the said Janet Cope was the living and undivorced wife of said deceased.

And as conclusions of law the court found:

1. That the sole heirs-at-law of said Thomas Cope, deceased, are Janet Cope and Thomas H. Cope, who are alone entitled to share in the distribution of the estate of said Thomas Cope, and that all the real estate above mentioned descended to and vested in said Janet Cope and Thomas H. Cope, subject to the administration upon such estate.

2. That the said George H. Cope is not an heir of said Thomas Cope, deceased, and not entitled to any share of said Thomas Cope's estate.

Mr. **J. G. Sutherland** for appellant.
Mr. **R. N. Baskin** for respondents.

Mr. Justice **Brown** delivered the opinion of the court:

The appellant, George H. Cope, who is admitted to be the illegitimate child of Thomas Cope, by Margaret Cope, his polygamous wife, claims the right to inherit a share of his father's estate under a Territorial Statute of Utah, enacted in 1852, which provides as follows: "Section 25. Illegitimate children and their mothers inherit in like manner" [as legitimate] "from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children."

While this Statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity. By section 6 of the Act of September 9, 1850 (9 Stat. at L. 453), establishing a territorial government for Utah, it is provided: "That the legislative power of said Territory

---

NOTE.—*As to power of Congress over Territories*, see *note* to Brunswick First Nat. Bank v. Yankton County, 25: 1046.

As to incapacity of illegitimate children to inherit; when they take devises or bequests under the description of children,—see *note* to Brewer v. Blougher, 19: 408.

shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." With the exceptions noted in this section, the power of the Territorial Legislature was apparently as plenary as that of the Legislature of a State. *Maynard* v. *Hill*, 125 U. S. 204 [31: 656]. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the Territorial Legislature to deal with as it saw fit, in the absence of an inhibition by Congress. Indeed, legislation of similar description is by no means unprecedented. By the laws of many States natural children are permitted to inherit from the mother, and also from the father in case of the after marriage of their parents, or where there are no lawful children, or where an adoption is made in due form, or where recognition is made by will. And if the question of parentage be satisfactorily settled, there would seem to be power in the Legislature to endow even the children of an adulterous intercourse with inheritable blood from the father.

Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed, and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit, do not apply to the fruits of an adulterous intercourse. *Sams* v. *Sams*, 85 Ky. 396.

But, while it is the duty of the courts to put a construction upon statutes, which shall, so far as possible, be consonant with good morals, we know of no legal principle which would authorize us to pronounce a statute of this kind, which is plain and unambiguous upon its face, void, by reason of its failure to conform to our own standard of social and moral obligations. Legislatures are as competent as courts to deal with these subjects, and, in fixing a standard of their own, are beyond our control. Thus in *Brewer* v. *Blougher*, 39 U. S. 14 Pet. 178, 198 [10: 408, 417], it was said by *Mr. Chief Justice* Taney, speaking for this court, that the expediency and moral tendency of a similar law was a question for the Legislature and not for this court; and it was held in that case that a Statute of Maryland, endowing illegitimate children with inheritable blood, applied to such as were the offspring of an incestuous connection.

It is true that the peculiar state of society existing at the time this Act was passed, and still existing in the Territory of Utah, renders a law of this kind much wider in operation than in other States and Territories; but it may be said in defense of this Act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents' sins. To recognize the validity of the Act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than upon the child; while to hold it to be invalid is to treat the child as in some sense an outlaw and a *particeps criminis*.

It is contended by respondents, however, that [68
even conceding the validity of this Statute, it was abrogated and annulled by the Anti-Polygamy Act of Congress of July 1, 1862 (12 Stat. at L. 501), the second section of which annuls by title the ordinance for the incorporation of the Mormon Church, and then adds: "And all other Acts and parts of Acts heretofore passed by the said Legislative Assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be, and the same hereby are, disapproved and annulled: *Provided*, That this Act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but only to annul all Acts and laws which establish, maintain, protect or countenance the practice of polygamy," etc. As this Act was passed before the death of Thomas Cope, and of course before descent cast upon his children, it applies to this case if the argument of respondents be sound. The question is then presented, Does the Territorial Act of 1852 establish, support, maintain, shield or countenance polygamy? It clearly does not establish, support or maintain it. Does it shield or countenance it? It does not declare the children of polygamous marriages to be legitimate; in fact, it treats them as illegitimate, or rather, it does not, except by indirection or inference, mention them at all; but it puts all illegitimate children, whether the fruits of polygamous or of ordinary adulterous or illicit intercourse, upon an equality and vests them with inheritable blood.

Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly-repugnant thereto as to admit of no other reasonable construction. *McCool* v. *Smith*, 66 U. S. 1 Black, 459 [17: 218]; *Bowen* v. *Lease*, 5 Hill, 221; *Ex parte Yerger*, 75 U. S. 8 Wall. 85, 105 [19: 332, 339]; *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44 [19: 370]; *United States* v. *Sixty-seven Packages*, 58 U. S. 17 How. 85 [15: 54]; *Red Rock* v. *Henry*, 106 U. S. 596 [27: 251].

In order to subject the Territorial Act of 1852 to the annulling clause of the Act of Con- [68
gress, its tendency to shield or countenance polygamy should be direct and unmistakable. No law will be declared void because it may indirectly, or by a possible, and not a necessary, construction, be repugnant to an annulling Act. Its direct and proximate results are alone to be considered. While, as before observed, the Act may have been passed in view of the existing state of things, and as an indirect method of recognizing the legitimacy of polygamous children, it has no tendency in itself to shield or countenance polygamy so far as it applies to children. Legislation for the protection of children born in polygamy is

the President, and it was argued that this must have been so because of the exercise of executive clemency, though the latter was declared to have been influenced by matters subsequent to the trial, it was thought that the order of [682] approval could not be presumed to have been made by the President upon the strength of an inference drawn from the remission of a part of the sentence. The inference that the President had personally acted could, indeed, be properly drawn from the substantive fact of the submission of the proceedings to him, if that had appeared, but presumption could not supply that fact, and then a presumption upon that presumption be availed of to make out that the approval was the President's personal act. This, as the chief justice remarked, would leave the fact that the order was his own to inference only.

The judgment of the Court of Claims is reversed and the cause remanded, with directions to dismiss the petition.

---

[682]

GEORGE H. COPE, *Appl.*, *v.* JANET COPE ET AL.

(See S. C. Reporter's ed. 682-689.)

Statute of Utah, that illegitimate children shall inherit, valid—succession of estates—power of Territories—Anti-Polygamy Act—repeal—Edmunds-Tucker Law.

1. The Territorial Statute of Utah of 1852, which provides that illegitimate children and their mothers inherit in like manner as legitimate from the father, was valid; so that an illegitimate child, whose father died in 1864 in Utah, inherits from the father.
2. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the Territorial Legislature to deal with as it saw fit, in the absence of an inhibition by Congress.
3. Such Statute was not abrogated nor annulled by the Anti-Polygamy Act of Congress of July 1, 1862 (12 Stat. at L. 501).
4. No statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction.
5. The Edmunds-Tucker Law of March 3, 1887 (24 Stat. at L. 635), is the first disapproval by Congress of the legislation of Utah recognizing the inheritable capacity of the issue of polygamous marriages, and that Act excepts all children declared legitimate by the 7th section of the Act of 1852, and all illegitimate children born within twelve months after the passage of the Act.

[No. 1327.]

Submitted Dec. 22, 1890. Decided Jan. 19, 1891.

APPEAL from a decree of the Supreme Court of the Territory of Utah, affirming a decree of the District Court of the Third Judicial District of Utah, affirming the decree of the Probate Court of Salt Lake County, that George H. Cope is not an heir of Thomas Cope, deceased, and not entitled to any share of Thomas Cope's estate. *Reversed.*

Statement by *Mr. Justice* **Brown:**

This was an appeal from a decree of distri- [68 bution, originally pronounced by the Probate Court of Salt Lake County, affirmed by the District Court of the Third Judicial District of Utah, and again by an equal division of the Supreme Court of the Territory.

The sole question presented for consideration was, whether George H. Cope, the illegitimate child of Thomas Cope, was, under the facts of the case, the heir of Thomas Cope, deceased. The finding of facts, so far as the same are material, was as follows:

1. That Thomas Cope, deceased, died at Salt Lake County, Utah Territory, intestate, on the — day of August, 1864, leaving certain real estate therein, the description of which is immaterial.

2. That said Thomas Cope left at the time of his death surviving him, Janet Cope, his lawful wife, Thomas H. Cope, his only legitimate son, and George H. Cope, his illegitimate son by Margaret Cope, his polygamous or plural wife, and that the marriage of the said deceased with Margaret Cope was contracted while the said Janet Cope was the living and undivorced wife of said deceased.

And as conclusions of law the court found:

1. That the sole heirs-at-law of said Thomas Cope, deceased, are Janet Cope and Thomas H. Cope, who are alone entitled to share in the distribution of the estate of said Thomas Cope, and that all the real estate above mentioned descended to and vested in said Janet Cope and Thomas H. Cope, subject to the administration upon such estate.

2. That the said George H. Cope is not an heir of said Thomas Cope, deceased, and not entitled to any share of said Thomas Cope's estate.

Mr. **J. G. Sutherland** for appellant.
Mr. **R. N. Baskin** for respondents.

Mr. Justice **Brown** delivered the opinion of the court:

The appellant, George H. Cope, who is ad- [6 mitted to be the illegitimate child of Thomas Cope, by Margaret Cope, his polygamous wife, claims the right to inherit a share of his father's estate under a Territorial Statute of Utah, enacted in 1852, which provides as follows: "Section 25. Illegitimate children and their mothers inherit in like manner" [as legitimate] "from the father, whether acknowledged by him or not, provided it shall be made to appear to the satisfaction of the court that he was the father of such illegitimate child or children."

While this Statute is an innovation upon the common law, and in some particulars a novelty in legislation, we perceive no objection to its validity. By section 6 of the Act of September 9, 1850 (9 Stat. at L. 453), establishing a territorial government for Utah, it is provided: "That the legislative power of said Territory

---

NOTE.—*As to power of Congress over Territories, see note* to Brunswick First Nat. Bank v. Yankton County, 25: 1046.

As to incapacity of illegitimate children to inherit; when they take devises or bequests under the description of children,—see note to Brewer v. Blougher, 10: 408.

shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the laws passed by the Legislative Assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect." With the exceptions noted in this section, the power of the Territorial Legislature was apparently as plenary as that of the Legislature of a State. *Maynard* v. *Hill*, 125 U. S. 204 [31: 656]. The distribution of and the right of succession to the estates of deceased persons are matters exclusively of state cognizance, and are such as were within the competence of the Territorial Legislature to deal with as it saw fit, in the absence of an inhibition by Congress. Indeed, legislation of similar description is by no means unprecedented. By the laws of many States natural children are permitted to inherit from the mother, and also from the father in case of the after marriage of their parents, or where there are no lawful children, or where an adoption is made in due form, or where recognition is made by will. And if the question of parentage be satisfactorily settled, there would seem to be power in the Legislature to endow even the children of an adulterous intercourse with inheritable blood from the father.

Legislation admitting illegitimate children to the right of succession is undoubtedly in derogation of the common law, and should be strictly construed, and hence it has generally been held that laws permitting such children, whose parents have since married, to inherit, do not apply to the fruits of an adulterous intercourse. *Sams* v. *Sams*, 85 Ky. 396.

But, while it is the duty of the courts to put a construction upon statutes, which shall, so far as possible, be consonant with good morals, we know of no legal principle which would authorize us to pronounce a statute of this kind, which is plain and unambiguous upon its face, void, by reason of its failure to conform to our own standard of social and moral obligations. Legislatures are as competent as courts to deal with these subjects, and, in fixing a standard of their own, are beyond our control. Thus in *Brewer* v. *Blougher*, 39 U. S. 14 Pet. 178, 198 [10: 408, 417], it was said by *Mr. Chief Justice* Taney, speaking for this court, that the expediency and moral tendency of a similar law was a question for the Legislature and not for this court; and it was held in that case that a Statute of Maryland, endowing illegitimate children with inheritable blood, applied to such as were the offspring of an incestuous connection.

It is true that the peculiar state of society existing at the time this Act was passed, and still existing in the Territory of Utah, renders a law of this kind much wider in operation than in other States and Territories; but it may be said in defense of this Act that the children embraced by it are not responsible for this state of things, and that it is unjust to visit upon them the consequences of their parents' sins. To recognize the validity of the Act is in the nature of a punishment upon the father, whose estate is thus diverted from its natural channel, rather than upon the child; while to hold it to be invalid is to treat the child as in some sense an outlaw and a *particeps criminis*.

It is contended by respondents, however, that [68
even conceding the validity of this Statute, it was abrogated and annulled by the Anti-Polygamy Act of Congress of July 1, 1862 (12 Stat. at L. 501), the second section of which annuls by title the ordinance for the incorporation of the Mormon Church, and then adds: "And all other Acts and parts of Acts heretofore passed by the said Legislative Assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy, be, and the same hereby are, disapproved and annulled: *Provided*, That this Act shall be so limited and construed as not to affect or interfere with the right of property legally acquired under the ordinance heretofore mentioned, nor with the right 'to worship God according to the dictates of conscience,' but only to annul all Acts and laws which establish, maintain, protect or countenance the practice of polygamy," etc. As this Act was passed before the death of Thomas Cope, and of course before descent cast upon his children, it applies to this case if the argument of respondents be sound. The question is then presented. Does the Territorial Act of 1852 establish, support, maintain, shield or countenance polygamy? It clearly does not establish, support or maintain it. Does it shield or countenance it? It does not declare the children of polygamous marriages to be legitimate; in fact, it treats them as illegitimate, or rather, it does not, except by indirection or inference, mention them at all; but it puts all illegitimate children, whether the fruits of polygamous or of ordinary adulterous or illicit intercourse, upon an equality and vests them with inheritable blood.

Nothing is better settled than that repeals, and the same may be said of annulments, by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly repugnant thereto as to admit of no other reasonable construction. *McCool* v. *Smith*, 66 U. S. 1 Black, 459 [17: 218]; *Bowen* v. *Lease*, 5 Hill, 221; *Ex parte Yerger*, 75 U. S. 8 Wall. 85, 105 [19: 332, 339]; *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44 [19: 370]; *United States* v. *Sixty-seven Packages*, 58 U. S. 17 How. 85 [15: 54]; *Red Rock* v. *Henry*, 106 U. S. 596 [27: 251].

In order to subject the Territorial Act of [68
1852 to the annulling clause of the Act of Congress, its tendency to shield or countenance polygamy should be direct and unmistakable. No law will be declared void because it may indirectly, or by a possible, and not a necessary, construction, be repugnant to an annulling Act. Its direct and proximate results are alone to be considered. While, as before observed, the Act may have been passed in view of the existing state of things, and as an indirect method of recognizing the legitimacy of polygamous children, it has no tendency in itself to shield or countenance polygamy so far as it applies to children. Legislation for the protection of children born in polygamy is

not necessarily legislation favorable to polygamy. There is no inconsistency in shielding the one and in denouncing the other as a crime. It has never been supposed that the Acts of the several States legitimating natural children, whose parents intermarry after their birth, had the slightest tendency to shield or countenance illicit cohabitation, but they were rather designed to protect the unfortunate children of those who were willing to do all in their power towards righting a great wrong. So, if the Act in question had been passed in any other jurisdiction, it would have been considered as a perfectly harmless, though possibly indiscreet, exercise of the legislative power, and would not be seriously claimed as a step towards the establishment of a polygamous system.

As this Act annuls only such territorial laws as shield or countenance polygamy, if we sustain the construction urged by the respondents here, it must necessarily follow that the children of polygamous marriages would be deprived of their power to inherit from the father, while the offspring of other illicit relations would be left to inherit under the Act. This would seem to be at war with the intent of the Legislature.

But whatever doubts there may be regarding the proper construction of this Act, we think they are dispelled by a scrutiny of the subsequent legislation upon the same subject. In 1876 the Legislature of Utah, being evidently in some doubt as to the proper interpretation of the Congressional Act of 1862, passed another Act declaring that "every illegitimate child is, in all cases, an heir to its mother. It [88] is also heir to its father when acknowledged by him." This was followed March 22, 1882, by an Act of Congress, commonly known as the "Edmunds Law" (22 Stat. at L. 31), which, while providing for further punishment for polygamy and its accompanying evils, in section 7 expressly legitimates the issue of polygamous or Mormon marriages born prior to January 1, 1883. If the Territorial Act of 1852 be open to the charge of shielding or countenancing polygamy, much more so is this Act, which not only admits polygamous children to the right of inheritance, but actually legitimates them for all purposes. The law remained substantially in this condition until March 3, 1887, when the Act of Congress known as the "Edmunds-Tucker Law" (24 Stat. at L. 635), was passed, the 11th section of which provides that "the laws enacted by the Legislative Assembly of the Territory of Utah which provide for or recognize the capacity of illegitimate children to inherit, or to be entitled to any distributive share in, the estate of the father of any such illegitimate child, are hereby disapproved and annulled; and no illegitimate child shall hereafter be entitled to inherit from his or her father, or to receive any distributive share in the estate of his or her father: *Provided*, That this section shall not apply to any illegitimate child born within twelve months after the passage of this Act, nor to any child made legitimate by the 7th section of the Act" of 1882.

Here, then, is the first clear and unqualified declaration of Congress of its disapproval of the legislation of Utah recognizing the inheritable capacity of the issue of polygamous marriages; and so careful is Congress of rights acquired or existing under these laws that it excepts by special proviso all children declared to be legitimate by the 7th section of the Act of 1882, as well as all illegitimate children born within twelve months after the passage of this Act.

These several Acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several Acts were passed, but the later Acts should also be regarded as legislative interpretations of the prior ones. *United States* v. *Freeman*, 44 U. S. 3 How. 556, 564 [11: 724, 727]; *Stockdale* v. *Atlantic Ins. Co.* 87 U. S. 20 Wall. 323 [22: [68 348]. Now if it had been intended by the Act of 1862 to annul the Territorial Act of 1852, fixing the inheritable capacity of illegitimate children, why did Congress in 1882 recognize the legitimacy of children born of polygamous or Mormon marriages, prior to January 1, 1883? Or why, in the Act of 1887, did it save the rights of such children as well as of all others born within twelve months after the passage of that Act? The object of these enactments is entirely clear. Not only does Congress refrain from adding to the odium which popular opinion visits upon this innocent but unfortunate class of children, but it makes them the special object of its solicitude, and at the same time offers to the parents an inducement, in the nature of a *locus penitentiæ*, to discontinue their unlawful cohabitation.

Our conclusion is that the appellant George A. Cope is entitled to share in his father's estate, and *the decree of the Supreme Court of the Territory must therefore be reversed.*

MASSACHUSETTS BENEFIT ASSOCIATION, *Plff. in Err.*, [68
v.
SARAH G. MILES.

(See S. C. Reporter's ed. 689-692.)

Jurisdictional amount—interest included in judgment.

1. Where the judgment was not entered for a definite sum, but generally in favor of plaintiff on the verdict, and the verdict was rendered thirteen days before judgment, and the amount actually due at the date of the judgment, upon the verdict and interest thereon to that time, was over $5,000, this court has jurisdiction of the case, where the state law allows interest on the verdict to be included in the judgment.
2. Where interest antecedent to the judgment appealed from is included in such judgment, and the amount, with the added interest, exceeds $5,000, this court has jurisdiction.

[No. 1380.]

Submitted Dec. 1, 1890. Decided Jan. 19, 1891.

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania, to review a judgment in favor of plaintiff on a policy of insurance.

On motion to dismiss for want of jurisdiction. *Denied.*

Statement by *Mr. Justice* **Brown:**

This was a motion to dismiss a writ of error upon the ground that the "matter in dispute" did not exceed the sum or value of five thousand dollars, as required by Revised Statutes, section 691, as amended by section 3 of the Act of February 16, 1875 (18 Stat. 315), to give this court jurisdiction.

Sarah G. Miles, the plaintiff below, brought an action in the Court of Common Pleas of Philadelphia County, in the State of Pennsylvania, against the Massachusetts Benefit Association, to recover five thousand dollars, with interest, due to her as beneficiary in a policy of insurance, issued by the defendant company upon the life of her husband, John S. Miles. The insured died on January 16, 1888. After the issue was made up, the defendant company removed the case to the Circuit Court for the Eastern District of Pennsylvania, where it was duly called for trial October 16, 1889. Defendant set up no counterclaim, but denied all liability upon the ground that the policy had lapsed by nonpayment of an assessment. Upon October 18th, the jury returned a verdict for the plaintiff, and assessed her damages at five thousand dollars.

Motion for new trial was made, and on October 31st the motion was denied, and judgment was entered in open court in the following words: "Motion for new trial denied, and judgment ordered to be entered in favor of the plaintiff, and against the defendant, on the verdict. Whereupon judgment is entered accordingly."

The defendant having taken out its writ of error, this motion was made to dismiss.

Mr. **Richard P. White,** for defendant in error, for motion:

As the writ of error was sued out by the defendant below, and as no question is presented growing out of a set-off or counterclaim, the amount in controversy is fixed by the judgment.

Walker v. *United States*, 71 U. S. 4 Wall. 163 (18: 319); *Thompson* v. *Butler*, 95 U. S. 694 (24: 540); *Hilton* v. *Dickinson*, 108 U. S. 175 (27: 691); *First Nat. Bank* v. *Redick*, 110 U. S. 224 (28: 124); *Henderson* v. *Wadsworth*, 115 U. S. 276 (29: 379).

The verdict was for five thousand dollars and the judgment was entered generally on the verdict, so that this court has before it only a judgment for that sum. At common law judgments did not bear interest.

Perkins v. *Fourniquet*, 55 U. S. 14 How. 331 (14: 443).

To determine the jurisdictional amount, however, neither interest on the judgment nor costs of suit can enter into the computation.

Western U. Teleg. Co. v. *Rogers*, 93 U. S. 565 (23: 977).

Messrs. Ernest L. Tustin, Wm. F. Johnson and **Frederick Carroll Brewster,** for plaintiff in error, against motion:

The plaintiff was on the day of judgment entitled to receive $5,010.83, and such was the amount of the judgment in fact and in law.

Walker v. *United States*, 71 U. S. 4 Wall. 163 (18: 319); *The Patapsco* v. *Boyce*, 79 U. S. 12 Wall. 452 (20: 458).

Mr. Justice **Brown** delivered the opinion of the court: [69

Our jurisdiction to review this case upon writ of error depends upon the amount of the judgment, and the sole question is whether, upon the face of this record, the judgment is for five thousand dollars, or for that amount with interest from the date of the verdict. Under the peculiar practice obtaining in Pennsylvania, the judgment was not entered up for a definite amount in dollars and cents, but generally, "in favor of the plaintiff, and against the defendant, on the verdict." As the verdict was rendered thirteen days before this entry, the amount actually due at the date of the judgment, if interest be computed upon the verdict, was $5,010.83.

At common law neither verdicts nor judgments bore interest; but by Revised Statutes, section 966, "interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the State in which such court is held, interest may be levied under process of execution on judgments recovered in the courts of such State; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such State." [69]

Did the case rest solely upon this Statute, it is difficult to see how interest could be computed upon this verdict, inasmuch as the specific allowance of interest upon judgments would seem to exclude the inference that interest should be allowed upon verdicts before judgment. But by an Act of the Legislature of Pennsylvania, passed in 1859, it is declared to "be lawful for any party or parties, in whose favor any verdict may be rendered for a specific sum of money, to collect and receive interest upon such sum from the date of the verdict; and every general judgment entered upon such verdict, whether by a court of original jurisdiction, or by the supreme court, shall be deemed and held to be a judgment for the sum found by the verdict, with interest thereon from the date of such finding."

We regard this Statute as settling the question in favor of our jurisdiction. Section 966, while providing only for interest upon judgments, does not exclude the idea of a power in the several States to allow interest upon verdicts, and where such allowance is expressly made by a state statute, we consider it a right given to a successful plaintiff, of which he ought not to be deprived by a removal of his case to the federal court. The courts of the state and the federal courts sitting within the State should be in harmony upon this point. Both in *Holden* v. *Freedman's Sav. & T. Co.*, 100 U. S. 72 [25:567], and in *Ohio* v. *Frank*, 103 U. S. 697 [26:531], it was held that the question of interest is always one of local law. This is also recognized in the 23d Rule of this court, which allows interest upon the judgment of the inferior courts, at such rate as similar judgments bear interest in the courts of the State where such judgment is rendered, whenever upon writ of error from this court the judgment of such inferior court is affirmed. Where interest antecedent to the judgment appealed [69

from is included in such judgment, and the amount, with the added interest, exceeds $5,000, jurisdiction will attach. *The Patapsco*, 79 U. S. 12 Wall. 451 [20:457]; *The Rio Grande*, 86 U. S. 19 Wall. 178 [22: 60]; *Zeckendorf* v. *Johnson*, 128 U. S. 617 [31:277]; *District of Columbia* v. *Gannon*, 130 U. S. 227 [32:922]; *New York Elevated R. Co.* v. *Fifth Nat. Bank*, 118 U. S. 608 [30:259]; *Keller* v. *Ashford*, 133 U. S. 610 [33:667].

The motion to dismiss will therefore be denied.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

IN

OCTOBER TERM, 1890.

Vol. 138.

REFERENCE TABLE

OF SUCH CASES

DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1890,

AND REPORTED HEREIN,

VOL. 138,

AS ALSO APPEAR IN

OFFICIAL REPORTER'S EDITION.

Off. Rep. 138 U. S.	Title.	Here in.
1	Joy v. St. Louis	843
2- 4	" "	845
4- 6	" "	846
6- 9	" "	847
9-12	" "	848
12-15	" "	849
15-18	" "	850
18-30	" "	851
30-32	" "	852
32-35	" "	853
35-38	" "	854
38-41	" "	855
41-43	" "	856
43-46	" "	857
46-49	" "	858
49-51	" "	859
52-53	Butler v. Gage	869
53-55	" "	870
55-58	" "	871
58-61	" "	872
61-64	United States v. Connor	860
64-66	" "	861
66-67	" "	862
67	Pleasant Twp. v. Ætna L. Ins. Co.	864
68-69	" "	865
69-72	" "	866
72-75	" "	867
75-77	" "	868
77-78	" "	869
78-79	Brimmer v. Rebman	862
79-82	" "	863
82-84	" "	864
84-85	United States v. Central P. R. Co.	895
85-87	" "	896
87	United States v. Kingsley	896
87-90	" "	897
90-92	" "	898
93	Superior City v. Ripley	914
93-95	" "	915
95-98	" "	916
98	" "	917
98	Sioux City Street R. Co. v. Sioux City	898
99-100	" " "	899
100-103	" " "	900
103-107	" " "	901
107-108	Sioux City Street R. Co. v. Sioux City	902
109-110	Reagan v. Aiken	892
110-111	" "	893
111-113	" "	894
113-114	" "	895
114	Bent v. Thompson	902
115-117	" "	903
117-120	" "	904
120-123	" "	905
123-124	" "	906
124-125	Consolidated Roller Mill Co. v. Walker	920
125-128	" "	921
128-131	" "	922
131-133	" "	923
134-135	Tubbs v. Wilholt	887
135-138	" "	888
138-141	" "	889
141-144	" "	890
144-146	" "	891
146-148	Whitehead v. Shattuck	873
150-152	" "	874
152-155	" "	875
155-156	" "	876
157	Cook v. United States	906
165-167	" "	907
167-170	" "	908
170-173	" "	909
173-176	" "	910
176-178	" "	911
178-181	" "	912
181-184	" "	913
184-185	" "	914
185-190	Chicago, S. F. & C. R. Co. v. Price	917
190-192	" " "	918
192-195	" " "	919
195	" " "	920
196-197	Coburn v. Cedar Valley Land & C. Co.	876
197-199	" " "	877
199-202	" " "	878
202-213	" " "	879
213-214	" " "	880
214-215	" " "	881
216	" " "	883
216-218	" " "	884

Off. Rep. 138 U. S.	Title.	Here in.
218–219	Coburn v. Cedar Valley Land & C. Co.	885
219–222	" " "	886
222–223	" " "	887
223–224	Miller v. Clark	966
224–225	" "	967
226	St. Louis v. Rutz	941
227–228	" "	943
228–231	" "	944
231–234	" "	945
234–241	" "	946
241–242	" "	947
242–244	" "	948
244–247	" "	949
247–249	" "	950
249–251	" "	951
252	Waterman v. Mackenzie	923
252–253	" "	924
253–256	" "	925
256–258	" "	926
258–261	" "	927
261	" "	928
262–264	Beardsley v. Beardsley	928
264–268	" "	929
268–270	" "	930
270–271	" "	931
271	North v. Peters	936
272–275	" "	937
275–277	" "	938
280–282	" "	939
282–285	" "	940
285	" "	941
285–287	Kauffman v. Wootters	962
287–288	Wheeling & B. Bridge Co. v. Wheeling Bridge Co.	967
288–291	" "	968
291–293	" "	969
293–295	United States v. Green	960
295–297	" "	961
297–298	" "	962
298–300	Kansas City, Ft. S. & M. R. Co. v. Daughtry	963
300–303	" " "	964
303–306	" " "	965
306	" " "	966
306	Ames v. Moir	951
306–309	" "	952
309–311	" "	953
311–312	" "	954
313	United States Mortgage Co. v. Sperry	969
314–316	" "	970
316–318	" "	971
319–321	" "	972
325–327	" "	974
327–330	" "	975
330–332	" "	976
332–335	" "	977
335–338	" "	978
338–341	" "	979
341–343	" "	980
343–346	" "	981
346–349	" "	982
349–352	" "	983
352	" "	984
353	Alexander v. United States	954
353–354	" "	955
354–356	" "	956
356–359	" "	957
359–360	" "	958
361	Crumpton v. United States	958

Off. Rep. 138 U. S.	Title.	Here in.
361–364	Crumpton v. United States	959
364–365	" "	960
365–366	Upshur v. Briscoe	931
366–369	" "	932
369–371	" "	933
371–375	" "	934
375–378	" "	935
378–379	" "	936
380	Wadsworth v. Adams	984
380–383	" "	985
383–387	" "	986
387–389	" "	987
389	Brown v. Trousdale	987
390–392	" "	988
392–394	" "	989
394–396	" "	990
396–397	" "	991
397–399	Beaupre v. Noyes	991
399–402	" "	992
402	" "	993
403	Cheney v. Hughes	993
404–405	Cooper, *Re*	993
405–408	" "	994
408–411	" "	995
411–413	" "	996
414	" "	997
414	Central Trust Co. v. Kneeland	1014
415–419	" "	1015
419–421	" "	1016
421–424	" "	1017
424	" "	1018
425–426	Russell v. Post	1009
426	" "	1010
426–429	" "	1011
429–431	" "	1012
431	Case Mfg. Co. v. Soxman	1019
431–434	" "	1020
434–436	" "	1021
436–439	" "	1022
439	" "	1023
439	Simmons v. Saul	1054
441–442	" "	1056
442–444	" "	1057
444–447	" "	1058
447–450	" "	1059
450–453	" "	1060
453–456	" "	1061
456–459	" "	1062
459–460	" "	1063
461–462	Graham, *Re*	1051
462–464	" "	1052
464–466	Clay v. Field; Freeman v. Clay; Field v. Clay	1044
466–469	" "	1045
469–471	" "	1046
471–474	" "	1047
474–477	" "	1048
477–480	" "	1049
480–482	" "	1050
482–483	" "	1051
483	Bunt v. Sierra Butte Gold Min. Co.	1031
484–485	" " "	1032
486	Hanner v. Moulton	1033
486	" "	1033
486–489	" "	1034
489–492	" "	1035
492–495	" "	1036
495	" "	1037
496	Missouri v. Andriano	1013
496–499	" "	1013

Off. Rep. 138 U. S.	Title.	Here in.
499–501	Missouri v. Andriano	1014
501–502	Louisville, E. & St. L. R. Co. v. Wilson	1023
502–504	" " "	1024
504–507	" " "	1025
507–509	" " "	1026
509	Kneeland v. American Loan & T. Co.	
	Kneeland v. Ballou	1052
510–512	" " "	1053
512–513	" " "	1054
514	Williams v. United States	1026
514–515	" "	1027
515–517	" "	1028
517–520	" "	1029
520–523	" "	1030
523–524	" "	1031
525–526	Cressey v. Meyer	1018
526–528	" "	1019
529–530	Barney v. Oelrichs	1037
530–533	" "	1038
533–536	" "	1039
536	" "	1040
537	Lawrence Mfg. Co. v. Tennessee Mfg. Co.	997
537–538	" " "	998
538–539	" " "	999
539–540	" " "	1000
540–543	" " "	1001
543–545	" " "	1002
545–547	" " "	1003
547–550	" " "	1004
550–552	" " "	1005
552	Lawrence Mfg. Co. v. Janesville Cotton Mills	1005
552–555	" " "	1006
555–558	" " "	1007
558–561	" " "	1008
561–562	" " "	1009
562–564	Schell v. Fauché	1040
564–567	" "	1041
567–570	" "	1042
570–573	" "	1043
573	Heath v. Wallace	1063
573–574	" "	1064
574–577	" "	1065
577–579	" "	1066
579–582	" "	1067
582–585	" "	1068
585–587	" "	1069
587–588	Ducie v. Ford	1091
588–589	" "	1092
589	" "	1093
591–592	" "	1094
592–593	" "	1095

Off. Rep. 138 U. S.	Title.	Here in.
593–595	Ducie v. Ford	1096
595	New Orleans v. Gaines / Gaines v. New Orleans	1102
597–599	" "	1103
599–602	" "	1104
602–605	" "	1105
605–608	" "	1106
608–610	" "	1107
610–613	" "	1108
613–616	" "	1109
616	" "	1110
617	Troy Laundry Mach. Co. v. Dolph	1083
617–620	" " "	1084
620–622	" " "	1085
622–623	" " "	1086
623–625	Gormley v. Bunyan	1086
625–627	" "	1087
627–629	" "	1088
630–632	" "	1089
632–635	" "	1090
635	" "	1091
635–637	Cook County v. Calumet & C. Canal & D. Co.	1110
637–640	" "	1111
640–643	" "	1112
643–645	" "	1113
645–648	" "	1114
648–651	" "	1115
651–654	" "	1116
654–655	" "	1117
656	San Francisco City & County v. LeRoy	1096
656–658	" "	1097
658–664	" "	1098
664–667	" "	1099
667–669	" "	1100
669–672	" "	1101
672	" "	1102
673	Merrill v. Monticello	1069
673–676	" "	1070
676–678	" "	1071
678–680	" "	1072
681–682	" "	1073
682–685	" "	1074
685–688	" "	1075
688–691	" "	1076
691–693	" "	1077
693–694	" "	1078
694–695	Anderson v. Watt	1078
695–698	" "	1079
698–701	" "	1080
701–704	" "	1081
704–707	" "	1082
707–708	" "	1083

THE DECISIONS

OF THE

Supreme Court of the United States,

AT

OCTOBER TERM, 1890.

[Authenticated copy of opinion record strictly followed, except as to such reference words and figures as are inclosed in brackets.]

JAMES F. JOY ET AL., *Appts.*,
v.
CITY OF ST. LOUIS ET AL.

(See S. C. Reporter's ed. 1-51.)

Use by one railroad of the right of way of another, when permissible—punctuation—covenant, when binding on subsequent purchasers—notice—reference in deed—agreements, when construed together—public interests—estoppel—condition, when binding—authority of park commissioners—power of court of equity—use of tracks of railroad—injunction, when proper—decree—public interests—specific performance, when decreed—agreement—want of mutuality.

1. Where two railroad companies have received from the public authorities a grant of a joint right of way through a public park, upon the agreement and condition to permit, upon reasonable regulations and terms, other railroads to use such right of way through the park and to the terminus of their road in the city, for a fair and equitable compensation, an easement for the benefit of the public is created, and one of said companies which has become the successor in interest of the other is bound to permit another railroad company, upon the consent of the public authorities, to use such right of way for a fair and equitable compensation.
2. Although the punctuation of an agreement cannot defeat its obvious intent, yet when the meaning is doubtful the punctuation may be considered to ascertain such meaning.
3. A covenant in an agreement made by a railroad company with park commissioners, from whom it received a grant of a right of way through a public park, to permit other railroad companies to use such right of way, is binding upon subsequent purchasers, with notice, from such company.
4. Where the right of mortgagees and purchasers at a foreclosure sale of a railroad is based solely upon an agreement made prior to the execution of the mortgage, they must be held to have had notice of it and they hold subject to its terms and conditions, whether the covenants thereof run with the land or not.
5. A reference, in a deed of a right of way to a railroad company, to the conditions of a contract on which the right of way was granted, is notice to the parties to the deed and to purchasers at a foreclosure sale of the railroad on a subsequent mortgage, of the contents of the contract, and of another contract referred to therein, and they purchase subject to such conditions.
6. Where two agreements and a deed, of same date, constitute a single transaction relating to the same subject matter, they should be construed together.
7. Where the subject matter of a contract concerns the interests of the public, the contract is to be construed liberally in favor of the public.
8. One party to an agreement, who has, by virtue of it, obtained property and the benefit of moneys expended thereon by the other party, cannot be heard to allege that the agreement was against the policy of the law, without offering to return the property.
9. Where a share of an incomplete right of way was conveyed to a railroad company subject to certain conditions, the completion by such company of the right of way, by the purchase of intervening and isolated tracts, does not destroy such conditions.
10. The confining, by park commissioners, railroads crossing a public park to the use of a single right of way is within the power of the commissioners, when it is a reasonable precaution, in the interest of public safety.
11. When a railroad company is entitled to use the right of way of another railroad company upon such reasonable terms and for such fair and equitable compensation as may be agreed upon by such companies, if the parties do not agree, a court of equity, having taken cognizance of the controversy, has power to settle the right and the amount of compensation.
12. Where a railroad company becomes entitled to use the right of way, or road-bed, of another company, it is entitled to use the tracks thereon, where the entire right of way is covered with tracks so that there is no room for an independent track, subject, however, to the prior right of the other company to use the same as its convenience requires.
13. A suit in equity is the proper remedy to enforce the right of one railroad company to use the right of way of another, conferred by contract; and in such a suit a prayer for an injunction against refusing to permit the use of said right of way is a

prayer for all that is necessary to secure the specific performance of the contract.

14. Where a decree of a court of equity is complete in itself and disposes of the controversy, it is no objection to it that the court will have to take supplemental proceedings to carry it out and make it effective under altered circumstances.

15. Considerations of the public interests are controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court.

16. The details of the manner of use of a right of way of a railroad company by another company are sufficiently furnished by the agreement for such use to enable a court to decree specific performance, where the agreement provides that one company shall have the sole control of the starting, running and regulating the time tables of and for its own trains, and of the relative times of the starting, coming in and running of the trains of both companies.

17. It is no objection to specific performance of an agreement to permit the right of way of a railroad to be used by other railroads, that the railroads entitled to such use are not named in the agreement.

18. A contract by one railroad company to permit other railroad companies to use its right of way does not lack mutuality, where the consideration is ample, and such company cannot resist the enforcement of the privilege on the ground that it cannot compel the other company to continue in its enjoyment.

[No. 106.]

Argued Dec. 9, 10, 1890. Decided Jan. 19, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Missouri on a bill of intervention filed in two causes pending in the same court consolidated into one in favor of the intervenors that the Colorado Company had the right to use the right of way and track named in the opinion and fixing the compensation therefor and granting a perpetual injunction against obstructing such use. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wells H. Blodgett,** for appellants:

The covenant of the County Company did not create an equitable easement in the road between the park and the City which affected that property in the hands of Joy and others, as purchasers from the Kansas City Company.

Whitney v. *Union R. Co.* 11 Gray, 359; *Jenks* v. *Williams*, 115 Mass. 217; *Jeffries* v. *Jeffries*, 117 Mass. 184; *Norcross* v. *James*, 140 Mass. 188; *Keppell* v. *Bailey*, 2 Myl. & K. 517; *Haywood* v. *Brunswick Permanent Ben. Bldg. Soc.* L. R. 8 Q. B. Div. 403; *London & S. W. R. Co.* v. *Gomm*, L. R. 20 Ch. Div. 562.

The court erred in holding that the agreement is sufficiently definite to be specifically enforced in a court of equity.

Colson v. *Thompson*, 15 U. S. 2 Wheat. 336 (4: 253); *Hennessy* v. *Woolworth*, 128 U. S. 438 (32: 500); *McKibbin* v. *Brown*, 14 N. J. Eq. 13; *Nichols* v. *Williams*, 22 N. J. Eq. 63; *Whitlock* v. *Duffield*, 1 Hoff. Ch. 110; *Huff* v. *Shepard*, 58 Mo. 242; *Morgan* v. *Milman*, 3 DeG. M. & G. 24; *Darbey* v. *Whitaker*, 4 Drew. 134; *Cooth* v. *Jackson*, 6 Ves. Jr. 33; *Milnes* v. *Gery*, 14 Ves. Jr. 406; *Kemble* v. *Kean*, 6 Sim. 333; *Taylor* v. *Portington*, 7 DeG. M. & G. 328; *Wilson* v. *Northampton & B. J. R. Co.* L. R. 9 Ch. 279; *Brace* v. *Wehnert*, 25 Beav. 348; *Wilks* v. *Davis*, 3 Meriv. 507; *Blundell* v. *Brettargh*, 17 Ves. Jr. 232; *South Wales R. Co.* v. *Wythes*, 5 De G. M. & G. 880; Fry, Spec. Perf. §§ 164-203; *Kendall* v. *Almy*, 2 Sumn. 278.

The court erred in entering a decree compelling the specific performance, by the Wabash Company, of a continuous duty requiring the exercise of skill and personal judgment as well as the constant expenditure of money, and requiring the court to retain perpetual control.

Rutland Marble Co. v. *Ripley*, 77 U. S. 10 Wall. 339 (19: 955); *Port Clinton R. Co.* v. *Cleveland & T. R. Co.* 13 Ohio St. 544; *Powell-Duffryn Steam Coal Co.* v. *Taff Vale R. Co.* L. R. 9 Ch. 331; *Ross* v. *Union Pac. R. Co.* 1 Woolw. 26; *St. Thomas* v. *Credit Valley R. Co.* 7 Ont. Ch. Div. 332; *Blanchard* v. *Detroit, L. & L. M. R. Co.* 31 Mich. 43; *Pollard* v. *Clayton*, 1 Kay & J. 462; Pom. Spec. Perf. Cont. §§ 288, 307, 312.

Purchasers are not bound to inquire into collateral contracts and circumstances.

Acer v. *Westcott*, 46 N. Y. 384; *Burch* v. *Carter*, 44 Ala. 115; *Atty-Gen.* v. *Backhouse*, 17 Ves. Jr. 283; *Mueller* v. *Engeln*, 12 Bush, 441; *Penrose* v. *Griffith*, 4 Binn. 231.

Messrs. Leverett Bell, **John C. Orrick** and *George R. Peck*, for appellees:

The covenants and conditions in the tripartite agreement, as to the use of the right of way by other roads, run with the land and bind subsequent purchasers.

Tulk v. *Moxhay*, 2 Phill. Ch. 774; *Luker* v. *Dennis*, L. R. 7 Ch. Div. 227; *Bronson* v. *Coffin*, 108 Mass. 175; *Whitney* v. *Union R. Co.* 11 Gray, 359-364; *Parker* v. *Nightingale*, 6 Allen, 341-344; *Van Doren* v. *Robinson*, 16 N. J. Eq. 256; *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206; *Western* v. *Macdermott*, L. R. 2 Ch. 77; *Watertown* v. *Cowen*, 4 Paige, 510-513; *Randall* v. *Latham*, 36 Conn. 48-53; *Winfield* v. *Henning*, 21 N. J. Eq. 188; *Verplanck* v. *Wright*, 23 Wend. 506; *Stockett* v. *Howard*, 34 Md. 121.

Where a covenant does not run with the land, it confers an equitable right in the covenantee, as against a subsequent purchaser with notice, and this right must exist if the instrument containing the covenant is a link in his chain of title.

Parker v. *Nightingale*, 6 Allen, 341; *Van Doren* v. *Robinson*, 16 N. J. Eq. 256; *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35.

Where a purchaser is put on inquiry, he is deemed as purchasing with notice of all facts which such an inquiry would reveal.

Stephenson v. *Smith*, 7 Mo. 610; *Menas* v. *McLean*, 13 Mo. 298; *Meier* v. *Blume*, 80 Mo. 184; *Widdicombe* v. *Childers*, 84 Mo. 388; *Bishop* v. *Schneider*, 46 Mo. 472; *McCamant* v. *Patterson*, 39 Mo. 110; *Crockett* v. *Maguire*, 10 Mo. 34; *Stevens* v. *Hampton*, 46 Mo. 404; *Digman* v. *McCollum*, 47 Mo. 375; *Musick* v. *Barney*, 49 Mo. 458; *Speck* v. *Riggin*, 40 Mo. 405; *Maupin* v. *Emmons*, 47 Mo. 304.

The mortgagees and purchasing committee are chargeable with notice of the tripartite agreement.

Atlantic Dock Co. v. *Leavitt*, 54 N. Y. 35; *Bishop* v. *Schneider*, 46 Mo. 472.

The mortgagees and their grantee, the purchasing committee, are bound by the covenants

and conditions of the tripartite agreement, without regard to the question of notice.

Whitney v. *Union R. Co.* 11 Gray, 359-364; Waterman, Spec. Perf. §§ 196, 199, 200; *Wilkinson* v. *Clements*, L. R. 8 Ch. 96; *Perkins* v. *Hadsell*, 50 Ill. 216; *Stansbury* v. *Fringer*, 11 Gill & J. 149; *Old Colony R. Co.* v. *Evans*, 6 Gray, 25; *Cooper* v. *Pena*, 21 Cal. 403; *Union Pac. R. Co.* v. *McAlpine*, 129 U. S. 305 (32: 673); *McMurray* v. *Moran*, 134 U. S. 150 (33: 814).

The railroad, being granted privileges for the public good, was bound to consider the public good.

Stourbridge Canal Co. v. *Wheeley*, 2 Barn. & Ad. 793; *Gildart* v. *Gladstone*, 11 East, 675; *Blakemore* v. *Glamorganshire Canal Nav. Co.* 1 Myl. & K. 165; *Lee* v. *Milner*, 2 Younge & C. (Exch.) 618; *Ware* v. *Regents Canal Co.* 28 L. J. N. S. Ch. 157; *Baxendale* v. *Great Western R. Co.* 16 C. B. N. S. 137; *Doe* v. *Manchester, B. & R. R. Co.* 14 Mees. & W. 694; *Webb* v. *Manchester & L. R. Co.* 1 R. & C. Cas. 576; *Gray* v. *Liverpool & B. R. Co.* 4 R. & C. Cas. 240; *Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 161 (24: 95).

The parties had power to make the agreement.

Hayes v. *Michigan Cent. R. Co.* 111 U. S. 228 (28: 410); *New York* v. *Williams*, 15 N. Y. 502; 2 Pars. Cont. 631; *Hurley* v. *Brown*, 98 Mass. 545; *Dallman* v. *King*, 4 Bing. N. C. 105; *Boyd* v. *Moyle*, 2 C. B. 644; *Russell* v. *Phillips*, 14 Q. B. 891; *Jones* v. *Gibbons*, 8 Exch. 920.

The right of way includes the tracks.

Chicago, B. & Q. R. Co. v. *Paddock*, 75 Ill. 616; *Challiss* v. *Atchison, T. & S. F. R. Co.* 16 Kan. 117; *Williams* v. *Western Union R. Co.* 50 Wis. 71.

The court had the power to settle both the question of right and the amount of compensation.

Dinham v. *Bradford*, L. R. 5 Ch. 519; *Tscheider* v. *Biddle*, 4 Dill. 55; *Biddle* v. *Ramsey*, 52 Mo. 153; *Arnot* v. *Alexander*, 44 Mo. 27; *Hug* v. *Van Burkleo*, 58 Mo. 202; *Gregory* v. *Mighell*, 18 Ves. Jr. 328.

[2] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an appeal by James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley, as purchasing committee, the Central Trust Company of New York and James Cheney, as trustees, and the Wabash, St. Louis and Pacific Railway Company, a Missouri corporation (hereinafter called the Wabash Company), from a decree of the Circuit Court of the United States for the Eastern District of Missouri, made December 31, 1886, on a bill of intervention filed July 12, 1886, in the same court, by the City of St. Louis, a municipal corporation of the State of Missouri, and the St. Louis, Kansas City and Colorado Railroad Company, a Kansas corporation (hereinafter called the Colorado Company), against the Wabash Company and its receivers. This bill of intervention was filed in two causes pending in the same court consolidated into one. One of them was a bill in equity filed by the Wabash Company against the Central Trust Company of New York and others, on the 27th of May, 1884, for the appointment of receivers of the Wabash Company, because of its insolvency, setting forth that it had executed two mortgages, one known as the "general mortgage," and the other as the "collateral trust mortgage," the first of them June 1, 1880, to the Central Trust Company of New York and James Cheney, as trustees, and the other of them May 1, 1883, to the Mercantile Trust Company of New [3] York. In the said suit, a cross-bill was filed in the same court, on June 9, 1884, by the Central Trust Company of New York and James Cheney, as trustees, to foreclose the said "general mortgage" and certain sustaining mortgages executed in aid of it. An amended bill was filed June 15, 1884, and an amended cross-bill October 14, 1884. The second suit was one brought January 13, 1885, by the Central Trust Company of New York and James Cheney, as trustees, in the Circuit Court of the City of St. Louis in Missouri, against the Wabash Company and others, praying the same relief prayed for in such cross-bill filed June 9, 1884. This suit was removed into the Circuit Court of the United States for the Eastern District of Missouri, and was consolidated, on March 19, 1885, with the suit the bill in which was filed May 27, 1884.

A decree of foreclosure and sale was made in the consolidated cause on January 6, 1886, under which, on April 26, 1886, the railroads and property were sold to Joy, Hubbard, Welles and Ashley, as purchasers. The sale was confirmed June 15, 1886, and deeds were ordered to be executed to the purchasers. Meantime, and before the deeds were executed, the bill of intervention was filed. The railroad property in question was all the time in the hands of Solon Humphreys and Thomas E. Tutt, as receivers, appointed by the court on May 27, 1884.

The facts involved in the present appeal depend almost entirely upon documentary evidence, and as agreed upon by the parties in their respective briefs may be stated as follows:

This action was brought to compel the specific performance of a contract through which the Colorado Company claimed to be entitled to a joint use, with the Wabash Company, of that portion of the tracks of the latter Company which extends eastwardly from a point on the northern line of Forest Park, through the park, and from thence to the Union Depot in the City of St. Louis, at Eighteenth Street. The facts out of which the controversy arose are, substantially, as follows:

(1.) In August, 1871, a railway corporation known as the St. Louis County Railroad Company (hereinafter called the County Company) was organized under the general [4] laws of Missouri, to construct a narrow-gauge railroad from the City of St. Louis, in a westerly direction, to a point in the County of St. Louis 16 miles from the city.

(2.) On November 8, 1871, W. D. Griswold was the owner of a tract of land lying immediately west of the City of St. Louis, known as the Cabanne Dairy Farm, and on that date he sold and conveyed to the County

Company a right of way 40 feet in width, through the tract owned by him.

(3.) On March 25, 1874, the Legislature of Missouri passed an Act for the establishment of Forest Park, in the County of St. Louis, immediately west of the City. The Act described the property which might be taken by condemnation for park purposes, and included the farm or tract owned by Griswold. The third section of the Act contained the following proviso: "*Provided*, That nothing in this Act contained shall prevent the St. Louis County Railroad Company from using and occupying a right of way of the width of not more than seventy feet through the northeastern portion of said Forest Park; the said railroad shall only enter the park through Duncan's subdivision on the east side of said park, and, running westwardly on the northern side of the River des Peres, shall pass out of said park at a point on the northern line thereof, east of Union Avenue: *And provided further*, That no switch or siding shall be constructed by said railroad company in said park, nor shall more than one depot be established in said park, and that shall be for passengers only: *And provided further*, That the grade of said railroad, as far as the same runs through said Forest Park, shall be approved by said park commissioners." Laws of Missouri 1874, p. 371.

(4.) On August 11, 1875, the County Company having located its line between the City and the park, and having acquired some detached portions of a right of way through a number of lots and blocks between the Union Depot and the park, and the St. Louis, Kansas City and Northern Railway Company (hereinafter called the Kansas City Company) already having a line of railroad from St. Louis to Kansas City, which connected on the northern line of the park with the right of way and line of the County Company, [5] those two companies entered into a written contract, in which the County Company agreed to convey to the Kansas City Company, for the sum of $125,000, a strip 28 feet wide through each tract owned by it, between the eastern line of the park and the western limits of the City; and a strip 30 feet in width through each tract lying between the western limits of the City and the Union Depot at Eighteenth Street; and also an undivided one half of all the right of way it then owned or might thereafter acquire through the park. The contract also provided, among other things, that inasmuch as the Kansas City Company was to make a tunnel and cut just east of the park, it should let the trains of the County Company pass through said tunnel and cut under such regulations and restrictions as were agreed upon with respect to trains in the park and elsewhere. It was then provided that the use of the property in the park and through the tunnel and cut should be in common, but that the Kansas City Company should have absolute control of the running and starting of its own trains and the making of its own time-tables, and that no train of the County Company, or its assigns, should be started within eight minutes of the time fixed for starting the trains of the Kansas City Company; that there should be twenty minutes' time between the starting and coming in of the trains of the County Company; that only the County Company should have a depot in the park; and that the Kansas City Company should not have a depot or stop its trains in the park. The contract also provided that, at two specified places within the city limits where the right of way of the County Company was narrowest, it (the County Company) might lay and use one rail on the right of way of the Kansas City Company; that where proceedings for condemnation, or negotiations, had been commenced by the County Company the same should be prosecuted, or discontinued, as requested by the president of the Kansas City Company; that, in consideration of the covenants therein contained, and of certain covenants and agreements on the part of the commissioners of Forest Park contained in another agreement of even date therewith, the Kansas City Company should construct and maintain its railroad through the park, tunnel and cut, for the joint use of both of said railroad companies; and that the County Company would within two years pay to the Kansas City Company one half of the actual cost of constructing said road through said park, and said tunnel and cut, or forever relinquish to the Kansas City Company all claims to the road and property in said park, tunnel and cut. This contract was signed by said parties and delivered, but it was never acknowledged or recorded in the office of the county recorder.

(5.) On the same day the foregoing contract was made, the County Company, in pursuance of its agreement, conveyed to the Kansas City Company a strip 28 feet in width through each lot or tract owned by it between the eastern line of the park and the western limits of the City; a strip 30 feet wide through each lot or tract owned by it, between the western limits of the City and Tayon Avenue in the City of St. Louis; and an undivided one half of all its right, title and interest in or to the right of way and other privileges and franchises then owned or held by it, or which might thereafter be owned or held by it, through said park. The portions of the foregoing deed which are material to this controversy are as follows: "And also the said party of the first part" [the County Company] "hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer, unto the said party of the second part" [the Kansas City Company] "the right of way over and upon the following described piece of land, situated between King's Highway and Union Avenue, a strip of land twenty-eight (28) feet in width off the southern portion, and for the whole length thereof, of that part of the right of way granted to said party of the first part by W. D. Griswold by deed dated November 3, 1871, and recorded in the office of the recorder of St. Louis County, aforesaid, in book 443, page 96, lying between the northern line of Forest Park and the eastern line of Union Avenue, all of which right of way conveyed by said deed is described as follows, to wit: A strip of land forty (40) feet in width, the centre line of which be-

gins at King's Highway, twenty (20) feet north of the southeast corner of the land of said Griswold, known as the Cabanne Dairy Farm, and running thence westerly along parallel to the south line thereof eight hundred and twenty-five (825) feet; thence by a curve eleven hundred and seventy (1,170) feet long, bearing northwest with a radius of nineteen hundred and three (1,903) feet; thence by a line bearing north 55° west about ten hundred and ninety (1,090) feet to a point on Union Avenue, not less than four hundred and eighty-seven (487) feet south of the northeast corner of Robert Forsyth's land. . . . And also the said party of the first part hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer, unto the said party of the second part and to its successors and assigns, an undivided one half of all the right, title or interest of the party of the first part of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities, owned by or vested in, or enjoyed by, or that may hereafter be acquired and owned by, vested in or enjoyed by, the party of the first part, in, through or upon Forest Park by any means or from any source whatever; all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part." The foregoing deed contained the ordinary covenants of warranty, and was duly acknowledged and recorded in the office of the recorder of said county, August 13, 1785. The several pieces of right of way owned by the County Company and conveyed by it to the Kansas City Company are indicated in blue on Chart A, in the printed record.

(6.) On the same day (August 11, 1875) another agreement was entered into, known as the "tripartite agreement," the parties to it being the commissioners of Forest Park, party of the first part, the County Company, party of the second part, and the Kansas City Company, party of the third part. This tripartite agreement began by reciting: "That said Forest Park commissioners, in consideration of the relinquishments, agreements and stipulations hereinafter contained, on the part of the said party of the second part, do hereby accept and approve the line and grade of said railroad as laid down and described upon the accompanying plat and profile hereto attached and forming part of this agreement, and said line and grade, in case there is no forfeiture of this agreement, is hereby fixed as the sole and finally established right of way to which said party of the second part is entitled by statute or otherwise through said park, or any part thereof, and the width of said right of way, as established by statute, is hereby reduced from seventy (70) feet and fixed at forty-two (42) feet between its outer points." The County Company then relinquished 28 feet off the 70 feet of its right of way established by statute through the park, leaving its right of way through the park 42 feet in width. The agreement then, in eight successive paragraphs, provided for the manner of constructing the road-bed through the park by the County Company—that it should not be so constructed as to mar the landscape beauty of the park; and for the building of a depot in the park just outside of the right of way, but immediately adjoining it. The eighth and ninth parargaphs read as follows: "Eighth. The work of constructing said railroad through said park shall be commenced in good faith by the party, as hereinafter specified, within ninety (90) days from the delivery hereof, and shall be completed in one year thereafter under penalty of a forfeiture of this agreement; and upon completion thereof the railroads shall be operated through said park so as to prevent unnecessary noise or inconvenience to the public, as far as reasonably practicable, and the roads or their assigns shall comply with all reasonable rules or regulations of said park commissioners in that respect, and all of the aforesaid permanent improvements shall be kept and maintained in such condition as will not injuriously affect or mar the landscape beauty of the park, this provision referring to the aforesaid forty-two (42) feet right of way road-bed; and said party of the second part, or its assigns, shall also keep its police or guard, within the limits of the park, neatly uniformed. Ninth. Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through [9] the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies." The tenth paragraph is an admission by the County Company that its right of way is not exclusive, and that the agreement is not to be construed as limiting or impairing the right of the park commissioners to grant other rights of way to other railroad companies. The twelfth paragraph is as follows: "And whereas, for the purpose of enabling the party of the third part to reach the Union Depot of St. Louis, Missouri, an amicable arrangement and agreement for a right of way outside of and through said Forest Park has been made and entered into by and between the parties of the second and third parts, and in pursuance thereof the parties of the second and third parts are to enter upon and enjoy the right of way and all the rights, privileges, immunities, powers, improvements and property belonging to or vested in, or that may belong to or vest in, the party of the second part, in common, in, upon and through said park, under certain regulations, terms and conditions agreed upon by and between said parties therein; and whereas the party of the third part, in further pursuance of said last-named agreement, is about to construct, maintain and operate a railroad in, upon and through said park, at great expense, and to engage in other great outlays and to assume other heavy burthens and responsibilities to be of advantage to said third party through the continued enjoyment of said right of way and other rights, privileges, powers, franchises, immunities, improvements and property in,

upon and through said park: Now, therefore, in view of the premises and as inducements to said party of the third part to proceed as intended, the party of the first part does hereby grant and convey unto, and license and permit, the said party of the third part, its successors and assigns, to have, hold, use and enjoy said right of way in, upon and through said park, in common with and to be held and enjoyed jointly with said party of the second part and its assigns, on the terms of the said contract between them, and under the same terms and conditions as are hereby and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself; or in case said party of the second part, its successors or assigns, should forfeit its said rights, privileges and franchises in, upon and through said park, or from any cause cease to have, maintain or enjoy the same, then it is hereby agreed and covenanted that the party of the third part shall not also be excluded from said park, but shall, with its successors and assigns, continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property, on the terms hereinbefore set forth, continuously and forever." The thirteenth paragraph provides that the Kansas City Company shall have no depot in the park. The fourteenth paragraph, in so far as it is material, is as follows: "Now, therefore, in consideration thereof and of the agreement of the party of the third part herein, the party of the first part herein accepts the agreement and contract of the party of the third part herein to execute, perform and comply with all of the terms, provisions and things herein mentioned to be done, performed or complied with as to said improvements, except as aforesaid, by the party of the second part hereto, and in lieu and stead of said party of the second part hereto, so far as assumed as aforesaid, releasing it therefrom, and in consideration thereof the party of the third part hereto covenants and agrees with the other parties hereto that it will, in lieu and stead of the party of the second part hereto, do, perform and comply with all the terms and provisions, matters and things, herein expressed to be done, performed or complied with by said party of the second part as to said improvements, except as aforesaid, subject to the terms and conditions in said agreement of even date herewith contained; and it is hereby expressly covenanted and agreed that a compliance by the party of the third part, for itself or for itself and the party of the second part jointly, in the construction of said railroad in, upon and through said park, tunnel and cut in accordance with the terms of this agreement, shall be taken and accepted as performance of the conditions imposed upon said party of the second part; and it is further expressly covenanted and agreed that all and every part of the work, its kind, description and extent, to be performed by either of said parties of the second or third parts, is hereinabove expressed, and neither of said parties shall be held or required to do or perform any other or further work and conditions than those hereby definitely set forth." The last clause of the contract provides that neither of said railroad companies shall be required to supply any material, or do any of the work, necessary to construct or maintain either of the arched entrances into or exits from said park, but that all the work and material required in the construction of said arches shall be paid for by the park commissioners. The foregoing contract was signed by the parties, but it was never acknowledged as a deed. It was afterwards, in 1879, recorded in the office of the county recorder.

(7.) The evidence shows that after the execution of the foregoing deed and contracts, the Kansas City Company acquired from divers parties the necessary additional right of way between the park and the Union Depot, and proceeded to construct and put in operation its road through the park, tunnel and cut, and on down to the Union Depot in the City, the road through the park being on the line established by the tripartite agreement; that at the same time the park commissioners proceeded with the work referred to in the last clause of that agreement, and expended for material and work on the arched entrances or exits, rendered necessary by the presence of the railroad in the park, and in the erection of walls for the tunnel in the park, nearly $40,000; that the road through the park was completed in 1876 by the Kansas City Company; and that, the County Company having failed in the performance of all its covenants, and having failed to refund to the Kansas City Company any portion of the cost of constructing the road through the park, it lost and abandoned all claim to the right of way and road-bed through the park, tunnel and cut, and the Kansas City Company thereupon, under the terms of the agreement, took sole control of the road through the park, tunnel and cut. Afterwards, in 1878, it acquired, by purchase from third parties, all the property and rights of way of the County Company between the park and the Union Depot.

(8.) In 1879, the Kansas City Company was consolidated with the Wabash Railway Company under the name of the "Wabash, St. Louis and Pacific Railway Company." The Wabash Company assumed all the obligations of the Kansas City Company, and in so far as this controversy is concerned the consolidation was only a change of name.

(9.) In 1880, the Wabash Company conveyed its property in trust to the Central Trust Company of New York and James Cheney, to secure a series of bonds, $18,000,000 of which were issued and sold. In 1884, the Wabash Company became insolvent, and Solon Humphreys and Thomas E. Tutt were, by the Circuit Court of the United States for the Eastern District of Missouri, appointed receivers of its property, and afterwards bills were filed by the Central Trust Company and Cheney to foreclose said mortgage, as before mentioned.

(10.) In 1886, while Humphreys and Tutt,

receivers, were in possession of the Wabash property, the Colorado Company having constructed a line of railroad connecting with the Wabash Road at the north line of Forest Park, and of the same gauge, demanded of the receivers permission to run its cars over the Wabash tracks through the park and down to the Union Depot in the City, which Union Depot was, on August 11, 1875, and has since contiuned to be, the only general passenger depot reached by all railroads entering the City. The Colorado Company contended that it was entitled to this right under the contracts aforesaid, and particularly under the provisions of the ninth and the subsequent paragraphs of the tripartite agreement. This claim was denied by the receivers, and thereupon the Colorado Company and the City of St. Louis filed their said bill of intervention, setting forth the facts above stated, and praying the court to enjoin and restrain the Wabash Company and the receivers from interfering with its use of said property. The City of St. Louis joined in the proceeding as the successor of the park commissioners, the park having, by appropriate legislation, been brought within the jurisdiction of the City. An amended bill of intervention was filed August 4, 1886. The prayer of the amended bill was as follows: "Your orators pray that a writ of injunction issue out of and under the seal of this honorable court enjoining and restraining the said Wabash, St. Louis and Pacific Railway Company, and the said Solon Humphreys and Thomas E. Tutt, as such receivers, and each of them and of their agents, servants, counsellors and employés, from in any manner refusing to permit your orator, the St. Louis, Kansas City and Colorado Railroad Company, under such reasonable regulations and terms as to this court may seem proper, from using the said right of way of said Wabash, St. Louis and Pacific Railway Company, commencing at the north line of said Park, where the railway of said Wabash, St. Louis and Pacific Railway Company enters said park, thence over said right of way to said Eighteenth Street in said City of St. Louis, by running its engines and cars over and upon said right of way, including the tracks of said Wabash, St. Louis and Pacific Railway Company between the points at said Union Avenue and said Eighteenth Street." In their answer the Wabash Company and the receivers admitted the execution of the agreements, but denied that under them, or either of them, the Colorado Company had any right to use any portion of the Wabash tracks or right of way through the park or between the park and Eighteenth Street. The answer then stated the facts concerning the execution of the general mortgage by the Wabash Company in 1880, to the Central Trust Company and Cheney; averred that the Wabash Company had made default in the payment of interest on its bonds; that by the terms of said mortgage said trustees were entitled to possession of said property; that said receivers were in possession of said railroad under said mortgage for the benefit of the holders of said mortgage bonds, and that neither said bondholders, trustees nor receivers were privy to or bound by any agreement or contract made by the County Company with said park commissioners, with respect to the use of its railroad through said park or elsewhere, by other railroad companies. The answer then denied that the intervenors were [14] entitled to the relief prayed for, and set up the several defenses stated and relied upon by the appellants.

(11.) On the issues thus presented the case was referred to a special master, who reported in favor of the claim made by the intervenors. Considerable testimony was taken by the master, but it related almost entirely to matters affecting the compensation to be paid for the use of the tracks and property in question, and it is unnecessary to refer to it in detail. The following testimony of witnesses, on other points, was given: S. T. Emerson, chief engineer in charge of the construction of the Kansas City Road from the Union Depot to the north line of the park, testified as follows: "*Q.* Now from that point [Forsyth Junction] to the Union Depot, what is the most, or the only, practical entrance to the depot from that point? *A.* The Wabash Railroad." W. Emerson also testified as follows: "*Q.* How many tracks, if any, are on the right of way where the Wabash Railway now enters the park from Eighteenth Street, the thirty feet from Eighteenth Street to the park and the forty-two feet through the park? *A.* There are occasional places where there is a side track. There could not be but one track besides the main track on the thirty feet." Andrew McKinley, president of the board of Forest Park commissioners at the time the tripartite agreement was made, testified as follows: "*Q.* What was the policy of the board with reference to railroads passing through the park, at the time of the execution of the tripartite agreement? *A.* There was a great deal of discussion and there was quite a controversy about where the road should run, under the provision which I have mentioned" (referring to the Act of the Legislature, requiring the County Road to enter on the eastern side, through Duncan's subdivision). "*Q.* Please describe the park to the master, whether it has been improved, and, if so, how, in a general way? *A.* The provisions contained in the proviso that I have just spoken of were intended to protect the park against the invasions of all railroads, unquestionably. I put it there myself. *Q.* What effect would the invasion of the park by railroads have upon the park for the pur- [15] pose for which it was established? *A.* I think a very damaging effect upon the point of use and upon the point of landscaping. *Q.* For what purposes was the park intended to be used principally—as a driving park? *A.* It is shown in the Act itself to be dedicated to the people of the City and County of St. Louis for their enjoyment forever—that is, a pleasure ground for the people of St. Louis. *Q.* Are there drives running through it? *A.* Yes, sir; nineteen and three-quarters miles of drives through the park. *Q.* What effect would the penetration of the park by railroads at different points have upon the

park as a driving park? *A.* Up to this time it was apprehended that the road would produce some great danger to persons visiting Forest Park, and it was a long time before that public impression was relieved of the apprehension that horses would be frightened, and hence there is a provision that the road shall be covered over with a cover or protected by trees. During the time I was president of the park it was not thought to be necessary. *Q.* How much money has been expended in beautifying the park? *A.* $405,000 during my administration; since that time nothing. It remains as it was then. *Q.* What does it represent in money to-day? *A.* In cash paid $1,300,000, and, besides that, some contributions made by the City since. The interest on that sum, of course, is to be added. The bonds are thirty-year bonds." Cross-examination: "*Q.* Now, the expenditures by the park commissioners were in the erection of masonry composing these two arches and the principal viaduct through which the people enter the park. It was in the masonry composing those structures? *A.* Yes, sir; there would have been no necessity for them, except for the railroad. *Q.* They were made necessary by the railroad? *A.* Yes, sir. *Q.* They were for the convenience of persons passing in and out of the park? *A.* Yes, sir. *Q.* Without the railroad there would have been no necessity for the culverts; they were the entrances for carriages and footmen? *A.* Yes, sir." A. A. Talmage, general manager of the Wabash Company, testified as follows: "*Q.* Would it be practicable for any other road subject to your rules and regulations to use the track from [16] the north line of the park to the depot—I mean the main track? *A.* It could be done under the rules and regulations of this Company, but usually it is done by substituting the motive power and trainmen of our own road to handle the trains of foreign roads."

(12.) The Wabash Company and the receivers excepted to the reports of the master (of which there were two) on various grounds, which need not be given in detail.

(13.) The exceptions were argued before the court held by *Mr. Justice* Brewer, then circuit judge, and *Judge* Treat, and it held (29 Fed. Rep. 546) that, under the contracts, the Colorado Company had the right to use, on such terms and subject to such regulations as to the court seemed equitable, the Wabash tracks through the park, and from the park down to the connection with the Union Depot tracks at Eighteenth Street in the City; and on those points it overruled all the exceptions and confirmed the master's reports. It differed, however, with the master on the question of the compensation to be paid by the Colorado Company, and sustained exception eleven on that point.

(14.) The court then entered a decree, December 13, 1886, finding that the equities were with the intervenors, and that they were entitled to the relief prayed for, and fixing the compensation to be paid by the Colorado Company for the use of the right of way and tracks, side-tracks, switches, turn-outs, turn-tables and other terminal facilities of the Wabash Company, between the north line of Forest Park and Eighteenth Street in the City of St. Louis, at $2,500 per month. The decree then proceeds as follows: "And the court doth further find, adjudge and decree that the expense per annum of maintaining the said right of way and other property pending such joint use thereof, including therein all taxes upon said property, shall be borne by the said Wabash, St. Louis and Pacific Railway Company and the said intervenor, the St. Louis, Kansas City and Colorado Railroad Company, in the proportion that the number of wheels each of said companies shall cause to be passed over the main track, or parts thereof, on said right of way, per annum, bears to the total number of wheels that both of said companies shall cause to be passed over the same during each [1 year pending the said period of such joint use, and that this expense shall be paid at the expiration of each year. The said right of way and tracks thereon and other terminal facilities shall be maintained and kept in good repair by the Wabash, St. Louis and Pacific Railway Company. And the court doth further order, adjudge and decree that the running of all trains, engines or cars of said intervenor, the said St. Louis, Kansas City and Colorado Railroad Company, over said right of way and tracks, and the use of said right of way, road, terminal facilities and other property specified as aforesaid, shall conform to the rules and regulations now in force, and such other reasonable rules and regulations as may hereafter be adopted by the said Wabash, St. Louis and Pacific Railway Company, or its said receivers, to enable said intervenor to fully enjoy the benefits of this decree, and that the trains of said Railroad Company, intervenor, shall be so regulated as that at least eight minutes shall, if deemed necessary, intervene between its trains and the trains of said Wabash, St. Louis and Pacific Railway Company, at any point between said north line of Forest Park and Eighteenth Street, and that the sole control and regulation of the running of the trains of the said companies shall be, under this decree, in the Wabash, St. Louis and Pacific Railway Company and its receivers, and subject to the further order of this court. And the court doth further order, adjudge and decree that, in all respects, subject to the terms of this decree, the said Railroad Company, intervenor, shall enjoy the equal use and benefit of said right of way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities with said Wabash, St. Louis and Pacific Railway Company or its said receivers, and the said Wabash, St. Louis and Pacific Railway Company and Solon Humphreys and Thomas E. Tutt, as such receivers, and said Central Trust Company of New York and James Cheney, and all persons claiming by, through or under them and each of them respectively, and their agents, servants, counsellors and employés be, and the same are hereby, perpetually enjoined and restrained from in any manner refusing to permit the said intervenor, the said St. Louis, Kansas City and Colorado Railroad [Company, its successors or assigns, and its

or their officers, agents or employés, from using with its or their engines, cars (loaded or empty), the said rights of way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities of said Wabash, St. Louis and Pacific Railway Company between the north line of said Forest Park and said Eighteenth Street, on the terms hereinabove set forth in this decree, in and for the transacting of its or their business, and in the operation of its or their road. And the said intervenor, the St. Louis, Kansas City and Colorado Railroad Company, by its officers, agents and employés and each of them, is hereby authorized and permitted, with its right of way, road, tracks and property, engines and cars, loaded or empty, to make connection with said Wabash, St. Louis and Pacific Railway Company at the north line of said Forest Park, and to use the said right of way, tracks, switches, side-tracks, turn-outs, turn-tables and other terminal facilities of said Wabash, St. Louis and Pacific Railway Company, or anyone claiming by, through or under it, as to the same, between the north line of said park and Eighteenth Street, on the terms, in the manner and subject to the regulations in this decree set forth in and for the transaction of the business, and in operation of the road, of said St. Louis, Kansas City and Colorado Railroad Company, its successors or assigns, and said Solon Humphreys and Thomas E. Tutt, receivers, and all agents, servants or persons by them engaged or acting with or for them, said Central Trust Company and James Cheney, said Wabash, St. Louis and Pacific Railway Company, and all persons claiming by, through or under said last-named Company, are hereby restrained and enjoined from in anywise obstructing, preventing, interfering with or refusing to comply with the permit and privilege hereby ordered, adjudged and decreed." The rules in force upon the Wabash Road, and which were adopted by the decree, for the government of the parties in the use of the property, are found, as "Exhibit D," in the printed record.

(16.) On the day the decree was entered, James F. Joy, Thomas H. Hubbard, Edgar T. Welles and O. D. Ashley filed their petition in the cause, reciting the execution of the Wabash mortgage of June 1, 1880, to the Central Trust Company and Cheney, as trustees; stating that there had been a foreclosure of said mortgage and a sale of the mortgaged property on the 26th day of April, 1886, at which they had become the purchasers; that the sale to them had been duly confirmed by the court and proper deeds had been made conveying to them the right of way, railroad tracks, terminal facilities and other property, the use of which the intervenor was seeking to acquire in this proceeding; that said property was still in the possession of and being operated by said receivers; that, as such purchasers, they had an interest in the property and subject matter of the litigation, which they desired to protect by an appeal to the Supreme Court of the United States; and asking that they be made parties defendant, and be allowed an appeal to that court. The court thereupon entered an order, on said day, reciting the petition, and that it appeared to the court that said Joy, Hubbard, Welles and Ashley were the owners of the premises and right of way theretofore owned by the Wabash Company, between the north line of Forest Park and across the park to Eighteenth Street in the City of St. Louis, over which the intervenor was seeking to obtain a right to run its engines and cars, and ordering that said purchasers be made parties defendant in the cause. An appeal to this court from the foregoing decree was afterwards duly perfected.

It is contended by the appellants that the [29] circuit court erred (1) in holding that the covenant on the part of the County Company, to permit other railroads to use its right of way between the park and the terminus of its line in the City, was binding on the Kansas City Company, and gave to the Colorado Company the right to use the right of way and the tracks afterwards acquired and constructed by the Kansas City Company between the park and the City; (2) in decreeing that the covenant of the County Company, to permit other railroads to use its right of way between the park and the terminus of its road in the City, created an equitable easement in the road between the park and the City, which affected such property in the hands of Joy and others, as purchasers; (3) in decreeing that such covenant on the part of the County Company was an agreement sufficiently definite in terms to be specifically enforced by a court of equity; (4) in decreeing the specific performance by the Wabash Company of a continuous duty, requiring the exercise of skill and personal judgment, as well as the expenditure of money, and requiring the court to retain perpetual control over the cause, in order to superintend the execution of the decree and make from time to time such changes in the rules and regulations adopted by the Wabash Company as the circumstances of the parties and the shifting contingencies of business and trade should render necessary; (5) in making a decree broader than the contract, in that the County Company only agreed, at most, to permit other companies to use its right of way, while the decree gives the right to use the right of way, and tracks, side-tracks, switches, turn-outs, turn-tables and other terminal facilities of the Wabash Company; (6) in holding that there was mutuality of equitable remedy between the parties to the suit; and (7) in holding that the contract of the County Company was binding on Joy and others, as purchasers in good faith and without notice, under the mortgage made by the Wabash Company in 1880.

But we are of opinion that, under the two agreements of August 11, 1875, and the deed [30] of that date from the County Company to the Kansas City Company, the Wabash Company, as successor of the latter Company, is bound to permit the Colorado Company to use the right of way from the north line of Forest Park, through the park, to the termi-

nus of the Wabash Company's road on Eighteenth Street, for a fair and equitable compensation.

Forest Park, containing 1,379 acres of land, had been established as a park for the benefit of the people, and was intended principally as a driving park. The board of Forest Park commissioners had, under the Act of March 25, 1874, the power to lay off, improve, adorn, govern, manage and control the use of the park and the avenues surrounding it. Before the execution of the tripartite agreement, neither the County Company nor the Kansas City Company had any railroad to the Union Depot. The County Company had located its line east and west of the park, and had purchased the right of way at different points along its line from the Union Depot to the park; but it had built no railroad, and the location of its right of way through the park was undetermined at the time. The Kansas City Company had its depot for freight and passengers in the northern part of the City, some distance from the Union Depot. As the Union Depot was at that time the only general passenger depot in the City, and was reached by most of the railroads which entered the City, the Kansas City Company determined to build a branch of its road from Ferguson, about nine or ten miles from the City, to the Union Depot, and thus avail itself of better facilities for doing a passenger business, and to cross the bridge over the Mississippi River with its trains. It is stated in the agreement of August 11, 1875, between the County Company and the Kansas City Company, that the latter required the right of way in order to reach the Union Depot. Its branch line from Ferguson was located through the park. In its efforts to obtain the right of way through the park it encountered the County Company. The board of park commissioners was conferred with by the two companies, in regard to securing a definite right of way for both of them through the park. This is shown [31] by the testimony of Mr. McKinley, before referred to. The park commissioners were willing, at that time, to grant the use of one right of way through the park, on a certain line, with conditions as to the use of such right of way by other railroads, so as to protect the park, as far as possible, from invasion by other railroads, on separate and independent rights of way. In order to accomplish this result, the board expended $40,000 in aid of the construction of the railroad through the park. In view of the deep cut on the line of the Wabash Road just east of the park, it would be difficult for any other railroad to enter the park, from the east, on an independent right of way, and at the same time use the right of way of the Kansas City Company through the park. Hence arose the provision that this right to use the right of way by other railroads should apply not only to the "right of way through the park," but also to the right of way "up to the terminus of its road in the City of St. Louis,"—that is, the right of way from the park to the Union Depot.

It was under these circumstances that the tripartite agreement came into existence; and the terms of paragraph 9 of it must be construed. That paragraph is here repeated: "Ninth. Said party of the second part shall permit, under such reasonable regulations and terms as may be agreed upon, other railroads to use its right of way through the park and up to the terminus of its road in the City of St. Louis, upon such terms and for such fair and equitable compensation to be paid to it therefor as may be agreed upon by such companies." It is to be construed in connection with paragraph 12 of the same agreement.

In regard to these two paragraphs, the opinion of the circuit court says: "It will be observed that by the ninth paragraph the County Road agreed to permit the use of its right of way by other railroads. Whether a like obligation was assumed by the Kansas Road depends upon the last sentence in the twelfth paragraph, which purports to grant to the Kansas Road the right to occupy and enjoy the right of way through the park jointly with the County Road 'on the terms of the said contract between them, and under the same terms and conditions as are hereby [3 and hereinbefore imposed upon said party of the second part, and which are hereby assumed by said party of the third part as to improvements, except as to building a depot and switch in said park, which the party of the second part is to do itself.' It must be conceded that the meaning of this language is not perfectly clear. It is claimed by the defendants that the words 'as to improvements, except as to building,' etc., qualify not only the immediately preceding clause, commencing 'and which are hereby assumed,' but also the one prior, commencing 'and under the same terms and conditions,' and therefore that the terms and conditions as to improvements are those alone cast upon the Kansas Road. This would make the two clauses but a single compound one, qualified by the following relative clause 'as to improvements,' etc. As against this it must be observed that, grammatically, a relative clause generally qualifies its immediate antecedent, and therefore, in this case, would refer simply to that clause which provides for the assumption by the Kansas Road. This natural grammatical construction is strengthened by the punctuation—a comma after the words 'party of the second part' and none after the words 'party of the third part,' which seems to separate the entire first clause from the second and its qualifying terms. I know that the matter of punctuation is never relied upon to defeat the obvious intent; but, when the meaning is doubtful, the punctuation is certainly a matter tending to throw light upon it. Further, there are not simply two, but really three, antecedent clauses, the first one being 'the terms of the said contract between them,' that is, the two railroad companies. Very clearly this qualifying clause does not refer to that, and therefore it should not be held to qualify the second, unless the obvious intent compels such construction. It is objected that the clause commencing 'and which are hereby assumed' is, under this construction, superfluous. I think not. These improvements

called for the expenditure of money, and the idea seemed to be that the Kansas Road should not only hold its rights upon certain conditions, but that, as to those involving expenditure of money, it should expressly assume the performance. There is a manifest [3] difference between a conveyance subject to a mortgage and a conveyance in which the grantee assumes the payment of the mortgage. This distinction evidently dictated the form of expression used."

It appears, from paragraph 12, that the Kansas City Company had in view the failure of the County Company to comply with the provisions of paragraphs 1 to 8 inclusive of the tripartite agreement, relating to the construction of the road, among which was the provision which required the completion of the road within one year, under the penalty of the forfeiture of all rights under the agreement. The Kansas City Company guarded against such contingency by the provision, in paragraph 12, that, in case the County Company, its successors or assigns, should forfeit its rights, privileges and franchises in, upon and through the park, or from any cause should cease to have, maintain or enjoy the same, then the Kansas City Company should not also be excluded from the park, but, with its successors and assigns, should continue to have, maintain and enjoy all of said rights, privileges, immunities, franchises, improvements and property, on the terms thereinbefore set forth, continuously and forever. Thereby, in case of the forfeiture of its rights by the County Company, the Kansas City Company became possessed of the entire right of way, subject to the terms of the agreement of August 11, 1875, between the two companies, and to those of the tripartite agreement of the same date; and that which, prior to the forfeiture, was held and enjoyed jointly by the two companies, became the sole property of the Kansas City Company, its successors and assigns, on the terms of the said contract between the two companies, and under the same terms and conditions which were imposed upon the Kansas City Company. Among the conditions so imposed were those of paragraph 9 of the tripartite agreement. Further, those terms as to improvements, except as to building a depot and switch in the park, were assumed by the Kansas City Company. The depot and switch were to be built by the County Company. The word "improvements" related to the building of the road and the erection of what was to be erected, except the depot and switch. The [4] reason why the Kansas City Company did not assume the building of the depot and switch appears from a clause in the agreement of August 11, 1875, between the two companies, to the effect that the County Company should have and maintain the passenger depot in the park, so far as the two companies were concerned, and that the Kansas City Company should not have the power of stopping any of its trains in the park. As, however, the latter company would use the right of way through the park, and what were called the "improvements," except the depot and switch, the park commissioners required it to assume the obligations of the County Company in that regard.

This was the view of the contract taken by the circuit court, and we think it was correct. It is evidently in accordance with the intention of the parties to the tripartite agreement. The object of the park commissioners was to protect the park from the invasion of more than one railroad track; and, to accomplish that result, it was necessary to give to other railroad companies the right to use the one right of way, and to impose on the Kansas City Company, as well as the County Company, the obligation to permit other companies to use such right of way. *Hayes* v. *Michigan Cent. R. Co.* 111 U. S. 228 [28: 410].

We are also of opinion that the covenants in paragraph 9 of the tripartite agreement, as to the use of the right of way by other railroad companies, are binding upon subsequent purchasers, with notice, from the Kansas City Company. *Tulk* v. *Moxhay*, 2 Phill. Ch. 774; *Luker* v. *Dennis*, L. R. 7 Ch. Div. 227; *Bronson* v. *Coffin*, 108 Mass. 175; *Whitney* v. *Union R. Co.* 11 Gray, 359, 364; *Parker* v. *Nightingale*, 6 Allen, 341, 344; *Van Doren* v. *Robinson*, 16 N. J. Eq. 256; *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206; *Western* v. *Macdermott*, L. R. 2 Ch. 72; *Watertown* v. *Cowen*, 4 Paige, 510; *Randall* v. *Latham*, 36 Conn. 48, 53; *Cincinnati* v. *White*, 31 U. S. 6 Pet. 431 [8: 452]; *Brew* v. *Van Deman*, 6 Heisk. 433; *Winfield* v. *Henning*, 21 N. J. Eq. 188; *Verplanck* v. *Wright*, 23 Wend. 506; *Stockett* v. *Howard*, 34 Md. 121; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35.

In the present case, the tripartite agreement [35] is a link in the chain of title of the mortgagees and of the purchasing committee. The right of way through the park, granted by Griswold to the County Company, November 3, 1871, was lost by non-user. The right of way granted by the park commissioners to the County Company under the first Park Act, of March 25, 1872, failed because that Act was declared unconstitutional, in *State*, *Chouteau*, v. *Leffingwell*, 54 Mo. 458. The third line, that established by the tripartite agreement, was not identical with either of the two prior lines. The park commissioners therefore granted to the two companies, under the tripartite agreement, all the right of way which they acquired in the park. The right of the mortgagees and of the purchasing committee to use such right of way is based solely upon that agreement; and, holding under it, they must hold subject to its terms and conditions, irrespectively of the question of notice. *Whitney* v. *Union R. Co.* 11 Gray, 359; *Van Doren* v. *Robinson*, 16 N. J. Eq. 256; *Tulk* v. *Moxhay*, 2 Phill. Ch. 774; *Luker* v. *Dennis*, L. R. 7 Ch. Div. 227; *Western* v. *Macdermott*, L. R. 2 Ch. 72. Therefore, the Wabash Company, the mortgagees and the purchasing committee must be held to have had notice of the covenants and conditions of the tripartite agreement prior to the execution of the mortgage, and are bound by them, whether the covenants be or be not strictly such as run with the land.

Nor is the failure to acknowledge the tripartite agreement as a deed of any importance. There was sufficient to put the purchasers on inquiry, and to charge them with notice of all the facts which such an inquiry would have made known. The Wabash Company came into existence in August, 1879, through the consolidation of the Kansas City Company with the Wabash Railway Company. This consolidation took place under statutes by virtue of which the consolidated company took all the property, rights and franchises, and assumed all the liabilities, of the Kansas City Company. The Wabash Company, therefore, was not strictly a purchaser from the Kansas City Company. The consolidation was merely a change of name. If the Kansas City Com-
[36] pany was bound by the tripartite agreement to grant the use of the right of way to other railroads, on certain terms, the Wabash Company, as consolidated, was equally bound to do so. The mortgage was executed in 1880, and the committee purchased in 1886. The tripartite agreement was recorded in the recorder's office of the City of St. Louis, September 5, 1879, prior to the execution of the mortgage and prior to the purchase under it made by the committee. *Bishop* v. *Schneider*, 46 Mo. 472; *Stevens* v. *Hampton*, 46 Mo. 404; *Digman* v. *McCollum*, 47 Mo. 372.

The tripartite agreement, and that between the County Company and the Kansas City Company, and the deed from the County Company to the Kansas City Company, all of them bear date August 11, 1875. The deed was duly acknowledged, and was recorded August 13, 1875. It is a link in the chain of title of the mortgagees and the purchasing committee. It recites that it is made in pursuance of the terms of a certain contract made and executed between the County Company and the Kansas City Company, and dated August 11, 1875, and is in full satisfaction of so much of such contract as relates to the conveyance of certain pieces of land and right of way to the Kansas City Company. It also contains the following provision: "And also the said party of the first part hath conveyed, assigned and transferred, and by these presents doth convey, assign and transfer, unto the said party of the second part, and to its successors and assigns, an undivided one half of all the right, title or interest of the party of the first part of, in or to the right of way, and of, in or to any and all other rights, privileges and franchises, powers and immunities owned by, or vested in, or enjoyed by, or that may hereafter be acquired and owned by, vested in or enjoyed by, the party of the first part, in, through or upon Forest Park, by any means or from any source whatever; all of which conveyances of the said rights of way in this deed mentioned are made subject to the terms and conditions upon which the same were granted to the party of the first part, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertain-
37] ing." Thus this deed refers to the contract of August 11, 1875, between the County Company and the Kansas City Company, and to the terms thereof; and the Kansas City Company took its title subject to the terms and conditions imposed upon the County Company by the tripartite agreement. This reference to the terms and conditions on which the right of way mentioned in the deed was granted to the Kansas City Company put all the parties to the deed, and their assigns, on inquiry as to the terms of the contract by which such rights of way were granted, and led up to the provision in the agreement of August 11, 1875, between the two companies, which referred to the tripartite agreement in the following language: "And whereas, under this agreement and a certain agreement between the parties hereto and the commissioners of Forest Park of even date herewith, the party of the second part is about to, and hereby, in consideration of the covenants and agreements of the party of the first part, hereinafter particularly set forth, and of the covenants and agreements of said commissioners of Forest Park in said agreement with them contained, does, covenant and agree to construct and maintain a railroad bed and road in, upon and through said Forest Park and the tunnel and cut hereinbefore specified, according to certain plans and specifications agreed upon, and according to the terms and conditions of said agreement with said commissioners, for the joint use of both the parties (of the first part and of the second part) hereto, their several successors and assigns." Being thus chargeable with notice of the contents of the contracts of August 11, 1875, between the County Company and the Kansas City Company, the mortgagees and the purchasing committee were chargeable also with notice of the tripartite agreement, to which it referred; and they purchased subject to the terms on which the right of way was granted. *Kirkpatrick* v. *Peshine*, 24 N. J. Eq. 206; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35; *Bishop* v. *Schneider*, 46 Mo. 472; *Stevens* v. *Hampton*, 46 Mo. 404; *Maupin* v. *Emmons*, 47 Mo. 304; *McCamant* v. *Patterson*, 89 Mo. 100, 110; *Mense* v. *McLean*, 13 Mo. 298; *Meier* v. *Blume*, 80 Mo. 179, 184.

The covenant in paragraph 9 of the tri- [3
partite agreement created an easement in the property of the County Company and the Kansas City Company for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might wish to use not only the right of way through the park but also that between the park and the Union Depot. *Whitney* v. *Union R. Co.* 11 Gray, 359, 364; *Parker* v. *Nightingale*, 6 Allen, 341, 344; *Wilkinson* v. *Clements*, L. R. 8 Ch. 96; *Perkins* v. *Hadsell*, 50 Ill. 216; *Stansbury* v. *Fringer*, 11 Gill & J. 149; *Cooper* v. *Pena*, 21 Cal. 403; *Union Pac. R. Co.* v. *McAlpine*, 129 U. S. 305, 314 [32: 673, 676]; *McMurray* v. *Moran*, 134 U. S. 150 [33: 814].

The two agreements of August 11, 1875, and the deed of that date from the County Company to the Kansas City Company, constituted a single transaction, relating to the same subject matter, and should be construed together in such a way as to carry into effect the intention of the parties, in view of their

situation at the time and of the subject matter of the instruments. Contracts of such a character are to be construed liberally in favor of the public when the subject matter concerns the interests of the public. *Parker* v. *Great Western R. Co.* 7 Scott, N. R. 835, 870; *Colman* v. *Eastern Counties R. Co.* 10 Beav. 1, 14; *Stourbridge Canal Co.* v. *Wheeley*, 2 Barn. & Ad. 792; *Blakemore* v. *Glamorganshire Canal Nav. Co.* 1 Myl. & K. 154, 165; *Lee* v. *Milner*, 2 Younge & C. (Exch.) 611, 618; *Ware* v. *Regents Canal Co.* 28 L. J. N. S. Ch. 153, 157; *Gray* v. *Liverpool & B. R. Co.* 4 R. & C. Cas. 240.

The Kansas City Company, under the agreements, completed its road through the park to the Union Depot in 1876. The agreement between the County Company and the Kansas City Company provided that the County Company should pay to the Kansas City Company one half of the cost of the construction and maintenance of the road-bed through the park and the tunnel and the cut, within two years from August 11, 1875, and that, if the County Company should fail or refuse to make payment for sixty days after demand, after it should become due, all the rights, privileges, franchises, powers, immunities, improvements and property of the County Company, in, through or upon Forest Park, and in, into, through, over or upon the tunnel and cut, should become, by virtue of such failure and refusal, without further process or proceedings, forfeited to the Kansas City Company, its successors and assigns; that, in case of such forfeiture, no further payments should be made by the County Company, but the Kansas City Company might enter upon the sole and absolute possession and enjoyment of all such rights, privileges, franchises, powers, immunities, improvements and property, to the exclusion of the County Company; and that the latter company should, in such case, convey by deed to the Kansas City Company, its successors and assigns, all of such rights, privileges, franchises, powers, immunities, improvements and property. The two years expired in 1877. The County Company, having paid nothing, forfeited to the Kansas City Company all its interest in the right of way through the park and through the tunnel and the cut east of the park.

By the two agreements and the deed, the Kansas City Company obtained from the County Company an undivided one half of the right of way through the park, and the other rights of way, then owned by the County Company, between the park and the Union Depot, and, by virtue of the two agreements and the forfeiture, without further action by either the County Company or the park commissioners, the Kansas City Company became vested with the title to the whole right of way through the park, the tunnel and the cut, and became substituted for the County Company under the agreements. All the obligations and conditions imposed upon the County Company became those of the Kansas City Company, except as to building the depot and the switch in the park; and the latter Company became subject to the conditions which were imposed on the County Company by the tripartite agreement. That agreement created the easement before referred to, which covered the tracks through the park and the tracks east of the park to the Union Depot. *Whitney* v. *Union R. Co.* 11 Gray, 359, 364; *Parker* v. *Nightingale*, 6 Allen, 341, 344.

The permission to other railroad companies to use such tracks was a concession to the park commissioners, and was one of the conditions of the grant of the right of way through the park to the County Company; and the Kansas City Company obtained the title to, and the exclusive possession of, such right of way, under the agreement providing for such permission. It would be inequitable to permit the Kansas City Company, or its successor, to continue to use the right of way through the park and at the same time to deprive the park commissioners, or their successors, the City of St. Louis, as trustees of the public, of the benefit of the use by other railroad companies of the right of way between the park and the Union Depot. The park was dedicated to the use of the people of the City and County of St. Louis, and it was the duty of their trustees to preserve that use to them, for park purposes. In the view of those trustees, it was necessary, for the protection of the park, that other railroad companies should be permitted to use not only the right of way through the park but also that between the park and the Union Depot. In order to obtain the right of way through the park, the Kansas City Company subjected itself to the condition imposed by paragraph 9 of the tripartite agreement, and it is right that that Company and its successor should be held to a strict compliance with its covenant. The appellants, although enjoying the benefit of the $40,000 expended by the park commissioners and of the right of way through the park, deny their liability under the agreement, without offering to return to the grantors the property obtained by virtue of the agreement. Under such circumstances, these parties cannot be heard to allege that the agreement was against the policy of the law. *Wiggins Ferry Co.* v. *Chicago & A. R. Co.* 73 Mo. 418.

In respect to the point that paragraph 9 of the tripartite agreement covers the use by other railroad companies, not only of the right of way through the park, but also of the right of way to the terminus of the County Company's road in the City of St. Louis, the circuit court very rightly said, in its opinion: "It is argued with great force, however, by counsel for the respondents, that even if the purchasers were charged with notice of these terms and conditions as attaching to the lands described in the deed, inasmuch as the Kansas Road obtained a large portion of its right of way between Forest Park and the Union Depot from other sources, it took these latter portions free from any burden cast upon the lands specifically conveyed by the County Road. 'Can it be,' he says, 'that a condition in a deed of a few feet of the right of way, in a long line of three hundred miles, casts a burden on the entire line, to be assumed by every succeeding purchaser?' I might answer this extreme

case by a reverse question: Can it be possible that a condition attached to substantially the entire right of way of this long line of road can be defeated by the fact that some few feet have been acquired by a deed free from such condition? But these extreme cases do not constitute the practical matter before us. Here the County Road had an incomplete right of way through the park and to the Union Depot. A share of this incomplete right of way it conveyed to the Kansas Road subject to certain conditions. Can it be that the completion by the Kansas Road of this right of way, by the purchase of intervening and isolated tracts, destroys the entire value of the conditions? Looking at this matter in a practical way, and from a reasonable standpoint, I think the answer to this question must be in the negative."

In *Bronson* v. *Coffin*, 108 Mass. 175, 180, it was said, the court speaking by Gray, *J.*: "An interest in the nature of an easement in the land which the covenant purports to bind, whether already existing, or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant to do certain acts upon that land, for the support and protection of that interest and the beneficial use and enjoyment of the land granted, run with the land charged. And an obligation, duly expressed, that the structures upon one parcel of land shall forever be of a certain character for the benefit of an adjoining parcel is equally a charge upon the first parcel, whether the obligation is affirmative or merely restrictive, and whether the affirmative acts necessary to carry the obligation into effect are to be done by the owner of the one or the owner of the other." And it was held by the court, where there was a [42] covenant to make and maintain a fence on a railroad, contained in a deed granting to the road a strip for the right of way, that this covenant was an incumbrance on all the remaining land of the grantor, and ran with that land, because the covenant gave the grantee an interest in the nature of an easement in the adjoining land of the grantor. See also *Western* v. *Macdermott*, L. R. 2 Ch. 72; *Whitney* v. *Union R. Co.* 11 Gray, 359, 364; *Parker* v. *Nightingale*, 6 Allen, 341; *Union Pac. R. Co.* v. *McAlpine*, 129 U. S. 305, 314 [32: 673, 676]; *McMurray* v. *Moran*, 134 U. S. 150 [33: 814].

There can be no doubt of the power of the County Company and the Kansas City Company, under the statutes of Missouri, to make the agreement in question. Gen. Stat. of Missouri of 1866, chap. 63, sec. 32, p. 341.

The only right of way through the park and to the Union Depot claimed by the appellants is that established by the tripartite agreement. Every other right of way through the park was surrendered, by that agreement, to the park commissioners, because that agreement says that the line and grade established by it was thereby fixed "as the sole and finally established right of way to which" the County Company was "entitled by statute or otherwise through said park, or any part thereof." Such line and grade were laid down and described on the plat and profile which were attached to the tripartite agreement and formed part thereof. The park commissioners expended about $40,000 in complying with their engagements under that agreement. At its date, as testified to by Mr. McKinley, it was feared that the invasion of the park by railroads would not only affect unfavorably the landscape beauty of the park, but would also produce great danger to persons visiting it; and it was a long time before the apprehension was relieved that horses would be frightened. The consideration for the expenditure of the $40,000 was the provision of the tripartite agreement which protected the park and prevented its being defaced and injured by the construction of other railroads through it. The confining of such railroads to the use of the single right of way established was a reasonable precaution. *Hayes* v. *Michigan Cent. R. Co.* 111 U. S. 228 [28: 410]; *New York* v. *Williams*, 15 N. Y. 502. Such provision was in the interest of the public safety, and the park commissioners had the right to exact it.

In case the County Company should forfeit its rights in the park, the Kansas City Company was to continue to enjoy the right of way on the terms imposed on the County Company by paragraph 9 of the tripartite agreement. Such construction of the contract is the only one consistent with fair dealing and the manifest intention of the parties. The tripartite agreement is the only muniment of title under which the appellants now enjoy the right of way. The grant of the right to other railroads to use such right of way through the park and to the Union Depot was a grant to the park commissioners, as trustees for the public, and is to be construed liberally. Paragraph 9 is imperative. It provides that the County Company "shall permit" other railroads to use its right of way. This is to be done "under such reasonable regulations and terms as may be agreed upon," and "upon such terms and for such fair and equitable compensation to be paid" to the County Company "therefor as may be agreed upon by such companies." Not only are the regulations and terms to be reasonable, but the compensation is to be fair and equitable. Although the statement is that the compensation is to be such "as may be agreed upon by such companies," yet the statement that it is to be "fair and equitable" plainly brings in the element of its determination by a court of equity. If the parties agree upon it, very well; but if they do not, still the right of way is to be enjoyed upon making compensation, and the only way to ascertain what is a "fair and equitable" compensation therefor is to determine it by a court of equity. Such is, in substance, the agreement of the parties. The provision cannot be construed as meaning that, if the parties do not agree, there is to be no compensation, and that, because there can in that event be no compensation, there is to be no enjoyment of the right of way. In this view, it cannot be said that the court is making an agreement for the parties which they did not make themselves. *Emery* v. *Wase*, 8 Ves. Jr. 505; *Milnes* v. *Gery*, 14 Ves. Jr.

400; *Gregory* v. *Mighell*, 18 Ves. Jr. 328; *Providence* v. *St. John's Lodge*, 2 R. I. 46; *Dike* v. *Greene*, 4 R. I. 285.

On the question whether paragraph 9 of the tripartite agreement covers not merely the right of way through the park and up to the terminus of the road in the City of St. Louis, but also the tracks for that extent, the opinion of the circuit court very properly says: "The language of the ninth paragraph, under which, as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its 'right of way.' Now, the term 'right of way' has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed. Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the terms 'right of way;' 'tracks' and 'road-bed' frequently appear, and in all cases the term 'right of way' is used as descriptive of the strip above referred to. Notably, in the fifth paragraph, is the distinction between the 'right of way' and the 'track' disclosed, in which it is provided that the depot shall be wholly outside of the right of way, but immediately adjoining the track. Now, the right of way through the park, as given by the Griswold deed, was 40 feet; as fixed by the contract with the Forest Park commissioners, was 70 feet; and by this present contract, 42 feet. So the County Road conveyed to the Kansas Road, outside of the park, a strip either 30 or 28 feet in width for its right of way. My thought, at first, was that the intervenors could only claim a right to use so much of this right of way as was not, in fact, occupied by the track of the Wabash, and that all that was intended by this ninth paragraph was to permit other railroad companies to occupy and use so much of the Kansas Road's right of way as it did not itself occupy and use; but, after reflection on the arguments of counsel, I have been led to the conviction that this was too narrow a construction, and was not the real intent of the parties. The master, in his report, shows that the entire right of way is occupied by tracks and sidings, so that there is no room for another and independent track; and as there is nothing to show that this occupation has not been made in good faith, and to supply the needs of the Wabash Company, if my first interpretation had been correct, the intervenors would plainly be without any rights. I think, however, the true construction is this: that the Kansas Company was to have the first right—a right not limited to its necessities, but as broad as its convenience. Subject, and only subject, to such prior right, other companies were to have the use of the right of way, and if the respondent's business compelled the occupation by its tracks or sidings of the entire right of way, but the convenience of its business would permit the use of those tracks and sidings by another road, then such other road would be entitled to the use of both the right of way and the tracks and sidings. This construction is, I think, in accordance with the obvious intent of the parties, who were contracting for general rights, and not fixing the specific details."

The evidence shows that the entire right of way is occupied with tracks and sidings, so that there is no room for another and independent track, and that the entrance into the Union Depot over the tracks of the Wabash Company is the only practical route for the road of the Colorado Company to that depot. As the Kansas City Company had the right to cover its right of way with main and side tracks, so that there should be no room on such right of way for the tracks of another railroad, it would be in its power to defeat the intent of the agreement, if the right of way should be held not to include the tracks. Moreover, as the County Company and the Kansas City Company were tenants in common of the right of way through the park and to the east end of the cut, each company had the right to use the whole of the right of way, subject to the right of the other company to use the whole of it. Hence, the grant to other roads of the privilege of using the right of way applied to the whole of such right of way through the park, and not to a particular part of it. The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no practical use to a railroad without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way. The record shows that the railroad of the Colorado Company is of the same gauge as that of the Wabash Company, and that it is entirely practicable for the Colorado Company to use the tracks of the Wabash Company from the north line of the park to the Union Depot, subject to the reasonable rules and regulations of the Wabash Company.

The appellants having denied all right of the Colorado Company under the tripartite agreement, it became necessary for the intervenors to come into a court of equity; and the court, having taken cognizance rightfully of the subject matter in controversy, has the power to settle not only the right but also the amount of compensation. The action of the circuit court was, in effect, to enforce the specific performance of the agreement. The offer by the Colorado Company, in its bill, to pay a fair and equitable compensation, with its prayer to have such compensation determined by the court, brought the matter within the cognizance of the court, the other party having substantially agreed, by paragraph 9 of the tripartite agreement, that the compensation should be determined by a court of equity. The prayer for an injunction to restrain the Wabash Company and its receiver from refusing to permit the Colorado Company to use the right of way of the Wabash Company from the north line of the park to Eighteenth Street, is a prayer for all that is necessary to secure practically the specific performance of the agreement. *Dinham* v. *Bradford*, L. R. 5 Ch. 519; *Tillett* v. *Charing Cross Bridge*, 26 Beav. 419; *Raphael* v. *Thames Valley R. Co.* L. R. 2 Eq. 87;

Tscheider v. *Biddle*, 4 Dill. 55; *Biddle* v. *Ramsey*, 52 Mo. 158; *Arnot* v. *Alexander*, 44 Mo. 27; *Hug* v. *Van Burkleo*, 58 Mo. 202; *Gregory* v. *Mighell*, 18 Ves. Jr. 328.

The right to use the right of way is a continuing right. If the remedy were to be at law, repeated actions for damages would be necessary. The remedy at law would be wholly inadequate. It would not secure directly the enforcement of the provision of paragraph 9 of the tripartite agreement, or the use of the right of way by the Colorado Company. It would be neither plain nor complete, nor would it be a reasonable substitute for the remedy in equity, by the injunction asked for.

[47] The appellants rely largely upon cases of the character of that of *Rutland Marble Co.* v. *Ripley*, 77 U. S. 10 Wall. 339 [19: 955], where this court refused to enforce the specific performance of a personal contract to deliver from a quarry marble of certain kinds and in blocks of a specified kind, holding that, as the duties required of the owners of the marble quarry were continuous, and the agreement was one for a perpetual supply of marble, the court could make no decree which would end the controversy, and the case would have to remain in the court forever, with the liability on the part of the court to be called upon, to the end of time, to determine, not only whether the prescribed quantity of marble had been delivered, but whether every block was from the right place, and was sound, and of suitable size or shape or proportion; and it was held that it was impracticable for the court to superintend the execution of such a decree.

In the present case, it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash Company for the running of trains upon its tracks by the Colorado Company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this, the decree is complete in itself and disposes of the controversy; and it is not unusual for a court of equity to take supplemental proceedings to carry out its decree and make it effective under altered circumstances.

Considerations of the interests of the public are held to be controlling upon a court of equity, when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court. These considerations have been recognized and applied by this court in several cases. *Barton* v. *Barbour*, 104 U. S. 126 [26: 672]; *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286, 311, 312 [27: 117, 126, 127]; *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434, 458 [29: 963, 971].

The circuit court having adopted the rate of compensation insisted upon by the appellants, and the Colorado Company not having taken an appeal, the question of the rate of [48] compensation is concluded between the parties. So also is the question that the rules and regulations for the running of the trains of the Colorado Company are to be those prescribed by the Wabash Company and its successors.

In view of the testimony as to the use, by agreement, of the tracks of one railroad company by the engines and cars of another, the practical difficulties insisted upon of carrying out the regulations laid down in the decree of the circuit court amount to very little, if anything. That these regulations are practical is shown by the agreement of August 11, 1875, between the County Company and the Kansas City Company, in that provision thereof which is as follows, and which was adopted to a certain extent by the circuit court in its decree: "It is agreed and covenanted that to accommodate the running arrangements of the party of the second part said party of the second part shall have the absolute and sole control of the running, starting and regulating of the time-tables of and for its own trains; and it is further agreed and covenanted that no train, locomotive, car or other conveyance of the party of the first part, its successors or assigns, shall be allowed or attempted to be started or run within eight (8) minutes of the time fixed or stated for the starting, coming in or running of the train or trains of the party of the second part, its successors or assigns; and there shall be twenty minutes' time between the starting and coming in of the trains of the party of the second part, and this matter as to said specified times shall be under the sole control and regulation of the party of the second part." It is to be noted, however, that the agreement referred to gave to the Kansas City Company the control only of its own trains, while the decree gives to the Wabash Company the control of all the trains to be run over its tracks, with the proviso that the trains of the Colorado Company shall not be started or run within eight minutes of the time fixed for the starting, coming in or running of the trains of the Wabash Company. The latter Company is required only to make reasonable rules and regulations for the running of the trains of the Colorado Company. The Wabash Company is to fix the time-tables, and the trains of the Colorado Company are to be operated [49] on the tracks of the Wabash Company subject to the rules and regulations of the latter Company, so long as a train of the former Company occupies the tracks of the latter Company.

It is objected that the details of the manner of the use of the right of way are not set forth in paragraph 9 of the tripartite agreement, and that therefore a court of equity will not decree a specific performance. But viewing the two agreements of August 11, 1875, as a single contract, the details as to the manner of use of the right of way are sufficiently furnished by agreement of the parties, for it is provided by the agreement of August 11, 1875, between the County Company and the Kansas City Company, not only that the latter Company shall have the absolute and sole control of the starting, running and regulating of the time-tables of and for its own trains, but also that the matter of the relative times of the starting,

coming in and running of the trains of the County Company and of those of the Kansas City Company shall be under the sole control and regulation of the latter Company, its successors and assigns.

The case of *Texas & P. R. Co.* v. *Marshall*, 136 U. S. 393 [34: 385], is much relied upon by the appellants; but the principle of that case does not apply to the present one. There, the court held that, if the railroad company was under a contract with the City of Marshall to keep there its principal office of business and its main machine shops and car works, it was much more consonant to justice that the injury suffered by the city should be compensated by a single judgment in an action at law; that there was no substantial difficulty in ascertaining such compensation; and that therefore the city had a complete remedy at law. But in the present case, the remedy in damages by an action at law would be entirely inadequate, and nothing short of the interposition of a court of equity would provide for the exigencies of the situation. See also *Wilson* v. *Northampton & B. J. R. Co.* L. R. 9 Ch. 279.

The decree of the circuit court is so framed as to execute itself. It finds that the rules and regulations now in force for the running of trains over the right of way and tracks of the Wabash Company, and which are set forth in the record, are reasonable rules and regulations. So long as they are undisturbed, there is no occasion for the action or interposition of the court.

The fact that the railroads which are to be allowed, under paragraph 9 of the tripartite agreement, to use the right of way through the park and up to the terminus in the City of St. Louis, are not named in that paragraph, is of no importance. *Wolverhampton & W. R. Co.* v. *London & N. W. R. Co.* L. R. 16 Eq. 433; *Express Cases*, 117 U. S. 1 [29: 791]; *Denver & R. G. R. Co.* v. *Alling*, 99 U. S. 463 [25: 438].

Railroads are common carriers and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation. The present case is a striking illustration. Here is a great public park, one of the lungs of an important city, which, in order to maintain its usefulness as a park, must be as free as possible from being serrated by railroads; and yet the interests of the public demand that it shall be crossed by a railroad. But the evil consequences of such crossing are to be reduced to a minimum by having a single right of way, and a single set of tracks, to be used by all the railroads which desire to cross the park. These two antagonisms must be reconciled, and that can be done only by the interposition of a court of equity, which thus will be exercising one of its most beneficent functions. As to the objection that there is no mutuality in the contract, and therefore it cannot be enforced, the circuit court says in its opinion: "As to the objection on the ground of the want of mutuality in the contract, I think it of little force. The respondent has been paid for the privilege that is now claimed. The consideration, as I have heretofore shown, was ample; and, when a party has received payment for a privilege, I do not think it can resist the enforcement of that privilege on the mere ground that it cannot compel [5
the other party to continue in its enjoyment." We concur in this view. Under the tripartite agreement, the right of way through the park was obtained by the Kansas City Company, and, in consideration of the covenants contained in paragraph 9 and other paragraphs of that agreement, $40,000 were expended by the park commissioners in aid of the construction of the railroad through the park, upon the right of way granted. Things were to be done by each party for valuable considerations to be paid by one to the other. The park commissioners complied in all respects with the agreement. Although the one easement was granted in consideration of the other, the appellants refused to permit the enjoyment of the easement which they granted. The want of mutuality is urged when the appellants are called upon to comply with the covenant, which is valuable to the City of St. Louis and the public whom that City represents. Such want of mutuality is alleged to consist in the inability of the appellants to prevent other railroads which may use the right of way from discontinuing such use, and in the fact that the contract did not specify the period during which the other railroads should be required to use the right of way. But we think that there is no such want of mutuality as should interfere with the enforcement of the contract.

It is insisted that the County Company had no power to bind itself to grant the use of its right of way east of the park. But the appellants do not occupy a position to insist upon that objection, so long as they themselves use the right of way which was granted, and enjoy the benefit of the money which the park commissioners expended.

The City of St. Louis is, in the present case, not merely a nominal party, but is charged with the duty of protecting the park, and of preserving and fostering the commerce of the City. Both of those objects are clearly set forth in the tripartite agreement executed by the park commissioners, of whom the City of St. Louis is the successor; and the considerations thus arising are legitimate ones in a court of equity, the case being founded upon the tripartite agreement.

Decree affirmed.

1]

UNITED STATES, *Appt.*,
v.
FREDERICK D. CONNOR.

(See S. C. Reporter's ed. 61-67.)

Informer of violation of Revenue Laws, claim of.

Under the Act of 1866, no right accrued to an informer of a violation of the Revenue Laws until judgment or compromise; where there was no compromise or judgment until after the repeal of that Act, the informer has no claim.

[No. 113.]

Argued Jan. 9, 1891. Decided Jan. 19, 1891.

APPEAL from a judgment of the Court of Claims in favor of claimant for the amount due him as an informer of the violation of the Revenue Laws. *Reversed.*

Statement by *Mr. Justice* **Brewer:**

In December, 1871, the appellee gave the 2] first information, to the proper officers of the United States, of a violation of the Internal Revenue Laws by one William Stout. Proceedings were thereupon instituted by the government for collection of the penalty therefor. At the time this information was given, section 179 of the Act of June 30, 1864, as amended by the Act of July 13, 1866 (14 Stat. 145), was in force. This, after casting upon the collectors the duty of instituting prosecutions for all fines, penalties and forfeitures due the government, under the Revenue Acts, contained these provisions as to informers: "And where not otherwise provided for, such share as the Secretary of the Treasury shall, by general regulations, provide, not exceeding one moiety nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty or forfeiture, who shall first inform of the cause, matter or thing whereby such fine, penalty or forfeiture shall have been incurred; and when any sum is paid without suit, or before judgment, in lieu of fine, penalty or forfeiture, and a share of the same is claimed by any person as informer, the Secretary of the Treasury, under general regulations to be by him prescribed, shall determine whether any claimant is entitled to such share as above limited, and to whom the same shall be paid, and shall make payment accordingly. It is hereby declared to be the true intent and meaning of the present and all previous provisions of Internal Revenue Acts granting shares to informers, that no right accrues to or is vested in any informer in any case until the fine, penalty or forfeiture in such case is fixed by judgment or compromise, and the amount or proceeds shall have been paid, when the informer shall become entitled to his legal share of the sum adjudged or agreed upon and received: *Provided*, That nothing herein contained shall be construed to limit or affect the power of remitting the whole or any portion of a fine, penalty or forfeiture conferred on the Secretary of the Treasury by existing laws."

In 1872 the Statute was changed by section 39 of the Act of June 6 of that year (17 Stat. 256), which reads: "That so much of section one hundred and seventy-nine of the Act of July thirteenth, eighteen hundred and [63] sixty-six, as provides for moieties to informers be, and the same is hereby, repealed; and the commissioner of internal revenue, with the approval of the Secretary of the Treasury, is hereby authorized to pay such sums, not exceeding in the aggregate the amount appropriated therefor, as may, in his judgment, be deemed necessary for detecting and bringing to trial and punishment persons guilty of violating the Internal Revenue Laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law; and for this purpose there is hereby appropriated one hundred thousand dollars, or so much thereof as may be necessary, out of any money in the treasury not otherwise appropriated." By section 46 of the same Act (p. 253) it was provided as follows: "That all Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed: *Provided*, That all the provisions of said Act shall be in force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of former Acts, the right to which has already accured, or which may hereafter accrue, under said Acts, and for maintaining, continuing and enforcing liens, fines, penalties and forfeitures incurred under and by virtue thereof. And this Act shall not be construed to affect any act done, right accrued or penalty incurred under former Acts, but every such right is hereby saved; and all suits and prosecutions for acts already done in violation of any former Act or Acts of Congress relating to the subjects embraced in this Act may be commenced or proceeded with in like manner as if this Act had not been passed."

The suit against Stout was not tried. On May 13, 1873, a settlement was made with him; and he paid the United States, in lieu of and as a penalty, the sum of eight hundred dollars. On March 22, 1875, the appellee presented an application to the Treasury Department for his informer's share, which was indorsed "too late," and nothing was done thereunder. Twelve years thereafter, and on February 24, 1887, by his attorney, he made a second application. To such application the following answer was returned:

[64]

"Treasury Department,
"Office of the Secretary,
"Washington, D. C., February 24, 1887.
"George A. King, Esq.,
"Attorney-at-Law, Washington, D. C.
"Sir: In your letter to the Secretary, dated the 20th of January, 1887, you request that your client, Mr. Frederick D. Connor, of New Albany, Indiana, be declared to have been the first informer in a case in which he claimed that a penalty of $800 has been recovered by reason of information which had been given by him, and you make this request so that in case the Secretary should decline to order payment of the proper share of said penalty to the informer, he may then be in a position to apply to the Court of Claims for relief.

"In reply, I have to say that the case is not one in which payment of the informer's share can be properly made at the present time, because the penalty was fixed by compromise, and the amount paid after August 1, 1871, when the Act of June 6, 1872 (17 Stat. 256), took effect, repealing section 179 of the Act of June 30, 1864, as amended by the Act of July 13, 1866 (14 Stat. 145), under which the share of the informer is claimed in this case, and because the question as to the effect of such repeal was involved in the *Ramsay Case*, in which the judgment of the Court of Claims, on being appealed to the Supreme Court of the United States, was recently affirmed by a divided court, thus rendering the decision of no effect as a precedent.

"I see no objection, however, to stating that the proof filed in the office of the Secretary of the Treasury shows that said Frederick D. Connor gave the first information upon which a penalty of $800 was recovered by compromise from William Stout, a distiller of fruit; the compromise having been approved by the Secretary of the Treasury on the 13th day of May, 1873, and the penalty having been paid on the 29th of April, 1874.

"I add that under the schedule of shares prescribed by the Secretary of the Treasury, August 14, 1866, pursuant to the authority conferred by said section 179, the share of the penalty that would be payable to an informer in this case would be three hundred and seventy dollars ($370).

"It is presumed that on this declaration you can take the case to the Court of Claims and obtain an adjudication.

"C. S. Fairchild, Acting Secretary."

Thereafter this suit was brought, claiming under the Act of 1866, and the alleged decision by the Secretary of the Treasury as evidenced by the letter quoted. The judgment of the Court of Claims was in favor of the claimant, and the government has brought this appeal.

Mr. **John B. Cotton,** *Assistant Atty-Gen.*, for appellant:

The Court of Claims has no jurisdiction.

United States v. *Ramsay*, 120 U. S. 214 (30: 582), 21 Ct. Cl. 448, 449; *New England Miss. Land Co.* v. *United States*, 1 Ct. Cl. 135; *Meade* v. *United States*, 2 Ct. Cl. 224; *United States* v. *Kaufman*, 96 U. S. 567 (24: 792); *Woolner* v. *United States*, 13 Ct. Cl. 355-365; *Calhoon* v. *United States*, 24 Ct. Cl. 414; *Johnson* v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); *Marquez* v. *Frisbie*, 101 U. S. 473 (25: 800); *Dorsheimer* v. *United States*, 74 U. S. 7 Wall. 166 (19: 187); *Belcher* v. *Linn*, 65 U. S. 24 How. 508-522 (16: 754-757); *Stairs* v. *Peaslee*, 59 U. S. 18 How. 524 (15: 475); *United States* v. *Wright*, 78 U. S. 11 Wall. 648 (20: 188); *Decatur* v. *Paulding*, 39 U. S. 14 Pet. 497 (10: 549); *United States* v. *Black*, 128 U. S. 47 (32: 357); *Boughton* v. *United States*, 12 Ct. Cl. 334; *Campbell* v. *United States*, 12 Ct. Cl. 470.

On appeal this court will examine and determine whether the facts thus found were in law sufficient to maintain the judgment for the claimant.

United States v. *Pugh*, 99 U. S. 265 (25: 322); *United States* v. *Clark*, 96 U. S. 37 (24: 696).

Mr. **George A. King,** for appellee:

The repeal of the Moiety Statute did not devest the appellee of the right to recover the stipulated share for information given by him while the Statute was in full force and effect.

United States v. *Reisinger*, 128 U. S. 398 (32: 480); *Jones* v. *Shore*, 14 U. S. 1 Wheat. 462 (4: 136); *Pacific Mail Steamship Co.* v. *Joliffe*, 69 U. S. 2 Wall. 450 (17: 805); *Twenty Per Cent Cases*, 87 U. S. 20 Wall. 179 (22: 339); *Loring* v. *Boston*, 7 Met. 411; *Shuey* v. *United States*, 92 U. S. 73 (23: 697); *Ramsay* v. *United States*, 21 Ct. Cl. 443, 447.

Mr. Justice **Brewer** delivered the opinion of the court:

The right of claimant, as informer, depends on the Act of 1866. Before final adjustment of the claim made against Stout, the Act of 1866 was repealed. Unless, therefore, prior to this repeal some right was vested, the claimant has no standing in court. But the Act of 1866 explicitly declared that no right accrued to an informer until the fine, penalty or forfeiture became fixed by judgment or compromise, and the amount thereof was paid. While there is in the repealing Act a reservation, it is only of rights which have accrued. As, under the Act of 1866, no right accrued until judgment or compromise, the repeal by the Act of 1872 left nothing to the claimant. It is familiar law, that an offer of reward conveys no right beyond the specific terms of the offer; that it may be withdrawn at any time; and that unless prior to the withdrawal something has been done to complete a contract or settle and establish a right under the offer, a claimant takes nothing by reason thereof. It is urged that the claimant had done all that he was called upon to do under the Act of 1866; that the government had the full benefit of his information; and that it would be unseemly for it to appropriate such benefit and repudiate any liability therefor. It is claimed that a reasonable construction of the Act of 1866 is, that the liability to the informer arose the moment the information was given, while the amount to be paid was not settled until judgment or compromise and payment; and the opinion of the Court of Claims, in the case of *Ramsay* v. *United States*, 21 Ct. Cl. 443, is cited in support of this view.

But the language of the Act of 1866 is clear. It is emphatic that no right accrues. No clearer language could be used; and we may not, under the pretense of an equity, enlarge the scope of an offer beyond its express words. Is the claim so meritorious as to justify a strained construction of the language of the Statute? What did the claimant do? So far as it appears, he simply informed the officers of the government of a violation of one of the laws of his country. Is there no obligation resting upon a citizen to disclose such a fact? Does such an act of disclosure make him a special object of public gratitude; or has he simply discharged a duty, resting in common upon all citizens? Is it not clear that an offer of reward therefor is not the recognition of an equitable duty

of the government to the informer, but a mere act of public policy, the giving or withholding of which, and whose terms, are wholly within the discretion of the government. Whoever claims under such an offer must bring himself within its terms. Failing to do that, his compensation is the consolation which comes to every citizen from the discharge of a public duty, which is the common obligation of all. We conclude, therefore, that the claimant acquired no right before the repeal of the Act of 1866, and therefore has no claim against the government for compensation for the information he gave.

If the facts were otherwise, and a stronger claim for compensation was made out, can the letter of the Secretary of the Treasury be considered as an adjudication of the claim? It is conceded that such an adjudication is prerequisite to this action. The tenor of the Secretary's letter is not to the effect that he is adjudicating upon the claim. On the contrary, the findings show that twelve years before the claim had been presented, and practically determined against the claimant. The Statute of Limitation would bar a suit commenced as this was, twelve years after such adjudication. Rev. Stat. § 1069; *Finn* [37] v. *United States*, 123 U. S. 227 [31: 128]. Obviously, from the language of the letter, the Secretary did not intend a reopening of the case and a new adjudication, but simply to furnish to the claimant such information as the records of his Department disclosed.

Without resting the case, however, on this last point, we hold, for the reasons first stated, that *the judgment of the Court of Claims was erroneous; and it must be reversed, and the case remanded with instructions for further proceedings in accordance with the views herein expressed.*

---

[78] JOHN A. BRIMMER, JR., Sergeant of the CITY OF NORFOLK, *Appt.*,

v.

WILLIAM REBMAN.

(See S. C. Reporter's ed. 78-84.)

Power of State to discriminate against products of other States— Virginia Statute as to sale of unwholesome meats unconstitutional.

1. A State cannot, under the guise of exerting its police powers, or of enacting Inspection Laws, make discriminations against the products and industries of some of the States in favor of the products and industries of its own or of other States.
2. The Virginia Statute of 1890 to prevent the sale of unwholesome meats is a regulation of commerce beyond the power of the State to establish.

[No. 1154.]

Submitted Jan. 5, 1891. Decided Jan. 19, 1891.

APPEAL from a judgment of the Circuit Court of the United States for the Eastern District of Virginia discharging William Rebman on habeas corpus from imprisonment for violation of the Virginia Act to prevent the selling of unwholesome meats, under a conviction before a Justice of the Peace. *Affirmed.*

The facts are stated in the opinion.

Messrs. **R. Taylor Scott** and **Robt. M. Hughes**, for appellant:

The court erred in holding the Virginia Statute unconstitutional.

Powell v. *Pennsylvania*, 127 U. S. 678 (32: 253); *People* v. *Durston*, 55 Hun, 64; *Huse* v. *Glover*, 119 U. S. 543 (30: 487); *Slaughter-House Cases*, 83 U. S. 16 Wall. 36 (21: 394); *Smith* v. *Alabama*, 124 U. S. 465 (31: 508); *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96 (32: 352); *Mugler* v. *Kansas*, 123 U. S. 623 (31: 205); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *Minnesota* v. *Barber*, 136 U. S. 313 (34: 455); *Kimmish* v. *Ball*, 129 U. S. 217 (32: 695); *Dent* v. *West Virginia*, 129 U. S. 114 (32: 623); *Barbier* v. *Connolly*, 113 U. S. 27 (28: 923); *Patterson* v. *Kentucky*, 97 U. S. 501 (24: 1115); *Turner* v. *Maryland*, 107 U. S. 38 (27: 370).

Messrs. **Wm. J. Campbell, W. C. Goudy** and **A. H. Veeder**, for appellee:

The Law of Virginia is in conflict with art. 1, § 8, par. 3, of the United States Constitution, which provides that Congress shall have power to regulate commerce among the several States.

Gibbons v. *Ogden*, 22 U. S. 9 Wheat. 1 (6: 23); *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419 (6: 678); *Welton* v. *Missouri*, 91 U. S. 275 (23: 347); *Passenger Cases*, 48 U. S. 7 How. 283 (12: 702); *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 (24: 527); *Henderson* v. *New York City*, 92 U. S. 259 (23: 543); *Chy Lung* v. *Freeman*, 92 U. S. 275 (23: 550); *License Cases*, 46 U. S. 5 How. 504 (12: 256); *State Freight Tax Case*, 82 U. S. 15 Wall. 232 (21: 146); *Crandall* v. *Nevada*, 73 U. S. 6 Wall. 35 (18: 744); *Mobile County* v. *Kimball*, 102 U. S. 691 (26: 238); *Hall* v. *De Cuir*, 95 U. S. 485 (24: 547); *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465 (31: 700); *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489 (30: 694); *Ex parte Rollins*, 80 Va. 314; *Minnesota* v. *Barber*, 136 U. S. 313 (34: 455); *Leisy* v. *Hardin*, 135 U. S. 100 (34: 128); *Lyng* v. *Michigan*, 135 U. S. 161 (34: 150.)

The law of Virginia is in conflict with art. IV., § 2, par. 1, of the United States Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Ward v. *Maryland*, 79 U. S. 12 Wall. 418 (20: 449); *Welton* v. *Missouri*, 91 U. S. 275 (23: 347); *Walling* v. *Michigan*, 116 U. S. 446 (29: 691); *Asher* v. *Texas*, 128 U. S. 129 (32: 368); *Re Watson*, 15 Fed. Rep. 511; *Ex parte Rollins*, 80 Va. 314; *Minnesota* v. *Barber*, 136 U. S. 313 (34: 455).

Mr. Justice **Harlan** delivered the opinion [79] of the court:

William Rebman was tried and convicted before a justice of the peace in Norfolk, Virginia, "a city of fifteen thousand inhabitants or more," of the offense of having wrongfully, unlawfully and knowingly sold and offered for

---

NOTE.—*As to power of Congress to regulate commerce*, see *notes* to Gibbons v. Ogden, 6: 23; Brown v. Maryland, 6: 678.

As to interstate commerce, regulation of; power of Congress, how far exclusive,—see *note* to Gloucester Ferry Co. v. Pennsylvania, 29: 158.

As to police power of States; instances of its exercise,—see *note* to Barbier v. Connolly, 28: 923.

sale "eighteen pounds of fresh meat, to wit, fresh, uncured beef, the same being the property of Armour & Co., citizens of the State of Illinois, and a part of an animal that had been slaughtered in the County of Cook and State of Illinois, a distance of one hundred miles and over from the said City of Norfolk in the State of Virginia, without having first applied to and had the said fresh meat inspected by the fresh-meat inspectors of the said City of Norfolk, he, the said Rebman, then and there well knowing that the said fresh meat was required to be inspected under the laws of Virginia, and that the same had not been so inspected and approved, as required by the Act of the General Assembly of Virginia entitled 'An Act to Prevent the Selling of Unwholesome Meat,' approved February 18, 1890." He was adjudged to pay a fine of $50 for the use of the Commonwealth of Virginia, and $3.75 costs; and, failing to pay these sums, he was by order of the justice committed to jail, there to be safely kept until the fine and costs were paid, or until he was otherwise discharged by due course of law.

[9] He sued out a writ of habeas corpus from the Circuit Court of the United States for the Eastern District of Virginia, upon the ground that he was restrained of his liberty in violation of the Constitution of the United States. Upon the hearing of the petition for the writ he was discharged, upon grounds set forth in an elaborate opinion by *Judge* Hughes, holding the circuit court. *Re Rebman*, 3 Interst. Com. Rep. 126, 41 Fed. Rep. 867. The case is here upon appeal by the officer having the prisoner in custody.

The sole question to be determined is whether the Statute under which Rebman was arrested and tried is repugnant to the Constitution of the United States. The Statute is as follows:

"Whereas it is believed that unwholesome meats are being offered for sale in this Commonwealth; therefore

"1. Be it enacted by the General Assembly of Virginia that it shall not be lawful to offer for sale, within the limits of this State, any fresh meats (beef, veal or mutton) which shall have been slaughtered one hundred miles or over from the place at which it is offered for sale until and except it has been inspected and approved as hereinafter provided.

"2. The county court of each county and the corporation court of each city of this State shall, in their respective counties and cities, appoint one or more inspectors of fresh meats, on the petition of not less than twenty citizens; and it shall be the duty of said inspectors to inspect, and approve or condemn, all fresh meat offered for sale in this State which has been transported one hundred miles or more from the place at which it was slaughtered.

"3. And for all fresh meat so inspected said inspector shall receive as his compensation one cent per pound, to be paid by the owner of the meat.

"4. It shall be the duty of any and all persons, firms or corporations, before offering for sale in this State fresh meats, which, under the provisions of this Act, are required to be inspected, to apply to the fresh-meat inspector of the county or city where the same is proposed to be sold and have said meat inspected; and for a failure so to do, or for offering to sell any fresh meats condemned by said inspector, the person, firm or corporation so selling or offering to sell shall be fined not less than fifty nor more than one hundred dollars for each offense, to be recovered before any justice of the peace of the county or city where the violation occurs: provided, that in cities of fifteen thousand inhabitants or more one half of the fees of inspectors shall be paid into the state treasury; and provided, further, that nothing in this Act shall apply to the Counties of Accomac and Northampton. [8

"5. The said inspectors, before discharging the duties herein imposed, shall take and subscribe an oath before the court appointing them to faithfully discharge said duties, and the several courts are respectively empowered to remove, for cause, any inspector and to appoint another or others instead.

"6. This Act shall be in force from and after the first day of March, eighteen hundred and ninety." Acts of Va. 1889-90, p. 63, chap. 80.

The recital in the preamble that unwholesome meats were being offered for sale in Virginia cannot conclude the question of the conformity of the Act to the Constitution. "There may be no purpose," this court has said, "upon the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution;" in which case, "the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void." *Minnesota* v. *Barber*, 136 U. S. 313, 319 [34: 455, 457], and authorities there cited. Is the Statute now before us liable to the objection that, by its necessary operation, it interferes with the enjoyment of rights granted or secured by the Constitution? This question admits of but one answer. The Statute is, in effect, a prohibition upon the sale in Virginia, of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business, whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals, from which the beef, veal or mutton is taken, were slaughtered. Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting Inspection Laws, make discriminations against the products and industries of some of the States in favor of the products and indus- [8

tries of its own or of other States. The owner of the meats here in question, although they were from animals slaughtered in Illinois, had the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State, is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void. *Welton* v. *Missouri*, 91 U. S. 275, 281 [23: 347, 349]; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465 [24: 527]; *Minnesota* v. *Barber*, above cited. The fees exacted under the Virginia Statute for the inspection of beef, veal and mutton, the product of animals slaughtered one hundred miles or more from the place of sale, are, in reality, a tax; and "a discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first-mentioned State is, in effect, a regulation in restraint of commerce among the States, and, as such, is a usurpation of the powers conferred by the Constitution upon the Congress of the United States." *Walling* v. *Michigan*, 116 U. S. 446, 455 [29: 691, 694]. Nor can this Statute be brought into harmony with the Con-
[83] stitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for, "a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute." *Minnesota* v. *Barber*, above cited; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 497 [30: 694, 697]. If the object of Virginia had been to obstruct the bringing into that State, for use as human food, of all beef, veal and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the Statute before us be enforced.

It is suggested that this Statute can be sustained by presuming—as, it is said, we should when considering the validity of a legislative enactment—that beef, veal or mutton will or may become unwholesome, "if transported one hundred miles or more from the place at which it was slaughtered," before being offered for sale. If that presumption could be indulged consistently with facts of such general notoriety as to be within common knowledge, and of which, therefore, the courts may take judicial notice, it ought not to control this case, because the Statute, by reason of the onerous nature of the tax imposed in the name of compensation to the inspector, goes far beyond the purposes of legitimate inspection to determine quality and condition, and, by its necessary operation, obstructs the freedom of commerce among the States. It is, for all practical ends, a Statute to prevent the citizens of distant States, having for sale fresh meats (beef, veal or mutton), from coming into competition, upon terms of equality, with local dealers in Virginia. As such, its repugnancy to the Constitution is manifest. The case, in principle, is *not distinguishable* from *Minnesota* v. *Barber*, where an Inspection Statute of Minnesota, relating to fresh beef, veal, mutton, lamb and pork, offered for sale in that State, was held to be a regulation of interstate commerce and void, because, by its necessary operation, it excluded from the markets of that State, practically, all such meats—in whatever form, and although entirely sound and fit for human food—from animals slaughtered in other States.

Without considering other grounds urged in opposition to the Statute and in support of the judgment below, we are of opinion that the Statute of Virginia, although avowedly enacted to protect its people against the sale of unwholesome meats, has no real or substantial relation to such an object, but, by its necessary operation, is a regulation of commerce beyond the power of the State to establish.

Judgment affirmed.

PLEASANT TOWNSHIP, *Plff. in Err.*,
v.
ÆTNA LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 67-78.)

Ohio Act as to town bonds—invalid town bonds—rules of federal courts—state decisions.

1. The Ohio Act of April 9, 1880, authorizing certain townships to build railroads, is in conflict with the State Constitution, and the bonds of Pleasant Township, Van Wert County, issued under it, were issued without authority, and are not binding upon the Township.
2. In matters of contract, especially, the right of citizens of different States to litigate in the federal courts of the various States is a right to demand the independent judgments of those courts.
3. Rules of property and action in the State are always regarded by the federal courts, but the federal courts exercise their own judgment in reference to the doctrines of commercial law and general jurisprudence.

[No. 1214.]

Submitted Dec. 18, 1890. Decided Jan. 19, 1891.

IN ERROR to the Circuit Court of the United States for the Northern District of Ohio, to review a judgment sustaining a demurrer to an answer in an action upon coupons of bonds of Pleasant Township, Ohio. *Reversed.*

The facts are stated in the opinion.

NOTE.—*Municipal bonds as affected by change in the ruling of the highest court of a State, or by change in the Constitution.* See *note* to Mitchell v. Burlington, 18: 350.

As to negotiability of railroad bonds, see *note* to White v. Vermont & M. R. Co. 16: 221.

Suits on coupons detached from bonds. See *note* to Kenosha v. Lamson, 19: 725.

As to overdue coupons; rights of holders of; effect of, on bonds to which they are attached,—see *note* to Texas v. White, 19: 839.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see *note* to Davenport v. United States, 19: 704.

Recitals in negotiable bonds or securities, as evidence of the fact recited and as an estoppel. See *note* to Mercer County v. Hackett, 17: 548.

As to municipal bonds; reference to statute in,—see *note* to Ogden v. Daviess County, 26: 263.

Messrs. **John H. Doyle, I. N. Alexander** and **Isaiah Pillars,** for plaintiff in error:

In the absence of power on the part of Pleasant Township to issue the bonds they are a mere nullity.

The purchaser of the bonds is bound to take notice of any prohibition in the State or Federal Constitution against the passage of the Act and the granting such power.

Marsh v. *Fulton County*, 77 U. S. 10 Wall. 676 (19: 1040); *South Ottawa* v. *Perkins*, 94 U. S. 260 (24: 154); *East Oakland Twp.* v. *Skinner*, 94 U. S. 255 (24: 125); *Cromwell* v. *Sac County*, 96 U. S. 351 (24: 195); *Wells* v. *Pontotoc County*, 102 U. S. 625 (26: 122); *Dallas County* v. *MacKenzie*, 94 U. S. 660 (24: 182); *Northern Nat. Bank* v. *Porter Twp.* 110 U. S. 608 (28: 258); *Hayes* v. *Holley Springs*, 114 U. S. 120 (29: 81); *Merchants Exch. Nat. Bank* v. *Bergen County*, 115 U. S. 384 (29: 430); *Lake County* v. *Graham*, 130 U. S. 675 (32: 1065); Dill. Mun. Corp. §§ 542, 546.

Pleasant Township had no power to issue and sell the bonds. The Act of April 9, 1880, was an attempt to evade the Ohio Constitution.

Ohio Const. art. 8, § 6; *Taylor* v. *Ross County*, 23 Ohio St. 22; *Stradling* v. *Morgan*, Plowd. 207; *Foster's Case*, 11 Coke, 59; *Child* v. *Hudson's Bay Co.* 2 P. Wms. 207; *Cohen* v. *Hoff*, 3 Brev. 500, 502; *Harward* v. *St. Clair & M. L. & D. Co.* 51 Ill. 130.

Counties and townships in the State of Ohio are not corporations. They can neither sue nor be sued except by statutory authority.

Hunter v. *Mercer County*, 10 Ohio St. 515; *Boalt* v. *Williams County*, 18 Ohio, 16; *Lake County* v. *Ashtabula County*, 24 Ohio St. 393; *Hamilton County* v. *Mighels*, 7 Ohio St. 109.

The bonds so issued must be paid by taxation. Such taxation is not for a police purpose. It cannot therefore be authorized by the Legislature.

Cooley, Const. Lim. 213, 215, 572; 2 Bouvier, Law Dict. 348; *Reeves* v. *Wood County Treasurer*, 8 Ohio St. 333, 339; Broom, Leg. Max. 454; *United States* v. *Morse*, 3 Story, 89; *Re Albany Street*, 11 Wend. 151.

Acts identical in language except as to population and the amounts authorized to be borrowed were held to be unconstitutional and void by the Supreme Court of Ohio, in the cases of *Wyscaver* v. *Atkinson*, 37 Ohio St. 80, and *Counterman* v. *Dublin Twp.*, 38 Ohio St. 515.

Mr. **John C. Lee,** for defendant in error:

This court will respect the decisions of state courts but will not give them a retroactive effect and allow them to render invalid contracts which in the judgment of this court were lawfully made.

Groves v. *Slaughter*, 40 U. S. 15 Pet. 449 (10: 800); *Ohio L. Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 416 (14: 997); *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 175 (17: 520); *State* v. *Wapello County*, 13 Iowa, 388; *Douglass* v. *Pike County*, 101 U. S. 677 (25: 968); *Cass County* v. *Johnston*, 95 U. S. 360 (24: 416).

This court will not follow decisions of a State if thereby contract rights which have accrued under earlier rulings will be injuriously affected.

Fairfield v. *Gallatin County*, 100 U. S. 47 (25: 544); *Boyd* v. *Alabama*, 94 U. S. 645 (24: 302); *Thompson* v. *Perrine*, 103 U. S. 806 (26: 612); *Taylor* v. *Ypsilanti*, 105 U. S. 60 (26: 1008).

Questions relating to bonds issued in a negotiable form, under an Act, involve questions relating to commercial securities, and whether under the Constitution of the State such securities are valid or void belongs to the domain of general jurisprudence.

Chicago, B. & Q. R. Co. v. *Otoe County*, 83 U. S. 16 Wall. 667 (21: 375); *Olcott* v. *Fond du Lac County*, 83 U. S. 16 Wall. 678 (21: 382); *Pine Grove Twp.* v. *Talcott*, 86 U. S. 19 Wall. 666 (22: 227).

The rights of bondholders are to be determined by the law as it is judicially construed to be when the bonds are put on the market as commercial paper.

Green County v. *Conness*, 109 U. S. 104 (27: 872); *Callaway County* v. *Foster*, 93 U. S. 567 (23: 911); *Ralls County* v. *Douglass*, 105 U. S. 728 (26: 957); *Burgess* v. *Seligman*, 107 U. S. 20 (27: 359); *Anderson* v. *Santa Anna*, 116 U. S. 356 (29: 633).

Mr. Justice **Brewer** delivered the opinion [68
of the court:

This is an action on bonds issued by the plaintiff in error under the authority of an Act of the Legislature of Ohio, of April 9, 1880 (77 Ohio Laws, pages 157 and following). The single question for consideration is the constitutionality of that Statute. For if the Act is unconstitutional, the bonds were issued without authority, and are not [6
binding upon the Township; while, on the other hand, if it is constitutional and valid, no question is made as to the regularity of the proceedings which ended in the issue of the bonds.

To obtain a clear understanding of this question a reference must be had to the Constitution, legislation and judicial decisions of the State, in respect to railroad bonds. The Constitution of Ohio, adopted in 1851, contained in article 8, section 6, this prohibition: "The General Assembly shall never authorize any county, city, town or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation or association whatever; or to raise money for, or loan its credit to or in aid of, any such company, corporation or association." This provision was inserted in the Constitution, and adopted by the people, in view of the fact then and since well known in the history of all States, particularly in the West, that municipal bonds to aid railroads were freely voted in expectation of large resulting benefits—an expectation frequently disappointed. It was a declaration of the deliberate judgment of the people of Ohio that public aid to such quasi public enterprises was unwise, and should be stopped. The first effect of this constitutional provision was the full withholding of all public aid to railroad enterprises. Nothing broke this clear record of exemption from taxation for railroad enterprises until 1869, when, on the 4th day of May of that year, the Legislature passed an Act which, though general in its terms, as

applicable only to cities having exceeding one hundred and fifty thousand inhabitants, was, by the existing condition of municipalities, one in fact having reference solely to the City of Cincinnati. This Act authorized such city to issue bonds, and out of the proceeds thereof construct a railway, one of the termini of which should be the city. The validity of this Act was sustained by the Supreme Court of the State, at its December, 1871, Term, in the case of *Walker* v. *Cincinnati*, 21 Ohio St. 14.

On April 22, 1872, the Legislature passed an Act to authorize counties, townships and municipalities to build railroads. 69 Ohio Laws, 184. This Act was general in its
70] terms, and gave power to any county, township or municipality to issue bonds and build railroads, under certain restrictions. At the December, 1872, Term, this Act was adjudged unconstitutional and void, as in conflict with section 6, article 8, heretofore quoted. *Taylor* v. *Ross County*, 23 Ohio St. 22.

In 1880 several Acts were passed by the Legislature, authorizing certain townships to build railroads. These Acts were general in form, but special in fact. The one under which these bonds were issued (77 Ohio Laws, 157) commences with these words: "Be it enacted by the General Assembly of the State of Ohio, That whenever in any township, which by the federal census of 1870 had, and which by any subsequent federal census may have, a population of thirty-six hundred and eighty-three." The other Acts passed contemporaneously with this, by similar language, necessarily applied immediately to townships north or south, and so situated as to include only those on the continuous line of a railroad already projected and surveyed. One of these Acts, precisely like that under which the bonds in controversy were issued, was brought before the Supreme Court of Ohio at the January Term, 1881, and adjudged void, as in conflict with the section heretofore referred to. *Wyscaver* v. *Atkinson*, 37 Ohio St. 80. And a like ruling was made in *Counterman* v. *Dublin Twp.*, 38 Ohio St. 515. While the particular Act under which these bonds were issued does not appear to have been presented to that court, yet, as appears above, Acts identical, save in the language describing the township, and passed at the same session, and obviously part of a single scheme, have been presented to that court, and by it declared void. In the judgment, therefore, of her highest tribunal, this Act of the Legislature of the State of Ohio is unconstitutional, and the bonds issued under it are without authority of law and invalid.

It is true that the defendant in error became the purchaser and holder of these bonds before these last adjudications of the state court. It did not, therefore, buy with judicial declaration that the series of Acts, under one of which it claims, was in conflict with the Constitution; and yet it purchased without any such declaration that it was
71] valid. It is claimed that this Act of 1880 was modeled on the Statute of 1869—the Cincinnati Act heretofore referred to; and that, therefore, though not in terms, yet in fact, there had been a previous judicial affirmation of the highest court in the State in favor of such legislation. The rule laid down in *Douglass* v. *Pike County*, 101 U. S. 677 [25: 968], is invoked; and it is urged that, whatever decision may have been made by the Supreme Court of Ohio since the purchase of these bonds by defendant in error, its prior rulings were in favor of the constitutionality of such legislation and the validity of the bonds; and that, therefore, such judicial determination entered into and established the contract of the Township, and forever settled the validity of those bonds. Such was the view of the learned circuit judge who decided this case. We would not weaken in the least the authority of the case of *Douglass* v. *Pike County*, *supra*. There comes, incidentally, into this case that which is abundant justification of the rule there announced. The City of Cincinnati, under the authority of the Act of 1869, issued many millions of bonds. These bonds are current in the market, indorsed by the legislative Act authorizing the city to issue them, by the vote of the people of the city in favor of their issue and by the judicial declaration of the highest court of the State, that the Act of the Legislature was constitutional and valid. With such triple authentication, and relying upon the case of *Douglass* v. *Pike County*, *supra*, well may the bondholders expect of this court a judgment against the city, even if there should be a subsequent decision of the Supreme Court of Ohio, against the constitutionality of such Act, and although the personal opinions of the members of this court should be in harmony with that adjudication. In other words, whatever may be thought of the constitutionality of a statute, if it were a new question, there may, by concurrence of legislative, judicial and popular action, become impressed upon bonds issued thereunder an unimpeachable validity. But this is not such a case. While in the matter of structure there is between the Act of 1869 and that of 1880 a striking resemblance, there are also marked differences. Even if in form they were absolutely alike, yet, as they are Acts respecting different classes of corporations, [71
the validity of the one would not necessarily determine the validity of the other. A statute empowering a county to issue bonds and build a jail might be unquestionably valid; while a statute, in precisely the same language, attempting to give the same power to a school district, might be as plainly unconstitutional and void. Here, the Act of 1869 was a grant of power to a city, a "municipal corporation proper," as *Judge* Dillon calls it in his work on Municipal Corporations (volume 1, section 23); while the Act of 1880 was a grant to a township—a "quasi corporation," as the same author calls it—a distinction recognized in the State of Ohio long before the passage of even the Act of 1869. *Hamilton County* v. *Mighels*, 7 Ohio St. 109. The differences between these two classes of corporations it is unnecessary to point out in detail. It is enough to say that one has, far more than the other, the powers, capacities

and duties of a private corporation; so that a delegation of power to the one, if adjudged valid, does not justify the inference that a delegation of a like power to the other must also be valid. So far, therefore, as judicial determinations are concerned, the purchaser of these bonds had no express warrant from the Supreme Court of the State to rely upon. So far as any mere implications and inferences from such judicial decisions are concerned, they were stronger against than in favor of the validity of these bonds. The Statute of 1872, empowering counties and townships to issue bonds to build railroads, had been declared void; and the Statute of 1869 had been sustained, as is evident from the opinion of the supreme court, because, as believed, it was a special exception from the inhibition of the Constitution. The purchaser of these bonds cannot, therefore, plead judicial guaranty. It took the chances, and purchased at its own peril. Was the Act of 1880 in conflict with the Constitution of Ohio? The Supreme Court of the State has said that it was. 37 Ohio St. *supra*. We are not concluded by that determination. In matters of contract, especially, the right of citizens of different States to litigate in the federal courts of the various States is a right to demand the independent judgments of those courts. The settled law in that respect is well stated in the case of *Burgess* v. *Seligman*, 107 U. S. 20, 33 [27: 359, 365]: "Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State Constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

In this case our judgment accords fully with that of the Supreme Court of the State in 37 and 38 Ohio St., *supra*. Notice the [7 constitutional provision. The significance of its inhibition is read in the evil which it was intended to remedy. Common was the practice, theretofore, of issuing municipal bonds to aid in the construction of railroads. The practice was felt to be evil, stimulating unnecessary railroad enterprises, and injuriously affecting the interests of the taxpayer. The universal method of railroad enterprises was through private corporations. The possibility of other methods was unknown, or not seriously contemplated. So when the people, by their Constitution, prohibited public aid to private corporations, obviously the thought was that all public assistance to the building of railroads was prohibited. The ingenuity of the lawyer and the legislator, by means of which the letter of this prohibition was avoided, and a city enabled to construct a railroad running from itself to other parts of the country, as a great highway of approach and distribution of its business, was obviously not expected or foreseen. We are not criticising the decision in *Walker* v. *Cincinnati*, *supra*, as an erroneous construction of the constitutional provision. We simply note the fact that the Statute therein construed was a skillful avoidance of its generally understood scope. This exceptional character was no nullification of the provision. On the contrary, the supreme court, in its opinion in that case, clearly recognized and stated the force of such prohibition; and, noticing the exceptional character of this legislation, by that very fact indicated that otherwise its force and scope were absolute and wide reaching. It is one thing for a large city, with its concentration of business interests, to build, equip and own a great railroad highway running from such centre outward into other districts, rapid and easy communication with which advances its business interests; and it is a very different thing for a quasi municipal corporation, like a township, with its sparse population, and its lack of concentration of business interests, to construct a few miles of railroad through its territory. Business may demand the one; convenience alone supports the other. The justification of the one is in the private and business element which enters into a municipal corporation proper; the absence of which element in a quasi corporation, like a [7 township, forbids its investment in railroad enterprises. A railroad is a highway, but its character and mode of use make a large distinction between it and other highways. A few miles of track, unequipped with rolling stock and disconnected from other lines

of track, are absolutely worthless. An ordinary highway through a township, although disconnected at either end with other highways, is of practical benefit and substantial use to the people of the township; but it is not so with a railroad track. Only in a lengthened line, with rolling-stock equipment, does a railroad become a thing of value. The Act of 1869 contemplated for the City of Cincinnati a lengthened line, with rolling-stock equipment, and made ample provisions therefor. It meant no investment of public funds in a short track to be utilized thereafter by conjunction with other railroads, and made valuable by the infusion of private capital in the ultimate enterprise. It contemplated no mingling of public and private funds in the completed road. This matter was noticed by the Supreme Court of Ohio in its opinion in the *Cincinnati Case*, when, after quoting the constitutional provision, it said: "The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein. Though joint-stock companies, corporations and associations only are named, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person, or from that of several persons associated together."

In determining the constitutionality of any statute, its scope and effect are as proper for consideration as its language; the eyes of the court are never limited to the mere letter; and, so construing the Act of 1869, the court held that such Act contemplated and provided for a completed and continuous line of railroad, which, fully equipped, remained the property of the city, and was a great highway which opened from itself outward into territory whose business would advance the commercial interests of the city. In like manner, when the court came to consider the subsequent legislation with respect to counties and townships, including therein both the legislation of 1872 and that of 1880, it properly considered what must be the effect and operation of the Statutes; and it ruled, that obviously under them all that was contemplated was a limited distance of track, whose value could only be secured by mingling the funds of the township with other capital. By the averments in this case, which, under the demurrer, must be accepted as true, a private corporation had projected and surveyed a line of road running through several townships; and the significance of these Acts was the securing of the right of way and the grading of the road-bed through these several townships, with the view of thereafter placing this, thus created, continuous line in the possession of some corporation which would equip and operate it. And this combination of statutes, with their several grants of township aid, clearly discloses that there was no thought or possibility of either of the townships building, equipping and owning an independent railroad. Each separate Act meant for its township, not a railroad, but a road-bed. The practical value, the only real, resulting benefit, was in the incorporation of this road-bed into the railroad projected by, and to be practically operated and made effective only through, private capital. This is not a mere matter of speculation. The descriptions in these various Acts of 1880 identify the townships. They are, as alleged in the answer, along in the line of a projected and surveyed railroad. This concurrence of separate township aid, by legislative sanction, establishes an intent to further the projected line through public aid. But this Act, with the others, in its particular operation, means not the building and ownership of a railroad, but aid to a projected and lengthy line of railroad. Such was the conclusion of the Supreme Court of Ohio. We quote its language from 37 Ohio St.: "When viewed in the abstract, it is difficult to see in what manner, within the contemplation of the Legislature, the proposed road could become of such public utility as to justify resort to taxation, but when applied to the subject matter, under the existing circumstances, the legislative intent becomes quite apparent. Beaver Township, Noble County, the only township to which the provisions of the Act were intended to apply, is a sparsely settled agricultural district, with a population of 1,684, without railroad facilities either within or bordering upon it. Without railroad connections, it is quite certain that the proposed improvement would be utterly useless; hence, in view of this fact, the trustees of the township designated the location of the proposed road as follows: 'Running through said township from the point that the Somerset Railway intersects the east line of said township and terminating where the Belair, Beaver Valley and Shawnee Railway intersects the west line of said township.' Neither of the connecting railways here mentioned is in existence, but only in contemplation, the former having been authorized to be built by Somerset Township, Belmont County, by an Act of the Legislature, similar to the one now under consideration, passed on the 18th of March, 1880. So that it is quite evident that the legislative intent, as well as that of the trustees of Beaver Township, was to make the proposed road a link in a more extended route or line of railway. The same intent is manifested in the fact that no provision was made for the operating of the proposed road by the township, but power only was given to lease the same on completion, to any person or persons or company which would conform to the terms and conditions which the trustees should prescribe."

The conclusion of that court was, we think, imperative, from the facts as devel-

oped. Beyond that, if we ignore all surrounding circumstances, the fact is that the amount of the aid to be voted was insufficient for the construction and equipment of a road of even short length, and turning to the mere letter of the Statute, we notice this significant fact. While the Act of 1869, by its language, contemplated and required a railroad, and thus a highway from Cincinnati outward into territory subservient to its business interests, the Act in question before us locates neither the road nor its termini. If the letter of the Statute alone be regarded, power is given by this Statute to construct a railroad in Alaska. Neither location nor termini are prescribed, and the general power is given to construct a railroad not exceeding seven miles in length. Can an Act containing such indefinite provisions, with an appropriation of township aid so limited as to foreclose the idea of a constructed and equipped railroad, and whose thought of mingling public aid with private capital is so evidenced, be one which can be sustained, in the face of the inhibition of the Constitution of the State of Ohio? We think not.

The judgment of the Circuit Court must be reversed, and the case remanded with instructions to overrule the demurrer to the answer.

HUGH BUTLER ET AL., *Plffs. in Err.*, *v.* DAVID A. GAGE ET AL., Executors of WILLIAM P. LINN, Deceased, ET AL.

(See S. C. Reporter's ed. 52-61.)

Presumption of signature of judge—petition for writ of error is no part of record upon which to decide whether federal question arose—when record does not present federal question.

1. It will be presumed that a judge who signs an allowance of a writ of error and a citation as presiding judge of the Supreme Court of a State was such presiding judge at the time of signing.
2. The petition for a writ of error forms no part of the record upon which to determine whether a federal question arose and was decided in the state court.
3. Where the Supreme Court of the State went to judgment without any suggestion that a federal question was presented in the case for its determination and no such question was presented in the petition for rehearing, a subsequent motion that oral argument of the case on the merits be permitted, and a denial thereof, did not necessarily involve the decision of the federal question.

[No. 1342.]

Submitted Jan. 5, 1891. Decided Jan. 19, 1891.

IN ERROR to the Supreme Court of the State of Colorado to review a judgment and orders of that court in an action upon a contract tried in the District Court of Lake County, Colorado

On motions to dismiss or affirm. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was an action brought in the name of William P. Linn and Lewis C. Rockwell against Hugh Butler and Charles W. Wright, in the District Court in and for the County of Lake and State of Colorado, upon a contract between Linn and Butler and Wright, subsequently assigned by Linn to Burrell, and by Burrell to Rockwell, as collateral security for money loaned by him to Linn. Linn subsequently died and his executors were substituted.

The defenses raised no federal question. Upon trial had, a verdict was rendered in favor of the plaintiffs and their damages were assessed at the sum of $9,008.83, and a motion for new trial having been overruled, judgment was rendered thereon January 17, 1888, whereupon the case was taken by appeal to the Supreme Court of the State of Colorado. Appellants assigned forty-three errors, but these involved no federal question. September 13, 1889, the supreme court entered an order reciting that "it appearing that this cause comes within the provisions of Rule 51 of this court, it is ordered by the court that this cause be, and is hereby, advanced for hearing, and that the same is hereby assigned to the supreme court commission for consideration and report and for oral argument at such time as said commission shall order." September 27, 1889, it was stipulated and agreed by and between the parties that the cause might be set down for oral argument on Wednesday, the 16th day of October, 1889. The cause was accordingly heard by the supreme court commission, which arrived at a decision and opinion and reported the same to the supreme court. On the 24th of December, 1889, the supreme court entered the following order:

"At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said District Court in and for the County of Lake as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to said district court for such other and further proceedings according to law as shall be necessary to the final execution of the judgment

---

NOTE.—*As to review by United States Supreme Court of territorial decisions; extent and manner of; distinction between an appeal and a writ of error,*—see *note* to Miners Bank of Dubuque v. Iowa, 13: 867.

As to exception, when must be taken, to be available on review, see *note* to Phelps v. Mayer, 14: 643.

As to what particularity in exceptions is necessary in order to a review in appellate court, see *note* to Moore v. Bank of Metropolis. 10: 172.

As to what questions the United States Supreme Court will review on writ of error; bill of exceptions, —see *note* to Parks v. Turner, 13: 883.

The supreme court will not review the discretionary action of the court below. See *note* to Barrow v. Hill, 14: 48.

What is final decree or judgment of state or other court, from which appeal lies. See *note* to Gibbons v. Ogden, 5: 302.

of said district court in the cause, notwithstanding the said appeal.

"It is further considered and adjudged by the court that said appellees do have and recover of and from said appellants their costs in this behalf expended, to be taxed, and that they have execution therefor. And let the opinion of the court filed herein be recorded."

And the opinion of the commission was then given upon the record, with these words attached: "*Per curiam:* For the reasons stated in the foregoing opinion the judgment is affirmed."

On the 7th of January, 1890, appellants filed their petition for a rehearing in the cause, assigning various reasons, but suggesting no federal question, and taking no exception, so far as appears, to the fact that the case had been heard by the commission, which on the 28th of March, the supreme court, upon consideration thereof, denied.

May 16, appellants filed their motion in words and figures as follows: "And now [54] come the said appellants and move the court to grant an oral argument on the merits of this cause and appeal in and before this court, and that in the meantime no mandate, remittitur or process issue herein to affirm or enforce in any way the judgment of the said District Court of Lake County complained of and appealed from,"—which motion was overruled May 23d. Thereupon appellants presented their petition for a writ of error from this court, addressed to "*Hon.* J. C. Helm, Chief Justice of the Supreme Court of the State of Colorado." In this paper it was claimed, after a recital of various steps taken in the case, that the motion and request of appellants that the supreme court should grant an oral argument on the merits of the appeal and of the cause, and the refusal of the court to grant the same and to hear an oral argument, "drew in question the constitutionality of the Statutes of the State of Colorado, entitled 'An Act to Regulate the Practice in the Supreme Court; Appointing Commissioners therefor, Fixing their Salary, and Defining their Duties,' approved March 7, 1887; and a certain other Act entitled 'An Act Providing for a Supreme Court Commission,' approved April 1, 1889,—in that by the said Statutes and the construction placed thereon and the practice adopted thereunder by said supreme court, litigants and suitors in said supreme court were deprived of their right to have their appeals and writs of error and other judicial controversies to be tried before, heard and decided by said supreme court, and because the same are repugnant to and inconsistent with and forbidden by the Fourteenth Amendment to the Constitution of the United States, which provides that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;' and that said decision in this cause in effect sustains the validity of said Statutes so drawn in question."

The writ of error was allowed as follows:

"State of Colorado:

"Desiring to give petitioners an opportunity to test in the Supreme Court of the United States the question presented in the foregoing petition, it is ordered that a writ of error be allowed to said court, and that the same be made a supersedeas, the bond, in the penal sum of sixteen thousand dollars, herewith presented, being approved.

"In testimony whereof witness my hand this 27th day of May, A. D. 1890, the chief justice being absent.

"Chas. D. Hayt,
"Presiding Judge of the Supreme Court of the State of Colorado."

The writ of error having issued and citation having been duly served, signed by and attested in the name of *Judge* Hayt, and the transcript having been filed in this court, the defendants in error moved to dismiss or affirm.

Mr. **L. C. Rockwell,** for defendants in error, for motion:

A decision of the state court which involved no question of federal law is not reviewable here.

Santa Cruz County Suprs. v. *Santa Cruz R. Co.* 111 U. S. 361 (28: 456); *Chouteau* v. *Gibson*, Id. 200 (400).

This court cannot review a state decision that a state law is in conflict with the State Constitution.

Withers v. *Buckley*, 61 U. S. 20 How. 84 (15: 816); *Medberry* v. *Ohio*, 65 U. S. 24 How. 413 (16: 739); *Jackson* v. *Lamphire*, 28 U. S. 3 Pet. 280 (7: 679).

Mr. **Hugh Butler,** for plaintiffs in error, against motion:

It is not necessary to give this court jurisdiction that the federal question now presented should have been a part of the original controversy. It is sufficient if, in the course of the procedure, something was done, or threatened, which destroyed or impaired any right or privilege protected by the Fourteenth Amendment to the Constitution. If the procedure was void because prohibited, and because it amounted to the taking of life or property without "due process of law," this court has jurisdiction to prevent the threatened wrong, and as a means may use a writ of error in one case or a writ of habeas corpus in another.

Re Medley, 134 U. S. 160 (33: 835); *Re Kemmler*, 136 U. S. 436 (34: 519).

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The motion to dismiss is predicated upon two grounds: *First.* Because the writ of error was not allowed, nor the citation signed, by the chief justice of the Supreme Court of the State of Colorado. *Second.* Because no federal question was involved in the case, or appeared or was raised upon the record.

It is essential to the exercise by this court of revisory jurisdiction over the final judgments or decrees of the courts of the States that the writ of error should be allowed either by a justice of this court, or by the proper judge of the state court, after ascertaining by an examination of the record that a ques-

tion cognizable here was made and decided in the state court, and that such allowance was justified. *Gleason* v. *Florida*, 76 U. S. 9 Wall. 779 [19: 730]. Section 999 of the Revised Statutes provides that the citation shall be signed by the chief justice, judge or chancellor of the court rendering the judgment or passing the decree complained of, or by a justice of this court; and it was held in *Bartemeyer* v. *Iowa*, 81 U. S. 14 Wall. 26 [20: 792], that when the Supreme Court of a State is composed of a chief justice and several associates, and the judgment complained of was rendered by such court, the writ could only be allowed by the chief justice of that court or by a justice of this court.

Section 5 of article VI. of the Constitution of the State of Colorado is as follows: "The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum or pronounce a decision." And by section 8 of that article it is provided that: "The judge having the shortest term to serve, not holding his office by appointment or election to fill a vacancy, shall be the chief justice, and shall preside at all terms of the supreme court, and, in case of his absence, the judge having in like manner the next shortest term to serve shall preside in his stead." Gen. Stat. Col. 1883, p. 49.

It appears from the record that the chief justice was absent when this writ was allowed, and it is stated by counsel that *Judge* Hayt, who allowed it, had the next shortest term to serve, as the other associate justice was elected to fill a vacancy. It is certainly to be presumed that *Judge* Hayt was, as he asserted himself to be, the presiding judge of the court in the absence of the chief justice. The first ground urged for the dismissal of the writ of error is therefore untenable.

This brings us to consider whether the record before us so presents a federal question as to justify the maintenance of the writ. And it may be remarked in the outset, that the petition for a writ of error forms no part of the record upon which action here is taken. *Manning* v. *French*, 133 U. S. 186 [33: 582]; *Clark* v. *Pennsylvania*, 128 U. S. 395 [32: 487]; *Warfield* v. *Chaffe*, 91 U. S. 690 [23: 444].

Sections 1 and 2 of article VI. of the Constitution of the State of Colorado read thus:

"Section 1. The judicial power of the State as to matters of law and equity, except as in the Constitution otherwise provided, shall be vested in a supreme court, district courts, county courts, justices of the peace and such other courts as may be provided by law.

"Sec. 2. The supreme court, except as otherwise provided in this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law." Gen. Stat. Col. 1883, p. 48; Laws Col. 1887, p. 483.

In 1887 the Legislature of the State of Colorado passed a Statute authorizing the appointment of three supreme court commissioners for the period of two years, unless sooner relieved or discharged, and upon April 1, 1889, enacted a similar Statute authorizing the appointment of like commissioners for the period of four years. Sections 2 and 3 of the latter Act are as follows:

"Sec. 2. Said commissioners shall be subject to such rules and orders as the supreme court shall from time to time adopt for their government, and for procedure before them; they shall examine and consider together and report upon such cases as shall be referred to them by the court for that purpose, and perform such other services as the court shall require. Their reports shall be in writing and signed by one of their number, and shall show which concur therein and which, if any, dissent; and a dissenting commissioner may likewise make a report. Every report shall contain a concise but comprehensive statement of the facts in the case, the opinion of the commissioner or commissioners submitting the report, and a citation of the authorities relied on in support of the opinion. The court may provide by rule for a hearing of an oral argument by counsel before said commission: *Provided*, That no cause shall be referred to said commissioners in which they, or any of them, are or have been interested as counsel or otherwise.

"Sec. 3. Every opinion shall be promptly delivered to the chief justice, who shall lay the same before the court. The court may approve, or modify, or reject any such opinion. Whenever it shall approve and adopt an opinion as submitted, or as modified, the same as approved and adopted shall be promulgated as the opinion of the court, and shall be filed and reported, and judgment [58] shall be rendered in the same manner and with the same effect and subject to the same orders, motions and petitions for rehearing as in the case of other opinions and judgments of the court; and every such opinion shall show which commissioner prepared the opinion and which concurred, and the approval and adoption, and by the concurrence of which judges; and whenever the court shall reject the opinion of the commissioners in any cause, the opinion of the court shall be prepared and a like proceeding had in all respects as in other causes submitted to the court." Sess. Laws Col. 1889, 444, 445.

Three commissioners were appointed under this Act and are now acting as such commissioners, and it was to them that the consideration of this case on appeal was assigned by the State Supreme Court. In the argument for plaintiffs in error it is asserted that the record involves the inquiry: "Did the Supreme Court of the State of Colorado in this instance, by reason of the State Statute of 1889, deny to the plaintiffs in error any right or privilege secured and protected by the Fourteenth Amendment?"—and that "the right denied in this case was a review by a court, created and existing under the law of the land, and created for the purpose of determining such controversies." And it is contended that, considering the nature of the

right, the Statute and the course pursued under it deprived plaintiffs in error of due process of law and the equal protection of the laws.

The record discloses that, after the cause was assigned to the commission "for consideration and report and for oral argument at such time as said commission shall order," it was stipulated and agreed by the parties that the cause should be set down for oral argument on a certain day. And it is nowhere shown that any objection was made by plaintiffs in error to the commissioners acting, but the cause proceeded to argument, report and judgment, without question as to the jurisdiction.

An application was then made to the supreme court for a rehearing, and a brief filed in support thereof, and the authority of the commission, or of the supreme court in its action upon the commission's report, was not even then impugned. Counsel frankly ad- [59] mits that "up to this time, no attack had been made against the authority of the commission or against the right of the court to accept and adopt the work of the commission;" but, he continues, that after the petition for rehearing in this case was denied, the objection was made in another case that the commission "had no right or power to decide judicial controversies, and that the supreme court had no right or power to base its final judgment on the report or recommendation of the commission." This other case was entitled *Bullock* v. *McGerr*, and will be found reported in 28 Pac. Rep. 980. The question came up on a petition for a rehearing, which among other grounds contained the following: "The counsel for appellants desire to argue the validity of an opinion of the supreme court in the form of an indorsement or ratification of the commission based on an oral argument heard before the commission." The rulings are embodied in the syllabus prepared by the court, as follows:

"1. The constitutionality of the legislative Act providing for a supreme court commission is not necessarily involved upon the petition for a rehearing of a cause which had been referred to the commission in pursuance of said Act.

"2. Courts ordinarily decline to determine the constitutionality of legislative enactments in a case where the record presents some other and clear ground upon which the judgment may rest.

"3. The supreme court alone can promulgate opinions and render judgments, and its duty is not discharged by the adoption *pro forma* of the conclusions of the supreme court commission.

"4. The privilege of being heard orally before the supreme court prior to final judgment is a right which, though subject to reasonable regulation, cannot, under our practice, be denied to any party litigant making seasonable application therefor."

Each of the three judges of the court delivered an opinion and the general subject was largely discussed, and reference made to *State* v. *Noble*, 118 Ind. 350, 4 L. R. A. 351, where, upon an application for a writ of prohibition, the Act of the Legislature of Indiana creating such a commission was held unconstitutional; and to *People* v. *Hayne*, 83 Cal. 111, 7 L. R. A. 348, where, upon *quo warranto*, the Supreme Court of California sustained the validity of the commission; and, in addition to these cases of a direct proceeding against the commissioners as respondents, to *Chicago, K. & W. R. Co.* v. *Abilene T. S. Co.*, 42 Kan. 97, in which the Supreme Court of Kansas, upon a petition for rehearing, refused to consider the question of the constitutionality of a similar Act and denied the rehearing upon the merits. The opinions in *Bullock* v. *McGerr* appear to have been announced May 16, 1890, and on the same day appellants made their motion that the supreme court grant an oral argument on the merits of the cause and that the remittitur be stayed in the meantime, which motion was denied.

We are not informed of the ground upon which this denial was based, but we presume, in the light of *Bullock* v. *McGerr*, that the supreme court considered the application to be heard orally as coming too late; and it is quite clear that the constitutionality of the Act providing for the supreme court commission was not considered to be necessarily involved and was not passed upon. Yet we are asked to retain this cause for the purpose of deciding that question, notwithstanding plaintiffs in error acquiesced in the hearing of the case by the commission, and stipulated as to the time when the argument should take place before that body; participated in that argument; petitioned the supreme court for a rehearing, and did not moot the point now raised until after the final judgment of the supreme court had been pronounced and the petition for rehearing had been overruled. The validity of a statute of, or an authority exercised under, the State of Colorado, on the ground of such statute or authority being repugnant to the Constitution, treaties or laws of the United States, was not drawn in question in the Supreme Court of Colorado, and that court did not decide in favor of its validity. No title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, was specially set up or claimed under such Constitution, [61] treaty, statute, commission or authority, and no decision was rendered against such title, right, privilege or immunity. The Supreme Court of the State confessedly went to judgment without any suggestion that a federal question was presented for its determination, and not even in the petition for rehearing was any such question brought to the attention of the court. And the disposition of the motion that oral argument be permitted after the petition for rehearing was denied, did not, in itself, necessarily involve the decision of a federal question.

We cannot, under such circumstances, reexamine the judgment and orders of that court, and *the writ of error must be dismissed.*

[146] CHARLES E. WHITEHEAD, Trustee, etc., *Appt.*,
v.
E. E. SHATTUCK ET AL.

(See S. C. Reporter's ed. 146-156.)

When suit in equity to recover lands cannot be brought—remedy at law—federal practice—cases distinguished.

1. An owner in fee, as trustee, of lands in Iowa, has a plain, adequate and complete remedy at law, against one in possession claiming title under documents which are fraudulent and void; and he need not resort to a court of equity to establish his right or to put him in possession.
2. Where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law.
3. By law of Congress, suits in equity shall not be sustained, in the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law.
4. *Holland* v. *Challen*, 110 U. S. 15 (28:52), and *Reynolds* v. *Crawfordsville First Nat. Bank*, 112 U.S. 405 (28:733), distinguished.

[No. 128.]

Argued and Submitted Jan. 6, 1891. Decided Jan. 26, 1891.

APPEAL from a judgment of the Circuit Court of the United States for the Northern District of Iowa, dismissing on demurrer a suit in equity to quiet the title of plaintiff, as trustee, to land in the County of Humboldt, Iowa. *Affirmed.*

Statement by *Mr. Justice* **Field:**

[147] This is a suit in equity to quiet the title of the plaintiff, as trustee of the Des Moines and Fort Dodge Railroad Company, a corporation of Iowa, to certain real property in the County of Humboldt in that State, of the value of five thousand dollars.

The bill alleges that the plaintiff is the owner in fee of the premises, but holds the title as trustee aforesaid; that notwithstanding his ownership of the property and his right to its immediate possession and enjoyment, the defendants claim title to it and are in its possession, holding the same openly and adversely to him; that their claim of title and right of possession are founded upon a pre-emption and homestead claim, and entry thereunder, made in the United States land office, a certificate of such entry given by that office, and a patent issued by the Land Department of the United States of the land as subject to entry; and also upon a subsequent deed of the Iowa Homestead Company, the grantee of the Dubuque and Sioux City Railroad Company, which latter company claimed title under the Act of Congress of May, 1856, making a grant of land to [148] Iowa to aid in the construction of certain railroads in that State, and a certificate of the proper officer of the Land Department of the United States setting apart the lands to that company as a portion of the grant.

The bill charges that the claim and pretended title of the defendants are without foundation in law or equity; that they are made in fraud of the rights of the plaintiff; that the pre-emption and homestead claim, and entry thereunder, and the certificate of entry of the land office, and the patent of the United States, were fraudulently made, giving as a reason therefor that the land thus entered and patented was not at the time subject to entry and patent, and that the deed of the Iowa Homestead Company conveyed no title, for the reason alleged that the land was no part of the grant to the State; and that these evidences of title were procured without legal right and in violation of law, but are clouds upon the plaintiff's title, and interfere with and prevent the sale of his property. He therefore prays that the certificate of entry, and the patent of the land, and the certificate of the Land Department that the land was a part of the grant to the State of Iowa, and the deed of the Homestead Company, may be annulled and canceled, and the cloud upon his title caused thereby removed, and the title to the premises be established and quieted in him.

To the bill the defendants demurred, on the ground, among others, that it appeared from it that the plaintiff had a plain, speedy and adequate remedy at law, by ejectment, to recover the real property described, and that it showed no ground for equitable relief. The demurrer was sustained by the court below, and a decree entered dismissing the bill. From this decree the plaintiff has appealed to this court.

Messrs. **C. E. Whitehead** and *J. F. Duncombe*, for appellant:

Complainant out of possession may under the Iowa Statute maintain this action to quiet title against defendant in possession, and may include a prayer to recover possession.

Lees v. *Wetmore*, 58 Iowa, 170; *Wells* v. *Miner*, 25 Fed. Rep. 533; *Chapman* v. *Brewer*, 114 U. S. 170 (29: 87); *Clark* v. *Smith*, 38 U. S. 13 Pet. 195-203 (10: 123-127); *Re Broderick's Will*, 88 U. S. 21 Wall. 503, 519, 520 (22: 599, 605); *Van Norden* v. *Morton*, 99 U. S. 378, 380 (25: 453, 454); *Cummings* v. *Merchants Nat. Bank*, 101 U. S. 153, 157 (25: 903, 904); *Holland* v. *Challen*, 110 U. S. 15 (28: 52); *Reynolds* v. *Crawfordsville First Nat. Bank*, 112 U. S. 405 (28: 733).

Mr. **Chas. A. Clark**, for appellees:

The demurrer to appellant's bill was rightfully sustained by the court below, because appellant does not plead facts showing his title.

Story, Eq. Pl. §§ 207, 243, 250, 260, 261, 318, 508, 730.

The appellant by his bill shows that he is a trustee, and makes no showing that his trust is of such nature as to enable him to proceed without the presence of his *cestui que trust.*

Carey v. *Brown*, 92 U. S. 172 (23: 469); 2 Perry, Trusts, (2d ed.) §§ 298, 299, 520, 521;

NOTE.—*As to cancellation of a deed or a contract, in equity, for fraud, concealment or misrepresentation, see note* to Neblett v. Macfarland, 23: 471.

As to deed avoided in equity, by fraud, insanity, drunkenness, duress, undue influence, fraud on marriage; from ward to guardian; from heir to executor; cestui que trust to trustee; imbecility,—see note to Harding v. Handy, 6: 429.

Pierson v. *Armstrong*, 1 Iowa, 282; *Holland* v. *Baker*, 3 Hare, 72.

A statute of a Territory having the effect to annul the right of trial by jury in the federal courts is void.

Whitehead v. *Entwhistle*, 27 Fed. Rep. 781; *Webster* v. *Reid*, 52 U. S. 11 How. 460 (13: 770).

The right of trial by jury, guaranteed by the State Constitution, cannot be abrogated or encroached upon by legislation.

Baurose v. *State*, 1 Iowa, 374; *Santo* v. *State*, 2 Iowa, 165, 221; *State* v. *Kaufman*, 51 Iowa, 578; *McMartin* v. *Bingham*, 27 Iowa, 236; *Marshalltown* v. *Forney*, 61 Iowa, 584; *Henderson* v. *Rainbow*, 76 Iowa, 320; *Galliers* v. *Peppers*, 76 Iowa, 522; *Keokuk & N. W. R. Co.* v. *Donnell*, 77 Iowa, 225; *Eshelman* v. *Chicago, R. I. & P. R. Co.* 67 Iowa, 296; *Kelsh* v. *Dyersville*, 68 Iowa, 137; *Blair T. L. & L. Co.* v. *Walker*, 50 Iowa, 376; *Killian* v. *Ebbinghaus*, 110 U. S. 568 (28: 246); *Hipp* v. *Babin*, 60 U. S. 19 How. 271 (15: 633); *Parker* v. *Winnipiseogee Lake C. & W. Mfg. Co.* 67 U. S. 2 Black, 545 (17: 333); *Grand Chute* v. *Winegar*, 82 U. S. 15 Wall. 373 (21: 174); *Galt* v. *Galloway*, 29 U. S. 4 Pet. 332 (7: 876).

[150] *Mr. Justice* **Field** delivered the opinion of the court:

The facts set forth in the bill of the plaintiff clearly show that he has a plain, adequate and complete remedy at law for the injuries of which he complains. He alleges that he is the owner in fee, as trustee, of certain described lands in Iowa, and his injuries consist in this: that the defendants are in the possession and enjoyment of the property, claiming title under certain documents purporting to transfer the same, which are fraudulent and void. If the owner in fee of the premises he can establish that fact in an action at law; and if the evidences of the defendants' asserted title are fraudulent and void, that fact he can also show. There is no occasion for resort to a court of equity, either to establish his right to the land or to put him in possession thereof.

The sixteenth section of the Judiciary Act of 1789 (1 Stat. 82) declared "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law," and this provision has been carried into the Revised Statutes, in section 723. The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since [151] their adoption in the courts of England. The term "speedy" as used in the demurrer is embraced by the term "complete" in the Statute.

The Seventh Amendment of the Constitution of the United States declares that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." That provision would be defeated if an action at law could be tried by a court of equity, as in the latter court a jury can only be summoned at its discretion, to ascertain special facts for its enlightenment. *Lewis* v. *Cocks*, 90 U. S. 23 Wall. 466, 470 [23: 70, 71]; *Killian* v. *Ebbinghaus*, 110 U. S. 568, 573 [28: 246, 248]; *Buzard* v. *Houston*, 119 U. S. 347, 351 [30: 451, 452]. And so it has been held by this court "that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." *Hipp* v. *Babin*, 60 U. S. 19 How. 271, 278 [15: 633, 635].

It would be difficult, and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that where an action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury.

What we have thus said will be sufficient to dispose of this case, but some consideration is due to the arguments of counsel founded upon the statutes of Iowa, and the principle supposed to have been established by this court in the decision of the case of *Holland* v. *Challen*, 110 U. S. 15 [28: 52], upon which the plaintiff relies.

The Code of Iowa enacts that "an action [1 to determine and quiet the title to real property may be brought by anyone having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession," implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that State. *Lewis* v. *Soule*, 52 Iowa, 11; *Lees* v. *Wetmore*, 58 Iowa, 170. If that be its meaning, an action like the present can be maintained in the courts of that State, where equitable and legal remedies are enforced by the same system of procedure, and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts, but the law of that State cannot control the proceedings in the federal courts, so as to do away with the force of the law of Congress declaring that "suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law," or the constitutional right of parties in actions at law to a trial by a jury.

The State, it is true, may create new rights and prescribe the remedies for enforcing them, and if those remedies are substantially consistent with the ordinary modes of pro-

ceeding in equity, there is no reason why they should not be enforced in the courts of the United States, and such we understand to be the effect of the decision in *Clark* v. *Smith*, 38 U. S. 13 Pet. 195 [10: 123], and *Re Broderick's Will*, 88 U. S. 12 Wall. 503 [22: 599].

In *Holland* v. *Challen*, 110 U. S. 15 [28: 52], a bill was filed to quiet title under a Statute of Nebraska, which provided that an action might be brought by any person, in possession or not, claiming title to real estate, against any person who claimed an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title. The bill alleged that the plaintiff was the owner in fee simple, and entitled to the possession, of the real property described. It then set forth the origin of his title, and alleged that the defendant claimed an adverse estate or interest in the premises, and that this claim so affected his title as to render a sale or other disposition of the property impossible, and disturbed him in his right of possession. He therefore prayed that the defendant might be required to show the nature of her adverse estate or interest; that the title of the plaintiff might be adjudged valid and quieted as against her and parties claiming under her, and his right of possession assured; and that the defendant might be decreed to have no estate in the premises and be enjoined from in any manner injuring or hindering the plaintiff in his title and possession. The defendant demurred to the bill, on the ground that the plaintiff had not made or stated such a case as entitled him to the discovery or relief prayed. The court below sustained the demurrer, dismissed the bill, and the case was brought to this court, where the decree was reversed and the bill sustained.

It was urged that the title of the plaintiff to the property had not been by prior proceedings judicially adjudged to be valid, and that he was not in possession of the property, the contention of the defendant being that, when either of these conditions existed, a court of equity would not interpose its authority to remove a cloud upon the title of the plaintiff and determine his right to the possession of the property. The court replied that "the Statute of Nebraska enlarges the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property. It authorizes the institution of legal proceedings not merely in cases where a bill of peace would lie, that is, to establish the title of the plaintiff against numerous parties insisting upon the same right, or to obtain repose against repeated litigation of an unsuccessful claim by the same party, but also to prevent future litigation respecting the property by removing existing causes of controversy as to its title, and so embraces cases where a bill *quia timet* to remove a cloud upon the title would lie."

The court then explained that a bill of peace would lie only where the plaintiff was in possession and his right had been successfully maintained, and that the equity of the plaintiff in such cases arose from the protracted litigation for the possession of the property which the action of ejectment at common law permitted; and that to entitle [154 the plaintiff to relief in such cases there must be a concurrence of three particulars—the possession of the property by the plaintiff, the disturbance of his possession by repeated actions at law and the establishment of his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was also observed that a change in the form of the action for the recovery of real property had taken place from that which formerly existed, and that the judgment rendered in such cases in some States became a bar to future litigation upon the subjects determined; and that in such cases there could be no necessity of repeated adjudications at law upon the right of the plaintiff, as a preliminary to his invoking the jurisdiction of a court of equity to quiet his possession against an asserted claim to the property. The court also explained when a bill *quia timet* would lie, and in what respect such a bill differed from a bill of peace. It was brought, it said, not so much to put an end to vexatious litigation respecting the property, as to prevent future litigation, by removing existing causes of controversy as to its title. It was designed to meet anticipated wrongs or mischiefs, the jurisdiction of the court being invoked because the party feared future injury to his rights and interests. To maintain a suit of this character, it was said, it was also generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long-continued possession.

The Statute of Nebraska authorized a suit in either of these classes of cases, without any reference to any previous judicial determination of the validity of the plaintiff's right, and without any reference to his possession; and the court pointed out the many advantages which would arise by allowing courts to determine controversies as to the title to property, even when neither party was in possession, referring particularly to what is a matter of every-day observation, that many lots of land in our cities remain unimproved because of conflicting claims to them, the rightful owner hesitating to place [155 valuable improvements upon them, and others being unwilling to purchase them, much less to erect buildings upon them, with the certainty of litigation and possible loss of the whole; and observing that what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country which are unoccupied and uncultivated, because of the unwillingness of persons to take possession of such land, and improve it in the face of a disputed claim to its ownership. An action for ejectment, said the court, would not lie where there is no occupant; and if no relief can be had in equity because the party claiming ownership is not in possession, the land must

continue in its unimproved condition. It was therefore manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it might be subjected to use and improvement. It was, said the court, to meet cases of this character, that statutes like the one of Nebraska had been passed by several States, and there was no good reason why the right to relief against an admitted obstruction to the cultivation, use and improvement of lands thus situated in the States should not be enforced by the federal courts when the controversy to which it might give rise was between citizens of different States. All that was thus said was applied simply to the case presented where neither party was in possession of the property. No word was expressed intimating that suits of the kind could be maintained in the courts of the United States where the plaintiff had a plain, adequate and complete remedy at law; and such inference was specially guarded against. Said the court: "No adequate relief to the owners of real property against the adverse claims of parties not in possession can be given by a court of law. If the holders of such claims do not seek to enforce them, the party in possession, or entitled to possession—the actual owner of the fee—is helpless in the matter, unless he can resort to a court of equity. It does not follow that by allowing, in the federal courts, a suit for relief under the Statute of Nebraska, controversies properly cognizable in a court of law will be drawn into a court of equity. There [156] can be no controversy at law respecting the title to or right of possession of real property, when neither of the parties is in possession. An action at law, whether in the ancient form of ejectment or in the form now commonly used, will lie only against a party in possession. Should suit be brought in the federal court, under the Nebraska Statute, against a party in possession, there would be force in the objection that a legal controversy was withdrawn from a court of law; but that is not this case, nor is it of such cases we are speaking." It is thus seen that the very case that is now before us is excepted from the operation of the ruling in *Holland* v. *Challen*, or at least was designedly left open for consideration whenever similar relief was sought where the defendant was in possession of the property.

Nor can the case of *Reynolds* v. *Crawfordsville First Nat. Bank*, 112 U. S. 405 [28: 733], be deemed to sustain the plaintiff's contention. It was there only held that the legislation of the State may be looked to in order to ascertain what constitutes a cloud upon a title, and that such cloud could be removed by a court of the United States sitting in equity in a suit between proper parties. The question did not arise as to whether the plaintiff had a plain, adequate and complete remedy at law, but whether a suit to remove the cloud mentioned would lie in a federal court. Nothing was intended at variance with the law of Congress excluding the jurisdiction of a court of equity where there is such a full remedy at law, or in conflict with the constitutional guaranty of the right of either party to a trial by jury in such cases. In *Frost* v. *Spitley*, 121 U. S. 552, 557 [30: 1010, 1012], subsequently decided, the court referred to *Holland* v. *Challen*, as authorizing a bill in equity to quiet title in the Circuit Court of the United States for the District of Nebraska by a person not in possession "if the controversy is one in which a court of equity alone can afford the relief prayed for," recognizing that the decision in that case went only to that extent.

Judgment affirmed.

JAMES M. COBURN ET AL., *Appts.*,
v.
CEDAR VALLEY LAND AND CATTLE COMPANY, LIMITED.

JAMES M. COBURN ET AL., *Appts.*,
v.
CEDAR VALLEY LAND AND CATTLE COMPANY, LIMITED, ET AL.

JAMES M. COBURN ET AL., *Appts.*,
v.
CEDAR VALLEY LAND AND CATTLE COMPANY, LIMITED.

JAMES M. COBURN ET AL., *Appts.*,
v.
CEDAR VALLEY LAND AND CATTLE COMPANY, LIMITED.

(See S. C. Reporter's ed. 196-223.)

Compromise—settlement of pending suit—decree on petition.

1. Upon the facts of this case, the compromise mentioned in the opinion covered all the matters in controversy in the case, and was so understood by the parties, and they are bound by it.
2. Although a settlement of a pending suit should usually be brought before the court by a cross-bill or supplemental answer, yet a decree establishing such a settlement may be rendered upon petition only, where no objection was raised to this course until after the decree was rendered, and where both parties appeared in the matter of the petition and contested as to the extent of the settlement.

[Nos. 139, 140, 141, 142.]

Argued and Submitted Jan. 9, 1891. Decided Jan. 26, 1891.

APPEALS from decrees of the Circuit Court of the United States for the Western District of Missouri, establishing a settlement between the parties. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

These cases, as stated in substance by counsel, may be described as follows:

(1.) On October 10, 1885, the Cedar Valley Land and Cattle Company, Limited, an English corporation, filed its bill against William N. Ewing and James M. Coburn in the Circuit Court of the United States for the Western District of Missouri, alleging that Stewart and others, having ascertained that the defendants were willing, in conjunction

with them, to subscribe to the capital stock of the corporation when formed, agreed among themselves to become the promoters of a corporation for the purpose of purchasing a ranch with the cattle and horses thereon, then the property of one Munson, and situated in the State of Texas; that the name of the corporation was to be the Cedar Valley Land and Cattle Company, Limited, and that plaintiff is the identical corporation in contemplation; that the corporation was formed January 7, 1885, and in the preceding December Stewart, Burnett, Campbell and Fisher, styling themselves plaintiff's directors and acting as plaintiff's promoters, believing that defendants were willing to undertake and assume the trust in behalf of the proposed corporation, directed and requested defendants to buy the ranch, land and cattle from Munson for plaintiff at the very lowest terms, and defendants accepted the trust; that on December 31, 1884, defendants, in the name of Ewing, in pursuance thereof, concluded negotiations with Munson for the ranch, and purchased it for plaintiff, and Ewing entered into a written contract with Munson, which is set out at length in the bill; that this contract was made for and in behalf of plaintiff, in contemplation of corporate existence, as was the employment of Ewing by the promoters and the contract of purchase, and with the intention that the contract should be adopted by the corporation when formed and inure to its benefit; that said contract was so adopted and the corporation proceeded to carry the same out, and complied with all the terms and conditions of the contract, including the payment of the sums of money therein provided, being $100,000 remitted December 31, 1884, $140,000 May 5, 1885, and $180,000 June 18, 1885, which moneys were intrusted to the defendants to make such payments; and that Ewing, on the 31st of December, 1884, made a declaration of trust that the $100,000 to be paid on that day was the property of the plaintiff. Plaintiff further averred that in August, 1885, it learned that Coburn and Ewing had secretly agreed with Munson for a commission for selling said property, and had received about $40,000 from him on that account, which was retained out of the moneys remitted, and that defendants agreed to pay Munson for some of his cattle about $18,000 more than he had at first been willing to sell for; and further, that defendants, out of the cash sent them by the Company with which to pay Munson, had retained the sum of $60,000, and in lieu thereof had conveyed to him a lot and building in Kansas City, belonging to them, worth not more than $45,000. The bill prayed for a decree for such amount as defendants might be found to have received, upon an accounting, etc.

The defendants answered, denying that they were promoters of said corporation, and alleging that all their agreements and arrangements as to the character in which they should act in the purchase of said ranch property were made with Burnett, one of the persons named as a promoter and director in the bill, and that Burnett knew that the defendants would be paid a commission by Munson, and that the defendants were openly engaged in the business of selling such property for a compensation, and that the services rendered by defendants involved much labor and were reasonably worth a larger amount than was received. The answer also alleged that plaintiff acquired said ranch for $100,000 less than its actual market value; and that the only connection which defendants had with said corporation was that after it had been organized, Ewing subscribed to its capital stock, pursuant to a contract by which he was appointed its manager for the term of five years.

Exceptions were filed to the sufficiency of this answer, which were referred to a special master for examination and report. This report was made and the exception set for hearing. The appeal in this case is No. 139.

(2.) On December 8, 1885, Coburn and Ewing filed a cross-bill against the Cattle Company, by leave, which alleged that they for a number of years had been partners in the business of selling property as brokers [196 and for a commission, and that, at all the times mentioned in the plaintiff's bill, they had the ranch in their charge for the purpose of selling the same under an agreement for a reasonable compensation to be paid them by Munson; that Burnett, knowing this fact, made an agreement with them to procure a purchaser for said property if they would share their commission with him; that afterwards they were directed by Burnett to buy the property upon terms and conditions and at specified prices known to him; that they entered into the contract with Munson pursuant to directions from Burnett, and expended a large amount of time and labor in the transaction, a reasonable compensation for which was alleged to be $50,000; and that some months afterwards, the corporation, having been organized in the meantime, entered into an agreement with Coburn and Ewing, that, if they would subscribe $100,000 to its capital stock, it would appoint Ewing its manager for the period of five years at a stipulated salary, which proposition was accepted, the sum of $50,000 paid on account of such subscription, and the appointment accordingly made. The cross-bill further alleged that said corporation had attempted to annul the contract so made with Ewing, and without offering to cancel said subscription or to return any part of the money paid on account thereof, or tendering or offering to pay the reasonable and expected profit arising from said contract, had sought to sequester said stock and had refused to permit its transfer on its books; and that the market value of said stock was $125,000, and the reasonable and expected profit arising out of said contract was $20,000.

The cross-bill prayed for an answer to certain separate interrogatories directed to matters peculiarly within the knowledge of the corporation, and that, upon it appearing to the court that Coburn and Ewing were entitled to be paid a reasonable compensation, and that it was the duty of the corporation to pay the same, the court might decree it to Coburn and Ewing, and that the corporation might be required to pay them the value

of their stock, less any sum that might be unpaid thereon, and to pay to Ewing the [200] sum of $20,000 on account of his contemplated profit out of the contract appointing him manager of the corporation, and also for general relief. To this cross-bill the Cattle Company filed a demurrer. The appeal in this case is No. 142.

(3.) On October 6, 1885, Coburn and Ewing filed their bill against the Cattle Company and George D. Fisher in the Circuit Court of Jackson County, Missouri, which alleged that, in March, 1885, Ewing proposed to the defendant Company, on behalf and in the name of Coburn and Ewing, to subscribe for two thousand shares of its capital stock, of the par value of $50 each, upon the condition that Ewing should be appointed manager of the Company for the period of five years; that this proposition was accepted and Ewing appointed accordingly by the directors of the corporation, and thereupon Coburn and Ewing subscribed for the two thousand shares and paid $50,000 in full of all assessments or calls which had been made on said stock, and certificates had been issued to them accordingly; that Ewing entered upon the duty of manager and had been continuously employed therein ever since; and that on September 7, 1887, the corporation attempted to cancel and terminate the appointment of Ewing as such manager by written communication, setting forth that "in consequence of the facts which have come to the knowledge of the board of directors connected with your purchase from Mr. Munson," they had decided to annul his appointment, and that Fisher was authorized to take charge of the Company's property, and requested the delivery of the same to him accordingly. The bill also alleged that there were peculiar reasons of fitness, etc., for the employment of Ewing, and that Coburn and Ewing would not have subscribed or taken any shares in the capital stock but for the contract to appoint Ewing manager; that Ewing had faithfully performed all his duties and had at no time given the Company any just cause for terminating his appointment; and that the contract was of great value to Ewing, and would yield him a sum aggregating $20,500 for the unexpired portion thereof. And the bill further alleged that Fisher was undertaking to prevent Ewing from performing his functions as manager, and to take out of [201] his possession all property in his hands as such, without offering to pay or refund the value of the stock to Coburn and Ewing, or the reasonable damages accruing to Ewing by reason of the refusal of the Company to further perform its contract with him, and without releasing or indemnifying him for certain liabilities he had incurred, and for which he was personally liable, on account of the Company, to all of which compensation, reimbursement and indemnity Coburn and Ewing alleged themselves entitled before Ewing could be discharged from said appointment; and an injunction was prayed accordingly.

This cause was removed to the United States Circuit Court for the Western District of Missouri, and the corporation answered, alleging that no such contract was made for the appointment of Ewing, but that the subscription of Coburn and Ewing to the capital stock was unconditional; and that Ewing was appointed as manager, but as an entirely separate and distinct transaction. It was admitted that said appointment was canceled and terminated by the notice mentioned in the bill, and the grounds for such action were set forth as resting practically on the same facts alleged in the bill of the Company in No. 139. The appeal in this case is No. 140.

(4.) On November 23, 1885, the Cattle Company filed a cross-bill setting forth the alleged employment of Coburn and Ewing on behalf of the intended corporation; the making of the contract with Munson; that Coburn and Ewing had received a commission from Munson secretly; the transactions as to the property in Kansas City, and the alleged overpayment in the purchase of cattle; the cancellation of Ewing's appointment by reason of the premises; and alleging that Ewing had done acts in hostility to the interests of the corporation, which would be imperiled if he were allowed to manage the same. An injunction was prayed restraining Ewing from acting as such manager and in anywise interfering with the property of said corporation.

Coburn and Ewing answered, averring substantially the same facts disclosed in their answer in No. 139, their cross-bill in No. 142 and their original bill in No. 140. The application of Coburn and Ewing and of the Cattle Company for temporary injunctions [2 came on for hearing in December, 1885, and the circuit court made an order granting the temporary injunction prayed for in the cross-bill of the Cattle Company. The appeal in this case is No. 141.

The record in No. 141 discloses that upon the cross-bill there was filed an affidavit and exhibits, which showed that a suit had been commenced by Coburn and Ewing against the Cattle Company in a state court of Texas and an injunction obtained, which, upon the removal of the cause to the Circuit Court of the United States for the Northern District of Texas, was dissolved by *Judge* McCormick, upon the ground that where it appeared that plaintiffs had been employed to purchase a ranch and cattle, and had secretly received from the seller a commission, and where one of them had afterwards obtained employment from the Company as the manager of the ranch and herd, without disclosing the facts, the Company had good cause for removing him from a position obtained under such circumstances. The opinion is reported in 25 Fed. Rep. 791.

June 19, 1886, the Cattle Company filed in each of said causes the following "petition for a decree:"

"Now comes The Cedar Valley Land and Cattle Company, Limited, a party to the above-mentioned suits, and petitions the court to enter an order or decree in each of said cases showing that the matters in controversy therein have all been settled and compromised by the parties and are decreed and adjudged to be finally settled, and ordering that all the said cases be dismissed, the

plaintiff in each to pay costs therein, and that the sureties on the injunction bond given by this petitioner be discharged.

"And in support of this application, the petitioner files herewith true copies of the written correspondence between the parties, embodying their agreement of compromise, and on the hearing of this petition will produce the originals thereof; also affidavit of George Dixon Fisher."

The correspondence was as set forth in the margin.*

[3] The affidavits of Messrs. Fisher, McCrary and Field were also filed on behalf of appellees.

[4] Fisher stated that about the 29th of April, 1886, he called upon Coburn and submitted [5] to him the form of a bond to be given by Coburn and Ewing in pursuance of the terms of the compromise, to bind said firm not to [6] buy up or otherwise molest any of the range privileges of the Company. The form of the bond had been changed by striking out the [7] words "as part and parcel of the" in the second line, and inserting in place thereof "in accordance with the terms of our letter of [8] date February 27, 1886, accepting terms of compromise," and Coburn added the follow- [9] ing words: "of all pending litigation." The first sentence of the proposed bond was therefore amended so as to read as follows: "That [0] for a good and valuable consideration and in accordance with the terms of our letter of [1] date February 27, 1886, accepting terms of compromise of all pending litigation between us and the Cedar Valley Land and Cattle Company, Limited, etc." Affiant added that he was present as a member of the board of [212] directors of the Cattle Company when the proposition of compromise was agreed upon, [213] and that it was intended that the same should be a full and final settlement of all pending litigation between the parties. The original paper referred to was attached.

Mr. McCrary testified that he had principal charge on behalf of the Company of the negotiations for compromise and settlement between the parties; that the Company and its counsel throughout the negotiations insisted that any settlement made should end the litigation, and the final proposition made by the Company February 11 and 12 was not intended to be any departure from this condition, but on the contrary was submitted by this affiant as a proposition "to end the litigation," as appears by the letter transmitting the same; that neither he nor the Company ever for a moment intended to settle the claims of the Company against Coburn and Ewing, leaving their claims against it to be further litigated, and if Coburn and Ewing or their counsel had such an intention, it was unknown to this affiant at the time the settlement was entered into; that as soon as affiant heard an intimation that it might be claimed that the settlement did not cover all the matters in litigation, he wrote Coburn and Ewing the letter of February 27, 1886, which was written the same day the acceptance of the proposition of compromise was received, and before any steps were taken on behalf of the Company by affiant to carry the same out;

---

*"Received November 12, 1885.

"Karnes and Waters will recommend any one of the following compromises:

"1. C. & E. to be paid back the money for their stock, say $50,000.

"C. & E. to pay back the sum of $40,000.

"The Company to enter its appearance in a suit to be brought by C. & E. to determine the value of their services and commission in purchase of property, leaving out all transactions between C. & E. and W. B. M.

"2. The Company to allow C. & E. $25,000 as their commissions for the purchase of the ranch, C. & E. to pay balance of $40,000, Company to pay back amount of stock, each party to pay costs made by themselves.

"3. Arbitrate by three persons, one selected by each, they to choose a third, what their services shall be, and the Company then to pay the amount set, C. & E. to pay $40,000 & Company to pay amount of stock.

"Either proposition to be finality as to all the matters embraced in the bill filed by the Company vs. C. & E."

Response to the proposition of Waters and Karnes, Attorneys for Coburn & Ewing.

"Adams and Field and Geo. W. McCrary will recommend to their client, the Cedar Valley Land & Cattle Company, a settlement with Coburn and Ewing as follows:

"1. C. & E. to be allowed for their stock what they have paid on it.

"2. C. & E. to pay back to the Company the sum of $40,000.

"3. Ewing to surrender management.

"4. This settlement to be a full and final adjustment of all the controversies between the parties and of all claims of either party against the other.

"5. No delay of legal proceedings in consequence of these negotiations, unless by an agreement the controversies are ended.

"This proposition involves the surrender of the Company's claim for the profit on the sale of the Delaware Street property, to which we think it entitled, and which will, we suppose, amount to about the sum of $15,000, as well as other claims set forth in its bill.

"And it involves also the allowance for the stock of C. & E. of about $10,000 more than its present value.

"These are, therefore, the most favorable terms we can recommend, and under no circumstances can we advise the payment of commissions to C. & E. or any waiver of the Company's right to defend against any claim that they may make on this account."

From appellants' to appellees' counsel, December 28, 1885.

"In the matter of controversy between the Cedar Valley Land and Cattle Company and Mess. Coburn & Ewing it must have been observed that I have not seemed quite in accord with those associated with me. I have always felt inclined to some amicable adjustment, and regretted when I was directed to terminate rather summarily the negotiations to that end undertaken a few weeks ago. I have now taken the liberty of addressing you this note entirely upon my own responsibility, and I am induced to do so by a statement made to me by Mr. Gage, a mutual friend of both parties, to the effect that he understood Mr. Fisher that the terms proposed by you in our former negotiation were still open for acceptance. If such be the case I say frankly to you that in my judgment the terms then proposed contain substantially the correct basis of settlement, and I would like again to move in the direction of ending all this interminable litigation. I do not wish to trespass on your valuable time, and hence I have not called to present these views in person, but if this letter receives a favorable response I will see my clients and at some time when agreeable to you will call at your office to canvass the matter more in detail. If it is thought best by you not to negotiate further I would be glad that no mention be made of this letter."

From appellees' to appellants' counsel, December 28, 1885.

"Yours of this date received. Mr. Fisher is out of town and will not return until the last of the

that if affiant had then been notified that Coburn and Ewing would insist that only one side of the controversy was settled, he would have tendered back the stock certificate and declined to go on with the compromise; and that receiving soon after the paper, filed with Mr. Fisher's affidavit, in which Coburn described the proposition accepted as one to settle "all pending litigation," affiant felt free to go on and perfect the compromise, believing that if Coburn and Ewing intended to attempt to reserve any right of action against the Company, it must be on some cause of action not involved in the present litigation.

Mr. Field said that he was one of the attorneys of the Cattle Company, and on the 27th of February, 1886, presented to Mr. Karnes a paper prepared after consultation with his associate counsel, which was de-
[214] stroyed or misplaced by affiant after Mr. Karnes declined to sign the same; that the principal purpose in presenting such writing was to obtain the speedy and formal discharge of the sureties on the injunction bond, which purpose was explained to Karnes, though such paper did contain stipulations as to dismissing the bills and cross-bills at the costs of each party, respectively, all of which counsel for the Cattle Company understood was already included in the settlement; and that when such paper was presented to Mr. Karnes, he replied that Mr. Coburn had gone to St. Louis, and that he would make no other agreement of settlement for Coburn and Ewing, but he assured affiant that the sureties on the injunction bond were not to be harmed or disturbed, and affiant dropped the matter and did not further urge Mr. Karnes' signature to such writing.

On behalf of appellants the affidavits of Karnes and Coburn were filed. Mr. Karnes stated that on the 27th of February, 1886, Mr. Field brought to his office a statement to the effect that the settlement of that day was to be in full of all claims or demands between the parties, and he distinctly told Mr. Field that such paper would not be signed, but that Coburn and Ewing had settled their matters with the Cattle Company on the propositions of February 11 and 12, and the unconditional acceptance of these propositions by Coburn and Ewing, and that this settlement would not be supplemented by any further agreement. He further said the letter of acceptance had been prepared with the understanding that the terms of the compromise would be accepted only just in the way they were proposed and to cover nothing more; and that every letter and paper since, so far as his knowledge extended, had been prepared with the understanding that the settlement of February 27 spoke for itself, and that nothing was to be added thereto or subtracted therefrom.

Coburn testified that when the propositions of February 11 and 12 were considered, all previous propositions had been rejected; that the compromise proposed by the Company would not have been accepted had it not been supposed that it was left open to Coburn and Ewing to assert any claim they had for serv-

---

week. I think, however, he is still disposed to settle, and if you can bring your clients to agree to the terms proposed by us let me know and as soon as he returns I will see him and advise you.

"P. S.—I will not mention the matter to anyone until I hear from you further."

From appellants' to appellees' counsel, December 28, 1885.

"Upon the receipt of your communication of today I at once sought an interview with my clients. Maj. Ewing is out of the city, and I only saw Mr. Coburn, who thinks Maj. Ewing will agree to any arrangement that he may make. He has much to say of the Company's injustice to them in seeking to appropriate without compensation the result of their labor and skill in the purchase of this property. He contends that Munson was taken at a time when for several reasons he was very anxious to sell, and that they drove an unusually good bargain with him. Of course, I have sought to impress upon him that the case must be tried squarely upon the law. I have brought myself to believe that there is not much probability of your recovering on account of the house and the bulls, but as to the commission of $40,000 I have frankly said that I believe the chances were against my clients. This amount represents the whole sum your Company has lost, while it has received the benefit of valuable services at no expense whatever. Any settlement made must involve an entire withdrawal of the interests of Coburn and Ewing. They insist that their stock is worth a premium, while, on the other hand, Mr. Fisher claims that it has depreciated. I am aware that you have the impression that Burnett was not connected with this sale, but in this it is more than probable that you are in error, and Coburn and Ewing have in their possession the proportional part realized coming to Burnett, amounting to $16,800. All these phases of the case I have gone over carefully with Mr. Coburn, and he has become willing to settle in a way approximately as follows:

"(1.) That the stock of Coburn and Ewing be taken at $50,000.

"(2.) That Coburn and Ewing pay back to the Company the $40,000 received from Munson.

"(3.) That the Company, with American securities, indemnify C. & E. against any claim of the representatives of Burnett as to the $16,800.

"(4.) That all suits be dismissed, each party paying his own costs, all claims for damages or compensation be waived, and full receipts passed.

"(5.) That the salary of Ewing up to the time of his discharge be paid to him, amounting to about one month's pay, and that there be paid a few small items of expenses, amounting in all to a very small sum. As I understand, this is substantially your proposition to us. In a conversation with you I think you stated that you would favor the indemnity for the $16,800. I believe there is a controversy between Mr. Ewing and Mr. Fisher as to whether the Company owes Ewing about a month's balance on salary. This, however, of course, can be settled by the books. If I have not made my proposition clear I will be glad to state it more fully, and upon Mr. Fisher's return I much hope a satisfactory adjustment can be made."

From appellees' to appellants' counsel, January 5, 1886.

"We were advised by the counsel of the Cedar Valley Land and Cattle Company in London that the Company has no right either to purchase or provide for the cancellation of the stock now held by Coburn and Ewing. In view of this advice Mr. Fisher does not feel at liberty to conclude the settlement upon the basis of taking back the stock. If we could agree upon any settlement which would leave the stock in the hands of Coburn and Ewing, or which would not require the Company to take it, Mr. Fisher would feel at liberty to act in the matter; but, as I assume that this cannot be accomplished, I have advised Mr. Fisher, who leaves for London in a few days, to lay the whole matter before the board and give us instructions which will, I hope, enable us to agree with you upon some disposition of the stock and upon a final satisfactory adjustment of the matters between the parties."

From appellants' to appellees' counsel, January 8, 1886.

"Your note of the 5th instant was duly received, stating that no further action could be taken in the

ices rendered in the purchase of the ranch. That in the early correspondence this matter was referred to, but no mention was made in the later correspondence of this compensation, and consequently, to avoid any misunderstanding, the terms proposed were unconditionally accepted; that the letter of Mr. McCrary of February 27, 1886, was received and submitted to affiant's counsel, who advised him that he had distinctly informed Mr. Field that receipts in full were not to be passed, and that there was therefore no necessity of making any reply to Mr. McCrary's letter, for which reason he did not answer the same; that in every step taken in closing up said compromise, Coburn and Ewing had distinctly refused to sign any receipts in full or acknowledge any settlement in full, and that in the many receipts passed, language indicating a settlement in full was in each case stricken out, and in lieu thereof it was inserted that the receipt was given on the basis of the letters of February 11 and 12 and the acceptance of February 27; that affiant had no recollection concerning the interlineation of the paper attached to Fisher's affidavit, but he knew that there was no intention to convey the impression that Coburn and Ewing intended to abandon their claim for services; and that every step taken in the purchase of the ranch was in the utmost good faith and with strict regard to the interests of the Company, and Coburn and Ewing had paid to it more than they ever received from Munson, and had received no compensation whatever for their services in the purchase of the ranch.

A hearing having been had, the court rendered a decree in each of the four cases, finding that there had been by the agreement of the parties a full compromise and settlement of all the matters in controversy in the case, and ordering, in pursuance of the agreement, that each of the bills be dismissed at plaintiffs' costs, to be taxed. The opinion of *Judge* Brewer will be found in 29 Fed. Rep. 584.

On the same day, Coburn and Ewing moved the court to set aside and vacate the decree entered in each of said causes and to grant them a rehearing, which motions were overruled, the circuit court delivering an opinion reported in 29 Fed. Rep. 586. Thereupon the cases were brought to this court by appeal.

Messrs. Henry N. Ess and **L. C. Krauthoff**, for appellants:

A court of equity has no jurisdiction to render a decree except only in pursuance of allegations made in the form of a bill, either original, cross or supplemental.

Carneal v. *Banks*, 28 U. S. 10 Wheat. 181, 189 (6: 297, 299); *Harding* v. *Handy*, 24 U. S. 11 Wheat. 103, 120 (6: 429, 434); *Piatt* v. *Vattier*, 34 U. S. 9 Pet. 405, 415 (9: 173, 177); *Jackson* v. *Ashton*, 36 U. S. 11 Pet. 229, 249 (9: 698, 706); *Knox* v. *Smith*, 45 U. S. 4 How. 298, 317 (11: 983, 991); *Foster* v. *Goddard*, 66 U. S. 1 Black, 506, 518 (17: 228, 232); *Barnes* v. *Chicago, M. & St. P. R. Co.* 122 U. S. 1, 14 (30: 1128, 1132); *Veach* v. *Rice*, 131 U. S. 293, 317 (33: 163, 171); *Ohio C. R. Co.* v. *Central Trust Co.* 133 U. S. 83, 90 (33: 561, 563); Story,

---

matter of settling the dispute between the C. V. L. & C. Co. and Mess. Coburn and Ewing until Mr. Fisher had additional instructions from his Company. I have delayed answering until I could confer with Mess. C. & E., which I now have done. They greatly regret the delay that will be necessarily occasioned, as they hoped for a speedy termination of the controversy. I have urged upon them that they allow me to continue my efforts for an adjustment. This they have done, with the understanding that I request you to ask Mr. Fisher to report by cable at the earliest possible moment whether the proposition will be accepted. This is a matter involving so large an amount and requiring the taking of testimony at so many and such remote points that I assume that we are agreed as to the importance of determining this negotiation one way or another as soon as the same can be reasonably done.

"Awaiting your further advice, I am, very truly."

From appellees' to appellants' counsel, January 11, 1886.

"I have arranged with Mr. Fisher to cable me instructions from London as to compromise of the controversy between Coburn and Ewing and the C. V. L. & C. Company. I will advise you promptly when instructions are received."

From appellants' to appellees' counsel, January 26, 1886.

"Mess. Coburn & Ewing have 2,000 shares in the C. V. L. & C. Co., £5 each paid, amounting to about $48,800. They will settle the controversy with the Company—

"1. By returning the $40,000 commission and the Company's taking their stock at the actual amount paid by them; or,

"2. They will turn over to the Company 1,600 shares and retain 400.

"3. In any event C. & E. are to be protected against any claim by Burnett's estate, either by a release or indemnity.

"4. Mess. C. & E. agree not to buy up or otherwise molest any of the ranch privileges now enjoyed by the Company.

"5. This settlement in no way to affect the arrangements heretofore made concerning the W. & L. cattle, but the same to be carried out by both parties in good faith as agreed upon, but not to enter into this arrangement in any way whatever. In other words, the W. & L. cattle are in no way taken into consideration in this settlement.

"6. The balance of salary as compensation to be paid to Mr. Ewing."

From appellees' to appellants' counsel, February 2, 1886.

"I inclose herewith a letter just received from Mr. Fisher from New York, which explains itself. Mr. F. carries with him to London the several propositions of settlement which have been under discussion. Will you kindly advise me what response Coburn & Ewing have to make to the terms suggested in this letter? If possible I should like to be advised in time to write Mr. Fisher to-morrow, as requested.

"Please return Mr. Fisher's letter."

From Fisher to appellees' counsel, 29th January, 1886.

"As I wired you yesterday, I am unfortunately here till to-morrow, at 2 P. M., in consequence of the steamer I intended sailing with yesterday being disabled. I am sorry at this, as I am anxious to get to London to consult with my co-directors. I have been thinking a good deal over the best way to arrange a compromise with C. & E., but in every shape I take it it is always saddled with the difficulty of dealing with their stock.

"No one, of course, would be fool enough to take their shares at par when it is so generally known, and by none better than C. & E. themselves, that the value of all cattle shares are not within 20 per cent of what they were, and as the Company itself can neither buy nor cancel it is most perplexing. The following is a proposition that has occurred to me that C. & E. might submit to the board: C. & E. agree to pay Co. the $5,000 commission, with interest thereon at the rate of 8 per cent per annum for the time they have had it; C. & E. to retain their stock in Company by the directors getting for them an advance on it for $40,000, at the rate of interest of

Eq. Pl. (9th ed.) § 393; *Chapin* v. *Walker*, 6 Fed. Rep. 794; *Armstrong* v. *Chemical Nat. Bank*, 37 Fed. Rep. 466; *Borckman's App.* (Pa.) 3 Cent. Rep. 546; *Gordon* v. *Gordon*, 3 Swanst. 400, 472; *Nokes* v. *Fish*, 3 Drew. 735, 744.

Where an agreement is made, pending the suit, compromising the matter in litigation, the proper procedure is to bring that agreement before the court in the form of a supplemental bill, or by a plea like unto one *puis darrein continuance* in common-law pleading. Otherwise such agreement cannot be noticed.

Yeatman v. *Lynn*, 30 U. S. 5 Pet. 224, 231, 232 (8: 105, 107, 103); *Hobson* v. *M'Arthur*, 41 U. S. 16 Pet. 182, 194 (10: 930, 934); *Candler* v. *Pettit*, 1 Paige, 168, 2 N. Y. Ch. L. ed. 603; *Jackson* v. *Ramsay*, 3 Cow. 75, 79; *May* v. *Coleman*, 84 Ala. 325; *Bower* v. *Swadlin*, 1 Atk. 294; *Taunton* v. *Pepler*, 6 Madd. 166; *Roche* v. *Morgell*, 2 Sch. & Lef. 721; Mitf. & Tyl. Eq. Pl. (ed. 1882) 180; Story, Eq. Pl. (9th ed.) § 393.

A mere motion cannot form the basis of a final decree.

Like v. *Beresford*, 3 Bro. Ch. 366; *Fenton* v. *Garlick*, 8 Johns. 194, 197; *Willis* v. *Parkinson*, 3 Swanst. 233; *Tullett* v. *Armstrong*, 1 Keen, 428, 435; *Fuller* v. *Metropolitan L. Ins. Co.* 31 Fed. Rep. 696.

Where a case is not cognizable in a court of equity, or not presented to such a court by proper pleadings, a jurisdictional defect exists, which may be taken advantage of at any stage of the proceeding, and which cannot be waived by the conduct or agreement of the parties.

Thompson v. *Central Ohio R. Co.* 73 U. S. 6 Wall. 134, 137 (18: 765, 767); *Sullivan* v. *Portland & K. R. Co.* 94 U. S. 806, 811 (24: 324, 326); *Oelrichs* v. *Spain*, 82 U. S. 15 Wall. 211, 227, 228 (21: 43, 44); *McDonald* v. *Hobson*, 48 U. S. 7 How. 745, 758 (12: 897, 902); *Parker* v. *Winnipiseogee Lake C. & W. Mfg. Co.* 67 U. S. 2 Black, 545, 550 (17: 333, 336); Story, Eq. Pl. (9th ed.) §§ 10, 34, 257, 264; *Chase* v. *Palmer*, 25 Me. 341, 345; *Chambers* v. *Chalmers*, 4 Gill & J. 420, 438; *Herbert* v. *Hobbs*, 3 Stew. (Ala.) 9, 14.

The decree must conform to the allegations, as well as to the proofs of the parties.

Crockett v. *Lee*, 20 U. S. 7 Wheat. 522, 526, 528 (5: 513-515); *Hipp* v. *Babin*, 60 U. S. 19 How. 271, 277, 278 (15: 633, 635); *Boone* v. *Chiles*, 35 U. S. 10 Pet. 177, 209 (9: 388, 399); *Harrison* v. *Nixon*, 34 U. S. 9 Pet. 483, 503 (9: 201, 208); *Washington, A. & G. R. Co.* v. *Washington*, 77 U. S. 10 Wall. 299, 301, 302, 303 (19: 894, 895); *Reynolds* v. *Stockton*, 9 Cent. Rep. 33, 43 N. J. Eq. 211, 214; *Simonton* v. *Winter*, 30 U. S. 5 Pet. 141, 149 (8: 75, 78); *Jones* v. *Davenport*, 45 N. J. Eq. 77, 81, 85; *Quincy* v. *Steel*, 120 U. S. 241, 245 (30: 624, 625); *Ditch* v. *Sennott*, 2 West. Rep. 837, 116 Ill. 288, 290.

Here, a decree has been rendered not prayed for in the pleadings, nor warranted by any allegation in either of the bills, original or cross, before the court.

Grand Chute v. *Winegar*, 82 U. S. 15 Wall. 373 (21: 174); *Dowell* v. *Mitchell*, 105 U. S. 430, 432 (26: 1142, 1143); *Ambler* v. *Choteau*, 107 U. S. 586, 590 (27: 322, 324); *Marye* v. *Parsons*, 114 U. S. 325, 329, 330 (29: 205, 206); *Bristow* v. *Whitmore*, 4 Kay & J. 743, 745.

---

ten per cent per annum, said advance to go to liquidate the debt to the Company, C. & E., besides, paying the Company's expense in connection with this litigation.

"This arrangement would enable C. & E. to hold their stock, which they appear to value so highly, until such time as they could sell it at par, or possibly, in two years, at a premium, and at the same time refund the $40,000. The Company would in this case not commence proceedings for damages caused by turning back the cattle. If you think well of this project you can see Karnes about it, and, if C. & E. are disposed to make the above proposition, cable the word 'consent' on the 8th February, the day I expect to get to London. Frankly, I must say this is a more favorable settlement than I would give them, as I am satisfied there is more in the real estate than $15,000, but under the circumstances might be accepted by the board.

"Of course, if there is no cablegram, I will understand they will not make this proposition; in any case, write not later than Wednesday."

From appellants' to appellees' counsel, February 2, 1886.

"I am just in receipt of your letter of to-day, including a letter from Mr. Fisher, from N. Y., which I herewith return to you. You have heretofore seen fit to express your appreciation of what I had done and was doing to get this controversy settled, and hence I need not restate my endeavors in the matter. I am only sorry to see Mr. Fisher taking the position indicated by his letter. I am now convinced that Mr. Gage was correct in his opinion that he, F., was unfavorable to any settlement. The terms proposed in his letter I have not submitted nor will I submit to my clients. I have been satisfied from the beginning and am still satisfied, and have so stated to Mess. C. & E., that they are liable in law for the return of the $40,000, but I don't believe they are liable any further. This they ought to repay. On the other hand, this Company has received the benefits of their labor without any expense. There ought to be some recognition of the equities of the case. On such a basis I have tried to have an adjustment made; but if it is the determination of Mr. Fisher to drive these men to the wall, then there is no alternative left but to fight. I shall still hope, however, that through the co-operation of yourself and Mr. Gage a fair and just settlement may be made, and that the damage to the interests of all concerned, to which Mr. Fisher's rashness will lead, may be avoided. As Mr. Fisher mentioned my name in his letter, I would be glad to have him furnished a copy of this."

Cablegram.

"From London. Kansas City.

"Ewing's proposals declined. Letter posted today, inclosing complete answer to cross-bill and conveying the only terms which will be accepted. Inform Ewing."

From appellees' to appellants' counsel, February 15, 1886.

"I inclose copy of letter, just received from the secretary of the Cedar Valley Land and Cattle Company, submitting the only terms upon which the Company will settle with Coburn and Ewing. The sum demanded is nominally larger than that offered by you, but as it is proposed to receive payment in cattle and the stock of the Company now held by C. & E. at par, I am in hopes your clients will consider it better to accept than to continue the litigation.

"If this proposition is accepted please advise me before March 4th."

From Coburn and Ewing to appellees' counsel, February 27, 1886.

"On February 4th, 1886, you handed to J. V. C. Karnes, Esq., one of our counsel, a copy of a letter which you had just received from the secretary of the Cedar Valley Land and Cattle Company, which is as follows:

" 'The Cedar Valley Land and Cattle Company, Limited.

" 'Moorgate Street Chambers, London, E. C., " 'Feb. 11, 1886.

" 'Dear Sir: The board have had under their very careful consideration Mess. Karnes & Waters' letter, dated the 26th of January, 1886, containing two alternative offers by Mess. Coburn and Ewing for

The course pursued in the case at bar was a denial of due process of law both in substance and in form.

Kennard v. *Louisiana*, 92 U. S. 480, 483 (23: 478, 479); *Windsor* v. *McVeigh*, 93 U. S. 274, 282 (23: 914, 917); *Pennoyer* v. *Neff*, 95 U. S. 714, 733 (24: 565, 572); *Ex parte Wilson*, 114 U. S. 417 (29: 89); *Davidson* v. *New Orleans*, 96 U. S. 97, 105 (24: 616, 620); *Hurtado* v. *California*, 110 U. S. 516, 534 (28: 232, 238); *Hagar* v. *Reclamation Dist.* 111 U. S. 701, 708 (28: 569, 572); *Murray* v. *Hoboken L. & I. Co.* 59 U. S. 18 How. 272, 280 (15: 372, 376); *McNaughton* v. *Osgood*, 114 N. Y. 574, 578.

Even if the court had jurisdiction to proceed on a motion, the decree ought not to have embodied an affirmative adjudication of an independent fact.

Kidd v. *Morrison*, Phil. Eq. 31, 32; *Stewart* v. *Southard*, 17 Ohio, 402, 406; *Faucher* v. *Grass*, 60 Iowa, 505, 507; *Re Elsam*, 3 Barn. & C. 597; *Hoskins* v. *Lord Berkeley*, 4 T. R. 402.

Messrs. Harwood & Meredith and **Morgan H. Beach**, for appellee:

A petition for a decree is a pleading and was the proper one in these cases, and upon such a petition a compromise of pending litigation will be enforced by the court.

Daniell, Ch. Pr. (5th Am. ed.) 795, 796, 1588; *Dawson* v. *Newsome*, 2 Giff. 272; *Tebbutt* v. *Potter*, 4 Hare, 164; *Pryer* v. *Gribble*, L. R. 10 Ch. App. 584; *Askew* v. *Millington*, 9 Hare, 65; *Plumley* v. *Horrell*, 20 L. T. N. S. 473; *Nashville, C. & St. L. R. Co.* v. *United States*, 113 U. S. 261 (28: 971); Wells, Res Adjudicata, 366.

A judgment entered by agreement will bind those by whose agreement it has been entered.

Fletcher v. *Holmes*, 25 Ind. 458.

Decrees entered on such statements of facts are binding as to all matters therein embraced.

Derby v. *Jacques*, 1 Cliff. C. C. 425; *Porter* v. *Bussey*, 1 Mass. 436.

A supplemental bill was not necessary in introducing the compromise agreement.

Kelsey v. *Hobby*, 41 U. S. 16 Pet. 269, 277 (10: 961, 963); *Gilbert* v. *Endean*, L. R. 9 Ch. Div. 259, 269; *Walden* v. *Bodley*, 39 U. S. 14 Pet. 156 (10: 398).

Objections raised after decree entered by consent come too late.

Livingston v. *Woodworth*, 56 U. S. 15 How. 546 (14: 809).

Mr. Chief Justice **Fuller** delivered the opinion of the court: [216]

We are entirely satisfied with the conclusion of the circuit court, upon the evidence, that all the matters in controversy between the parties had been fully compromised and settled. The litigation was being prosecuted upon two bills and two cross-bills when the negotiations commenced, and involved the claims of the Company against Coburn and Ewing and the claim of Coburn and Ewing for compensation for services rendered in the purchase of the ranch. No reason appears for the severance of claims so intimately connected, and the reservation of the latter while the former were settled. The proposition from Coburn and Ewing's solicitors of November 12 embraced three distinct

---

the settlement of the claims made by the Cedar Valley Land and Cattle Company upon them.

" 'I am instructed to inform you that neither of these propositions is acceptable, and that the action against Mess. Coburn and Ewing must proceed. With that view the answer to Mess. Coburn and Ewing's cross-bill has been forwarded to Mess. Adams and Field along with a letter from the solicitors of the Company.

" 'The Company being liable in a large sum of costs, which will not be recovered from Mess. Coburn and Ewing, the only terms upon which the board can agree to compromise the claim of the Company are as follows:

" '1. That the amount payable to the Company by Mess. Coburn and Ewing be £10,000, the amount paid by them for the 2,000 shares now standing in their names.

" '2. That this amount, £4,000, shall be paid in cash, or in lieu thereof that the cattle of the L. & W. herd now upon the Cedar Valley ranch shall be accepted as cash, when counted over this spring, upon a valuation to be made by two valuers—one chosen by Coburn and Ewing and one by the Company—the valuers appointing a referee.

" '3. That the balance then remaining due to the Company will be discharged by the transfer to such person or persons as may be named by the board of a sufficient number of Mess. Coburn & Ewing's shares on the basis of a par value, the shares then remaining in the hands of Coburn & Ewing to be held by them for a period of not less than two years.

" '4. Mess. Coburn & Ewing to give security that they will not buy up or otherwise molest any of the range privileges now enjoyed by the Company.

" '5. That the Company agree to protect Coburn & Ewing against any claim from the executors of the partner of the late Geo. Burnett.

" 'When the board consider (1) that the issue has practically been decided against Mess. Coburn & Ewing by the same judge before whom the case will ultimately be tried; (2) that Mess. Coburn & Ewing have received from Mr. Munson the sum of $75,000 for a property which, in the written estimate of six of the eminent valuers in Kansas City, is worth from $45,000 to $50,000; (3) the almost insuperable difficulty which the board will have in placing any of the shares transferred by Mess. Coburn & Ewing, in consequence of the nonpayment of a dividend, resulting from Mr. Ewing's vindictive or ill-judged action in ordering the beeves back to the ranch, and (4) the interest upon the amount of commission obtained in various ways from Mr. Munson from the period of its receipt up to the present date, which, we are advised, would be recoverable from them by an action at law, the board is of the opinion that the foregoing offer is more favorable to Mess. Coburn & Ewing than the latter had any right to expect. The board, however, is induced to offer these easier terms with the object of settling the matter before the general meeting of the 4th of March. It is therefore to be distinctly understood that this proposal only remains open until the 3d of March, and that failing the receipt on or before that date of a telegram announcing that Mess. Coburn & Ewing have signed an agreement embodying the above terms, the offer now made by the board is withdrawn on that day. It will suit the Company infinitely better to receive the amount of their claim in cash, as would be the case when a judgment has been recovered in their favor, than to have to deal with any large number of shares transferred by Mess. Coburn & Ewing. It is to be understood that the offer is to be made without prejudice to any claim for damages which the board may have against the executors of the partner of the late George Burnett.

" 'The directors desire me to add that in the event of the foregoing offer being refused they will feel it their duty in the interests of the shareholders to claim full compensation for damages which the Company have sustained under various heads, which are clearly attributable to the account of Mess. Coburn & Ewing.

" 'I am, dear sir, yours truly,

"James K. Webb, Sec'y.

" 'Geo. W. McCrary, Kansas City, Mo., U. S. A.'

"And on February 26, 1886, you sent to Mr. Karnes the original letter you had on that day received from the same party, and which was as follows:

offers, and each offer included compensation for services in and about the purchase. The response to this proposition stated what the counsel for the Cattle Company would recommend, the settlement so recommended "to be a full and final adjustment of all the controversies between the parties, and of all claims of either party against the other," and that counsel would under no circumstances "advise the payment of commissions to C(oburn) and E(wing), or any waiver of the Company's right to defend against any claim that they may make on this account." It is ingeniously argued by appellants' counsel that by his last clause it was intended to so exclude from the settlement this claim for compensation as to leave it outstanding to be litigated. But we think, on the contrary, that it was expressed with sufficient clearness that the Company would not be advised to consider any offer of settlement except upon the condition of the surrender of this claim, and that it was for this reason that the negotiations were at that time terminated. Upon the 28th of December the [217] negotiations were renewed upon the basis of the terms suggested by the Cattle Company, and the first letter of appellants' solicitor of that date declares that "the terms then proposed contain substantially the correct basis of settlement" and expresses the desire "again to move in the direction of ending all this interminable litigation." Appellees' counsel at once replied that "if you can bring your clients to agree to the terms proposed by us let me know."

On the same day appellants' solicitor, after going over the matter carefully with Mr. Coburn, wrote, proposing: "(1.) That the stock of Coburn and Ewing be taken at $50,000. (2.) That Coburn and Ewing pay back to the Company the $40,000 received from Munson. (3.) That the Company, with American securities, indemnify Coburn and Ewing against any claim of the representatives of Burnett as to the $16,800. (4.) That all suits be dismissed, each party paying his own costs, all claims for damages or compensation be waived, and full receipts passed. (5.) That the salary of Ewing up to the time of his discharge be paid to him, amounting to about one month's pay, and that there be paid a few small items of expenses, amounting in all to a very small sum. As I understand, this is substantially your proposition to us."

To this appellees' counsel responded on January 5, 1886, that London counsel had advised that the Company could not purchase or provide for the cancellation of the stock held by Coburn and Ewing, and therefore that Fisher did not feel at liberty to conclude the settlement upon the basis of taking back the stock, though he would, if a settlement could be agreed on which would leave the stock in the hands of Coburn and Ewing, or which would not require the Company to take it; and that he had advised Fisher, who was leaving for London, to lay the whole matter before the board for instructions, which he hoped would enable "us to agree with you upon some disposition of the stock and upon a final satisfactory adjustment of the matters between the parties." On the 26th of January, appellants' solicitors wrote that Coburn and Ewing would settle "the controversy with the Company—(1) by returning the $40,000 commission and the Company taking their stock at the actual price paid by them; or (2) they will turn over to [2

"'The Cedar Valley Land and Cattle Company, Limited,
"'Moorgate Street Chambers, London, E. C.,
"'12th Feb., 1886.

"'Dear Sir: In reading over the letter which I had the pleasure to address to you yesterday I noticed two points in reference to which I would like to make some observations.

"'The sum of £10,000 is fixed as the damages to be paid by Mess. Coburn and Ewing, and it is added that this sum was the amount paid by Mess. Coburn and Ewing for their shares. Seeing that there is no connection whatever between the claim for damages and the payment of shares, it is advisable that the words 'the amount paid by them for the 2,000 shares now standing in their names,' be eliminated from the letter, if you think advisable to read it or give a copy of it to Mess. Coburn and Ewing.

"'The words 'vindictive or ill-judged,' on page 3 of the letter, should also be eliminated, as Mr. Ewing, in his letter of 24th October last, stated that he was acting for the best interests of the stockholders in turning back the beeves. These words are unnecessary, although the directors could not possibly approve a step which precluded the possibility of paying a dividend, the nonpayment of which would have, as had been fully explained to Mr. Ewing, such an injurious effect on an English company. If Mess. Coburn and Ewing should prefer to deliver the cattle of the L. & W. herd, now on the Cedar Valley ranch, the transfer of the 12,000 would be accepted by the board at present, leaving the balance of £4,000 to stand over in the meantime.

"'If the valuation of the L. W. herd shall eventually fall short of that sum, the balance of such valuation to be made up to the Company by the transfer of an equivalent number of shares in the Company on the basis of a par value, the boarding of the above cattle to be paid for at the time of transfer at the agreed-on rate, $1.50 per head.

"'The board is quite ready to agree to Mr. Ewing's stipulation that he shall be paid his salary during such time as he remained in the service of the Company, whatever amount may be found to be due to him upon a proper adjustment of accounts.

"'Will you kindly bear these points in mind in dealing with the other side.

"'I am, dear sir, yours truly,
"'James E. Webb, Sec'y.

"'Geo. W. McCrary, Esq., Kansas City, Mo., U. S. A.'

"Both of these communications, together with your two letters forwarding them to Mr. Karnes, he has placed in our hands. In connection with both our counsel we have fully considered the terms of this proposition. We wish to state emphatically that we regard the proposition as unjust and oppressive, but we have so much involved in this litigation that we agree to and accept the terms of the offer made. The £4,000 will be arranged for with the L. W. cattle, as suggested in the letter of February 12th, and the 1,200 shares of stock therein mentioned we herewith hand you, to be transferred to such parties as may be named. We have only two certificates of one thousand shares each, and we deliver both to you, and the Company can return us a certificate for 800 shares. The bond called for by the fourth section of the proposition in the letter of February 11th we will give at any time. It will now soon be the season when the L. W. cattle can be counted, and we will be ready at once to name valuers. Now that a settlement has been effected, we hope there will be no delay in carrying it out in all respects as agreed upon.

"We desire to express to you our thanks for the uniform courtesy with which you have treated us throughout this unpleasant matter.

"We are, dear sir, very truly,
"W. N. Ewing.
"James M. Coburn.
"Coburn & Ewing."

the Company 1,600 shares and retain 400. (3.) In any event, C. & E. are to be protected against any claim by Burnett's estate, either by a release or indemnity. (4) Mess. C. & E. agree not to buy up or otherwise molest any of the range privileges now enjoyed by the Company. (5) This settlement in no way to affect the arrangements heretofore made concerning the W. & L. cattle, but the same to be carried out by both parties in good faith as agreed upon, but not to enter into this arrangement in any other way whatever. In other words, the W. & L. cattle are in no way taken into consideration in this settlement. (6) The balance of salary as compensation to be paid to Mr. Ewing." This letter should be read in connection with that of December 28, for its apparent object was to accommodate the objection in relation to the stock, as well as to except the W. & L. cattle. The language in respect to the waiver of all claims for damages or compensation and the passing of full receipts was not repeated, but, taken in connection with the original response of the Cattle Company and what had followed thereon, the Cattle Company and its counsel could not have understood that there was an intentional reservation of the question of compensation. The controversy referred to January 26 was the same controversy referred to in the letter of January 8, of the same counsel, and must be held to have covered the entire controversy in respect to which the parties were treating.

On the 2d of February appellees' counsel inclosed the letter received from Mr. Fisher from New York, in answer to which appellants' counsel, referring to the suggestions of Fisher in relation to certain details of the settlement growing out of the difficulty in dealing with Coburn and Ewing's stock in the Company, replied, saying, among other things, that Coburn and Ewing ought to repay the $40,000, but "on the other hand this Company has received the benefits of their labor without any expense." Fisher carried with him to London, as appellants were informed, "the several propositions of settlement which have been under discussion," and which bore upon their face the concession that Coburn and Ewing no longer claimed to be entitled to compensation.

Upon the 24th of February the copy of the letter from the secretary of the Cattle Company was sent to appellants, stating that the board of directors had had under consideration the two alternative offers of the 26th of January for the settlement of the claims made by the Cattle Company, and that neither of these propositions was acceptable. These alternative offers related to the Company's taking Coburn and Ewing's stock at the actual amount paid by them, or taking 1,600 shares and retaining 400. The secretary then proceeded to state "the only terms upon which the board can agree to compromise the claim of the Company," which terms required the payment by Coburn and Ewing of £10,000, £4,000 in cash or in L. & W. cattle, and the remainder by a sufficient number of shares on the basis of par value; and the giving of security by Coburn and Ewing not to interfere with the Company's range privileges; and agreed to the indemnifying of Coburn and Ewing against any claim from Burnett's or his partner's executors. And the letter says that in view of the facts "that the issue [21

From appellees' counsel to appellants, February 27, 1886.

"Mr. Karnes has handed me your letter accepting the terms of compromise proposed by the Cedar Valley Land & Cattle Company, and has also placed in my hands the certificates for the two thousand shares of stock held by you in the Company. I will wire Mr. Webb, secretary of the Company, that you have accepted in writing the Company's proposition, and have written him, requesting that the Company take immediate steps to choose a valuer and proceed with as little delay as possible to close up the matter of the compromise. Of course it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties.

"The matter of costs and the balance due you on salary can easily be adjusted hereafter. Col. Karnes and I agree that each party pay its own costs."

From appellees' to appellants' counsel, March 18, 1886.

"I am just in receipt of a letter from James E. Webb, secretary of the Cedar Valley Land and Cattle Company, Limited, of date March 6th, of which I inclose you a copy. Mr. Webb sends me with this letter an assignment to be executed by Messrs. Coburn and Ewing, transferring to him 1,200 shares of their stock in said Company. When Mr. Webb wrote this letter he had not received my communication written on the 27th of February, informing him that Messrs. Coburn and Ewing had placed in my hands their certificates for the whole 2,000 shares, and had requested that the Company would issue to them a new certificate for 800 shares. That letter would reach London about the 7th inst., and an answer may be expected very soon. Probably it would be better to take no further action until it is received."

From Webb, sec'y, to appellees' counsel.

"London, E. C., 6 March, 1886.

"Dear Sir: I have to acknowledged the receipt, on the 27th February, of your cablegram of that date reading:

" 'Terms proposed accepted by Coburn & Ewing to-day in writing.'

"That telegram was laid before the board at their meeting on the 3d inst., and I am directed to inform you that they are glad that a settlement has been arrived at upon terms which they believe will be found upon consideration to be satisfactory to all parties. The board is prepared to find that all the obligations entered into by Mess. Coburn and Ewing will be faithfully and honorably carried out by these gentlemen, and they trust that amicable relations will be resumed and will continue uninterruptedly for the future.

"With the view to the carrying out of the provisions of the agreement with Mess. Coburn & Ewing, I now inclose a transfer of 1,200 shares, to be executed in my favor, and the Company undertake that if the value of the L. W. herd shall exceed the sum of £4,000 the difference shall be adjusted by the re-transfer to Mess. Coburn and Ewing of shares to an equivalent value.

"Awaiting confirmation by letter of your cablegram of the 27th."

From appellees' to appellants' counsel, March 27, 1886.

"I am now advised that the Cedar Valley Land and Cattle Company cannot issue the new certificates for eight hundred shares of stock to Coburn and Ewing, as per terms of compromise, until the latter have assigned the twelve hundred shares. They therefore wish Mess. C. & E. to execute the inclosed assignment, to be sent by me to London. This done, they will immediately execute and send over the new certificates for eight hundred shares.

"Please have the assignment executed and return to me at the earliest time practicable, as I wish to forward it without delay."

has practically been decided against Mess. Coburn and Ewing by the same judge before whom the case will ultimately be tried," the amount of money received by them from Munson, and the difficulty in placing any of the shares, etc., the board is of opinion that the offer is favorable to Coburn and Ewing, but "is induced to offer these easier terms with the object of settling the matter before the general meeting of the 4th of March." This would repay the Company $50,000 instead of $40,000, but only $20,000 would be paid in cash or cattle, and the remainder in shares.

The contention seems to be that, as the terms of compromise mentioned in the secretary's letter addressed to the Cattle Company's attorney did not specifically allude to the claim for compensation, both parties had made and received propositions in which that claim was left open to litigation, and, therefore, appellants could accept the proposition contained in the secretary's letter, and at the same time reserve the objectionable claim. But we do not agree with that view, as already indicated, and are of opinion that Coburn and Ewing must have known that
20] the intention of the Company was to settle the entire matters of difference between them, and that in no event would the Company entertain any claim for compensation on their part. This must be so, since the whole theory of the negotiation renewed December 28 conceded the terms of the Company's solicitors in response to the proposition of November 12 as the correct basis of settlement, and those terms embraced the rejection of the item of commissions, which was so well understood that appellants' letter of December 28 expressly said that all claims for damages or compensation were to be waived and full receipts passed. What the board was considering, as appellants must be held to have known, was what appellants should pay and how they should pay it, and it was only in regard to the disposition of their stock that any difficulty arose in substantially arriving at a final conclusion before Fisher went to London.

It was claimed by the Company that the stock was not worth its par value on account of certain action on Ewing's part, which turned out to be ill-advised, and the directors considered that although they asked Coburn and Ewing to pay $50,000 instead of $40,000 as offered, yet as the larger part of this was to be taken in their stock at par, it was a liberal offer on the Company's part, in view of all the other facts and circumstances surrounding the transaction. And to this Mr. McCrary alludes in his letter of February 24, when he says: "The sum demanded is nominally larger than that offered by you; but, as it is proposed to receive payment in cattle and the stock of the Company now held by C. and E. at par, I am in hopes your clients will consider it better to accept than to continue the litigation."

The secretary assumed, as we think he had a right to do, that the claim for compensation on the part of Coburn and Ewing had been dismissed as inadmissible, and that his letter to the counsel of the Company need only name the terms upon which the Company's claim was to be compromised. The attempt, by the letter of February 27, 1886, reciting the secretary's letters, to so limit the compromise as to reserve the right to litigate the question of compensation, is not commendable. Appellants could not in good faith restrict their settlement in this way, nor attribute the [21
courtesy with which Mr. McCrary had acted as extending to a concession which he had refused to make at the very threshold. And when he notified Coburn and Ewing, on the 27th of February, that "it is understood that the settlement embraces all the matters involved in the pending litigation in the several suits between the parties," it was their duty, if that were not so, to have so advised him at once.

What passed between Mr. Karnes and Mr. Field is in dispute, but it is clear enough that it could not control so important a difference, if it really existed. The letter of Mr. McCrary informed Coburn and Ewing that he should wire the Company of its acceptance of the proposition, and his affidavit shows that this letter was written before he had taken any steps to carry out the compromise on behalf of the Company. The subsequent letters in March of Mr. McCrary and of the Company demonstrated their understanding that the entire controversy was settled, which indeed was the only motive of any negotiations at all.

The grounds upon which the Cattle Company resisted the claim for compensation are too obvious to require comment, and were the same which justified the removal of their agent from his agency. We do not doubt that the compromise covered all the matters in controversy; that this was understood by the parties with whom they were dealing; and that the latter were bound, as the court held, in the premises.

But, although the decision of the court was correct upon the merits, it is objected that the decrees in question were improperly rendered, for want of jurisdiction to proceed upon the petitions. Undoubtedly the ordinary rule would have required the matter of the settlement to be presented by a supplemental bill or cross-bill or a bill in that nature; and these decrees were rendered upon petition only. But this objection was not raised until after a decision rendered. Appellants appeared in answer to the petitions and introduced affidavits to support their views of the meaning to be attached to the correspondence, and they insisted that their claim for compensation was not embraced in the compromise, and, therefore, that the dismissal of the bill should be without prejudice.

The case of *Kelsey* v. *Hobby*, 41 U. S. 16 [22
Pet. 269, 277 [10: 961, 963], is decisive against this objection. There a release was filed in a chancery suit by the defendant, who moved to dismiss the bill, which motion was opposed upon the ground that the release was obtained by duress. The parties went on to take testimony as to the circumstances under which the release was given, and it

was held by the court, speaking through *Mr. Chief Justice* Taney: "Some objections have been made as to the manner in which the release was introduced into the proceedings. It was filed in the cause, and a motion thereupon made to dismiss the bill; and it is said that being executed while the suit was pending, and after the answers were in, and the accounts before the master, it should have been brought before the court by a cross-bill or supplemental answer, and could not in that stage of the proceedings be noticed by the court in any other way. It is a sufficient answer to this objection to say that it was admitted in evidence without exception, and both parties treated it as properly in the cause; and the complainant proceeded to take testimony to show that it was obtained from him by duress, and the defendants to show that it was freely and voluntarily given. It had the same effect that it would have had upon a cross-bill or supplemental answer, and the complainant had the same opportunity of impeaching it. And there is no propriety in requiring technical and formal proceedings, when they tend to embarrass and delay the administration of justice, unless they are required by some fixed principles of equity law or practice, which the court would not be at liberty to disregard." In *Gilbert* v. *Endean*, L. R. 9 Ch. Div. 259, 267, *Sir* George Jessel, Master of the Rolls, uses this language: "I think a court of appeal cannot refuse to decide on the merits where the parties in the court below argued the case on the merits without objecting to the evidence. They must be taken to have assented to having their rights decided on the motion according to the usual rules governing interlocutory motions. If they wished them to be decided otherwise, they should have objected to the reception of the evidence. I think it is impossible for the appellant to succeed upon that ground, not having taken that course in the court below." These cases are cited by appellees, together with *Pryer* v. *Gribble*, L. R. 10 Ch. App. 534; *Tebbutt* v. *Potter*, 4 Hare, 164; *Askew* v. *Millington*, 9 Hare, 65. *Forsyth* v. *Manton*, 5 Madd. 78; *Wood* v. *Rowe*, 2 Bligh, 595, 617; *Rowe* v. *Wood*, 1 Jac. & W. 315, 337, and *Tebbutt* v. *Potter*, 4 Hare, 164,—were referred to in *Askew* v. *Millington*, and *Vice-Chancellor* Turner held, where the agreement of compromise went beyond the ordinary range of the court in the existing suit, and the right to enforce the agreement in that suit was disputed, that the proper course for proceedings to enforce it was by bill for specific performance, and not by motion or petition in the original suit to stay the proceedings, and he thought this must necessarily be so where the agreement itself was disputed. But, under the circumstances, we have already held that the petitioners' case did not fail upon the merits, and as all parts of the agreement fell within the range of the suits, and appellants did not dispute the form of proceeding, we are of opinion that the decrees cannot be reversed upon this ground. *They are therefore affirmed.*

SILAS TUBBS, *Plff. in Err.*, [13

v.

R. E. WILHOIT ET AL., Executors of the Estate of JOSEPH KILE, Deceased.

(See S. C. Reporter's ed. 134-146.)

Swamp-Land Act—change of as to California—township plats and surveys—when final and effectual—commissioner's duty.

1. The Swamp-Land Act of Sept. 28, 1850, imported a present grant to the States, and the title to the lands passed to the State at once, their identification to be made by the Secretary of the Interior, but when identified the title to relate back to the date of the Act.
2. By the Act of July 23, 1866, the provisions of the Act of 1850, for the identification of the swamp lands in California, were changed, and where township plats were made and approved it was made the duty of the commissioner of the General Land Office to certify over to that State, as swamp, all the lands represented as such upon such approved plats.
3. The Act of 1866 did not require approval by the commissioner of the General Land Office of township plats, which had then been made and approved by the surveyor general of the United States for California; and, until April 17, 1879, it was not the practice of the Land Department to require any specific approval by the commissioner of the surveys or plats of townships made by the surveyor general, but they became final and effective when filed by that officer.
4. An official township plat prepared by the surveyor general in triplicate, in 1864, and certified by the surveyor general, one of which was returned to the General Land Office, and one was filed in the local land office, upon which certain lands were represented as swamp, is a sufficient basis, in that respect, for a patent of California conveying such lands to a purchaser.
5. The duty of the commissioner to certify over to the State the lands represented as swamp on a township plat was ministerial, and he could not defeat the title of the State by withholding such certificate.

[No. 450.]

Submitted Jan. 5, 1891. Decided Jan. 26, 1891.

IN ERROR to the Supreme Court of the State of California to review a judgment in favor of defendants in an action for land in San Joaquin County, California. *Affirmed.*

The facts are stated in the opinion.

Mr. **Henry Beard** for plaintiff in error.

Messrs. **A. T. Britton** and **A. B. Browne** for defendants in error.

Mr. Justice **Field** delivered the opinion [13 of the court:

This is an action for the possession of a parcel of land of about eighty acres in the County of San Joaquin, California, being substantially the south half of the southeast quarter of section 11, in township 4, of that county.

NOTE.—*That patents for land may be set aside for fraud*, see *note* to Miller v. Kerr, 5: 381.

As to errors in surveys and descriptions in patents for lands; how construed,—see *note* to Watts v. Lindsey, 5: 423.

The plaintiff in the court below, and in error here, asserted title to the premises under a patent of the United States issued to him in due form on the first of October, 1879, upon a homestead entry made by him in May, 1873, and commuted to a cash entry in November following.

The original defendant below, Joseph Kile, now deceased, and in whose place his executors, Wilhoit and Thompson, have been substituted, claimed the premises under a patent
136] of California, bearing date the 5th of August, 1865, conveying to him the premises as swamp and overflowed lands, and as part of the land granted to the State by the Act of Congress of September 28, 1850 (9 Stat. 519).

The action was brought in the Superior Court of the County of San Joaquin, where the issue was tried without the intervention of a jury, by stipulation of the parties. Special findings of fact were filed, upon which judgment for the plaintiff was rendered. On appeal to the Supreme Court of the State the judgment was reversed, and judgment ordered in favor of the defendants for the lands, and for the rents and profits thereof. To review this judgment the case is brought here on a writ of error. The question presented is the validity of this title under the patent of California. If the claim thereto were abandoned or overthrown, the right of the plaintiff to recover under the patent of the United States would be conceded.

To determine this question, a consideration must be had of the various proceedings taken to obtain the patent of the State, and the law bearing upon them. The Act of Congress of September 28, 1850, granted to the several States of the Union all the swamp and overflowed lands within their limits, which on the passage of the Act remained unsold, to enable them to construct the necessary levees and drains for the reclamation of such lands; and made it the duty of the Secretary of the Interior, as soon as practicable, to make out an accurate list and plats of the lands described, and transmit the same to the governors of the States, and upon their request to cause patents to be issued to the States therefor.

Soon after the passage of the Act the question arose in each State as to the time the grant took effect—whether at the date of the Act, or on the issue of the patent to the State upon the request of its governor after the list and plats of the lands had been made out by the Secretary of the Interior and transmitted to him. After much consideration by the officers of the department of the government under whose supervision the Act was to be carried out, and by the courts of the several States in which such lands existed, it was
137] held that the words "are hereby granted" in the Act imported a present grant, and not a promise of one in the future; and that the title to the lands therefore passed to the State at once, their identification to be made by the action of the Secretary of the Interior, but when identified the title to relate back to the date of the Act.

In the recent case of *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039], the rulings of the officers of the Land Department, and of the courts of the States in which swamp and overflowed lands existed, by which the conclusion mentioned was reached, are stated with much fullness, and it is unnecessary to repeat what is there said. It is sufficient to observe that the construction thus given to the Act is now the accepted law of the country.

But the enjoyment of the grant was greatly impeded by the delay of the Interior Department to make out and certify the lists required. This delay arose from many causes, some of which the Secretary could not control, such as the insufficiency of the force under his command to make the required surveys and the necessary identification of the lands. The decision of this court in *Hannibal & St. J. R. Co.* v. *Smith*, 76 U. S. 9 Wall. 95 [19: 599], tended in some degree to lessen the evil effects of the delay, in holding that when that officer had neglected or failed to make the identification it was competent for the grantees of the State, in order to prevent their rights from being defeated, to identify the lands in any other appropriate mode which would effect that object. And in *Wright* v. *Roseberry* it was suggested that such mode of identification by the State was also permissible where the Secretary declared his inability to certify the lands from any other cause than a consideration of their character—a suggestion followed in the decision of that case.

In consequence of the delays in certifying the lists and the inconveniences which followed, the Legislatures of several States, in which such lands existed, undertook to identify the lands and dispose of them, and for that purpose passed various Acts for their survey and sale and the issue of patents to purchasers. The conflicts which thus arose between parties claiming under the State and [13
parties claiming directly from the United States led to various Acts of Congress for the relief of purchasers and locators of swamp and overflowed lands. 10 Stat. 634, chap. 147; 11 Stat. 251, chap. 117.

The inconvenience and conflicts mentioned were especially annoying and injurious to the State of California, for the great emigration to that State in 1850, and the years immediately following, created a call for lands of this description, not only because they were easily reclaimed, but because of their extraordinary fertility after reclamation. Accordingly, as early as 1855 its Legislature, asserting her ownership of such lands, provided for their survey and sale, and for the issue of patents. Legislation was also had on that subject in 1857, 1858 and 1859. As great confusion had from the causes mentioned arisen in the title to such lands, and also to other lands in California claimed under grants of the United States, Congress, on July 23, 1866, passed an Act, entitled "An Act to Quiet Land Titles in California," by which, among other things, the provisions of the original Act of 1850 for the identification of swamp and overflowed lands in that State were changed. Their identification was no longer left to the Secretary of the Interior, but was made subject to the joint action of

the state and the federal authorities. The fourth section, which related to those lands, provided as follows:

"That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this Act, or within one year from the return and approval of such township plats. The commissioner shall direct the United States surveyor-general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the General Land Office for approval: *Provided*, That in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land. In case such state surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the commissioner shall direct the surveyor-general to make segregation surveys, upon application to said surveyor-general by the governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the General Land Office, representing and describing what land was swamp and overflowed under the grant, according to the best evidence he can obtain. If the authorities of said State shall claim as swamp and overflowed any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant, September twenty-eight, eighteen hundred and fifty, and the right to the same, shall be determined by testimony, to be taken before the surveyor-general, who shall decide the same, subject to the approval of the commissioner of the General Land Office." 14 Stat. 219, chap. 219, sec. 4.

By this section, rules or methods were established for the identification of swamp and overflowed lands in California which superseded all previous rules or methods for that purpose. It first enacted that, in all cases where township surveys had been or should thereafter be made under the authority of the United States, and the plats thereof be approved, it should be the duty of the commissioner of the General Land Office to certify over to the State, as swamp and overflowed, all the lands represented as such upon the approved plats, within one year from the passage of the Act, or within one year from the return and approval of such township plats.

The section then provided for the construction of township plats where none previously existed. It required the commissioner of the General Land Office to direct the United States surveyor-general for California to examine the segregation maps and surveys of the swamp and overflowed lands made by the State, and directed that when he should find them to be in conformity with the system of surveys adopted by the United States he should construct and approve township plats accordingly and forward them to the General Land Office for approval. But in case such surveys should be found not in accordance with the system of United States surveys, and in other townships where no survey had been made by the United States, the commissioner was required to direct the surveyor-general to make segregation surveys, upon application of the governor of the State, within one year, of all the swamp and overflowed lands in the township, and report the same to the General Land Office, representing and describing what land was swamp and overflowed according to the best evidence he could obtain. The section further provided that if the State should claim as swamp and overflowed any land not so represented upon such map or in the returns of the surveyors, then the character of such land at the date of the grant, and the right of the State thereto, were to be determined by testimony to be taken before the surveyor-general, subject to the approval of the commissioner of the General Land Office.

With this brief review of the Act of September 28, 1850, and of the fourth section of the Act of July 23, 1866, we proceed to state what was done by the original defendant, Joseph Kile, to secure the title of the State. In April, 1864, the United States subdivisional survey of township 4 north, of range 5 east, of Mt. Diablo meridian, in the County of San Joaquin, was made, and the field and descriptive notes, together with the map or plat of the survey, were examined and approved, and the approval certified by the United States surveyor-general for California. On the first of July following (1864) a copy of this examined and approved map or plat was filed in the United States district land office at Stockton, California, which district included the lands of that township, and a copy was returned to the General Land Office of the United States at Washington. The certificate of approval by the United States surveyor of the plat of the survey, written [1 upon its margin, was as follows:

"The above map of township No. 4 north, range No. 5 east, Mount Diablo meridian, is strictly conformable to the field-notes of the survey thereof on file in this office, which have been examined and approved. Surveyor-General's Office, San Francisco, California, June 30, 1864.

"L. Upson, Sur-Gen. Cal."

Upon this approved map or plat the greater part of the lands of the township, including all of section 11, was colored green, and upon the face of the part thus colored the words "swamp and overflowed land" were written. The lands thus colored and marked were excluded from the estimated aggregate area of public lands and included in the es-

timated aggregate area of swamp and overflowed land.

In August, 1864, Kile made application in accordance with the provisions of the Acts of the Legislature of California to purchase from the State the southeast quarter of section eleven, as being part of the swamp and overflowed lands granted by the Act of Congress; and on the 18th of that month the county surveyor of the County of San Joaquin made a survey and recorded in his office a plat and field-notes thereof, and certified and reported the same to the state surveyor-general, in whose office they were filed and recorded on the 30th of September following. On that day, and after the state surveyor-general had approved the survey, plat and field-notes, the State of California issued and delivered to Kile a certificate of purchase of the southeast quarter of section eleven, founded upon his application and the approved survey. The certificate set forth that Kile had made part payment of the purchase-price and was the purchaser of the land, and that on making full payment and surrendering the certificate he should receive a patent from the State.

On the 5th of August, 1865, Kile, having paid the residue of the purchase-money and surrendered the certificate, received from the State a patent for the land. The patent re-
[142] cites that all the requirements of the Act of Congress, as well as of the Acts of the Legislature of the State in relation to swamp and overflowed lands, had been complied with, and that the governor, by virtue of the authority vested in him, thereby bargained, sold and conveyed to Kile the lands with the appurtenances.

These proceedings having been taken, and the patent issued, the first clause of section four of the Act of Congress of July 23, 1866, operated to confirm the title of the patentee. That clause, as already stated, provided that in all cases where township surveys had been made, or should afterwards be made, under the authority of the United States, and the plats thereof approved, it should be the duty of the commissioner of the General Land Office to certify over to the State, as swamp and overflowed, all the lands represented as such upon the approved plats, within one year from the passage of the Act, or within one year from the return and approval of such township plats. The only objection urged against the operation of this provision is that the township plat was not in terms approved by the commissioner of the General Land Office. The clause mentioned requires no such approval of township plats which had then been made and approved by the surveyor-general of the United States for California. The township surveys were made under the authority of the United States, and the plat thereof was approved by that authority, when they were made and approved by that officer. Only such township plats were to be submitted to the approval of the commissioner as should be subsequently made by that officer from the segregation maps and surveys of swamp and overflowed lands of the State after he had found the surveys to be in conformity with the system of surveys adopted by the United States; and such township plats as should be made by him when the segregation maps and surveys of the State were not in accordance with the United States system of surveys, or were of townships where no surveys at all had been made. Until April 17, 1879, it had not been the practice of the Land Department to require any specific approval by the commissioner, either of surveys of the public lands or of plats of townships in accordance therewith, made by the surveyor-general of the State, before they were deemed so far [14
final as to sanction sales or selections of the lands surveyed and platted. It is true that wherever fraud or error existed in the action of the United States surveyor-general for the State, the power of correction was vested in the commissioner, but where the survey was itself correct, and the township plat conformed thereto, they become final and effective when filed in the local land office by that officer.

In speaking of the laws and of the practice of the Department on this subject, the late Secretary of the Interior, Mr. Schurz, in a communication to the commissioner of the General Land Office, under date of August 7, 1877, said:

"By the Act of Congress, approved May 1, 1796 (1 Stat. 464), 'providing for the sale of the lands of the United States in the territory northwest of the River Ohio and above the mouth of the Kentucky River,' the surveyor-general was authorized to prepare plats of the townships surveyed, to keep one copy of the same in his office for public information, and to send other copies to the 'places of sale,' and to the Secretary of the Treasury. The present local land offices are equivalent to the 'places of sale' mentioned in the Act of 1796, and, as a matter of practice, from that date to the present time the township plats prepared by the surveyor-general have been filed by him with the local officers, who thereupon proceeded to dispose of the public lands according to the laws of the United States. There is nothing in the Act of 1796, or in the subsequent Acts, which requires the approval of the commissioner of the General Land Office before said survey becomes final and the plats authoritative. Such a theory is not only contrary to the letter and spirit of the various Acts providing for the survey of the public lands, but is contrary to the uniform practice of this Department. There can be no doubt but that under the Act of July 4, 1836, reorganizing the General Land Office, the commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor-general. But when the survey is correct, it becomes final and effective when the plat is filed in the local office by that officer."

This view of the Secretary was referred to [144
and held to be correct in *Frasher* v. *O'Connor*, 115 U. S. 102, 114 [29: 311, 315]. This practice was changed by the Land Department in April, 1879, and communicated in its instructions to surveyor-generals on the 17th of that month. It was not until after

such instructions that the duplicate plats filed in the local land offices were required to be previously approved by the commissioner of the General Land Office.

There is no finding, nor even any allegation, that the survey and plat of township four, in the County of San Joaquin, were not correct, or that they were disapproved by the Land Department. The only change made upon that plat consisted in an erasure of the designation that some of the lands were swamp and overflowed, and the substitution of a designation of them as public lands, the Department having come to a different conclusion from that returned by the surveyor-general years before, such conclusion being reached upon an inquiry made long after the Department had ceased to have any control over the matter. The notes of the survey and the plat of the township remained precisely as they were when filed in the local land office on the 1st of July, 1864. But if an approval of the township plat by the commissioner of the General Land Office was necessary, it is to be found in the recognition of its correctness by the subsequent action of the commissioner. In *Wright* v. *Roseberry* there was no approval of the township plat in terms, but it was held to be an approved plat by the fact that it was officially used as such. 121 U. S. 516, 517 [30: 1047].

In this case the original and official township plat was prepared by the surveyor-general in triplicate; one of which was returned to the General Land Office of the United States, where it always remained, and one was filed in the local land office at Stockton. It is true that the latter one was afterwards, in 1865, withdrawn by the surveyor-general from the local land office by order of the commissioner, and was not returned and filed in that office; but a copy of the plat which had been returned to the General Land Office, certified by the commissioner, and also by the surveyor-general of California, as a correct copy of the plat on file in that office, was subsequently filed in the local land office at Stockton. It does not appear in terms by whose order this subsequent filing was had, but it must be presumed to have been by direction of the commissioner of the General Land Office. It is not to be presumed that the parties in charge of the local land office would have allowed a copy of the township plat, which had been taken from its files by order of the commissioner, to be refiled without the authority of that officer. Besides, to that plat thus returned the commissioner referred when he directed the register of the land office at Stockton to make a change of the words "swamp or overflowed lands" written upon it to the words "public lands." And subsequently when a patent of the United States for the land was issued to the plaintiff Tubbs the land was described as embracing eighty acres "according to the official plat of the survey of the same lands returned to the General Land Office by the surveyor-general." The one thus returned was a duplicate of the one originally filed in the local land office.

It is therefore conclusively established that such township plat was recognized by the Land Department at Washington as a correct plat, and used as such, which was the only approval of a similar plat in *Wright* v. *Roseberry*. This conclusion is strengthened by the fact that when subsequently the state authorities applied to the commissioner of the General Land Office to certify over to the State the lands represented upon the plat as swamp and overflowed, the application was refused, not on the ground of any supposed error in such plat, but solely for the reason that the Land Department had already devested itself of authority by the issue of a patent to the plaintiff. If there had been any error in the plat which would have justified the action of the Department it would undoubtedly have been stated. When the plaintiff was allowed to make a homestead entry all control over the land had passed from the Land Department, and the title by virtue of proceedings under the state law had been confirmed by the Act of Congress of July 23, 1866, and become vested in the defendant. That entry was not made until the 8th of May, 1873, several years after the official map of the township had been filed in the local land office at Stockton and in the General Land Office at Washington, and the issue of a patent by the State of California to the defendant Kile, and the passage of the Act of Congress. Whether the township plat be considered as approved by the action of the surveyor-general or by the subsequent recognition of its correctness by the commissioner of the General Land Office, when approved, the duty of the commissioner to certify over to the State the lands represented thereon as swamp and overflowed was purely ministerial. He could not defeat the title of the State by withholding such certificate, nor could he add to the title by giving it. Its only effect would have been to facilitate the proof of the vesting of the title in the State by its additional recognition of the land as that covered by the congressional grant of 1850. It would not have added to the completeness of the title. A strange thing it would be if the refusal of an officer of the government to discharge a ministerial duty could defeat a title granted by an Act of Congress, and enable him to transfer it to parties not within the contemplation of the government. The judgment of the court below must therefore be affirmed.

As to the alleged inadvertence in the entry of judgment in favor of the defendant for rents and profits, we have only to say that if there be any such inadvertence, it is not a matter for revision by this court, but only for consideration by the court below.

Judgment affirmed.

109] R. B. REAGAN, United States Marshal for the EASTERN DISTRICT OF TEXAS, ET AL.

v.

W. B. AIKEN ET AL.

(See S. C. Reporter's ed. 109–114.)

Action at law—accounting—chattel mortgage, when not void—instructions to jury—confidential communications.

1. An action by a mortgagee to recover the value of goods mortgaged to him, which had been seized and sold by defendant on an attachment, is an action at law; that an accounting for the proceeds of real estate sold, which was to be applied to reduce the debts secured by the mortgage, is necessary, does not make it an equitable action, as this is matter of defense which can be pleaded and proved in an action at law.
2. A chattel mortgage is not an assignment for the benefit of creditors and therefore void under the Statute of Texas, as giving preferences, although it is given to three creditors in behalf of themselves and certain other creditors named, and contains no condition of defeasance, but contains a direction for the mortgagees to sell.
3. This court will presume that the law was fully given by the court to the jury, where the charge is not in the record; and that it was correctly stated, where plaintiff in error took no exceptions to it.
4. Where one who is both a creditor and an attorney for other creditors is present at an interview between a mortgagor and creditors, held with a view of obtaining the mortgage, he cannot be excluded from being a witness as to what transpired, on the ground that communications to an attorney are confidential; especially where the creditors, whose attorney he was, did not object to his testimony.

[No. 468.]

Submitted Jan. 12, 1891. Decided Jan. 26, 1891.

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas, to review a judgment against defendant, Marshal for Eastern District of Texas, and his sureties, for goods taken by him on attachment, which were mortgaged. *Affirmed.*

Statement by *Mr. Justice* **Brewer:** [110

On December 23, 1885, J. M. Anderson and T. W. Anderson, Jr., executed a mortgage on certain real estate in Texas to one W. J. McDonald, to secure the payment of certain debts of the mortgagors. On the same day, J. M. Anderson mortgaged to said McDonald and W. B. Aiken and L. C. Stiles certain personal property, as security for the payment of the same debts. On December 27, Carter Bros. & Co., of Louisville, Kentucky, H. T. Simon, Gregory & Co., and J. H. Wear, Boogher & Co., of St. Louis, commenced in the Circuit Court of the United States for the Eastern District of Texas certain actions against J. M. Anderson, and caused writs of attachment to be issued and levied upon the personal property covered by the chattel mortgage above mentioned. The goods thus attached were sold by the marshal, and the proceeds applied in satisfaction of the claims in suit. On the 29th of March, 1886, the grantees in the chattel mortgage commenced a suit in the state court against the United States Marshal and the

NOTE.—*Mortgage defined; nature of.* See *note* to New Orleans Nat. Bkg. Asso. v. Adams, 27:910.

As to equitable mortgage by deposit of title deeds, see *note* to Biebinger v. Continental Bank, 25:271.

As to deed with contract to reconvey, when a mortgage and when not; action to have deed declared a mortgage, see *note* to Conway v. Alexander, 3:321.

That title of lands taken as security for moneys loaned is simply a mortgage, though the agreement is by parol; absolute conveyance can always be proved by parol to be a mortgage,—see *note* to Hughes v. Edwards, 6:142.

As to right to keep mortgage on foot to protect title; when not merged,—see *note* to Peltz v. Clarke, 8:199.

Assumption of mortgage by purchaser of premises; what constitutes; effect of; conveyance subject to mortgage,—see *note* to Elliott v. Sackett, 27:678.

As to release of grantee by grantor from covenant to assume mortgage, see *note* to Drury v. Hayden, 28:408.

As to record of mortgages on vessels of United States, see *note* to Moore v. Simonds, 25:590.

As to mortgages on crops to be planted, see *note* to Butt v. Ellett, 32:188.

As to lien of mortgage on after-acquired property, see *note* to Pennock v. Coe, 16:436.

As to mortgages for further advances; their validity and priority,—see *note* to Lawrence v. Tucker, 16:474.

As to power of corporations to mortgage, see *note* to Memphis & L. R. R. Co. v. Berry, 28:837.

As to power of national banks to take mortgages, see *note* to National Bank of Genesee v. Whitney, 26:443.

As to assignments for benefit of creditors, with preferences; when valid, when not,—see *note* to Marbury v. Brooks, 5:582.

As to attorney and client; privileged communications between; when attorney will be compelled to testify; how long privilege continues,—see *note* to Blackburn v. Crawford, 18:186.

Privileged communications; what are, and what are not; when excluded, when not.

A scrivener, who draws the papers, is not counsel of the parties, and a communication made to an attorney while acting in the capacity of a scrivener is not privileged. Hanlon v. Doherty, 7 West. Rep. 385, 109 Ind. 87.

An attorney who has drawn a will cannot excuse himself on the ground of privilege, or that it was a confidential communication. Sheridan v. Houghton, 16 Hun, 628; *Re* Chase, 41 Hun, 208.

Attorney, having will in his possession, cannot refuse to produce it on the ground that he received it as a confidential communication, and that as such it was privileged. *Re* Chapman, 27 Hun, 573; Whelpley v. Loder, 1 Dem. 368.

Where will is contested on ground of fraud, forgery or mistake, instructions for making the will received by the attorney are not privileged communications. *Id.*; Hebbard v. Haughian, 70 N. Y. 55, 62.

An attorney may be compelled, as against his client, to prove the existence of a paper deposited with him by his client, and that it is in his possession. Coveney v. Tannahill, 1 Hill, 33.

But an attorney cannot be compelled to produce, on subpœna *duces tecum*, the papers of his client, deposited with him. *Id.*

Privileged communications cannot be refused to be made known, where fraud is charged. *Id.*

An attorney who is present at a business transaction between his client and another, is not privileged as to what then passed. *Id.*

sureties on his official bond, alleging the seizure and sale under the writs, and seeking to recover the value of the goods thus seized and sold. This action, commenced in the state court, was removed by appropriate proceedings to the United States Circuit Court for the Eastern District of Texas. On February 3, 1887, the attaching creditors filed their bill in the same circuit court for an injunction to restrain the further prosecution of the action at law, the one commenced in the state and removed to the federal court. This bill was based on the proposition that the creditors of Anderson were secured by both the real estate and chattel mortgage, while the attaching creditors had only recourse on the property covered by the chattel mortgage; and that therefore the creditors thus doubly secured by the real estate and chattel mortgage should exhaust the security given by the former before making any claim to the property secured by the latter. The temporary injunction was issued as prayed for. The property secured by the real estate mortgage was sold, and the proceeds applied as directed therein; but such appropriation of proceeds did not pay the debts in full, and left a balance due the creditors therein named, secured only by the chattel mortgage. Thereafter, on September 26, 1887, by stipulation of counsel, the injunction bill was dismissed, and the action at law transferred from the state to the federal court was continued to the next term, with a proviso as to the use of the testimony already taken in the injunction suit; and also that the dismissal should be without prejudice to the right of the defendants in the law action to move for its transfer from the law to the equity docket. At the February Term, 1888, the law action came on for trial; an application was made to transfer it to the equity docket, which was denied, and the case went to trial, and resulted in a verdict and judgment against the marshal and his sureties for an amount equal to the sums due to the various creditors secured by the real estate and chattel mortgages, and unsatisfied by the proceeds of the sale of the real estate. To reverse such judgment a writ of error has been brought to this court.

Messrs. **John Paul Jones,** *Reese H. Voorhees* and *Todd & Hudgins,* for plaintiffs in error:

An accounting was necessary, and not only Anderson, but all the beneficiaries of the trust, were necessary parties to such accounting.

Only a court of equity could render full, adequate and complete relief to all parties.

1 Pom. Eq. Jur. § 150 *et seq.;* 3 Pom. Eq. Jur. §§ 1218 *et seq.*, 1229, 1230; 1 Dan. Ch. Pl. and Pr. 214 *et seq.;* Jones, Chat. Mort. § 685; *Brobst* v. *Brock*, 77 U. S. 10 Wall. 519 (19: 1002); *Shillaber* v. *Robinson*, 97 U. S. 68 (24: 967); *Chicago, D. & V. R. Co.* v. *Fosdick*, 106 U. S. 47 (27: 47).

The court erred in permitting the attorney for plaintiffs to testify as to transactions and conversations between him and his clients.

The execution of a deed or will cannot be called the secret of his client (Lord Say and Seal's Case, 10 Mod. 40), although he is a subscribing witness. Doe v. Andrews, Cowp. 845; Robson v. Kemp, 5 Esp. 52, 4 Esp. 235; Hurd v. Morning, 1 Car. & P. 372; Johnson v. Daverne, 19 Johns. 134; Sandford v. Remington, 2 Ves. Jr. 189; Kingston v. Gale, 8 Vin. Abr. 548; Bull. N. P. 284.

An attorney may be required to disclose whatever act was done in his presence towards the perpetration of a fraud. Coveney v. Tannahill, 1 Hill, 41.

He may be called as a witness to prove the existence of a deed and that it is in his possession, but cannot, as a witness, be compelled to produce it. Brandt v. Klein, 17 Johns. 335; Jackson v. M'Vey, 18 Johns. 330; Brard v. Ackerman, 5 Esp. 120; Bevan v. Waters, 1 Moody & M. 235.

Where a will is sought to be set aside on the ground of undue influence, communications by a testator to an attorney who prepared the will are not privileged. *Re* Austin, 42 Hun, 518; Martin v. Platt, 51 Hun, 430.

The rule which excludes from evidence confidential communications from client to attorney does not apply to cases of testamentary disposition of a client. Blackburn v. Crawford, 70 U. S. 3 Wall. 175 (18:186).

Where an attorney is a witness to a will, this is an express waiver by the testator of any privilege of secrecy as to what was said or done. *Re* Coleman, 111 N. Y. 220. See also Loder v. Whelpley, 111 N. Y. 239; Hartlett v. Bunn, 56 Hun, 509.

An attorney may be a witness to prove the execution of a contract drawn by him. Kaut v. Kessler, 6 Cent. Rep. 244, 114 Pa. 603.

The privilege extending to communications between attorney and client is not the privilege of the attorney, but of the client. Morris v. Cain, 39 La. Ann. 712.

To entitle a party to the protection accorded to privileged communications, they must be made to the attorney acting as legal adviser, and must have been made by the client for the purpose of professional advice on the subject of his rights or liabilities. Caldwell v. Davis, 10 Colo. 481.

The privilege of an attorney, under sec. 835, N. Y. Code, is in relation to the subject matter of the action, and not to the fact of his employment as attorney. Hampton v. Boylan, 46 Hun, 151.

Communications to an attorney in the presence of both parties for whom he is drawing an agreement are not privileged. Goodwin G. S. & M. Co's App. 10 Cent. Rep. 761, 117 Pa. 514.

Witness to will, not privileged. *Re* Freeman, 46 Hun, 458.

In a suit to set aside a will, a physician who attends on last illness is not admissible. Houston v. Simpson, 14 West. Rep. 828, 115 Ind. 62.

Attorney may be compelled to make discovery of papers in his possession.

An attorney may be compelled, by order of the court, to produce in evidence, and to make discovery of, a will or other papers in his possession, although he did not receive them from his client, but from a third person not a party to the suit. Zeh v. Glaskin, 22 Jones & S. 351; People v. Vail, 1 Cow. 589; People v. Vail, 2 Cow. 623; Doe v. Roe, 1 Mees. & W. 207; Eager v. Wiswall, 2 Paige, 369, 2 N. Y. Ch. L. ed. 947; Langslow v. Cox, 1 Chitty, 98; Harris v. Aldrit, 2 Chitty, 229; Fowler's Petition, 9 Abb. N. C. 268; Manley v. Bonnel, 11 Abb. N. C. 123; Mitchell's Case, 12 Abb. Pr. 249; 2 Phil. Ev. 196; Montrose v. Wannamaker, 21 Abb. N. C. 478; Martine v. Albro, 63 How. Pr. 215; 2 Story, Eq. Jur. § 1500; Wakeman v. Bailey, 2 Barb. Ch. 482, 5 N. Y. Ch. L. ed. 981.

1 Greenl. Ev. § 236 *et seq.*; *Chirac* v. *Reinicker*, 24 U. S. 11 Wheat. 280 (6: 474).

The conveyance is not a mortgage, but is a voluntary assignment.

Burrill, Assignments, 2, 6, 7, 8; 1 Hilliard, Mort. 359; *Dwight* v. *Overton*, 35 Tex. 390; *Hoffman* v. *Mackall*, 5 Ohio St. 124; *Woodruff* v. *Robb*, 19 Ohio, 216.

Being an assignment preferring creditors it is void.

Laws Tex. 1879, p. 57; *Lawrence* v. *Norton*, 15 Fed. Rep. 853.

Messrs. **J. S. Hogg**, *H. D. McDonald*, *Sims & Wright* and **C. A. Culberson**, for defendants in error:

The case was cognizable at law and the court properly refused to transfer it to the equity docket.

Thompson v. *Central Ohio R. Co.* 73 U. S. 6 Wall. 134 (18: 765); *Wood* v. *Weimar*, 104 U. S. 792 (26: 780); *Scott* v. *McDaniel*, 67 Tex. 317; *Stiles* v. *Hill*, 62 Tex. 429; Jones, Chat. Mort. § 426; *Norris* v. *McCanna*, 29 Fed. Rep. 757; *Wilson* v. *Martin*, 40 N. H. 88; *Wingard* v. *Banning*, 39 Cal. 543; *Gafford* v. *Stearns*, 51 Ala. 434; 1 Perry, Trusts, § 330.

The testimony of H. D. McDonald was properly admitted. The communication was not privileged, though he also acted as attorney.

Rochester City Bank v. *Suydam*, 5 How. Pr. 254; *Jeanes* v. *Fridenberg*, 3 Clark, 199; 1 Greenl. Ev. § 242.

Being the attorney of both parties the communication was not privileged.

Parish v. *Gates*, 29 Ala. 254; *Reg.* v. *Avery*, 8 Car. & P. 596.

If the statements are privileged, his clients alone could object.

Blackburn v. *Crawford*, 70 U. S. 3 Wall. 175 (18: 186); *Crittenden* v. *Strother*, 2 Cranch, C. C. 464; *Woburn* v. *Henshaw*, 101 Mass. 193; *Benjamin* v. *Coventry*, 19 Wend. 353; *Fessler* v. *Schriber*, 38 Ill. 172; *Riddles* v. *Aikin*, 29 Mo. 453; 1 Greenl. Ev. § 243.

The entire charge not being in the record this court will not presume that the alleged omissions were not supplied in other portions thereof.

Mutual L. Ins. Co. v. *Snyder*, 93 U. S. 393 (23: 887); *United States Exp. Co.* v. *Kountze*, 75 U. S. 8 Wall. 342 (19: 457); *Carter* v. *Carusi*, 112 U. S. 478 (28: 820); *Shutte* v. *Thompson*, 82 U. S. 15 Wall. 151 (21: 123); *Queen Ins. Co.* v. *Jefferson Ice Co.* 64 Tex. 578; *Cockrill* v. *Cox*, 65 Tex. 669; *Liverpool & L. & G. Ins. Co.* v. *Ende*, 65 Tex. 118.

The instrument is a chattel mortgage, not an assignment.

Texas Nat. Bank v. *Lovenberg*, 63 Tex. 506; *Jackson* v. *Harby*, 65 Tex. 713; *Calder* v. *Ramsey*, 66 Tex. 218; *Watterman* v. *Silberberg*, 67 Tex. 100; *Scott* v. *McDaniel*, 67 Tex. 315.

Mr. Justice **Brewer** delivered the opinion of the court:

Many assignments of error and many questions are presented by the counsel for plaintiffs in error. We notice those which seem to be substantial. It is alleged, first, that there was error in refusing to transfer the law action to the equity docket. This was an action at law, brought by certain mortgagees to recover the value of goods mortgaged to them, which had been seized, sold and appropriated by the defendant, the United States Marshal, to other purposes. Nothing is plainer than that such an action is one at law. It is urged that the debts secured by the chattel mortgage were also secured by a real estate mortgage; that the real estate thus conveyed had been sold, and the proceeds applied in reduction of the debts; that therefore an accounting was necessary to show the amount still due to the various creditors, and that such an accounting could only be had in an equitable action. The ruling of the circuit court was unquestionably correct. The recovery of the plaintiffs, the chattel mortgagees, was limited to the amount of the debts secured by the chattel mortgage. If any portion of the debts thus secured had been paid subsequently to the mortgage, by the voluntary act of the debtor or the appropriation of the proceeds of other securities, this was matter of defense which could be pleaded and proved in an action at law as fully and satisfactorily as in a suit in equity. It was simply a question as to the partial payment of indebtedness. How it was made was immaterial; the fact and amount were the substantial matters; and these were matters provable and determinable in an action at law. There was no error, therefore, in refusing to transfer the case from the law to the equity docket.

A second proposition is that the chattel mortgage so called was not, in fact, a chattel mortgage, but an assignment for the benefit of creditors, and therefore void under the Statute of Texas, as giving preferences and not being for the equal benefit of all creditors. But the instrument is, in form and expressed intent and scope, a mortgage. It recites that the grantor is indebted to sundry parties, naming them and giving the amounts of the debts; that he is desirous of securing such creditors; and in consideration of the premises conveys to three of the creditors named the property, with instructions to take possession and sell, and, after paying expenses, to apply the proceeds to the payment, ratably, of the debts, and the balance, if any, to return to the grantor. It then reads: "This instrument is intended as a chattel mortgage to secure the debts herein mentioned;" and states that it is made to the three creditors mentioned, in behalf of themselves and the other creditors named, because on account of the great number of the latter it would be inconvenient for them all to act in its execution. It is true that there is no expressed condition of defeasance; but that attaches to every conveyance made simply for security, and it is unnecessary to state that which the law implies. That it contained a direction for the mortgagees to sell, is not material; for, in the absence of such a direction, a mortgagee, on taking possession, should sell and apply the proceeds to the satisfaction of his debt. Instruments similar in form have been repeatedly presented to the consideration of the Supreme Court of Texas, and adjudged to be chattel mortgages, and not within the scope of the Act of March 24, 1879, providing for assignments for the benefit of creditors, or in con-

flict with the 18th section of that Act, which forbids preferences in assignments. *La Belle Wagon Works* v. *Tidball*, 59 Tex. 291; *Stiles* v. *Hill*, 62 Tex. 429; *Texas Nat. Bank* v. *Lovenberg*, 63 Tex. 506; *Jackson* v. *Harby*, 65 Tex. 710; *Calder* v. *Ramsey*, 66 Tex. 218; *Watterman* v. *Silberberg*, 67 Tex. 100; *Scott* v. *McDaniel*, 67 Tex. 317. Nor can any advantage be taken by the plaintiffs in error of the opinion expressed by the trial court, when the instrument was offered in evidence, that its validity depended entirely on the fact as to whether, when it was made, the grantor was insolvent or contemplated insolvency, and this, irrespective of whether that opinion was correct or not, for the verdict of the jury, in favor of the plaintiffs, negatives the existence of such conditions, if their existence avoided the instrument.

That the law was fully given by the court to the jury we are bound to presume, in the absence from the record of the entire charge; and that it was correctly stated, from the fact that plaintiffs in error took no exceptions to it. True, the record contains four special instructions given by the court, and two asked by the defendants and refused. It also shows that two days after the verdict, and in their motion for a new trial, the defendants protested and excepted to such giving and refusal; but nowhere is it stated that these four instructions were all that were given, and in the federal courts a motion for a new trial is a mere application to the discretion of the trial court, and it is [14] too late then to tender for the first time exceptions to rulings made at the trial. *Pacific Exp. Co.* v. *Malin*, 132 U. S. 531, 538 [33: 450]. So, although one of the instructions asked by the defendants, and refused, relates to the effect on the instrument of the insolvency of the grantor therein, it may have been refused because already fully given in the general charge. For these reasons there is nothing in respect to the instructions, either those given or refused, which can now be considered.

Another error alleged is, that the court permitted H. D. McDonald, one of the counsel for plaintiffs, to testify that he was present at the time of the execution of the chattel mortgage and to state what transpired at that time. The parties present at that interview were the mortgagor and certain of the creditors, and the interview was held with a view of obtaining from the mortgagor the security which was in fact given. McDonald was present both as a creditor and as attorney for the creditors. It is objected that communications to an attorney are confidential, and that he can neither be compelled nor permitted to disclose them as a witness; but the creditors whose counsel he was did not object to his testimony, and, as stated, he was present both as party and counsel. Under these circumstances, we see no error in the admission of his testimony.

These are the substantial matters presented for our consideration, and in them we find no error. *The judgment, therefore, will be affirmed.*

UNITED STATES, *Appt.*, [8

v.

CENTRAL PACIFIC RAILROAD COMPANY.

(See S. C. Reporter's ed. 84-87.)

Act of May 7, 1878—per cent due government from railroad company, how ascertained.

Under the Thurman Act of May 7, 1878, in order to ascertain the net earnings of a railroad company mentioned therein, and the per cent thereof due the government, expenditures for the permanent improvement of the company's property, such as betterments and improvements on the road, its buildings and equipments, which permanently increased them in value, are not to be deducted from the gross receipts; only the necessary expenses of operating the road and keeping the same in repair are to be deducted.

[No. 758.]

Argued Nov. 21, 24, 1890. Decided Jan. 26, 1891.

APPEAL from a judgment of the Court of Claims, in favor of the Central Pacific Railroad Company, claimant, for services rendered to the War, Post-Office and other Departments of the government, and moneys exacted by the Treasury Department and paid by claimant, in excess of the amount due from him to the government for the 25 per cent net earnings required to be paid by the fourth section of the Act known as the Thurman Act, passed May 7, 1878. *Reversed in part, and affirmed in part.*

The facts are stated in the opinion.

Messrs. **W. H. H. Miller,** *Atty-Gen.*, and **Wm. H. Taft,** *Solicitor-Gen.*, for appellant.

Messrs. **Joseph E. McDonald** and *Jos. K. McCammon* for appellee.

Mr. Justice **Bradley** delivered the opinion of the court:

This is an appeal from the Court of Claims. The claimant, the Central Pacific Railroad Company, filed a petition October 31, 1887, to recover from the United States the sum of $804,094.31, alleged to be due for services rendered to the War, Post-Office and other [85 Departments, and the sum of $321,157.72, alleged to have been exacted by the Treasury Department, and paid by the claimant, in excess of the amount actually due from the claimant to the government for the 25 per cent net earnings required to be paid by the fourth section of the Act known as the Thurman Act, passed May 7, 1878. The Court of Claims rendered a decree in favor of the claimant for the first of the above-mentioned sums, and for a portion of the second claim, amounting to $198,422.83, the other part of the sum demanded having been barred by the Statute of Limitations. Both parties appealed from the decree, but the claimants have dismissed their appeal and the government has consented that the decree shall be affirmed as to the said sum of $804,094.31 due to the claimants for services rendered to the Departments, so that the only matter of controversy remaining on the record is the decree

for the said sum of $198,422.83, the alleged amount of over-payments exacted for 25 per cent of net earnings during the years 1881, '82, '83 and '84. The ground of appeal on the part of the government as to this sum is that, in arriving at the net earnings of the Railroad Company for the years before mentioned, the Company claimed and the court allowed certain expenses which, as contended by the government, were not for current expenses and repairs, but were for betterments and improvements on the road, its buildings and equipments, whereby the capital of the Company invested in its works was increased in permanent value. These expenses, the government contends, ought not to have been allowed under the provisions of the Thurman Act. They are of the same class, as appears by a supplemental return made by the Court of Claims, which were allowed by this court as fairly chargeable under the head of expenses under the Act of 1862, in the case of *Union Pac. R. Co.* v. *United States*, 99 U. S. 402 [25: 274]. But the accounts in question in that case arose before the Thurman Act was passed, and the phraseology of this Act was probably adopted in view of the construction of the Act of 1862 claimed by the railroad companies in that case. As the law stood prior to 1878, under which 5 per cent of the net earnings [86] of the companies was to be paid into the treasury towards the liquidation of the bonds loaned to them by the government, we held that in arriving at such net earnings it was admissible for the companies to charge, as they had done, a reasonable amount for betterments and improvements, rendered necessary by the gradual increase of traffic, the better discharge of business and the public accommodation; not including, however, the cost of any important improvement, such as additional track, or any other matter involving a large outlay of money. This view was based upon the practice and usage of conservative and well managed railroad companies, which tended to the suppression of extravagant dividends that might be the result of a showing of large net earnings. But Congress, in the Thurman Act, *ex industria* used language with regard to the character of the expenses to be allowed in ascertaining the amount of net earnings, which seems to preclude any charges for improvements or betterments, or increase of permanent value of the works in any manner whatever. The language referred to is as follows: "That the net earnings mentioned in said Act of eighteen hundred and sixty-two, of said railroad companies respectively, shall be ascertained by deducting from the gross amount of their earnings respectively the necessary expenses actually paid within the year in operating the same and keeping the same in a state of repair, and also the sum paid by them respectively within the year in discharge of interest on their first-mortgage bonds, whose lien has priority over the lien of the United States, and excluding from consideration all sums owing or paid by said companies respectively for interest upon any other portion of their indebtedness; and the foregoing *provision* shall be deemed and taken as an amendment of said Act of eighteen hundred and sixty-four, as well as of said Act of eighteen hundred and sixty-two." 20 Stat. chap. 96, § 1, p. 58.

Considering the time and the circumstances under which this Act was passed, and the express declaration that the clause in question was to be deemed and taken as an amendment of the Acts of 1864 and 1862, we think its meaning cannot be mistaken as intending to exclude from the category of expenses to be taken from gross receipts in order to ascertain the "net earnings," all such expenditures as have the effect of permanently improving the value of the Company's property and works; and taken prospectively it is to be regarded as valid under the decision in *The Sinking Fund Cases*, 99 U. S. 700 [25: 496]. As the expenses in question are of the category referred to, and the allowance of them by the Court of Claims reduced the 25 per cent of net earnings by the said amount of $198,422.83, it follows that the judgment as to that sum must be reversed, and affirmed as to the said sum of $804,094.31, and *the cause remanded with instructions to enter judgment in conformity with this opinion.*

UNITED STATES, *Appt.*, [8
v.
JOSEPH F. KINGSLEY.

(See S. C. Reporter's ed. 87-92.)

Soldier's retained pay—sec. 1281, Rev. Stat.—evidence of forfeiture of retained pay—forfeiture, how declared—when pay may be withheld—pay for transportation and subsistence after discharge.

1. To entitle a soldier to retained pay under sec. 1281, U. S. Rev. Stat., it is necessary to show his discharge from the service and an honest and faithful service to the date of discharge; to deny him his right to retained pay it is not necessary that a forfeiture be declared by a court-martial, or other military authority.
2. By his enlistment the soldier contracts for honest and faithful service, and the rendition of such service is a condition precedent to his right to recover his retained pay. The fact that he has not rendered such service may be shown as well by his military record as by the judgment of a court-martial.
3. Sec. 1281, U. S. Rev. Stat., imposes a forfeiture of retained pay for a breach of the soldier's contract of enlistment, irrespective of any actual damages occasioned by his misconduct, and such forfeiture may be declared by the court in which he brings his action for such pay.
4. The accounting officers of the treasury may withhold from the soldier, when discharged, the retained pay provided for by sec. 1281, U. S. Rev. Stat., when he appears, from the report of his commanding officer, to have been guilty of numerous offenses which establish a failure to furnish the honest and faithful service demanded by the Statute.
5. A soldier cannot be deprived of pay for transportation and subsistence from the place of his discharge to the place of his enlistment, under sec. 1290, U. S. Rev. Stat., except when his discharge is a punishment inflicted by the judgment

of a court-martial or other military authority, for a specific offense, and not when he is discharged for unfitness for service and general bad character.

[No. 778.]

Argued Jan. 16, 1891. Decided Jan. 26, 1891.

APPEAL from a judgment of the Court of Claims, awarding the petitioner, Joseph F. Kingsley, $65.20 for retained pay, and $8.10 for transportation and subsistence from the place of his discharge to the place of his enlistment. *Reversed as to the $65.20, and affirmed as to the $8.10.*

Statement by *Mr. Justice* **Brown:**

This was an appeal by the United States from a judgment of the Court of Claims (24 Ct. Cl. 219) awarding to the petitioner, Joseph F. Kingsley, $73.30 for "retained pay," and for transportation and subsistence from the place of his discharge to that of his enlistment. The finding of the Court of Claims was as follows:

"*Findings of fact.*

"This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

"1. August 12, 1882, the claimant enlisted as a private in the Marine Corps of the United States at Brooklyn, N. Y.

"October 3, 1884, he was promoted to a corporal.

"September 4, 1885, he was reduced to a private.

"June 4, 1887, he was discharged from the Marine Corps at the Marine barracks, Navy-yard, Washington, D. C.

"2. The cause of discharge appears in the following correspondence and order:

" 'Marine Barracks, Navy-Yard,
'Washington, D. C., May 28, 1887.

'Sir: I have to respectfully request that private Joseph F. Kingsley, of this command, may be discharged from the service, as he is utterly worthless and his character is bad; he is also a very disturbing element in the garrison. I inclose herewith his staff returns, also a list of his offenses.

'Very respectfully, your obedient servant,
' P. C. Pope.

'Captain U. S. Marine Corps, Commanding Marines.

' C. G. McCauley, Colonel Commandant.'

" '*List of Offenses.*

' October 11, 1886. Twenty-four hours' over leave.

'October 21, 1886. Creating disturbance in quarters.

'December 3, 1886. Drunk in garrison.

' December 24, 1886. Insubordination and disrespect to sergeant of the guard, tried by summary court-martial, sentenced thirty days D. I., solitary confinement.

' February 23, 1887. Over leave.

' April 5, 1887. Improper conduct at target practice.

' May 20, 1887. Absent without leave.

' May 26, 1887. Insubordinate and disrespect to the officer of the day.'

"These reports were forwarded through the official channels to the Secretary of the Navy, and thereafter the following order was issued:

" 'Headquarters U. S. Marine Corps,
' Washington, D. C., May 31, 1887.

'Sir: Be pleased to discharge "by order of the Secretary of the Navy, as unfit for service, character bad," . . . private Joseph F. Kingsley, at the Marine Barracks, Navy-yard, Washington, D. C. (upon the report of his commanding officer, dated the 28th instant).

'Very respectfully, C. G. McCauley,
' Colonel Commandant U. S. Marine Corps.

'The Adjutant and Inspector, U. S. Marine Corps Headquarters.'

"June 4, 1887, in pursuance of this order the claimant was discharged.

"3. It does not appear that he demanded to be tried by court-martial or protested against his discharge.

"4. He has not received any 'retained pay' under section 1281 of the Revised Statutes, nor transportation and subsistence from the place of discharge to the place of enlistment under section 1290. He has, however, received all other pay and allowances.

"The distance from Washington Navy-yard to Brooklyn is 228 miles.

"5. Under the practice of the accounting officers of the Treasury Department enlisted men of the Marine Corps have been held to be entitled to all the benefits of sections 1281 and 1290 of the Revised Statutes.

"*Conclusion of law.*

"Upon the foregoing findings of facts the court decides, as conclusions of law, that the claimant is entitled to recover for 'retained pay,' under section 1281 of the Revised Statutes, $65.20, and for transportation and subsistence, under section 1290, $8.10."

From the judgment entered upon this finding the defendant appealed to this court.

Mr. **Wm. A. Maury,** *Assistant Atty-Gen.,* [9
for appellant.

No counsel appeared for appellee.

Mr. Justice **Brown** delivered the opinion of the court:

(1.) Claimant's right to retained pay depends upon Revised Statutes, section 1281, which reads as follows: "To the rates of pay stated in the preceding section one dollar per month shall be added for the third year of enlistment, one dollar more per month for the fourth year, and one dollar more per month for the fifth year, making in all three dollars increase per month for the last year of the first enlistment of each enlisted man named in said section. But this increase shall be considered as retained pay, and shall not be paid to the soldier until his discharge from the service, and shall be *forfeited* unless he serves honestly and faithfully to the date of discharge."

To entitle the soldier to this retained pay it is therefore necessary to show, first, his discharge from the service; second, an honest and faithful service to the date of discharge. It was held by the Court of Claims, however, that to deny his right to retained pay a *forfeiture* must have been considered and declared by a court-martial or other military authority having jurisdiction in the premises, and that the question of honest and

faithful service, required by the section, was not one that could be tried in a collateral proceeding. We are unable to concur in this opinion. By his enlistment the soldier contracts for honest and faithful service, and the rendition of such service is a condition precedent to his right to recover his retained pay. The fact that he has not rendered such service may be shown as well by his military record as by the judgment of a court-martial. It is true the word "forfeited" is used in the Statute, but we think it is not used in the technical sense of a punishment after judgment, but rather in the sense of a disability incurred by the nonperformance of a contract. A similar meaning is attached to the word when used in connection with the claim of a mariner for his wages. By his contract of shipment the seaman also bargains for honest and faithful service, and obedience
[1] to the lawful commands of the master and other officers of his vessel, and in case of desertion or gross misconduct, it is the constant practice of courts of admiralty to forfeit the whole or a part of his wages, irrespective of the actual damage suffered by the owner or master of the vessel. *The Balize*, Brown, Adm. 424. In an action at common law, however, such wages are not subject to forfeiture, but a deduction is made therefrom commensurate with the damages actually sustained. The Statute under consideration imposes a like forfeiture for a breach of the soldier's contract of enlistment, irrespective of any actual damages occasioned by his misconduct, and such forfeiture may be declared by the court in which he brings his action, as well as by the judgment of a court-martial. Indeed, the word in this connection means nothing more than an incapacity to recover, by reason of misconduct, irrespective of any actual damages, or, as defined by Worcester, "to lose by some breach of condition; to lose by some offense."

We are confirmed in this view by an examination of *United States* v. *Landers*, 92 U. S. 77 [23: 603], which was an action for bounty and pay, wherein *Mr. Justice* Field, speaking for the court, says: "Forfeiture of pay and allowances up to the time of desertion follows from the conditions of the contract of enlistment, which is for faithful services. The contract is an entirety; and, if service for any portion of the time is criminally omitted, the pay and allowances for faithful service are not earned. And, for the purpose of determining the rights of the soldier to receive pay and allowances for past services, the fact of desertion need not be established by the findings of a court-martial; it is sufficient to justify a withholding of the moneys that the fact appears upon the muster-rolls of his company. If the entry of desertion has been improperly made, its cancellation can be obtained by application to the War Department. But forfeiture of pay and allowances for future services, as a condition of restoration to duty, can only be imposed by a court-martial."

That the accounting officers of the treasury were justified in withholding the pay of the claimant in this case, is manifest by the numerous offenses of which he appears, from the report of his commanding officer, to have been guilty. This record furnishes a clear case of failure to furnish the honest and faithful service demanded by the Statute.

(2.) Different considerations apply to his claim for transportation and subsistence from the place of discharge to the place of enlistment. The right to this depends upon section 1290:

"When a soldier is discharged from the service, except *by way of punishment for an offense*, he shall be allowed transportation and subsistence from the place of his discharge to the place of his enlistment, enrollment or original muster into the service. The government may furnish the same in kind, but in case it shall not do so, he shall be allowed travel-pay and commutation of subsistence for such time as may be sufficient for him to travel from the place of discharge to the place of his enlistment, enrollment or original muster into the service, computed at the rate of one day for every twenty miles."

We think this Statute contemplates a discharge as a punishment inflicted by the judgment of a court-martial or other military authority, for a specific offense, and not such a discharge as was issued in this case, for unfitness for service and general bad character. While this may justify the proper authorities in ordering the discharge of the soldier as a worthless member of the service, we cannot consider such a discharge as "a punishment for an offense" within the meaning of the Statute. The question whether such punishment must necessarily be awarded by the judgment of a court-martial is not presented by the record, and we express no opinion upon the point.

The judgment of the Court of Claims must therefore be reversed, and the case remanded, with directions to set aside the judgment already rendered, and to enter a new judgment in favor of the claimant for $8.10, for his transportation and subsistence.

SIOUX CITY STREET RAILWAY COMPANY, *Plff. in Err.*, [96
v.
CITY OF SIOUX CITY and CITY COUNCIL OF SIOUX CITY.

(See S. C. Reporter's ed. 98-108.)

Iowa law—charter of corporation may be amended, and new conditions imposed.

1. Under sec. 1090 of the Iowa Code the Legislature has power to repeal and amend the articles of incorporation of a company, and to impose any conditions upon the enjoyment of its franchise which the General Assembly may deem necessary for the public good.

2. Where an ordinance of a city in Iowa conferred upon a street railway company, which was incorporated after the enactment of sec. 1090 of the Iowa Code, the right to construct and maintain a railway upon its streets on condition of the company paving the space between the rails, and the company accepted the ordinance, and subsequently the Legislature of the State, by Act of

March 15, 1884, required all street railway companies in cities to pave between the rails and also one foot outside of their rails at their own expense, the city has power, under such law, to assess the street railway company the cost of paving the space between the rails and one foot outside thereof.

3. Under sec. 1090, Iowa Code, it was not in the power of Sioux City in Iowa, in which a street railway was constructed, by any contract with the company constructing it, to deprive the Legislature of the State of the power of taxing the company.

4. The right to operate a railway in the streets of a city in Iowa is a franchise obtained through power given to such city by the State of Iowa, but the State reserved the power to regulate such franchise and impose conditions upon it, and the power to determine the question of the exemption of the company from taxation, and to prescribe what burdens should be imposed upon it for the public good in the enjoyment of its franchise.

5. An ordinance of a city in Iowa, authorizing a railway company to lay a street railway on condition that the company should pave between the rails, is subject to the provision of sec. 1090 of the Iowa Code, and, although accepted by the railway company, does not constitute a contract between the company and the city or the State, the obligation of which is impaired by laying a tax upon the company, for paving the space of one foot outside the rails, imposed by an Act of the Legislature.

[No. 1228.]

Submitted Jan. 8, 1891. Decided Jan. 26, 1891.

IN ERROR to the Supreme Court of the State of Iowa to review a judgment on demurrer dismissing an action to set aside an assessment, and which judgment confirmed the assessment. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. H. Swan,** for plaintiff in error:

The ordinance was accepted by the plaintiff, and this constituted a contract between the City and the Street Railway Company, and was governed by the terms and conditions set forth in it.

Des Moines v. *Chicago, R. I. & P. R. Co.* 41 Iowa, 569; *Burlington* v. *Burlington St. R. Co.* 49 Iowa, 147; *Des Moines St. R. Co.* v. *Des Moines B. G. St. R. Co.* 73 Iowa, 513; Dill. Mun. Corp. § 245; *State* v. *Corrigan Consolidated St. R. Co.* 85 Mo. 263; *Coast-Line R. Co.* v. *Savannah*, 30 Fed. Rep. 647; *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50 (19: 594).

This ordinance or contract between the City and the Street Railway Company is neither part of the articles of incorporations, by-laws, rules or regulations of the corporation, nor is it a franchise coming within the meaning of section 1090 of the Code of Iowa.

New Jersey v. *Yard*, 95 U. S. 104 (24: 352); *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 50 (19: 594); *Miller* v. *New York*, 82 U. S. 15 Wall. 498 (21: 104); *Maine C. R. Co.* v. *Maine*, 96 U. S. 510 (25: 840); *Sinking Fund Cases*, 99 U. S. 700 (25: 496); *Holyoke W. P. Co.* v. *Lyman*, 82 U. S. 15 Wall. 519 (21: 139); *Shields* v. *Ohio*, 95 U. S. 324 (24: 359); *Greenwood* v. *Union Freight R. Co.* 105 U. S. 13 (26: 961); *Spring Valley Water Works* v. *Schottler*, 110 U. S. 348 (28: 174); *Union Pass. R. Co.* v. *Philadelphia*, 101 U. S. 528 (25: 912); *Chicago* v. *Sheldon*, 76 U. S. 9 Wall. 55 (19: 597); *State* v. *Herod*, 29 Iowa, 123; *New York* v. *Second Ave. R. Co.* 32 N. Y. 261.

Messrs. **D. B. Henderson,** *J. L. Kennedy, C. L. Wright* and *E. H. Hubbard* for defendants in error.

Mr. Justice **Blatchford** delivered the [9 opinion of the court:

The Sioux City Street Railway Company became a corporation on December 6, 1883, under the General Incorporation Laws of the State of Iowa. On the 12th of December, 1883, the City of Sioux City, by an ordinance of the City Council, conferred upon the Company the right to locate, operate, construct and maintain street railways upon and along certain streets in the City, on the terms and conditions specified in such ordinance. Section 11 of the ordinance was as follows: "Sec. 11. Whenever, by resolution of common council, any street or part of street on which said track shall be laid and operated shall be ordered paved or macadamized, either at the expense of the City or owners of abutting property, then the said proprietors of said street railway shall pave or macadamize in the time and manner directed the space between the rails, and shall thereafter keep the same between the rails in good repair, and shall keep in good condition and repair the space between the tracks on all bridges that they cross." On the 18th of December, 1883, the Company accepted the ordinance. Prior to March 18, 1884, the Company had expended over $10,000 in constructing tracks on certain streets and for other purposes, and had contracted for material and supplies for constructing other tracks, and had its street railway in operation on certain streets, in accordance with the terms of the ordinance.

On March 15, 1884, the Legislature of Iowa passed an Act entitled "An Act Granting Additional Powers to Certain Cities of the First Class, with Reference to the Improvement of Streets, Highways, Avenues or Alleys, and to Provide a System of Payment therefor." The 6th section of that Act provided as follows: "All railway companies and street railway companies in cities of the first class, as provided in section one of this Act, shall be required to pave or repave be- [10 tween rails and one foot outside of their rails, at their own expense and cost. Whenever any street, highway, avenue or alley shall be ordered paved or repaved by the council of any such city, such paving or repaving between and outside of the rails shall be done at the same time and shall be of the same material and character as the paving or repaving of the street, highway, avenue or alley upon which said railway track is located, or of such other material as said council may order, and when said paving or repaving is done said companies shall lay in the best approved manner the strap or flat rail. Such railway companies shall keep that portion of the streets, highways, avenues or alleys between and one foot outside of their rails up to grade and in good repair, using for such purpose the same material with which the street, highway, avenue or alley is paved upon which the track is laid, or

such other material as said council may order." Laws of 1884, p. 22.

On January 15, 1886, the City of Sioux City became a city of the first class, under the statutes of Iowa, and has continued to be such.

On the 11th of May, 1886, the City Council passed an ordinance entitled "An Ordinance Providing for the Paving of the Streets between the Rails of Railways and Street Railways Located thereon, and Defining the Manner of Making Special Assessments to Defray the Cost and Expenses thereof and the Manner of Enforcing and Collecting the Same," the first section of which provided as follows: "Sec. 1. That whenever the City Council, etc., shall cause to be paved any street, avenue or alley whereon any railway has or shall be located and laid down, they shall also order and provide by resolution that the company or persons owning said railway or street railway pave said street, avenue or alley between the rails of said railway or street railway, and one foot each side the rails thereof, at their own expense and cost: *Provided*, That the provisions of this section shall not in any manner be construed to affect any rights accrued or existing in favor of said railway companies or street railway company under any franchise or license heretofore granted under any ordinance heretofore adopted by said City Council." Under this ordinance, and a subsequent one passed May 25, 1886, and a resolution passed August 31, 1886, the City Council ordered certain streets to be paved, including those parts as to which the assessments involved in this suit were imposed, and provided for assessing to the Street Railway Company the cost of paving the space between the rails and one foot outside thereof.

The assessment of a special tax against the Company or the cost of paving the space outside of the tracks was made December 27, 1886. Prior to that time, the Company had paid for so much of the paving as lay between the rails of its tracks. In proper time after the resolution of August 31, 1886, was served upon the Company, it filed its written objections thereto, as follows: "The Sioux City Street Railway Company objects to the resolution ordering the assessment of a special tax against said Company for the cost of paving one foot outside of its railway tracks in improvement districts 2 and 3. It objects to having the cost of paving one foot outside of the railway track charged to it, or to have same in any manner assessed against it or against its property, and to having any resolution or ordinance passed charging the cost of said paving to it, or making any assessment against it or against its property, or seeking in any manner to collect said cost from it, or making same a lien upon the title to any of the property, by any ordinance, resolution or confirmation purporting to charge such cost against the said Company or its property; that, by the terms of the charter granting the Company the right to locate, construct and maintain its said railway, it was expressly provided that the Company should only be required to pave so much of the street wherein the track was constructed as should lie between the rails of said track; that the City of Sioux City thereby expressly contracted and agreed that this Company should have the right to locate, construct, operate and maintain its said tracks in said streets, and should only be required to pave or keep in repair that portion thereof lying within the rails of its said tracks; that the said Company, relying upon the charter and the ordinance granting it the right to locate and construct the tracks on the said streets herein named and the provisions and conditions thereof, located, constructed and has since operated its track and railway on the said streets, and has in all respects complied with all the conditions and requirements imposed upon it by said City by the said ordinance, and that said assessment of costs of paving one foot outside the rails of said railway tracks is a violation of the grant and contract of said City to and with this Company, and is illegal and void." Notwithstanding this, the City Council, on the 15th of March, 1887, overruled the objections of the Company and confirmed the assessment.

Under this state of facts, the Company, on the 30th of May, 1887, filed in the District Court of the County of Woodbury, in the State of Iowa, its petition against the City of Sioux City and the City Council of Sioux City, setting forth the foregoing facts and averring as follows: "That, by the terms of the charter granting to the plaintiff the right to locate, construct and maintain said street railway, it was expressly provided that plaintiff should only be required to pave so much of the street whereon it constructed and operated its street railway as should lie between the rails of its said track, and the City thereby expressly contracted and agreed with plaintiff that, in consideration of its constructing and operating the said street railway over said streets, it should have the right so to do, and only be required to pave and keep in repair so much of the street as lies between its rails; and said Company, relying on the ordinance and contract of said City, located and constructed at great expense said track, and has ever since operated and maintained the same, and the said ordinance and resolution requiring plaintiff to pay the cost of paving one foot outside of the track of the railway is a violation of said contract granting it the right to locate and construct the said railway. The said City Council erred in passing said ordinance and resolution requiring plaintiff to pay the cost of paving one foot outside of their tracks, and erred in overruling their objections to the special charges and assessments made against said Company for said cost of such paving, and in determining that the said cost of such paving should be charged to said plaintiff and against the property, and erred in confirming said special assessments." The petition prayed for the issuing of an order for a writ of certiorari to the City Council and for a reversal of its action.

On the 11th of February, 1889, the petition was amended by averring that section 6 of the Act of March 15, 1884, in so far as it sought to impose upon the Company the

paving of one foot outside of its track, or to impose upon it the cost thereof, was a violation of subdivision 1 of section 10 of article 1 of the Constitution of the United States, as impairing the obligation of a contract, and that the ordinances of May 11, 1886, and May 25, 1886, and the resolutions of August 9, 1886, and December 27, 1886, were a violation of the same subdivision.

The defendants filed a demurrer to the petition and amendment, as follows: "That the facts stated herein do not entitle the plaintiff to the relief demanded, for that: 1. The said ground for relief, as stated in said petition and amendment thereto, is that the action of said City and its City Council, in assessing the cost of paving of one foot outside the rail of the tracks of plaintiff's railway, impairs the obligation of the contract made between said City and plaintiff, while said petition and amendment thereto discloses that such is not the effect of said action of the City. 2. That said petition and amendment thereto shows that, in making said assessment, the City of Sioux City, by its common council, only complied with the provisions of the law of the State of Iowa authorizing said assessment, and then in force. 3. That the said plaintiff took its charter as a corporation from the State, subject to the reserved power of the State to abridge or modify said charter, and to regulate, withhold or impose any other conditions upon any franchise obtained by said corporation, and the said plaintiff took said franchise and ordinance from said City subject to the rights of said City to make any charge or assessment against its property which the Legislature might provide by statute."

The district court sustained the demurrer, dismissed the petition and confirmed the assessments. The plaintiff appealed to the Supreme Court of Iowa, which affirmed the judgment, its opinion being reported in 78 Iowa, 367.

4] Section 1090 of the Code of Iowa, which was in force when the Railway Company became incorporated, provided as follows:

"Sec. 1090. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall, at all times, be subject to legislative control, and may be, at any time, altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof, whenever the General Assembly shall deem necessary for the public good."

5] The Supreme Court of Iowa, in view of section 1090, held that the City of Sioux City, by granting the authority to construct and operate the railway on the condition of paving between the rails, did not limit its authority to make and enforce other regulations and requirements, as authorized by section 1090; that, although, by the contract, the Company bound itself to pave between 6] the rails, the City did not bind itself not to exercise the authority conferred upon it by section 1090, to impose other conditions upon the exercise of the franchise of the Company, which, in the judgment of the City, might be required for the public good; and that the City was authorized to impose on the Company the burden of the additional paving outside of the rails.

No question is raised as to the regularity or legality of the proceedings for assessment for the cost of paving outside of the track, except the question of the power of the City to impose the assessment, in view of the franchise granted to the Company. The only contention is that, in view of the provision of section 11 of the ordinance of December 12, 1883, there was no power in the City to require the Company to pave anywhere except between the rails. On the other hand, the defendants contend that section 11, while requiring the Company to pave between the rails, does not provide that it shall be required to pave only between the rails. Reference is also made by the defendants to section 8 of the ordinance of December 12, 1883, which provides for the payment by the Company into the city treasury of an annual license fee of $25 on each car used by it, "in addition to the other taxes lawfully assessed and collected;" and it is contended that, as the Legislature subsequently passed a general law requiring all street railway companies to pay for the cost of paving one foot outside of the rails, this tax or assessment was charged lawfully against the Company. It is also contended that, no matter what the provisions of the ordinance were, it was within the power of the Legislature to enact laws imposing an additional tax upon the Company, and within the power of the City, acting under such a law, to make the charge upon the property of the Company; and that, under section 6 of the Act of March 15, 1884, the assessment and tax in question were made against the property of the Company, and the City merely carried out the direction of the Statute and did not impose the additional burden by its own voluntary act.

The Company took its franchise subject to such legislation as the State might enact. This is plain from the provision of section 1090 of the Code. The Company took its charter subject to the provisions of that section. [107] The General Assembly deemed it necessary for the public good to require street railways to pay for the paving of one foot outside of the tracks, probably upon the view that it was right that they should be required to pave that part of the street which they used almost exclusively. It was not in the power of the City, by any contract with the Company, to deprive the Legislature of the power of taxing the Company. *Union Pass. R. Co.* v. *Philadelphia*, 101 U. S. 528 [25: 912]; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347 [28: 173]; 2 Morawetz on Private Corporations, secs. 1061, 1062, 1066, 1085, 1095, 1097.

Under section 1090 of the Iowa Code, the Legislature had the power not only to repeal and amend the articles of incorporation of the Company, but to impose any conditions upon the enjoyment of its franchise which the General Assembly might deem necessary

for the public good. The reservation of this power was a condition of the grant. The City Council could make no arrangement with the Company which would not be subject, under that section, to the superior power of the General Assembly.

The cases referred to by the plaintiff in error, of *Des Moines* v. *Chicago, R. I. & P. R. Co.*, 41 Iowa, 569, and *Burlington* v. *Burlington St. R. Co.*, 49 Iowa, 144, are not applicable to the present case, because in them there was not involved any question of the power of the State to impose additional burdens or conditions on the enjoyment of the franchise; and section 1090 of the Code was not in any manner involved or referred to in them. The questions raised in the present case relate solely to the subject of taxation, which is a matter under the authority of the State.

Moreover, the City derived from the State alone its power to grant a license to the Company. The right to operate the railway in the streets is a franchise obtained through power given to the City by the State, but the State reserved the power to regulate such franchise and impose conditions upon it. It reserved the power to determine the question of the exemption of the Company from taxation and to prescribe what burdens should be imposed upon it for the public good in the [108] enjoyment of its franchise. Manifestly, such power of the State would exist, if the right to occupy the streets with tracks were granted to the Company directly by an Act of the Legislature of the State; and the case is not changed by the fact that the franchise was granted by the City. There is nothing in the ordinance of the City Council which takes away the power of the State and the City to impose additional taxes on the property of the Company, or which indicates an intent that no further or different tax should be subsequently imposed on its property. *Delaware R. R. Tax Case*, 85 U. S. 18 Wall. 206, 227 [21: 888, 895]; *Union Pass. R. Co.* v. *Philadelphia*, 101 U. S. 528, 536 [25: 912, 913]; *Com.* v. *Easton Bank*, 10 Pa. 451.

No question can arise as to the impairment of the obligation of a contract, when the Company accepted all of its corporate powers subject to the reserved power of the State to modify its charter and to impose additional burdens upon the enjoyment of its franchise. Under the Act of March 15, 1884, it was made a condition of the enjoyment of its franchise by the Company, that, when the City should determine that the streets should be paved, the Company should bear a certain portion of the cost thereof; and any prior contract between the Company and the City in regard to paving was subject to the provisions of section 1090 of the Code. There was nothing in the ordinance of December 12, 1883, which bound or could bind the City not to exercise its statutory authority to impose other conditions upon the exercise of the rights of the Company.

Our conclusion, therefore, is that there was no contract between the Company and the State or the City, the obligation of which was impaired by the laying of the tax in question.

Judgment affirmed.

WILLIAM BENT, *Appt.*, [11
v.
GUADALUPE THOMPSON ET AL.

(See S. C. Reporter's ed. 114-124.)

Laws of New Mexico—probate of will, when not annulled—jurisdiction of probate courts as to proof of wills—Statute of Limitations, as to annulling proof of wills—power of probate judge.

1. Under the Laws of the Territory of New Mexico a judgment of a probate court in that Territory admitting a will to probate cannot be annulled by the same court in a proceeding instituted by an heir more than twenty years after the original judgment was rendered and more than four years after the heir became of age.
2. Under the Laws of Velarde, which were continued in force in the Territory of New Mexico by the provisions of the Kearny Code, the practice and procedure of the probate courts were matters of statutory regulation; and the probate judge had jurisdiction to admit wills to probate, by receiving the evidence of the witness, and his judgment was valid, and, although reviewable on appeal, was conclusive unless appealed from and reversed.
3. The limitations of the Statute of January 22, 1880, of New Mexico, that actions on unwritten contracts for injury to and conversion of property and for fraud, and other actions not specified therein, must be brought within four years, applied to proceedings in the probate court. A suit in a probate court to set aside a probate of a will is an action.
4. By sections 1446-1449 of the Compiled Laws of New Mexico the probate judge had no power to declare a will void.

[No. 1282.]

Submitted Jan. 7, 1891. Decided Jan. 26, 1891.

APPEAL from a judgment of the Supreme Court of the Territory of New Mexico, affirming a judgment of the District Court of the County of Taos, declaring void and vacating proceedings of the Probate Court of Taos County annulling a prior probate of the will of Alfred Bent. *Affirmed.*

The facts are stated in the opinion.

Messrs. **E. T. Wells, R. T. McNeal, B. F. Butler, O. D. Barrett** and *Caldwell Yeaman*, for appellant:

The probate court had jurisdiction to entertain and allow the petition.

Ferris v. *Higley*, 87 U. S. 20 Wall. 382 (22: 384); 1 Wms. Exrs. (6th Am. ed.) 325, 333, 334, 336; *Noyes* v. *Barber*, 4 N. H. 412; *George* v. *George*, 47 N. H. 44; *Waters* v. *Stickney*, 12 Allen, 1; *Brown* v. *Gibson*, 1 Nott & McC. 326; *Randolph* v. *Hughes*, 89 N. C. 429; *Bell* v. *Armstrong*, 1 Addams, 365, 2 Eccl. 139; *Ralston* v. *Telfair*, 1 Dev. & B. L. 482; *Etheridge* v. *Corprew*, 3 Jones, L. 14; *Hamberlin* v. *Terry*, 7 How. (Miss.) 143; *Cowden* v. *Dobyns*, 5 Smedes & M. 82; *Garner* v. *Langford*, 12 Smedes & M. 558; *Wall* v. *Wall*, 30 Miss. 96; *Hubbard* v. *Hubbard*, 7 Or. 44; *Sowell* v. *Sowell*, 40 Ala. 243; *Robey* v. *Hannon*, 6 Gill, 463; *Clagett* v. *Hawkins*, 11 Md. 386; *Walker* v. *Perryman*, 23 Ga. 317; *Lively* v. *Harwell*, 29 Ga. 509; *Rogers* v. *Winton*, 2 Humph. 178; *Gibson* v. *Lane*, 9 Yerg. 475; *Burrow* v. *Ragland*, 6 Humph. 481; 3 Redf. Wills, chap. 1, § 3; Schouler, Exrs. §§ 67-70.

The heir was entitled as of right to notice of the proceedings and opportunity to contest the authenticity of the document.

Scott v. *Sandford*, 60 U. S. 19 How. 395 (15:691); *Hopt* v. *Utah*, 120 U. S. 430 (30:708); *Railroad Tax Cases*, 13 Fed. Rep. 722; *Broderick's Will*, 88 U. S. 21 Wall. 503 (22:599).

The lapse of time intervening between the probate and the initiation of this petition is no bar.

Such proceeding is not an action.

Re Hunter's Will, 6 Ohio, 500.

Mr. **Frank Springer** for appellees.

[ ] *Mr. Justice* **Blatchford** delivered the opinion of the court:

This is an appeal from a judgment of the Supreme Court of the Territory of New Mexico. The opinion of that court is reported as *Bent* v. *Thompson*, 23 Pac. Rep. 284. In connection therewith, that court made and filed a statement of facts in substance as follows:

Alfred Bent died on the 9th of December, 1865, leaving as his only heirs at law his widow, Guadalupe Bent, and three sons, namely, Charles Bent, William Bent (the appellant), also sometimes called Julian Bent, and Alberto Silas Bent. Charles Bent arrived at his majority on the 26th of April, 1881, William Bent on the 31st of May, 1883, and Alberto Silas Bent on the 20th of October, 1885. The widow was the mother of the above-named three children. She presented to the probate judge of Taos County, in the Territory of New Mexico, a last will and testament which she claimed to be, and which purported to be, the last will and testament of said Alfred Bent, executed December 6, 1865, the terms of which are not material. On the 6th of March, 1867, this will was proved, approved and ordered to be recorded, by the said probate judge, as the last will and testament of the said Alfred Bent, the record of the probate court on that day being [ ] in these words, the judge of probate, the clerk and a deputy sheriff being named as present: "The administrators of the estate of Alfred Bent, deceased, presented the will of said deceased for approval; the court examined said will and the witnesses in it mentioned, and finding it correct according to law approved it and ordered that it be recorded in this office." The said Guadalupe has since intermarried with one George W. Thompson. No appeal or other proceedings in regard to the will or its probate were had, so far as the record discloses, until August 12, 1887, when the appellant filed his petition in the Probate Court of Toas County for the re-probate of the will and the setting aside of the record of its former probate. At the time such petition was filed, more than twenty years had elapsed since the will was probated and recorded, and the petitioner had arrived at his majority more than four years prior to the filing of said petition, which was the commencement of this proceeding. The record does not disclose whether or not Charles Bent, William Bent and Alberto Silas Bent were summoned to be present at the time the will was probated in 1867, but does show that Guadalupe Bent, widow of the decedent and mother of the children, was a party to the proceeding.

Guadalupe Thompson, Alberto Silas Bent, Charles Bent, the Maxwell Land Grant Company and the Maxwell Land Grant and Railway Company appeared in the proceeding as respondents, and, on the 7th of September, 1887, the probate court made a decree declaring null and void the probate of March 6, 1867, and declaring further that the paper writing so proposed by said Guadalupe Thompson as the last will of Alfred Bent was not such last will, and ordering that it be rejected and the record thereof annulled.

Among the grounds of objection filed in the probate court by the Maxwell Land Grant Company and the Maxwell Land Grant and Railway Company, to its action in reopening the matter of the probate, were the following, called "third" and "fourth": "Because said petitioner has not made his application, if he had the right to do so, within a reasonable time after the former probate of said will. Because this court and judge thereof has no [11' right or authority to disprove the acts of his predecessor done in his official capacity more than twenty years since or at any other time, the record thereof having during all that time remained in full force and effect and other parties having acquired rights thereon on the faith of the same."

The two Companies took an appeal to the District Court sitting within and for the County of Taos, from the judgment of the probate court, assigning, among other reasons of appeal, the following: "6th. Because neither the probate court nor the probate judge had jurisdiction to entertain the said petition or grant the prayers thereof. 7th. Because neither said probate court nor said probate judge could inquire into the validity of the acts of the probate court or probate judge done at a regular term of the probate court more than twenty years prior to the filing of said petition of William Bent." The district court sustained the grounds of appeal above specified, and declared null and void, and vacated, set aside and held for naught the proceedings of the probate court of September 7, 1887. From this judgment William Bent appealed to the Supreme Court of the Territory. That court affirmed the judgment of the district court, and entered a judgment dismissing the petition, and declaring null and void, vacating, setting aside and holding for naught the proceedings of the Probate Court of Taos County had in September, 1887. William Bent has appealed to this court.

In its opinion, the supreme court discusses the question of probating a will in common form and in solemn form, in view of the fact that the petitioner demanded a re-probate of the will in solemn form, and that the opposing parties contended that the probate of a will was a purely statutory proceeding in New Mexico, and that its laws did not recognize the double form of probating wills nor require notice to heirs or legatees. The complaint of the petition was, that neither the petitioner, nor Charles Bent, nor Alberto Silas Bent, had any notice of the intention to present the will for probate, and were not

present or heard. The supreme court held that the civil law was in force in New Mex-
118] ico, and it examined the provisions thereof in regard to proving a will, and arrived at the conclusion that any person interested could have a will probated without notice to the heirs or other interested parties, it being required only that witnesses should be summoned, and only one form of probate being prescribed; that, by the Kearny Code of 1846, the prior "Laws of Velarde," in relation to the execution and proving of wills and the administration of the estates of deceased persons, dating back to 1790, were continued in force; that, by section 17 of the Act of January 12, 1852 (Laws of 1851-52, p. 356; Compiled Laws of New Mexico of 1884, sec. 1393), authority was given to probate judges, in their respective counties, to "qualify" or probate wills, "by receiving the evidence of the witnesses who were present at the time of making the same, and all other acts in relation to the investigation of the validity thereof;" that, by the Act of January 26, 1861 (Laws of 1860-61, p. 62; Compiled Laws, secs. 1446-1449), it was provided as follows: "No judge of probate shall have the power to declare any will, codicil or any other testamentary disposition to be null and void under the pretext of the want of the solemnities prescribed by the laws of this Territory by the testator making such disposition;" that the second section of the same Act provided, in substance, that, when a will was presented for probate, if the probate judge should doubt whether it ought to be approved or not, he should return the will immediately to the person who presented it for probate, noting on the foot of it his reasons for refusing approval; that the third section of the same Act provided that it should be the duty of the person to whom the will was returned to present the same at the next regular term of the district court of the county, whose duty it was made to examine into the matter and declare by its decision whether the will was valid or void, and then return it to the party; and that there was a proviso to the fourth section of the Act, reading as follows: "That any proceedings had by said judges of probate not in conformity with the provisions of this Act shall be declared null and of no effect by the district court, and all at the cost of the said probate judges."

The supreme court declares that such was
[119] the state of the law of the Territory at the time the will was executed and probated and at the time Alfred Bent died; that, in *Browning* v. *Browning*, 3 N. M. 371, it had held that the common law was not introduced into the Territory by the Organic Act, except in a very limited degree; that even in 1876, when the common law was formally adopted as the basis of the jurisprudence of the Territory, it was the common law "as recognized in the United States" that was adopted, that is, "the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that Kingdom, nor in conflict with the Constitution or laws of the United States nor of this Territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country;" that it was not intended, by the adoption of the common law in 1876, to repeal the statute laws of the Territory, but only such portions of the common law were adopted as did not conflict with such statute laws; that the Statute Laws governing probate courts and defining the manner in which wills should be probated in the Territory remained in force until modified by the Act of 1889, and were the basis of the jurisdiction and authority of the probate courts; that the probate of a will in the manner prescribed by the Statute was conclusive, and must be recognized and admitted in all courts as valid, so long as such probate stands; and that, as it appeared by the record that the will was probated as required by law, by the mother of the petitioner, who was an interested party, more than twenty years prior to the filing of his petition in the probate court, and that the petitioner delayed filing his petition for more than four years after he attained his majority, and as the record stated that the probate court examined the will and the witnesses mentioned in it, and found it correct according to law, approved it and ordered it to be recorded in the probate office, and as, by the Statute of New Mexico (Compiled Laws of 1884, secs. 1869, 1881), an infant was allowed one year after the removal of his disabilities to assert his rights, except as to real estate, in which case the period was extended to three years, the petitioner had no rights in the premises and no standing in court at the time he instituted the proceeding.

The only question presented for consideration is whether, under the laws of the Territory of New Mexico, a judgment of a probate court in that Territory admitting a will to probate can be annulled by the same court in a proceeding instituted by an heir more than twenty years after the original judgment was rendered and more than four years after the heir became of age.

The provisions of the laws of New Mexico applicable to proceedings such as those involved in the present case, which were in force at the date of the probate in 1867, were as follows, as contained in the Compiled Laws of 1884:

"§ 562. The several probate judges shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; the granting letters testamentary and of administration, and the repealing the same; . . . to hear and determine all controversies respecting wills, the right of executorship, administration or guardianship; . . ." Kearny Code 1846.

"§ 563. Appeals from the judgment of the probate court shall be allowed to the district court in the same manner, and subject to the same restriction, as in case of appeals from the district to the supreme court." Kearny Code 1846.

"§ 1393. Probate judges, in their respective counties, are authorized to qualify wills, by receiving the evidence of the witnesses who were present at the time of making the same, and all other acts in relation to the in-

vestigation of the validity thereof." Act of Jan. 12, 1852.

"§ 365. The laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatises on these subjects written by Pedro Murillo de Lorde [Velarde], shall remain in force so far as they are in conformity with the Constitution of the United States, and the statute laws in force for the time being." Kearny Code 1846.

The following four sections were enacted January 26, 1861:

"§ 1446. No judge of probate shall have the power to declare any will, codicil or any other testamentary disposition to be null and void under the pretext of the want of the solemnities prescribed by the laws of this Territory by the testator making such disposition.

"§ 1447. When any probate judge shall doubt whether any testamentary disposition, as those mentioned in section 1446, ought to be approved on account of the want of any solemnity as aforesaid, in case that such should be the opinion of any judge of probate, he shall immediately return to the person who may have applied for the approval of such document, the testament, codicil or any other testamentary disposition which may have been placed in his hands for the approval thereof, noting at the foot of said document the positive reasons on which he founds his opinion for refusing his approval.

"§ 1448. It shall be the duty of any person to whom may have been returned a document, such as are mentioned in this Act, to present the same to the district court of their respective county at the first regular term of said court; and it shall be legal for said court to examine such documents, together with the observations submitted by the probate judge who may have refused his approval; and it shall be the duty of the said district court, at the same term, to declare the validity or nullity of such documents, and to return the same, after making its decision, to the party interested.

"§ 1449. If, in the judgment of any probate judge of this Territory, any will, codicil or any other testamentary disposition does not merit his approval, he shall return the same to the party interested, as required in section 1447; but in this case the probate judge shall grant letters of administration to the person or persons appointed as testamentary executor in said documents in preference to any other person who may also solicit them: *Provided*, That any proceedings had by said judges of probate not in conformity with the provisions of this Act shall be declared null and of no effect by the district court, and all at the cost of the said probate judges."

No further change in the Probate Laws was made until 1889.

In addition to the foregoing, may be mentioned the following, by which all laws in force in New Mexico touching wills, if any, additional to those contained in Velarde's treatise, were continued in force until supplanted by legislation:

"All laws heretofore in force in this Territory, which are not repugnant to, or inconsistent with, the Constitution of the United States, and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this Territory." Kearny Code 1846, tit. *Laws*, sec. 1, found in Compiled Laws of 1884, p. 114.

This section was substantially re-enacted by the Act of July 14, 1851, and again in the Compiled Laws of 1865, p. 512 (chapter LXXII. sec. 6), but was omitted by the compilers from the Compiled Laws of 1884, on the ground that in their opinion it was "obsolete and out of date." Comp. Laws 1884, p. 1402, par. 72. The volume of 1884 is, however, only a compilation of existing law and neither re-enacts nor repeals anything.

The common law was not adopted in New Mexico until 1876, when the following Act was passed (Act of Jan. 7, 1876, chap. 2, § 2; Compiled Laws, § 1823): "In all the courts of this Territory, the common law as recognized in the United States of America shall be the rule of practice and decision."

Upon this Act the Supreme Court of New Mexico has held as follows: "We are therefore of opinion that the Legislature intended, by the language used in that section, to adopt the common law, or *lex non scripta*, and such British statutes of a general nature, not local to that Kingdom, or in conflict with the Constitution or laws of the United States, nor of this Territory, which are applicable to our condition and circumstances, and which were in force at the time of our separation from the mother country." *Browning* v. *Browning*, 3 N. M. 371.

In regard to the argument made, that by the provision in the Organic Act of New Mexico, declaring that the jurisdiction of the probate courts should be "as limited by law" (Act of Sept. 9, 1850, § 10, 9 Stat. 449), the practice and procedure of the common law touching matters of probate came into force in New Mexico, regardless of any statutory provisions of the Territory, which view is sought to be supported by a reference to *Ferris* v. *Higley*, 87 U. S. 20 Wall. 375 [22: 383], it may be said, that that case relates only to the jurisdiction and not to the practice of those courts; and that, in *Hornbuckle* v. *Toombs*, 85 U. S. 18 Wall. 648, 656 [21: 968], this court, speaking by *Mr Justice* Bradley, said: "From a review of the entire past legislation of Congress on the subject under consideration, our conclusion is that the practice, pleadings and forms and modes of proceeding of the territorial courts, as well as their respective jurisdictions, subject, as before said, to a few express or implied conditions in the Organic Act itself, were intended to be left to the legislative action of the Territorial Assemblies, and to the regulations which might be adopted by

the courts themselves. Of course, in case of any difficulties arising out of this state of things, Congress has in its power at any time to establish such regulations on this, as well as on any other, subject of legislation, as it shall deem expedient and proper."

From an examination of the provisions of the "Laws of Velarde," which, under the provisions of the Kearny Code, remained in force until modified by statute, we are of opinion that the practice and procedure of the probate courts were matters of statutory regulation; that the probate judge had jurisdiction to admit wills to probate by receiving the evidence of the witnesses; and that his judgment was valid and, although reviewable on appeal, was conclusive unless appealed from and reversed.

It is to be remarked that, in the findings of fact made by the Supreme Court of the Territory, it is not stated that William Bent was not present at the probate and was not cited to appear, but it is stated only that the record does not disclose whether or not he was summoned to be present.

Sections 1860, 1863 and 1869 of the Compiled Laws of New Mexico of 1884 are as follows:

"§ 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided."

"§ 1863. Those founded upon accounts and unwritten contracts, those brought for injuries to property, or for the conversion of personal property, or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified, within four years."

[124] "§ 1869. The times limited for the bringing of actions herein shall, in favor of minors and persons insane or under any legal disability, be extended so that they shall have one year from and after the termination of such disability within which to commence said actions."

It was held by the Supreme Court of New Mexico, in *Browning* v. *Browning*, 8 N. M. 871, that the limitations of the Statute of January 23, 1880, of New Mexico, of which those three sections are a part, applied to proceedings in the probate court. We think this construction was correct, and that the present suit is an action to annul a former judgment of the probate court. Such is the character of the judgment declaring the former probate to be null and void.

Moreover, by sections 1446-1449 of the Compiled Laws, before quoted, the course of procedure of the probate judge was distinctly defined, and he had no power to declare the will void. On the contrary, his proceeding, not being in conformity with the provisions of the Act of January 26, 1861, was, as declared by that Act, null and of no effect.

Judgment affirmed.

C. E. COOK ET AL., *Plffs. in Err.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 157-185.)

Public Land Strip, annexed to Eastern District of Texas—circuit court for that district has jurisdiction of trial for murder in Public Land Strip—Act of 1889, constitutionality of—place of trial of crime committed outside of State—ex post facto *law—evidence.*

1. The Public Land Strip, west of the 100th meridian, bounded on the south by Texas, on the west by New Mexico and on the north by Colorado and Kansas, was annexed by the Act of 1889 to the Eastern District of Texas for such judicial purposes as by that Act appertained to the court held at Paris in that district.
2. The Circuit Court of the United States for the Eastern District of Texas had jurisdiction to try defendant for the offense of murder committed prior to the passage of the Act of 1889, in the Public Land Strip, no prosecution for the offense having been commenced before the Act was passed.
3. Such Act, so construed, is not in violation of sec. 2, art. 3, of the Constitution, supplemented by the 6th Amendment, which provide for a trial of the accused within the State and district where the crime was committed, which district shall have been previously ascertained by law.
4. In respect to crimes committed outside of the States, in some place within the exclusive jurisdiction of the United States, Congress is not forbidden, by the second section of article 3 of the Constitution, from providing a place of trial different from the one in which the accused might have been tried at the time the offense was committed.
5. A crime committed against the laws of the United States, out of the limits of a State, is not local but may be tried at such place as Congress shall designate by law.
6. The Act of 1889 is not an *ex post facto* law, in that it subjects the accused to trial in the Eastern District of Texas rather than in some other judicial district, as this does not alter his situation in respect to the offense or its consequences.
7. A report of the attorney-general of Kansas, to the governor of that State, in regard to the death of a person, which contains statements purporting to have been made by defendants, and which connected them with the killing of said person, is not evidence upon the trial of defendants for the murder of said person, although the attorney-general is the attorney of the defendants on trial and denies, as a witness, the truth of the statements therein contained.

[No. 1311.]

Argued Dec. 11, 12, 1890. Decided Jan. 26, 1891

IN ERROR to the Circuit Court of the United States for the Eastern District of Texas, to review a judgment of conviction and sentence to death of plaintiffs in error for murder committed July 25, 1888, in the Public Land Strip, commonly called "No Man's Land." *Reversed.*

The facts are stated in the opinion.

Messrs. **John F. Dillon, Geo. R. Peck,** *Wm. R. Day, Joseph Frease* and *Wm. H. Rossington*, for plaintiffs in error:

34-868

The Circuit Court of the United States for the Eastern District of Texas had no jurisdiction of the offense charged in the indictment.

United States v. *Ta-wan-ga-ca*, Hemp. 304; *United States* v. *Ivy*, Hemp. 562; *United States* v. *Alberty*, Hemp. 444; *Ex parte Bollman*, 8 U. S. 4 Cranch, 75 (2: 554); *Kring* v. *Missouri*, 107 U. S. 221 (27: 506); *Re Murphy*, 1 Woolw. 141.

The Act of March 1, 1889, does not apply to past offenses.

Cooley, Const. Lim. 370; Sedgwick, Stat. and Const. Law (2d ed.) 164, 166, 173; *Chew Heong* v. *United States*, 112 U. S. 536 (28: 770); *United States* v. *Starr*, Hemp. 469; *United States* v. *Heth*, 7 U. S. 3 Cranch, 399, 413 (2: 479, 483); *Gut* v. *Minnesota*, 76 U. S. 9 Wall. 35 (19: 573); *Devoe Mfg. Co., Petitioner*, 108 U. S. 417 (27: 769).

The admission in evidence, at the instance of the government, of the report of Ex-Attorney-General Bradford was erroneous.

Reg. v. *Williams*, 6 Cox, C. C. 343; *The Lochlibo*, 1 Eng. L. & Eq. 645; *Com.* v. *Hudson*, 11 Gray, 64; *People* v. *Safford*, 5 Denio, 112; *Bullard* v. *Pearsall*, 53 N. Y. 230; 1 Whart. Ev. § 549; 2 Phillipps, Ev. (5th Am. ed.) 831; Starkie, Ev. (10th Am. ed.) 250; Best, Ev. § 645; *Reg.* v. *Ball*, 8 Car. & P. 745; *Com.* v. *Welsh*, 4 Gray, 535; *People* v. *Jacobs*, 49 Cal. 384; *Melhuish* v. *Collier*, 14 Jur. 621; *Adams* v. *Wheeler*, 97 Mass. 67; *Stearns* v. *Merchants Bank*, 53 Pa. 490; *Cox* v. *Eayres*, 55 Vt. 24; *Bauskett* v. *Keitt*, 22 S. C. 187, 197: *Burkhalter* v. *Edwards*, 16 Ga. 593; *Baltimore & O. R. Co.* v. *State*, 41 Md. 268; *Ryerson* v. *Abington*, 102 Mass. 526; *Hurley* v. *State*, 4 L. R. A. 161, 46 Ohio St. 320.

Messrs. **W. H. H. Miller,** *Atty-Gen.*, and **Wm. H. Taft,** *Solicitor-Gen.*, for defendant in error.

5] *Mr. Justice* **Harlan** delivered the opinion of the court:

The plaintiffs in error, with others, were indicted in the court below at its October Term, 1889, and were convicted and sentenced to suffer death, for the crime of murder alleged to have been committed on the 25th day of July, 1888, in that part of the United States designated in numerous public documents as the "Public Land Strip," but commonly called "No Man's Land." It is 167 miles in length, 34½ miles in width, lies between the 100th meridian of longitude and the Territory of New Mexico, and is bounded on the south by that part of Texas known as the "Panhandle," and by Kansas and Colorado on the north.

The prosecution was based upon section 5339 of the Revised Statutes, providing that "every person who commits murder . . .
6] within any fort, arsenal, dock-yard, magazine or in any other place or district of country under the exclusive jurisdiction of the United States, . . . shall suffer death;" and upon the Act of Congress of March 1, 1889, establishing a court of the United States for the Indian Territory and for other purposes, and attaching a part of that Territory, for limited judicial purposes, to the Eastern District of Texas. 25 Stat. 273, chap. 333.

The principal assignment of error is based upon these general propositions: That at the date of the alleged homicide the Public Land Strip was not within the jurisdiction of any particular State or federal district, and that no court of the United States had jurisdiction to try the alleged offense, or if any court had jurisdiction it was not the court below, but the Circuit Court of the United States for the Northern District of Texas, or that of the District of Kansas in which the defendants were found and arrested; and that if the above Act of March 1, 1889—under which alone this prosecution was conducted—placed the Public Land Strip within the limits of the Eastern District of Texas, it did not, and consistently with the Constitution of the United States could not, give the circuit court for that district jurisdiction of offenses committed prior to its enactment.

Did Congress intend to attach the Public Land Strip to the Eastern District of Texas for any purpose? That necessarily is the question to be first considered. And it must be determined without reference to the Act of May 2, 1890, providing a temporary government for Oklahoma; for that Act, while including this Strip within the Territory of Oklahoma, declares that all "crimes committed in said Territory" prior to its passage "shall be tried and prosecuted, and proceeded with until finally disposed of, in the courts now [then] having jurisdiction thereof," as if that Act had not been passed. 26 Stat. 81, 86, chap. 182, §§ 1, 9. We will be aided in the solution of the question of jurisdiction by recalling the history of the Public Land Strip, and various Acts of Congress, preceding that of 1889, which are supposed to have some bearing upon this case.

The Public Land Strip was once a part of the possessions of Mexico. This appears [167] from the Treaty of January 12, 1828, between the United States of America and the United Mexican States, confirming the previous Treaty of February 22, 1819, with the Monarchy of Spain. 8 Stat. 372, 374. When Texas achieved its independence this Strip was within its limits. Indeed, the Republic of Texas originally embraced the present territory of the State of Texas, as well as parts of what now constitutes New Mexico, Arizona, Colorado and Kansas. On the day of its admission into the Union, by the Joint Resolution of December 29, 1845, the judicial District of Texas was established, embracing the entire State. 9 Stat. 1, 108.

Congress, by an Act of September 9, 1850, chap. 49 (9 Stat. 446), made certain propositions to Texas, one of which was that its boundary on the north should commence at the point where the meridian of one hundred degrees west from Greenwich is intersected by the parallel of thirty-six degrees thirty minutes north latitude, and run from that point due west to the meridian of one hundred and three degrees; thence due south to the thirty-second degree of north latitude; thence on the latter parallel to the Rio Bravo del Norte, and thence with the channel of that river to the Gulf of Mexico. This proposition was accepted by Texas. Oldham & White's Digest Laws of Texas, p. 55. By

the same Act, § 2, the eastern boundary of New Mexico was established on the one hundred and third meridian. The remaining territory of Texas, as it was when admitted into the Union, passed by that Act under the jurisdiction of the United States. The Territory of Kansas was organized by the Act of May 30, 1854, chap. 59, sec. 19 (10 Stat. 277, 283), its southern line being fixed on the 37th parallel of north latitude. The Territory of Colorado was organized by an Act approved February 28, 1861, sec. 1 (12 Stat. chap. 59), its eastern boundary being on the 102d meridian, and its southern boundary being on the 37th parallel of north latitude. The result of all these enactments was that the body of public lands, known as the Public Land Strip, was left outside of Texas as well as of the Territories of New Mexico, Kansas and Colorado.

[168] By the Act of February 21, 1857, the State of Texas was divided into two judicial districts, the Western and the Eastern. 11 Stat. 164. The Northern District was established by an Act passed February 24, 1879, with courts at Waco, Dallas County, and Graham, Young County, embracing one hundred and ten counties by name, including Sherman, Hansford, Ochiltree and Lipscomb in the Panhandle, immediately south of the Public Land Strip, and Hemphill, Wheeler, Collingsworth and Childress immediately west of the 100th meridian, and Hardeman, Wilbarger, Wichita, Clay, Montague, Cooke, Grayson, Fannin and Lamar immediately south of the Indian Territory, in the central and eastern parts of Texas, but excluding the Counties of Red River and Bowie in the latter State near the Arkansas line. The same Act enlarges the Eastern District of Texas and designates all the counties that should thereafter compose the Eastern and Western Districts, respectively. Under this Act the Eastern District embraced, among others, the counties next to Louisiana and Arkansas, including Red River and Bowie. 20 Stat. 318, chap. 97.

An Act of Congress was passed January 6, 1883, chap. 13, for the holding at Wichita of a term of the District Court of the United States for the District of Kansas and for other purposes. 22 Stat. 400. By that Act, "all that part of the Indian Territory lying north of the Canadian River and east of Texas and the 100th meridian not set apart and occupied by the Cherokee, Creek and Seminole Indian tribes" was annexed to the District of Kansas; and the United States District Courts at Wichita and Fort Scott in that district were given "exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said District of Kansas against any of the laws of the United States now or that may hereafter be operative therein." § 2. It was further provided: "§ 3. That all that portion of the Indian Territory not annexed to the District of Kansas by this Act, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw and Seminole Indian tribes, shall, from and after the passage of this Act, be [169] annexed to and constitute a part of the United States judicial district known as the Northern District of Texas; and the United States District Court at Graham, in said Northern District of Texas, shall have exclusive original jurisdiction of all offenses committed within the limits of the territory hereby annexed to said Northern District of Texas against any of the laws of the United States now or that may hereafter be operative therein. § 4. That nothing contained in this Act shall be construed to affect in any manner any action or proceeding now pending in the Circuit or District Court for the Western District of Arkansas, nor the execution of any process relating thereto; nor shall anything in this Act be construed to give to said District Courts of Kansas and Texas, respectively, any greater jurisdiction in that part of said Indian Territory so as aforesaid annexed, respectively, to said District of Kansas and said Northern District of Texas than might heretofore have been lawfully exercised therein by the Western District of Arkansas; nor shall anything in this Act contained be construed to violate or impair, in any respect, any treaty provision whatever." It is insisted, on behalf of the United States, that this Act attached the Public Land Strip to the Northern District of Texas; that the words, "Indian Territory," were used to include that Strip; and that such a construction is sustained both by executive recognition and by the legislation of Congress.

Then comes the Act of March 1, 1889, chap. 333, above referred to (25 Stat. 783), which, it is contended, transferred the Public Land Strip from the Northern District to the Eastern District of Texas. By its first section a United States court, to be held at Muscogee, is established, "whose jurisdiction shall extend over the Indian Territory, bounded as follows, to wit: north by the State of Kansas, east by the States of Missouri and Arkansas, south by the State of Texas and west by the State of Texas and the Territory of New Mexico." It is given "exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory as in this Act defined, not punishable by death or by imprisonment at hard labor." § 5. That court was also given [1 "jurisdiction in all civil cases between citizens of the United States who are residents of the Indian Territory, or between citizens of the United States, or of any State or Territory therein, and any citizen of or person or persons residing or found in the Indian Territory, and when the value of the thing in controversy, or damages or money claimed, shall amount to one hundred dollars or more: *Provided*, That nothing herein contained shall be so construed as to give the court jurisdiction over controversies between persons of Indian blood only." § 6.

The seventeenth, eighteenth and twenty-eighth sections of that Act are as follows:

"§ 17. That the Chickasaw Nation and the portion of the Choctaw Nation within the following boundaries, to wit: beginning on Red River at the southeast corner of the Choctaw Nation; thence north with the boundary line between the said Choctaw Nation and the State of Arkansas, to a point where Big

Creek, a tributary of the Black Fork of the Kimishi River, crosses the said boundary line; thence westerly with Big Creek and the said Black Fork to the junction of the said Black Fork with Buffalo Creek; thence northwesterly with said Buffalo Creek to a point where the same is crossed by the old military road from Fort Smith, Arkansas, to Boggy Depot, in the Choctaw Nation; thence southwesterly with the said road to where the same crosses Perryville Creek; thence northwesterly up said creek to where the same is crossed by the Missouri, Kansas and Texas Railway track; thence northerly up the center of the main track of the said road to the South Canadian River; thence up the center of the main channel of the said river to the western boundary line of the Chickasaw Nation, the same being the northwest corner of the said nation; thence south on the boundary line between the said nation and the reservation of the Wichita Indians; thence continuing south with the boundary line between the said Chickasaw Nation and the reservations of the Kiowa, Comanche and Apache Indians to Red River; thence down said river to the place of beginning; and all that portion of the Indian Territory not annexed to
1] the District of Kansas by the Act approved January sixth, eighteen hundred and eighty-three, and not set apart and occupied by the five civilized tribes, shall, from and after the passage of this Act, be annexed to and constitute a part of the Eastern Judicial District of the State of Texas, for judicial purposes.

"§ 18. That the Counties of Lamar, Fannin, Red River and Delta of the State of Texas, and all that part of the Indian Territory attached to the said Eastern Judicial District of the State of Texas by the provisions of this Act, shall constitute a division of the Eastern Judicial District of Texas; and terms of the Circuit and District Courts of the United States for the said Eastern District of the State of Texas shall be held twice in each year at the City of Paris, on the third Mondays in April and the second Mondays in October; and the United States courts herein provided to be held at Paris shall have exclusive, original jurisdiction of all offenses committed against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern Judicial District of the State of Texas by the provisions of this Act, of which jurisdiction is not given by this Act to the court herein established in the Indian Territory; and all civil process, issued against persons resident in the said Counties of Lamar, Fannin, Red River and Delta, cognizable before the United States courts, shall be made returnable to the courts, respectively, to be held in that City of Paris, Texas. And all prosecutions for offenses committed in either of said last-mentioned counties shall be tried in the division of said Eastern District of which said counties form a part: *Provided*, That no process issued or prosecution commenced or suit instituted before the passage of this Act shall be in any way affected by the provisions thereof."

"§ 28. That all laws and parts of laws inconsistent with the provisions of this Act be, and the same are hereby, repealed."

Other sections prescribe the modes of procedure in the court established by that Act and the punishment for numerous offenses.

From this history of the Public Land Strip it appears: 1. That by the Act of 1883 all [172
of the "Indian Territory" north of the Canadian River and east of Texas and the 100th meridian, not set apart and occupied by the Cherokee, Creek and Seminole Indian tribes, was attached to the District of Kansas, while the portion not so annexed, and not set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw and Seminole Indian tribes, was annexed to the Northern District of Texas, saving actions or proceedings pending in the Circuit or District Court for the Western District of Arkansas. 2. That, by the Act of 1889, the court established for the Indian Territory was given exclusive original jurisdiction over all offenses against the laws of the United States committed within the Indian Territory as defined by that Act, not punishable by death or by imprisonment at hard labor. 3. That exclusive original jurisdiction was given by the Act of 1889 to the courts of the United States, sitting at Paris, Texas, of all such offenses, committed within the portion of the Indian Territory annexed to the Eastern District of that State, of which jurisdiction was not given to the court established in and for the Indian Territory.

Much of the discussion by counsel was directed to the inquiry whether the Act of 1883 attached the Public Land Strip to the Northern District of Texas. In view of the relations which certain Indian tribes once held to that Strip, under treaties with the United States—which treaties will be referred to in another connection—there are some reasons for holding, in accordance with the contention of the government, that it was so attached to that district. But it is not necessary to decide that point; for, however it might be determined, the question would remain whether the Public Land Strip was not within that portion of the Indian Territory, defined in the Act of 1889, which was assigned by that Act for certain judicial purposes to the Eastern District of Texas. If it was, the court below had jurisdiction of the offense charged in the indictment, unless the latter Act is construed as having no application to offenses committed prior to its passage. The Act of 1883 is chiefly important in the present inquiry as it may serve to explain the provisions of the Act of 1889.

It is certain that after as well as before the [173
passage of the Act of 1883, various public officers and committees in Congress described the "Indian Territory" as lying east of the 100th meridian, and represented the Public Land Strip as being unattached to any judicial district.* The most significant, per-

*Report of Commissioner of Indian Affairs, 1872, p. 33; Letter of Commissioner of General Land Office to Durant, September 17, 1873, Rec. Com. Gen. Land Office, vol. 27, p. 304; Report of Land Commission, p. 462; Report Com. Land Office, 1884; House Judiciary Committee, Rep. No. 2030, July 2, 1864; Id. Report, Doc. No. 389, February 11, 1886, embodying letter of Com'r Land Office of January 29, 1886; House Com. on Territories, 1887, Report No. 1684; Id. 1888, Rep. No. 2857; Id. February 7, 1888, Rep. 263.

haps, of all the official documents of this class are the letter of the Attorney-General of the United States to the President under date of November 15, 1887, and that of the Secretary of the Treasury, to the Speaker of the House of Representatives, under date of May 1, 1888. The former describes the Public Land Strip as "bounded on the north by the States of Kansas and Colorado, on the east by the Indian Territory, on the south by Texas and on the west by New Mexico," and says that it was not then "embraced in any district established by law of the United States." The latter, speaking of the urgent need of legislation to enforce the Revenue Laws of the United States in the Public Land Strip, says that "the land referred to is not embraced in any judicial district, and not being within the jurisdiction of any United States court the laws of the United States are inoperative, or, at least, cannot be enforced therein."

The public documents to which reference has been made undoubtedly show that, in the opinion of many gentlemen in the legislative and executive branches of the government, the "Indian Territory" did not extend further west than the one hundredth meridian, and that even after the passage of the Act of 1883 it remained unattached to any judicial district. So that, if Congress intended by the Act of 1883 to annex the Public Land Strip to the Northern District of Texas, it was informed by these documents that that Act was [174] not so construed by certain officers of the government. But it was further informed that the public interests absolutely demanded that that portion of the public domain should no longer remain in the condition in which it had been left for many years, namely, without being clearly included in some judicial district, whereby the rights of the general government, as well as of individuals, could be enforced against criminals and wrong-doers of every class. No possible reason can be suggested why, at the time of the passage of the Act of 1889, the Public Land Strip should not have been brought within some judicial district.

Upon a careful scrutiny of the Act of 1889, giving full effect to all of its clauses, according to the reasonable meaning of the words used, yet interpreting it in the light of the previous history of the Public Land Strip, and of the information communicated to Congress by public officers, we do not doubt that Congress intended to bring that Strip within the jurisdiction of the court established for the Indian Territory, and to attach it, for limited judicial purposes, to the Eastern District of Texas, thus enabling the general government to protect its own interests, as well as the rights of individuals. That Act was so interpreted by *Mr. Justice* Brewer before his accession to this bench. *Re Jackson*, 40 Fed. Rep. 372. Observe, that the country over which the court established by that Act was to exercise jurisdiction was not described as being east of the 100th meridian and south of Kansas, nor simply as the Indian Territory, but, *ex industria*, as the Indian Territory bounded "north by the State *of* Kansas [the southern line of that State constituting about two thirds of the northern boundary of the Public Land Strip], east by the States of Missouri and Arkansas, south by the State of Texas and west by the State of Texas *and* the *Territory of New Mexico*." If the Act had bounded it on the north by Kansas *and Colorado*, the description, beyond all question, would have included the Public Land Strip. But the description, as it is, necessarily includes that Strip, because the "Indian Territory," for which the new court, to sit at Muscogee, was established, being bounded on the north by Kansas, *and* west, in part, by "the Territory of New [1 Mexico"—the eastern boundary of which is on the 103d meridian—must include within its limits the Public Land Strip, lying between New Mexico and the 100th meridian. This fact is of greater significance than the careless omission to state, in the Act, that the Indian Territory, described in it, was bounded on the north by Colorado as well as by Kansas. The court at Muscogee was given exclusive original jurisdiction over all offenses against the United States, not punishable by death or by imprisonment at hard labor, committed, not simply within the Indian Territory, but within the Indian Territory, "as in this [that] Act defined," while the court at Paris was given exclusive original jurisdiction of all offenses against the laws of the United States within the limits of that portion of the Indian Territory attached to the Eastern District of Texas "by the provisions of this [that] Act," of which jurisdiction was not given to the court at Muscogee. If Congress did not intend to bring the Public Land Strip within the jurisdiction of the court established for the Indian Territory, and, for certain judicial purposes, within the jurisdiction of the courts held at Paris, in the Eastern District of Texas, why did it declare that the Indian Territory, for which it legislated in the Act of 1889, was bounded on the west "by the State of Texas *and* the Territory of New Mexico?" We cannot hold the words, "and the Territory of New Mexico," to be meaningless, simply because the northern boundary of that Strip was not described with precision and fullness; especially as every consideration of policy demanded that that part of the public domain should not longer be left without courts for the protection of the government and the people.

It is contended that this interpretation of the words "Indian Territory" in the Act of 1889 is wholly unauthorized by anything in the history of the Public Land Strip: for it is said that there are no facts whatever that make those words at all appropriate as embracing that Strip. This broad statement is scarcely justified by the facts. By the Treaty of July 27, 1853, made and concluded at Fort Atkinson, in the Indian Territory (10 Stat. 1013), between the United States and the Comanche, Kiowa and Apache Tribes [1 or Nations, "inhabiting the said territory south of the Arkansas River," it was provided that the annuities stipulated to be given by the United States should be delivered yearly in July to those tribes, collectively, at or in the vicinity of Beaver Creek, a large part of

which is within the Public Land Strip. By another Treaty with those tribes in 1865 (14 Stat. 717-721), the United States agreed that a certain district of country, or such parts as the President should from time to time designate, should be, and was, set apart for their "absolute and undisturbed use and occupation," and that of "such other friendly tribes" as had theretofore "resided within said limits, or as they may from time to time agree to admit among them, and that no white person, except officers, agents and employés of the government, shall go upon or settle within the country embraced within said limits, unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages." The boundaries of said district were: "Commencing at the northeast corner of New Mexico; thence south to the southeast corner of the same; thence northeastwardly to a point on main Red River, opposite the mouth of the north fork of said river; thence down said river to the 98th degree of west longitude; thence due north of the said meridian to the Cimarone River; thence up said river to a point where the same crosses the southern boundary of the State of Kansas; thence along said southern boundary of Kansas to the southwest corner of said State; thence west to the place of beginning." These boundaries, it is true, included a part of the State of Texas, and the Treaty was, in that respect, ineffectual. Nevertheless, the cession included the Public Land Strip, then a part of the public domain of the United States. By a subsequent Treaty with two of the same tribes, concluded October 21, 1867 (15 Stat. 581-587), they were restricted in territory to the southwest corner of the Indian Territory, but they reserved the right "to hunt on any lands south of the Arkansas River, so long as the buffalo may range thereon in such numbers to justify the chase." These Treaties are referred to as showing that as late as 1867 the Public Land Strip, in the mode of its use, had some connection with Indians west of the Mississippi, and especially with some of those now occupying permanent reservations in the Indian Territory. That Strip, we are informed, has not been occupied by Indians since 1867, but it was not opened to settlement, and could have been used for any of the purposes that the government had in view for Indians.

There are other circumstances that are not without significance as indicating why Congress in the Act of 1889 used the words "Indian Territory," as describing not only lands east of the 100th meridian, south of Kansas, but lands north of Texas and between that meridian and New Mexico. Among them the following may be named: 1. To a report of the commissioner of the General Land Office, made in 1864, was annexed a map, "constructed from the public surveys and other official sources in the General Land Office," in which the Public Land Strip is included within the boundaries of the Indian Territory; and a similar map, "constructed from the plats and official sources of the General Land Office," under the direction of Commissioner Wilson, was issued in 1867. 2. By an Act of March 2, 1887, Congress granted a right of way through the "Indian Territory" to a railroad company, beginning at a point on the northern line of said Territory at or near the south line of Kansas, crossed by the 101st meridian; thence in a southwesterly direction to El Paso, New Mexico. It could not commence at the point designated and reach El Paso by a southwesterly line without passing through the Public Land Strip. Unless that Strip was, for the purposes of that Act, regarded as a part of the Indian Territory, then the route to El Paso would not pass through the Indian Territory at all. 3. By the Treaty of May 6, 1828, with the Cherokee Indians, the United States, besides setting apart for the use of that tribe 7,000,000 acres within the limits of the Indian Territory, guaranteed to that nation "a perpetual outlet west, and free and unmolested use of all the country lying west of the western boundary" of the limits given, "and as far west as the sovereignty of the United States and their right of soil extend." In an official communication from the commissioner of the Land Office [171
to the Secretary of the Interior, under date of January 29, 1886, embodied in a report made on the 11th of February, 1886, by the Judiciary Committee of the House of Representatives, upon a proposed bill extending the laws of the United States over certain "unorganized territory south of Kansas," it was said: "It appears that the Cherokees claimed the Public Land Strip, now so called, as the outlet above mentioned, and the official maps down to 1869, or later, designated said Strip as *part of the Indian Territory*. I have not found in the records of this office any expressed reason why this Strip was so designated on the maps, nor why that designation was changed upon the maps published after 1869." The commissioner recommended the passage of the proposed bill, because it would take this "unorganized territory out of its anomalous condition to a certain extent and open the lands to entry."

These circumstances are referred to not as conclusive, nor as, in themselves, persuasive, but only to show that the Public Land Strip was regarded, at different times, by public officers to be part of the Indian Territory, as commonly designated, or as having such connection with the lands east of the 100th meridian, where various tribes of Indians had been located by the United States, as made it natural that it should be placed, together with the lands between that meridian and the States of Missouri and Arkansas, not occupied by the civilized Indian tribes, under the jurisdiction of the court established by the Act of 1889, or of some other court of the United States. Congress, it must be presumed, was not unaware of the fact that the words "Indian Territory" had been used by some to exclude, and by others to include, the Public Land Strip, and, to avoid misapprehension as to whether that Strip was annexed to some judicial district, and, perhaps, for the purpose of meeting the recommendation of the Secretary of the Treasury in his letter of May 1, 1888, it speaks, in the Act of 1889, of the Indian

Territory, not generally, but *as therein defined*. That description, we have seen, necessarily included the Public Land Strip, because it was the only part of the public domain in that part of the United States that
179] was bounded on the north by Kansas, as well as on the west by the Territory of New Mexico, and which immediately adjoined the Indian Territory lying east of the 100th meridian.

Much was said at the bar about the unreasonableness of the supposition that Congress intended to subject the people in the Public Land Strip to the jurisdiction of a court sitting at so great a distance as Paris, Texas, rather than to one at Graham, in the Northern District of Texas, or one at Wichita, in Kansas. Judging by the map, the distance from the Public Land Strip to Paris is not much greater than to Graham. Indeed, the facilities for reaching Paris may be quite as good as those for reaching Graham. While the court of the United States nearest to the Public Land Strip, other than the one at Muscogee, seems to be the District Court of Kansas, this fact cannot control, as against the natural meaning of the words of the Act.

Nor do we think that the interpretation of the Act of 1889 can or ought to be affected by that of 1890, providing a temporary government for the Territory of Oklahoma and enlarging the jurisdiction of the United States court in the Indian Territory. Oklahoma, by that Act, is made to include "all that portion of the United States *now known as the Indian Territory*, except . . . and except the unoccupied part of the Cherokee outlet, together with that portion of the United States known as the Public Land Strip." The boundary of the country "now known as the Indian Territory" and included in said Territory of Oklahoma is given, and the Public Land Strip is, separately, bounded "east by the 100th meridian, south by Texas, west by New Mexico, and north by Colorado and Kansas." This may be regarded at most as simply a declaration by Congress that the country then "known as the Indian Territory" did not include the Public Land Strip, and, therefore, that each should be separately described by its boundaries. But that does not prove that Congress did not intend, in 1889, to include the Public Land Strip in the "Indian Territory," *as defined by the Act of that year*. On the contrary, the Oklahoma Act, when it bounds that Strip on the "west by New Mexico," tends to show that substantially similar words used in describing
180] the Indian Territory mentioned in the Act of 1889 had reference to the Public Land Strip.

Looking at this question in every light in which it may be considered, we repeat the expression of our opinion that the Public Land Strip, west of the 100th meridian, bounded on the south by Texas, on the west by New Mexico and on the north by Colorado and Kansas, was annexed by the Act of 1889 to the Eastern District of Texas for such judicial purposes as by that Act appertained to the court held at Paris in that district.

Was it competent for the court below to try the defendants for the offense of murder committed prior to the passage of the Act of 1889?" We do not doubt that Congress intended to confer upon that court jurisdiction to try such cases. By the express words of the Act, the courts to be held at Paris, Texas, were given exclusive original jurisdiction of "all offenses committed against the laws of the United States" within that part of the Indian Territory attached to the Eastern Judicial District of Texas, of which jurisdiction was not given, by the same Act, to the court established for that Territory. The only exception made is in the proviso to the eighteenth section, declaring, among other things, that no prosecution commenced before the passage of the Act should be in any way affected by its provisions. This, in connection with the previous part of the same section, defining the jurisdiction of the court below, necessarily imports that where no prosecution had been commenced, it should have authority to try all offenses, punishable by death or imprisonment at hard labor, committed, no matter when, within the new territory over which its jurisdiction was extended. No other interpretation can be reasonably given to the Act. If the Public Land Strip was placed by the Act of 1883 in the Northern District of Texas, or if the defendants, having been apprehended in Kansas, were amenable, prior to the Act of 1889, to the District Court in that State, the jurisdiction of the United States court of neither of those districts had attached, by the commencement of a prosecution, before that Strip was annexed to the Eastern District of Texas. In so interpreting the Act of Congress we do
not infringe the settled rule that courts un- [1
iformly refuse to give to statutes a retrospective operation, where rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the Legislature. *United States* v. *Heth*, 7 U. S. 8 Cranch, 399, 413 [2: 479, 483]; *Chew Heong* v. *United States*, 112 U. S. 536, 559 [28: 770, 778]. The saving of only pending prosecutions shows that Congress did not except any offense against the United States of which the court below was given jurisdiction.

It is contended that the Act, so construed, is in violation of section two, article three, of the Constitution, supplemented by the Sixth Amendment. The former provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed." The latter provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." In respect to that clause of the Sixth Amendment declaring that the "district shall have been previously ascertained by law," it need only be said that if those words import immunity from prosecution where the district is not

ascertained by law before the commission of the offense, or that the accused can only be tried in the district in which the offense was committed (the district having been established when the offense was committed) the Amendment has reference only to offenses against the United States committed within a State. *United States* v. *Dawson*, 56 U. S. 15 How. 467, 487, 488 [14: 775, 783]; *Jones* v. *United States*, 137 U. S. 202, 211, 212 [34: 691, 695]. The second section of article three had provided, in respect to crimes committed in the States, that the trial by jury should be had within the State where the crime was committed. The Sixth Amendment added the further guaranty, in respect to the place of trial, that the district should have been previously ascertained by law, leaving the trial of offenses not committed within any State to be controlled by the second section of article three. The requirement in the latter section is that the trial "shall be at such place or places as the Congress may by law have directed." "As crimes," said *Mr. Justice* Story, commenting upon this section, "may be committed on the high seas and elsewhere out of the territorial jurisdiction of a State, it was indispensable that in such cases Congress should be enabled to provide the place of trial." 2 Story's Const. § 1781. It was consequently provided in the Act of April 30, 1790 (1 Stat. 114, chap. 9, sec. 8), that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought." And such was the law when the crime with which the defendants are charged was committed. Rev. Stat. §§ 730, 5339. But for the passage of the Act of 1889, and if the Public Land Strip was not attached by the Act of 1883 to the Northern District of Texas, the defendants could have been indicted and tried in the District of Kansas, where they were apprehended. *Jones* v. *United States*, above cited. So that the contention of the defendants is, in effect, that in respect to crimes committed outside of the States, in some place within the exclusive jurisdiction of the United States, Congress is forbidden by the second section of article three of the Constitution from providing a place of trial different from the one in which the accused might have been tried at the time the offense was committed. We do not so interpret that section. The words, "the trial shall be at such place or places as the Congress may by law have directed," impose no restriction as to the place of trial, except that the trial cannot occur until Congress designates the place, and may occur at any place which shall have been designated by Congress previous to the trial. This was evidently the construction placed upon this section in *United States* v. *Dawson*, above cited, where the court, speaking by *Mr. Justice* Nelson, said: "A crime, therefore, committed against the laws of the United States, out of the limits of a State, is not local, but may be tried at such place as Congress shall designate by law. This furnishes an answer to the argument against the jurisdiction of the court, as it respects venue, trial in the county and by jury from the vicinage, as well as in respect to the necessity of particular or fixed districts before the offense." So, in *United States* v. *Jackalow*, 66 U. S. 1 Black, 484, 486 [17: 225, 226]: "Crimes committed against the laws of the United States, out of the limits of a State, are not local, but may be tried at such place as Congress shall designate by law; but are local if committed within the State. They must then be tried in the district in which the offense was committed." If Congress—as it did in the Act of 1790, which may be regarded as a contemporaneous construction of the Constitution—may provide for the trial of offenses committed outside of the States, in whatever district the accused is apprehended, or into which he may first be brought, it is difficult to perceive why, such crimes not being local, it may not provide a place of trial where none was provided when the offense was committed, or change the place of trial after the commission of the offense.

It is said that the construction we place upon the second section of article three makes it obnoxious to the *ex post facto* clause of the Constitution. In support of this position reference is made to *Kring* v. *Missouri*, 107 U. S. 221 [27: 506], where it was declared that any statute passed after the commission of an offense which, "in relation to that offense or its consequences, alters the situation of a party to his disadvantage," is an *ex post facto* law. This principle has no application to the present case. The Act of 1889 does not touch the offense nor change the punishment therefor. It only includes the place of the commission of the alleged offense within a particular judicial district, and subjects the accused to trial in that district rather than in the court of some other judicial district established by the government against whose laws the offense was committed. This does not alter the situation of the defendants in respect to their offense or its consequences. "An *ex post facto* law," this court said in *Gut* v. *Minnesota*, 76 U. S. 9 Wall. 35, 38 [19: 573, 574[, "does not involve, in *any* of its definitions, a change of the place of trial of an alleged offense after its commission."

Another contention of the defendants is [184]
that the indictment is fatally defective, in that it fails to sufficiently show when Cross—the person alleged to have been murdered—died, or that he died within a year and a day from the infliction upon him of the alleged mortal wounds, or from the effect of such wounds, or within the territory in the jurisdiction of the court in which they were tried. As the Attorney-General and the Solicitor-General submit this question without argument, and without any suggestion in support of the indictment, and as the judgment must, for reasons to be presently stated, be reversed, leaving the government at liberty to find a new indictment, if its officers shall be so advised, we will not extend this opinion by an examination of the authorities cited by the defendants to show the present indictment to be defective.

At the trial below, one of the defendants' counsel, who had been attorney-general of

Kansas, and who, in that capacity, made to the governor of that State a report touching the death of Cross immediately after it occurred, was called, in rebuttal, as a witness for the prosecution. That report contained various statements purporting to have been made by the defendants, and which connected them with the killing of Cross. Although the witness stated that the report was based upon hearsay evidence merely, was thrown together hastily by a stenographer and was incorrect, and that the defendants had not made the statements therein attributed to them, certain parts of it were admitted in evidence to the jury, against the objection of the defendants. The record shows that this report was read in evidence to show that the witness had made different statements at another time and place. And the court, in its charge, said to the jury: "The instructions given above are limited, so far as the evidence is concerned, by the folowing instructions: The portions of Attorney-General Bradford's report were admitted in evidence to be considered by you as to whether or not the statements therein contained were made by the parties to said Bradford, said Bradford now being attorney for the defendants, and denying the truth of the statements therein contained; and as to whether or not these statements were ever made to said Bradford, is a question of fact to be considered by you from all the evidence upon that subject; and if you believe the statements were not so made to said Bradford, you are to disregard the same. But if you believe from the evidence that they were so made to said Bradford, then you are instructed to consider them as evidence, but only as to such parties by whom they were made."

[185]

The jury were thus informed that this report, although merely hearsay, was substantive evidence upon the issue as to whether the defendants were present at, and participated in, the killing. The representatives of the government, in this court, frankly conceded, as it was their duty to do, that this action of the court below was so erroneous as to entitle the defendants to a reversal. Numerous other errors are said to have been committed at the trial to the prejudice of the defendants, but as such alleged errors may not be committed at the next trial, it is not necessary now to consider them.

For the error above mentioned the judgment is reversed, and the cause remanded with directions to grant a new trial.

---

[93] CITY OF SUPERIOR, *Plff. in Err.*,
v.
LYMAN B. RIPLEY ET AL.

(See S. C. Reporter's ed. 93-98.)

Jurisdiction of circuit court, dependent on residence—suit by payee of draft or order against acceptor—by indorsee against indorser—residence of parties—allegation of demand and refusal, when unnecessary—sufficient allegation.

1. The acceptance of a draft or order in favor of a certain payee constitutes a new contract between the acceptor and such payee, and the latter may sue upon it in the United States circuit court, without tracing title from the drawer. On acceptance, the acceptor becomes the primary debtor.
2. The circuit court has jurisdiction of a suit brought by the indorsee of a promissory note, who is a citizen of one State, against his immediate indorser, who is a citizen of a different State, whether a suit could be brought in that court by the indorsee against the maker or not.
3. The payee of a draft or order, if a nonresident of the State in which the acceptor resides, may bring suit in the circuit court against the acceptor, notwithstanding the drawer of the paper is a resident of the same State as the acceptor.
4. In a suit upon an order drawn upon the mayor and council of a city, for the payment of a certain sum in dollars, which was accepted by the city, the acceptance stating that it was to be payable in city warrants, it is not necessary to allege that payment was demanded and refused; if payment has been made or tendered by the city it is a matter of defense and the burden of proof is upon the defendant.
5. In such a suit, an allegation that said city, though often requested, has not paid to plaintiff the amount of said order and acceptance or any part thereof, and that there is due and unpaid upon the same the entire amount thereof, is a sufficient allegation of nonpayment and refusal to pay.

[No. 1322.]

Submitted Jan. 6, 1891. Decided Jan. 26, 1891.

IN ERROR to the Circuit Court of the United States for the District of Nebraska, to review a judgment in favor of the plaintiffs upon certain orders accepted by the City of Superior. The City interposed a demurrer to the petition, which was overruled, and, not desiring to plead further, judgment was rendered for the plaintiffs. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a writ of error to reverse a judgment of the Circuit Court for the District of Nebraska in favor of the defendants in error, upon certain orders accepted by the City of Superior. The case was practically decided in overruling a demurrer to the petition, which set forth, in substance, the following facts:

1. That the plaintiffs, Ripley and Bronson, were citizens of the State of Missouri, and the defendant, the City of Superior, a municipal corporation of the State of Nebraska.

2. That under an ordinance, regularly adopted and confirmed by a popular vote, the City entered into a contract with S. K. Felton & Co. for the construction of a system of water-works for the sum of $25,000. That, in pursuance of such contract, Felton & Co. built and completed the water-works, which were accepted by the City on the 29th day of April, 1889; and that upon the contract price there was paid $5,000, October, 13, 1888, and $3,681, December 14, 1888.

3. That S. K. Felton & Co. became in-

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence, see note to Emory v. Greenough,* 1:940.

debted to the plaintiffs for water pipe, hydrants and other material sold and delivered to them by the plaintiffs, and used in said water-works, in the sum of $5,750, for which Felton & Co. executed the following order:

"Superior, Neb., Dec. 24th, 1888.

"Upon final completion and acceptance of water-works by the City of Superior, Neb., pay to the order of Ripley and Bronson five thousand seven hundred and fifty dollars, and charge same to contract price and on contract for erection of said water-works.

"(Signed) S. K. Felton & Co.

"(Addressed:) To the Mayor and City Council, City of Superior,

"Superior, Neb."

4. That said order was presented at a meeting duly called of the city council, and accepted by a vote of said meeting, and in pursuance thereof the mayor and city clerk, under the seal of the City, indorsed and accepted the said order as follows:

"The City of Superior, Neb., hereby accepts the within written order, provided the water-works are fully completed according to plans and specifications and are duly accepted by the City, and then in that event the City of Superior will withhold from the final payment of contract price that may be due S. K. Felton & Co. the amount of this acceptance, or such part thereof as may actually be due said S. K. Felton & Co. thereon, and will pay over such amount in city warrants to Ripley and Bronson in lieu of S. K. Felton & Co., and such amount to be credited upon said contract price for said water-works as if the same was paid to S. K. Felton & Co.

"Dated Superior, Neb., Dec. 24th, 1888.

"By order of the City Council.

"(City of Superior Corporate Seal.) C. E. Adams, Mayor.

"C. E. Davis, City Clerk."

And thereupon said S. K. Felton & Co. indorsed upon said order as follows:

"We accept and agree to above conditions the day and date hereof, and that this may be embraced in our contract with the City of Superior and be part thereof.

"S. K. Felton & Co.

"Witness: Chas. E. Davis."

5. That the water-works were completed by S. K. Felton & Co., and accepted by the City on the 29th of April, 1889; and that the City paid to S. K. Felton & Co. a large amount of money, subsequent to the acceptance of this order, in disregard of plaintiff's rights, and that there has accrued and become payable to them since said acceptance over $18,000, whereby the City became liable to the plaintiffs for the amount of their order.

To this petition the defendant City interposed a demurrer upon the grounds:

1. That it did not appear from said petition that the circuit court had jurisdiction of the subject matter of the suit.

2. That the said petition did not state facts sufficient to constitute a cause of action.

The court overruled the demurrer (41 Fed. Rep. 113), and, the defendant not desiring to plead further, rendered judgment for the plaintiffs, in the sum of $6,061.87.

Messrs. **Jno. M. Ragan**, *J. B. Cessna* and *W. F. Buck*, for plaintiffs in error:

The petition did not show on its face that the circuit court of the United States had jurisdiction of the subject matter of the action.

The City in accepting the order agreed to pay it in city warrants. There is no allegation in the petition that the defendants in error have demanded payment in warrants, or that the plaintiff in error ever refused to give them warrants for the order.

The Floyd Acceptances, 74 U. S. 7 Wall. 666 (19:169).

An order to pay out of a specified fund has always been held to be a valid assignment.

Christmas v. *Russell*, 81 U. S. 14 Wall. 84 (20:764).

A draft by A on B in favor of C for a valuable consideration amounts to a valid assignment to C of so much of the funds of A in the hands of B.

Spain v. *Hamilton*, 68 U. S. 1 Wall. 624 (17:625).

In order to confer jurisdiction on the circuit court, it must affirmatively appear that the assignor could have maintained the suit in that court.

Corbin v. *Black Hawk County*, 105 U. S. 659 (26:1136); *Metcalf* v. *Watertown*, 128 U. S. 586 (32:543); *Shoecraft* v. *Bloxham*, 124 U. S. 730 (31:574); *Blacklock* v. *Small*, 127 U. S. 96 (32:70).

Messrs. **Clinton Rowell**, *Curtis & Keyser* and *John A. Gilliam*, for defendants in error:

The acceptance of a bill of exchange or written order by the drawee creates a new contract and makes the acceptor the principal debtor.

Byles, Bills, 199; Daniel, Neg. Inst. § 533; 1 Parsons, Cont. 250; *Kirkman* v. *Hamilton*, 31 U. S. 6 Pet. 20 (8:305); *Hortsman* v. *Henshaw*, 52 U. S. 11 How. 177 (13:653); *Wallace* v. *M'Connell*, 38 U. S. 13 Pet. 136 (10:95); *Miltenberger* v. *Cooke*, 85 U. S. 18 Wall. 421 (21:864); *Tilden* v. *Blair*, 88 U. S. 21 Wall. 241 (22:632); *First Nat. Bank* v. *Whitman*, 94 U. S. 343 (24:229); *Wall* v. *Monroe County*, 103 U. S. 78 (26:430); *Ray* v. *Faulkner*, 73 Ill. 469; *Fentum* v. *Pocock*, 5 Taunt. 192.

An action upon that contract by parties who are citizens of different States can be maintained in the circuit court.

De Sobry v. *Nicholson*, 70 U. S. 3 Wall. 420 (18:263); *Marine & R. P. Min. & Mfg. Co.* v. *Bradley*, 105 U. S. 175 (26:1034); *Delaware County* v. *Diebold S. & L. Co.* 133 U. S. 473 (32:674).

The corporation had the right to accept this order and make payment therefor in the manner set forth in the petition.

Dill. Mun. Corp. (4th. ed.) §§ 406, 477, 473, 485; *Fanning* v. *Gregoire*, 57 U. S. 16 How. 524 (14:1043); *Abby* v. *Billups*, 35 Miss. 618; *Draper* v. *Springport*, 104 U. S. 501 (26:812).

Municipal corporations have the power to issue vouchers, certificates of indebtedness, orders, drafts and like instruments.

Nashville v. *Ray*, 86 U. S. 19 Wall. 468 (22:164); *Wall* v. *Monroe County*, 103 U. S. 74 (26:430); *Claiborne County* v. *Brooks*, 111 U. S. 400 (28:470); *District of Columbia* v. *Cornell*, 130

U. S. 661 (32:1042); *Lyell* v. *Lapeer Co.* 6 McLean, 446; *Little Rock* v. *Merchants Nat. Bank*, 98 U. S. 311 (25:109).

A contract that the contracting party shall receive his compensation in county warrants is, in legal effect, a contract that he shall be paid in money.

Babcock v. *Goodrich*, 47 Cal. 511; *Clark* v. *Polk Co.* 19 Iowa, 255; *Bayerque* v. *San Francisco*, 1 McAl. 175; *Benson* v. *Carmel*, 8 Me. 112.

Mr. Justice **Brown** delivered the opinion of the court:

(1.) In support of its demurrer founded upon the alleged want of jurisdiction in the circuit court, the plaintiff in error insists that the plaintiffs below obtained their right to bring suit upon this order by assignment from S. K. Felton & Co., who are not alleged to be citizens of any other State than Nebraska, and hence that the plaintiffs are disqualified to sue, under the Act of August 13, 1888 (25 Stat. 433), the first section of which [96] provides that no circuit or district court shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

The action in this case is brought upon an order drawn by S. K. Felton & Co., in which they direct the City to pay to the plaintiffs below a certain sum of money upon the completion and acceptance of certain work undertaken by them for the City, and charge the same to their contract price. This order was presented to the corporation and formally accepted, "provided the water-works are fully completed, according to plans and specifications, and are duly accepted by the City," and the City promised to pay the same *in city warrants*. This acceptance was a contract directly between the City and the plaintiffs below, upon which the City was immediately chargeable as a promisor to the plaintiffs. Nothing is better settled in the law of commercial paper than that the acceptance of a draft or order in favor of a certain payee constitutes a new contract between the acceptor and such payee, and that the latter may bring suit upon it without tracing title from the drawer. From the moment of acceptance, the acceptor becomes the primary debtor, and the drawer is only contingently liable, in case of nonpayment by the acceptor. Daniel on Negotiable Instruments, § 532; *Fentum* v. *Pocock*, 5 Taunt. 190; *Wallace* v. *M'Connell*, 38 U. S. 13 Pet. 136 [10: 95]. Ever since the case of *Young* v. *Bryan*, 19 U. S. 6 Wheat. 146 [5: 228], it has been the settled law of this court that the circuit court has jurisdiction of a suit, brought by the indorsee of a promissory note against his immediate indorser, whether a suit would lie against the maker or not, upon the ground, as stated by *Chief Justice* Marshall, "that the indorsee does not claim through an assignment but upon a new contract between himself and the indorser." This case was approved in *Mollan* v. *Torrance*, 22 U. S. 9 Wheat. 537 [6: 154]; *Evans* v. *Gee*, 36 U. S. 11 Pet. 80 [9: 639], and *Coffee* v. *Planters Bank of Tennessee*, 54 U. S. 13 How. 183 [14: 105]. It needs no argument to show that the same rule would apply as between the acceptor and the payee; and if the latter be a nonresident of the State, he may bring suit directly against the acceptor, notwithstanding the drawer of the paper is a resident of the same State as the acceptor, for the same reason that the acceptance creates a new contract, to which the drawer is not a party. *Thompson* v. *Perrine*, 106 U. S. 589 [27: 298].

The same principle is illustrated in the case of *DeSobry* v. *Nicholson*, 70 U. S. 3 Wall. 420 [18: 263], in which it was held that if the requisite citizenship exist between the immediate parties to a contract, the jurisdiction of the circuit court cannot be defeated by the fact that another and prior contract, to which the plaintiff is not a party, is set out as an inducement to the making of the contract in suit.

So, in *Marine & R. P. Min. & Mfg. Co.* v. *Bradley*, 105 U. S. 175 [26: 1034], a corporation agreed to pay on a certain date to A a sum of money, at a specified rate of interest; and, by an indorsement on the paper after it matured, further agreed, in consideration of forbearance to a date named, to pay at a higher rate of interest, to *bearer*. It was held that the indorsement was a new contract, upon sufficient consideration, and negotiable within the meaning of the law merchant, and that B, the legal holder of the paper, was not precluded from suing thereon in the circuit court, by the fact that A was a citizen of the same State as the corporation. In delivering the opinion of the court *Mr. Justice* Matthews observed: "It is true that the bond, as originally executed, was payable to Gayer, receiver, simply, and was not negotiable; but the subsequent indorsement was a new and complete contract, upon a distinct and sufficient consideration, and, being payable to bearer, is negotiable by delivery merely."

(2.) In support of its second ground of demurrer, the defendant City further insists that inasmuch as the acceptance of the City was a promise to pay in *city warrants*, the petition should allege that the plaintiffs demanded payment in warrants, and that the City refused to give them warrants for the order. The order, however, was to pay a certain sum in dollars and cents, and the [9 promise was to pay the amount of the acceptance, and if payment had been made or tendered, either in current money or in city warrants, it was matter of defense, and the burden of proof was upon the defendant. No allegation in the petition that payment in city warrants was demanded and refused was necessary to constitute a complete cause of action, and it is only after a failure to make out a prima facie case in the petition that a general demurrer will lie. *Wallace* v. *M'Connell*, 38 U. S. 13 Pet. 136 [10: 95]; *Brabston* v. *Gibson*, 50 U. S. 9 How. 263, 270

[13: 131, 138]. As the warrants were a mere method of payment in money, for the convenience of the City in carrying on its financial business, it may be treated as a promise to pay in money. *Babcock* v. *Goodrich*, 47 Cal. 488. If the promise were to pay in bank notes or other representatives of money, it would scarcely be claimed that it was not a promise to pay in money, or that any special demand of bank notes was necessary to be averred. There is an allegation in the petition that, though often requested, the said City of Superior has not paid to plaintiffs the amount of said order and acceptance, or any part thereof, and that there is now due and unpaid upon the same the entire amount thereof. We think this is a sufficient allegation of nonpayment and refusal to pay to render the City chargeable in this form of action.

The judgment of the Circuit Court must be affirmed.

5] CHICAGO, SANTA FÉ AND CALIFORNIA RAILROAD COMPANY, *Plff. in Err.*,

v.

JOHN R. PRICE ET AL.

(See S. C. Reporter's ed. 185-195.)

Contract for construction of railroad—decision of engineer of amount of work done, etc., when conclusive—fraud or incompetency.

1. Where a contract for constructing the road-bed of a railroad provided that the chief engineer of the railroad company should decide every question which might arise between the parties, and his measurements and calculations of the quantities of the work done and his decision thereon should be final and conclusive and binding upon both parties, estimates made by the division engineer under whose immediate supervision the work was done and approved by the chief engineer and certified by him are conclusive; and subsequent re-estimates by a subordinate engineer of the company, made without the knowledge or co-operation of the contractors, are not binding upon them, although they were approved by the chief engineer.

2. Where the amount of work by contractors in building a railroad is to be measured and ascertained by the chief engineer of the road, whose decision is to be final, it is binding and conclusive upon the parties unless there is fraud on the part of the engineer or such gross mistakes by him as to imply bad faith; his mere incompetency or negligence will not authorize the railroad company to go behind his estimates.

[No. 1456.]

Submitted Jan. 8, 1891. Decided Jan. 26, 1891.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment against the Chicago, Santa Fé & California Railroad Company for the balance due for clearing, grubbing and masonry for building the road-bed of that Company, under a written contract. *Affirmed.*

6] Statement by *Mr. Justice* **Harlan:**

This action was brought by Price, McGavock & Co., for the use of Jones, Forrest & Bodkin, to recover from the Chicago, Santa Fé and California Railroad Company the balance alleged to be due them under a written contract, made March 21, 1887, for the clearing, grubbing and masonry necessary to complete the road-bed of that Company from a point on the Mississippi River to Galesburg, Illinois, a distance of about fifty miles. The parties in writing waived a jury and tried the case before the court, which made a special finding of facts. There was a judgment against the Railroad Company. 38 Fed. Rep. 802.

The contract contained, among other provisions, the following: [187

"The aforesaid party of the first part [Price, McGavock & Co.], in consideration of the prices hereinafter agreed to be paid to them by the party of the second part [the Railroad Company], hereby agree and bind themselves to construct and in every respect to complete the grubbing and clearing, grading and masonry, including the furnishing of materials and all other things requisite and necessary to complete the road-bed and prepare the same ready for receiving the superstructure, upon that portion of the railroad of the party of the second part known and designated as section —, number —, the first fifty (50) miles eastward from station thirty (30), east bank of Mississippi River, of the Chicago, Sante Fé and California Railway, in such a manner as will conform in every respect to the annexed specifications and to the following conditions, viz.: [188 [189]

"1st. That the work shall be commenced within ten (10) days after the execution of these presents, or as soon after as the Railway Company shall have acquired a title to the lands, and shall be completed on or before the first day of August, one thousand eight hundred and eighty-seven.

"2d. The work shall be executed under the direction and supervision of the chief engineer of said Railway Company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work performed under this contract shall be determined and whose determination shall be conclusive upon the parties, and who shall have full power to reject or condemn all work or materials which in his or their opinion do not fully conform to the spirit of this agreement; and said chief engineer shall decide every question which can or may arise between the parties relative to the execution thereof, and his decision shall be binding and final upon both parties; and whereas the classification of excavation provided for in the annexed specifications is of a character that makes it necessary that special attention should be called to it, it is expressly agreed by the parties to this contract that the determination, by the measurements and calculations of the said engineer, of the respective quantities of such excavation shall be final and conclusive." [190

* * * * * *

"5th. If any damage shall be done by the party of the first part (or persons in their employ) to the owners or occupants of lands or other property adjoining or in the vicinity of the work herein contracted to be done the

engineer of said Company shall have the right to estimate the amount of said damage and to pay the same to said owner or occupant, and the amount so paid for such damage shall be deducted from the value of work done under this contract."

* * * * * *

"The aforesaid party of the second part hereby agrees that whenever this contract shall be completely performed on the part of the said party of the first part, and the engineer has certified the same in writing, the said party of the second part shall, within ten days thereafter, pay to said party of the first part any remaining sums due for said work, according to this contract, as follows, to wit: [Here follow the prices agreed upon for different kinds of work to be done.]"

* * * * * *

"It is further agreed between the parties that monthly payments shall be made by the party of the second part, on the certificate of the engineer, for work done, deducting ten per cent from the value of work done, as agreed compensation for damages, to be forever retained by the party of the second part in case the whole amount of work herein named shall not be done in accordance with this agreement.

"For the purpose of avoiding all causes of difference or dispute between the parties to [91] this contract relative to its true intent or meaning, and for the purpose of adjusting in an amicable manner any difference that may or can arise relative thereto, it is hereby mutually understood and agreed by the parties as follows, to wit:

"1. No extra charges will be claimed or allowed on account of changes, either in the line or grade of the road, the prices herein mentioned being considered as full compensation for the various kinds of work herein agreed to be performed.

"2. Whenever work is required to be done which is not now contemplated or covered by the prices herein mentioned the engineer shall fix such prices for the work as he shall consider just and equitable, and the said parties shall abide by such prices, provided the party of the first part enter upon and commence such work with full knowledge of the prices so fixed by the engineer; but if the party of the first part decline executing said work at the price fixed by the engineer, then the party of the second part may enter into contract with any person or persons for its execution, the same as if this contract had never existed; and if extra work, or work not provided for in this contract, is performed by the contractors, without protest or notice in writing to the engineer and to the party of the second part before prices shall have been fixed to such work, then the engineer shall estimate the same at such prices as he shall deem just and reasonable, and his decision shall be final, and the party of the first part shall accept of said prices in full satisfaction of all demands against the party of the second part for said extra work; but nothing shall be deemed extra work that can be measured or estimated under the provisions of this contract.

* * * * * *

"5. It is expressly agreed by the party of the first part that the party of the second part may at any time pay so much of the money due the party of the first part on the running or final estimates above mentioned to the laborers employed by the party of the first part as may be due said laborers and charge the same to the party of the first part.

"6. In case any or all work embraced in this contract shall be permanently suspended by and on account of the party of the second [1 part, which it is hereby agreed the party of the second part may do, for other causes than heretofore provided in this contract, then in that case all further operations under this contract shall be suspended within three days after receiving written notice from the party of the second part requiring the further progress of the work to be suspended, and the party of the first part shall have their choice either to consider such suspension temporary and resume work on the same within ten days after receiving notice to resume work, or may consider the same at an end, and shall receive full pay for all work by them performed under this contract, and at the prices herein stipulated, upon the estimate of the engineer, which shall be final and conclusive between the parties to this contract; which estimates shall not include any anticipated profits that might have accrued from the completion of the said work, it being understood that no claim for damages shall be made by the party of the first part on account of any profits that might accrue from the completion of the same."

Messrs. **Norman Williams** and *Charles S. Holt*, for plaintiff in error:

The final estimate of the chief engineer and his assistants, if properly made, is the measure of the plaintiffs' rights, and is conclusive.

1 Redf. Railways (6th ed.) 435; 1 Rorer, Railroads, 462; *Herrick* v. *Belknap*, 27 Vt. 673, *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549 (29:255), and cases cited; *Snell* v. *Brown*, 71 Ill. 133; *Monongahela Nav. Co.* v. *Fenlon*, 4 Watts & S. 210; *Sweet* v. *Morrison*, 116 N. Y. 19.

The court having refused to consider the final estimate, not because it was incorrect, but on the ground that the Company had no right to make any final estimate at all, the judgment should be reversed.

The recovery, if any, must be solely upon the contract rights of Price, the legal plaintiff.

1 Wait, Act. and Def. 364, 366, and cases cited; *Hamilton* v. *Brown*, 18 Pa. 87; *Saltmarsh* v. *Bowen*, 22 Ala. 221, 231; *Ferguson* v. *Milliken*, 42 Mich. 441; *Sanders* v. *District of Columbia*, 20 Ct. Cl. 337.

Mr. **P. S. Grosscup**, for defendants in error:

Under the common count for work and labor, as well as under the special counts, the judgment entered is sustainable.

Chitty, Pl. 348; Abbott, Trial Ev. 361, 362; *Lane* v. *Adams*, 19 Ill. 167; *Tunnison* v. *Field*, 21 Ill. 108; *Combs* v. *Steele*, 80 Ill. 101; *Fowler* v. *Deakman*, 84 Ill. 130.

The certificate of November 1st, upon which the disputed portion of the judgment is based, was in contemplation of law, and of the con-

tract, a conclusive settlement between the parties up to that date.

Rorer, Railroads, 462; *Herrick* v. *Belknap*, 27 Vt. 680; *Barker* v. *Belknap*, 27 Vt. 700; 2 Sutherland, Damages, 520.

The plaintiff in error was, under the circumstances of the case, estopped from denying the conclusiveness of that certificate.

Welch v. *Sherer*, 93 Ill. 64; *M'Mullen* v. *Wenner*, 16 Serg. & R. 18; *Weaver* v. *M'Corkle*, 14 Serg. & R. 304; *Scott* v. *Saddler*, 52 Pa. 211; 1 Greenl. Ev. (18th ed.) 207.

Mr. Justice **Harlan** delivered the opinion of the court:

The written contract between the parties in this case does not materially differ from the one before this court in *Martinsburg & P. R. Co.* v. *March*, 114 U. S. 549, 553 [29: 255, 256]. In that case the contractor did not allege in his declaration that the engineer ever certified in writing the complete performance of the contract, together with an estimate of the work done and the amount of compensation due him according to the prices established by the parties; which certificate and estimate was made by the agreement a condition of the liability of the company to pay the contractor the balance, if any, due him. Nor did the declaration allege any facts which, in the absence of such a certificate by the engineer whose determination was made final and conclusive, entitled the contractor to sue the company on the contract. It was held, in accordance with the principles announced in *Kihlberg* v. *United States*, 97 U. S. 398 [24: 1106], and *Sweeney* v. *United States*, 109 U. S. 618 [27: 1053], that the declaration was fatally defective in that it contained "no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him." Some observations in that case are pertinent in the present one. It was said: "We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to reply upon their right, which the law presumes they did not intend to waive, to demand that the engineer should, at all times, and in respect to every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

The only difference between that case and the present one is that the alleged mistakes of the engineer in the former were favorable to the railroad company, while in this case they are favorable to the contractors. But that difference cannot affect the interpretation of the contract. In the present case the agreement was that the work should be executed under the direction and supervision of the chief engineer of the Railroad Company and his assistants, by whose measurements and calculations the quantities and amounts of the several kinds of work should be determined, and "whose determination shall be conclusive upon the parties." Any decision of the chief engineer relating to the execution of the contract was to be "binding and final upon both parties." [19

His measurements and calculations as to excavations were made "final and conclusive."

What are the substantial facts found by the court below? The work was in four divisions, each division being in charge of an assistant or division engineer, who acted under the general direction of the chief engineer. The agreement provided for monthly payments to the contractor, on the certificate of the engineer, "for work done;" ten per cent from the value thereof to be retained by the Company until the whole work was completed in accordance with the contract. The work was under the immediate supervision of the division engineer. On the first day of each month he made up and forwarded to the assistant chief engineer an estimate of work done on each section of his division, according to quantities and classifications. Upon such estimates the assistant chief engineer ascertained the amount due the contractor to the beginning of the month. These monthly estimates were approved by both the assistant chief engineer and chief engineer. This course was pursued until the work was substantially completed, and was accepted and taken possession of by the Company. Subsequently, without the knowledge or co-operation of the contractors, Baker, a subordinate engineer of the Railroad Company, who had not supervised the work of the plaintiffs, re-estimated and reclassified it, and upon such re-estimate and reclassification, which were approved by the chief engineer, the Company claimed that the monthly estimates upon which the plaintiffs had been paid from time to time were much too large. [19

We are of opinion that the ultimate facts, as found by the court, do not authorize the Railroad Company to go behind the estimates from time to time by its division engineer, which were approved and certified by the assistant chief engineer and chief engineer. Within a reasonable interpretation of the contract, the last monthly estimate of work done on division nine (that being the only division here in dispute), followed by the acceptance by the Company of the whole work, was a certificate of complete performance entitling the plaintiff to be paid in full according to the terms of the contract. While there was evidence tending to show that the estimates by the division engineer, upon which the last monthly certificate was based,

were not made up from actual measurements on the ground, but from reports by subcontractors, there was also evidence tending to show that the remeasurements and reclassifications which the Company caused to be made after the completion and acceptance of the work, and which it calls the "final estimate," were inaccurate. But there is no fact distinctly found indicating fraud upon the part of the Company's engineers, or such gross mistakes by them as imply bad faith. It is found only that the monthly estimates might, with reasonable care, have been made nearly accurate, and that, if the remeasurements and reclassifications were correct, the discrepancy between them and the monthly estimates, upon which the plaintiffs were paid from time to time, could be explained only upon the ground of negligence, incompetency or dishonesty upon the part of the division engineer. But the court did not find that the monthly estimates were inaccurate, or that the chief or division engineer was dishonest, or that the subsequent remeasurement and reclassification were correct. The mere incompetency or mere negligence of the division or chief engineer does not meet the requirements of the case, unless their mistakes were so gross as to imply bad faith.

We are of opinion that the judgment is supported by the finding of facts, and it is affirmed.

124] CONSOLIDATED ROLLER MILL COMPANY, *Appt.*,

v.

R. R. WALKER.

(See S. C. Reporter's ed. 124-133.)

Gray's patent for improvement in roller mills—old process—want of invention—no infringement.

1. There is not any patentable subject matter in claim 1 of Gray's patent for an improvement in roller-grinding mills; the combination set forth therein evinces only the exercise of ordinary mechanical or engineering skill.
2. The application of an old process, machine or device to a like or analogous purpose, with no change in the mode of application and no result substantially different in its nature, will not sustain a patent, even if the new form of result has not before been contemplated.
3. The mere carrying forward of an original conception, resulting in an improvement in degree simply, is not invention.
4. The use of a roller mill manufactured under and in accordance with letters-patent to John T. Obenchain is not an infringement of Gray's patent for an improvement in roller-grinding mills; Gray's first claim does not embrace the Obenchain device.

[No. 1485.]

Submitted Jan. 9, 1891. Decided Jan. 26, 1891.

NOTE.—*For what patents are granted; when declared void.* See *note* to Evans v. Eaton, 4: 433.

As to patentability of inventions, see *notes* to Thompson v. Boisselier, 29: 76; Corning v. Burden, 14: 683.

As to distinction between inventions of mechanism, articles or products, and processes; when latter patented,—see *note* to Corning v. Burden, 14: 683.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Pennsylvania dismissing a suit in equity for the infringement of letters-patent issued to Wm. D. Gray for an improvement in roller-grinding mills. *Affirmed.*

The facts are stated in the opinion.

Mr. **R. Mason**, for appellant:

The combination was new and eminently useful.

A combination claimed is to be regarded as an entirety, and novelty may be predicated of it although all parts less than the whole may be old.

Parks v. *Booth*, 102 U. S. 96 (26: 54); *Imhaeuser* v. *Buerk*, 101 U. S. 647 (25: 945); *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691 (8: 547).

The right of the Crown to grant patents for monopolies in the practice of trades existed from time immemorial.

Darcy v. *Allin*, Noy, 173; *The Clothworkers of Ipswich Case*, Godb. 252.

He is the first inventor who first brings the knowledge of a new manufacture into the realm by taking out letters-patent therefor.

Earle v. *Sawyer*, 4 Mason, 1; *Crane* v. *Price*, 1 Webs. Pat. Cas. 393.

The courts have uniformly held that the words "substantially as described," or "as described," or "as set forth," are unnecessary, because the reference they make to the description is always implied.

Mitchell v. *Tilghman*, 86 U. S. 19 Wall. 287 (22: 125); *Lorillard* v. *McDowell*, 2 Ban. & A. 581; *Betts* v. *Menzies*, 10 H. L. Cas. 117; 2 Rob. Pat. § 517; *Pearl* v. *Ocean Mills*, 2 Ban. & A. 469.

Messrs. **Robert H. Parkinson** and *Joseph* [1
G. Parkinson for appellee.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a suit in equity, brought in the Circuit Court of the United States for the Western District of Pennsylvania, by the Consolidated Roller Mill Company against R. R. Walker, for the infringement of claim 1 of letters-patent No. 228,525, granted June 8, 1880, on an application filed May 2, 1879, to William D. Gray, for an improvement in roller-grinding mills. The circuit court, held by *Judges* McKennan and Acheson, entered a decree dismissing the bill, with costs. The case was heard on pleadings and proofs. The answer denied the validity of the patent, charged want of novelty and of patentability, and denied infringement. The opinion of the court (43 Fed. Rep. 575) was written by *Judge* Acheson.

The specification and claims of the patent are as follows: "My invention relates to that class of mills in which horizontal grinding-rolls arranged in pairs are employed; and the invention consists in the improved arrangement of belts and pulleys for communicating motion to the rolls, and in other minor details hereinafter described in detail. In the accompanying drawings, Figure 1 represents a side elevation of the same; Fig. 2, a top-plan view of the rolls and their operating-belts, and Fig. 3, an end elevation of the same, partly in section. It has been found by experience that when the

rolls are driven by gearing a great deal of noise and a jarring of the parts of the apparatus and trembling of the mill-floor re-
[6] sult, and this jarring and trembling in turn cause an unevenness of operation or grinding and a rapid and uneven wear of the rolls. To obviate these difficulties and produce an even, steady motion, I discard the gearing hitherto employed, and substitute therefor a system of belting arranged in a peculiar manner, to give the proper direction and speed to the rolls. In the drawings, A represents the frame or body of the machine, in the upper part of which are mounted, in pairs, a series of grinding or crushing rolls, C D E F. Above the grinding-rolls is arranged a hopper provided with feeding-rolls, G H, arranged to deliver the grain to each pair of rolls. B represents a counter-shaft, which is represented in the drawings as extending transversely through the base of the frame or body A, parallel with the grinding-rolls, but which may, if desired, be located entirely without the machine. As represented in Figs. 1 and 2, the grinding-rolls are furnished alternately at opposite ends each with a belt-wheel or pulley, while the counter-shaft B is furnished at one end with one wheel or pulley and at its opposite end with two. N represents the main driving-belt, which passes to and around the pulley *c* of the roll C, thence downward and around pulley *b* of the counter-shaft B, thence upward and around pulley *e* of the roll E, and back to the source of power, imparting to the rolls C and E a motion in one direction, and to the counter-shaft a motion in the reverse direction. From the pulleys *b′ b″* on the rear end of the counter-shaft B, belts P and R pass upward and around pulleys *d* and *f* of the rolls D F, as shown in Fig. 2, imparting to said rolls a motion the reverse of that of the rolls C E. In this way the two rolls of each set are caused to revolve toward each other while being all driven from a common source primarily.

"The use of belting obviates all the noise incident to gearing and produces a much more even and steady motion, each roller being driven from the counter-shaft, instead of one from another, as heretofore. Another advantage incident to the arrangement of belting above described is that, by simply removing the pulley of any shaft and replacing it with another of proper size, any desired difference
[7] in the speed of the rolls may be obtained, whereas in the case of gearing this cannot be accomplished except through the use of a very complicated arrangement of intermediate wheels. In order to adapt the counter-shaft B to perform the double purpose of reversing the motion of certain of the rolls and of acting as a belt-tightener, it is mounted, at opposite sides of the frame or body A, in boxes swiveled or hung in yokes L, sliding vertically in guides or boxes K, and adjusted up and down therein by screw rods or stems S, the swivel-boxes permitting a slightly greater movement of the shaft B at the one end than at the other, without interfering with its free rotation, and thereby permitting the tightening of the belt or belts at one side of the machine, without disturbing those at the other. In order to adjust and maintain the rolls C D and E F in proper relation to each other, the two outer rolls, C and F, are carried in sliding-boxes, which are formed each with a T rib or standard, *m*, moving in a groove or way of corresponding shape, the rolls being held up to their operative position by springs U, which, in turn, are regulated in pressure by screws T. Clamping-screws may be arranged to secure the sliding-boxes Q in any desired position. By the above arrangement of the sliding-boxes they are prevented from being advanced or retracted unequally, and thereby giving the rolls a 'winding' position. It is desirable that, when the rolls are not employed in grinding, they should be held apart, as otherwise they would be liable to injury by direct contact, and also subjected to unnecessary wear. To accomplish their ready separation I place just in front of each sliding-box Q a rotating cam or eccentric, Y, which, when turned in one direction, permits the box to be advanced, but when given a partial revolution about its axis forces and holds back the same.

"The meal, after being crushed by the rollers, sometimes packs or cakes together; and for the purpose of regranulating the same it is passed through a disintegrator. The disintegrator-cylinder may be mounted on and driven by the counter-shaft B, as shown in Fig. 3, in which case the usual surrounding shell or casing (shown in the drawings) will need to be adjustable vertically.

"The peculiar manner of or means for ad- [12
justing the shell forms no part of the present invention, and need not, therefore, be described in detail herein. Many arrangements—such as the use of bolts and slots, or adjusting-screws, for example—will suggest themselves to the skilled mechanic.

"Machines of this class are found to be impaired in their operation through the heating of the roller-journals. To overcome this defect I form on the shafts of the rollers, and also on the counter-shaft, near each end, a collar, *x*, which serves both to prevent end play of the shaft and to carry upward continually a supply of oil from the chamber or supply *z* to the upper side of the shaft and box, whence it spreads out over the entire surface of the bearing and journal. The boxes are each formed with an annular oil-chamber, *v*, at each end, communicating by inclined passages *w* with the supply chamber or sink *z*. In this way a perfect lubrication of the bearings is constantly maintained and heating is obviated. The feed-rolls G H are furnished at their ends with pulleys, *g h*, which are driven by belts from the grinding-rolls, D E, which, being stationary, cannot interfere with the tension of the belts, as would the adjustable rolls, C F.

"I am aware that various devices have hitherto been employed to regulate the distance between the rolls, in order to govern the fineness of the material delivered from them, and I am also aware that shafts have been made movable in such manner as to tighten belts passing over pulleys on other shafts, and I lay no claim thereto; but I believe myself the first to construct and organ-

ize a grinding-mill in the peculiar manner herein shown and described, whereby the single belt is caused to operate the various parts in the required directions and the disintegrating-cylinder caused to keep the belt tight.

"Having thus described my invention, what I claim is—

"1. In a roller grinding-mill, the combination of the counter-shaft provided with pulleys at both ends and having said ends mounted in vertically and independently adjustable bearings, the rolls C E having pulleys connected by belts with one end of the counter-shaft, and the rolls D F independently connected by belts with the other end of the counter-shaft, as shown.

29] "2. In a roller-grinding mill, a disintegrating-cylinder connected at its two ends by belts with the rolls, in combination with independently and vertically adjustable supports connected by transverse pivots with the boxes sustaining the ends of the cylinder, in the manner described and shown.

"3. In a roller-mill, the combination of the frame, the cylinder, the pivoted bearings, K, the forked arms, L, having the bearings therein, and the screw, S, as shown."

The opinion of the circuit court, after quoting from the specification, says: "Gray's specification, as our quotations therefrom indicate, suggests the idea that he was the first to apply belt-drives to roller-grinding mills. But the fact is otherwise, as the proofs abundantly show. Nor was he the first to discard from such mills cog gearing and friction gears altogether and substitute therefor belt driving." The opinion then refers to Mechwart's Austrian patent, granted August 3, 1875, extracts from which, as found in the record, are as follows: "The arrangement invented by me has for its object an advance in the former method of driving the co-operating rollers of any particular roller-mill. This end has heretofore been obtained exclusively either by the intermeshing of both rollers through the means of spur gear, or else through the naked driving of the one roller from the driven roller by means of friction produced through any pressure whatever between the rollers. . . . The substance of the invention, which I consider new and desirable for patent, consists in the use of belts for the driving of each single roller of a pair in roller-mills for the begetting of mill products in any desired relation of the two co-operating rolls to each other. Heretofore, in roller-mills, one roll of a pair has been driven from the other by means of spur gearing or by means of friction caused by the pressure between the rollers. The transmission of movement through spur gearing has, however, the disadvantage that through the unavoidable inequality of the intermeshing, an unequal movement of the rollers ensues, which results, according to experience, in the rapid loss of 'true' and in unequal wearing away of the rollers; besides this, the disagreeable rattling of spur gear-
0] ing and the rapid wearing away of the gears themselves is a disadvantage. The driving of the second roller by means of friction of the two rollers pressed together is only practical when the chop passes the rollers in very thin strata and not in coarse particles. In case of the latter the friction will be relieved and the driven roller be stopped; besides this, only an equal peripheral speed of the rollers is permitted by this construction and therefore it is not applicable when an unequal speed is desired, as, for example, in the grinding of the middlings into flour. These disadvantages the inventor has removed by his application of belt-drive to every single roller of a roller pair of a roller-mill, which, according to his best knowledge and conscience, has never been employed in similar machines and is entirely new, so that, by means of such transmission of movement, an equal revolution is obtained, which is impossible with spur gearing. In the accompanying three drawings are six different arrangements, shown for different groupings of the rollers, although I do not thereby intend to exclude every other possible arrangement."

The opinion then proceeds: "We find therein distinctly set forth the disadvantages resulting from the use of spur gearing in roller-grinding mills, viz., the disagreeable rattling, the rapid wearing away of the gears, and the unequal movement and unequal wearing away of the rollers, and also the inefficiency of driving by means of frictional contact between the rolls, which latter, it is set forth, is only practical when the chop passes the rollers in very thin layers and not in coarse particles, and is not applicable when an unequal peripheral speed of the rolls is required. All these disadvantages, it is declared, are avoided by Mechwart's invention, which consists in driving both co-operating rolls by means of belts, whereby, also, can be obtained an equal and also an unequal peripheral speed, while the diameter of the rolls, as well as the diameter of the belt pulleys, can be varied relatively to each other for different objects. Mechwart's drawings show, as examples, six different arrangements of belting, which, he states, are intended to illustrate 'only some of the different arrangements of the belt-drive for roller-mills, without exhausting the possible variations in its application.' Figure 3, [131
sheet A, shows a machine having two pairs of grinding rolls, the pairs being vertical and arranged side by side. A shaft, mounted in the machine frame in fixed bearings, carries two pulleys, one at each side of the machine. A belt from one of these pulleys passes around a tightening pulley at the upper right-hand corner of the machine, thence around a pulley on the upper left-hand roll shaft, thence around a pulley on the lower right-hand roll shaft, and thence back to the driving pulley; and by this belt one roll of each pair is driven. From the other pulley, on the other side of the machine, a belt is arranged in a similar manner, so as to drive the other two rolls of the pair. Without further description of the Mechwart system, it is enough to say that his patent disclosed roller-grinding mills, single and double, with both vertical and horizontal pairs of rolls arranged side by side, driven by means of belts exclusively, his machine being equipped with adjusting or tightening pulleys, and having a

shaft journalled directly into the machine frame and receiving its motion from the prime mover of the mill, either directly or by belt."

It then says: "But turning now to machinery employed in the arts generally, it is certain that the use of belt gearing interchangeably with or as a substitute for cog gearing was very old and common before Gray's alleged invention. It was, too, an old and familiar expedient to keep the belt adjusted to a proper degree of tightness by means of tightening pulleys, the shafts of which, in revolving, sometimes did other work about the machine; and shafts had been made movable in such manner as to tighten belts passing over pulleys on other shafts. It was also old, and very common in machine shops and factories of various kinds, to provide an individual machine with a counter-shaft mounted directly in the machine frame, the counter-shaft being driven by a belt from the line-shaft, and the machine by a belt from the counter-shaft. Furthermore, it was no new thing to provide the journal boxes or hangers in which counter-shafts are mounted with means for independently adjusting the ends of the shaft." It then adds that, in view of the things referred to, the court is unable to discover any patentable subject matter in claim 1 of Gray's patent; and that it falls directly within the established principle that the application of an old process, machine or device to a like or analogous purpose, with no change in the mode of application and no result substantially different in its nature, will not sustain a patent, even if the new form of result has not before been contemplated,—citing *Pennsylvania R. Co.* v. *Locomotive E. S. T. Co.*, 110 U. S. 490 [28: 222], and *Blake* v. *San Francisco*, 113 U. S. 679 [28: 1070].

It then says that it is quite clear, moreover, that the application of belting to drive roller-grinding mills, to obviate the difficulties incident to the use of cog gearing and to secure the advantages set forth in Gray's specification, did not originate with him; and that, therefore, even were it conceded that his peculiar arrangement is attended with better results than had been attained previously, still this would not sustain the patent, for the mere carrying forward of an original conception, resulting in an improvement in degree simply, is not invention,—citing *Burt* v. *Evory*, 133 U. S. 349 [32: 647]; and that the conclusion is unavoidable, that the combination set forth in Gray's first claim evinces only the exercise of ordinary mechanical or engineering skill,—citing *Hollister* v. *Benedict & B. Mfg. Co.*, 113 U. S. 59 [28: 901]; *Thompson* v. *Boisselier*, 114 U. S. 1 [29: 76]; *Aron* v. *Manhattan R. Co.*, 132 U. S. 84 [32: 272]; *Hill* v. *Wooster*, Id. 693, 701 [502, 506], and *Howe Machine Co.* v. *National Needle Co.*, 134 U. S. 388 [32: 963]. We fully concur in these views and conclusions, and regard them as entirely sufficient to justify the decree.

The circuit court further says: "It seems to be proper for us to add that our judgment is with the defendant upon the defense of non-infringement also. To understand the nature of the invention intended to be covered by the first claim, resort must be had to the specification, and we there find that the 'swivel boxes' are essential to the contemplated greater movement at one end of the shaft than at the other, whereby is effected 'the tightening of the belt or belts at one side of the machine, without disturbing those at the other.' This is apparent on the face of the paragraph hereinbefore quoted at length; and the expert testimony is direct [13: and convincing that, to the practical working of the described device as a belt-tightener, this swiveling feature is indispensable. Without the swiveled boxes Gray would not have 'independently adjustable bearings.' True, those boxes are not expressly mentioned in the claim, but we think they are to be regarded as entering therein by necessary implication, for the reason just stated, as well as by force of the words 'as shown.' Moreover, the prior state of the art would limit the claim to the specific organization shown and described. *Phœnix Castor Co.* v. *Spiegel*, 133 U. S. 360, 369 [32: 663, 666]. But that organization the defendant does not use. His alleged infringement consists in the use of a roller-mill manufactured under and in accordance with letters-patent No. 334,460, granted on January 19, 1886, to John T. Obenchain. In the defendant's machine the journal boxes are rigidly supported so as to be always horizontal, and incapable of any tilting or swiveling motion; and this is essential to the working of the apparatus. A continuous counter-shaft is not employed, but three coupled base shafts, the outer shafts or sections being each journalled at the outer end in a vertically adjustable non-swiveling box, and the inner end of each being forked and carrying a loosely pivoted ring. These two rings are connected by a tumbling rod forked at each end and pivoted to the rings, thus forming a universal coupling, and thereby, through the central shaft or tumbling rod, rotary motion is transmitted from one of the end shafts or sections to the other, no matter how much they may differ in vertical position. Now, for the reasons already given, we are of opinion that such a construction of Gray's first claim as would embrace the Obenchain device is inadmissible." We see no reason to doubt the correctness of these views.

Decree affirmed.

LEWIS E. WATERMAN, *Appt.*, [25

v.

JAMES A. MACKENZIE ET AL.

(See S. C. Reporter's ed. 252-261.)

Patent-right—transfer of—license, what is—rights of licensee, how enforced—assignment,

---

NOTE.—*As to assignment, before issuing and reissuing patent; recording; when assignment transfers extended terms,*—see *note* to Gayler v. Wilder, 13: 504.

When assignee may sue for infringement; when patentee must; when they must join. See *note* to Wilson v. Rousseau, 11: 1141.

As to damages for infringement of patent; treble damages,—see *note* to Hogg v. Emerson, 13: 824.

recording—husband and wife—right to sue for infringement—license to manufacture and sell—suit in equity—mortgage of patent—chattel mortgage—real estate mortgage—recording mortgage of patent—mortgagee, when may sue for infringement.

1. The monopoly granted by a patent issued under the laws of the United States for an invention or discovery is one entire thing, and cannot be divided into parts, except as authorized by those laws.
2. A transfer of either the whole patent, or of an undivided part or share of that exclusive right, or of the exclusive right under the patent in a specified part of the United States, is an assignment and vests in the assignee a title in so much of the patent itself, with a right to sue infringers, in the name of the assignee alone, if the assignment is of the whole patent or of the exclusive right in a specified territory, or jointly with the assignor, if the assignment is of an undivided part or share.
3. An assignment which does not transfer the whole patent, or an undivided part of the whole, or an exclusive right in any part of the country, is a mere license and gives the licensee no title in the patent, and no right to sue at law in his own name for an infringement.
4. The grant of an exclusive right under a patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent-right in the district, and is therefore only a license.
5. Any rights of the licensee of a patent-right must be enforced through or in the name of the owner of the patent, and, if necessary to protect the rights of all parties, joining the licensee with him as plaintiff.
6. An assignment of an entire patent, or of an undivided part thereof, or of the exclusive right under it for a limited territory, may be either absolute or by a mortgage, and is void as against a subsequent purchaser or mortgagee for a valuable consideration without notice unless it is duly recorded in the Patent Office.
7. In New York husband and wife are authorized to make conveyances and contracts of and concerning personal property to and with each other, in the same manner and to the same effect as if they were strangers.
8. The assignment of an entire patent-right vests in the assignee the exclusive right to sue, either at law or in equity, for its subsequent infringement.
9. An instrument by which one is granted "the sole and exclusive right and license to manufacture and sell" a patented article "throughout the United States," and which does not include the right to use such article, at least if manufactured by third persons, is a mere license and not an assignment of any title, and does not give the licensee the right to sue alone, at law or in equity, for an infringement of the patent.
10. A suit in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained.
11. A conveyance of a patent-right, made to secure the payment of a debt, upon condition that it should be avoided by the subsequent payment of that debt at a time fixed, is a mortgage, and, if recorded, a subsequent assignment of the patent-right is subject to that mortgage, though not in terms so expressed.
12. By a mortgage of personal property the whole title is transferred to the mortgagee as security for the debt, including the right of possession, where there is no express stipulation to the contrary.
13. A mortgage of real estate is in many of the States a mere security, but passes the title so far as necessary to protect the mortgagee, who, after possession taken, is entitled to the rents and profits, and damages for trespass, and before possession may restrain waste which impairs the security.
14. The recording of a mortgage of a patent-right in the Patent Office, in accordance with the Act of Congress, is equivalent to a delivery of possession, and makes the title of the mortgagee complete towards all persons, including the mortgagor.
15. The owner of the whole title in a patent under a mortgage duly executed and recorded is the only person entitled to maintain a suit in equity, against an infringer of the patent, for an injunction and an account of profits.

[No. 82.]

Argued Nov. 19, 1890. Decided Feb. 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of New York dismissing a suit in equity for an infringement of a patent and for an injunction, a discovery, an account of profits and damages. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

This was a bill in equity, filed April 21, 1886, against James A. Mackenzie and Samuel R. Murphy, by Lewis E. Waterman, claiming to be the sole and exclusive owner of a patent granted to him by the United States on February 12, 1884, for an improvement in fountain pens, and of the invention thereby secured; alleging an infringement thereof by the defendants; and praying for an injunction, a discovery, an account of profits and damages.

The defendants filed a plea, which alleged that the plaintiff, at the time of filing the bill, was not possessed, either of the patent, or of an exclusive right under it to the whole or any specified part of the United States; for that certain assignments in writing under seal of the patent and invention, from the plaintiff to Sarah E. Waterman, his wife, from her to the firm of Asa L. Shipman's Sons, and from that firm to Asa L. Shipman, were made by the parties thereto, and were recorded in the Patent Office, at the dates stated below, and that Shipman continued to be possessed of the patent and invention until and including the time of the filing of the bill.

The plaintiff filed a general replication. At the hearing on the issue thus joined, the following instruments, executed in New York [253] by and between citizens of that State, were duly proved:

1st. An assignment, made February 13, 1884, and recorded March 27, 1884, from Lewis E. Waterman, the plaintiff, to Sarah E. Waterman, his wife, of the whole patent and invention.

2d. A "license agreement," made between Mr. and Mrs. Waterman on November 20, 1884, and never recorded, by which she granted to him "the sole and exclusive right and license to manufacture and sell fountain

penholders containing the said patented improvement throughout the United States," and he agreed to pay her "the sum of twenty-five cents as a license fee upon every fountain penholder so manufactured by him."

3d. An assignment, made November 25, 1884, and recorded November 29, 1884, from Mrs. Waterman to the firm of Asa L. Shipman's Sons, of the whole patent and invention, expressed to be made in consideration of the payment of the sum of $6,500, and containing this provision: "The consideration of this assignment is, that whereas the said Lewis E. Waterman and the said Sarah E. Waterman have, on this 25th day of November, 1884, made a joint note of hand for the sum of $6,500, payable to the said Asa L. Shipman's Sons three years from this date, with interest at six per cent; now, if the said Lewis E. Waterman and myself, or either of us, shall well and truly pay the said note, according to its tenor, then this assignment and transfer shall be null and void, otherwise to be and remain in full force and effect." It also contained covenants of full right to assign, and against all incumbrances, "except a license to the said Lewis E. Waterman to manufacture and sell pens" under the patent, being the license above mentioned.

4th. An assignment, made November 25, 1884, in consideration of the payment of the sum of $6,500, and recorded November 29, 1884, from the firm of Asa L. Shipman's Sons to Asa L. Shipman, of all the right and title acquired by the assignment made to them by Mrs. Waterman, as well as the promissory note thereby secured.

5th. An assignment, made April 16, 1886, and recorded April 22, 1886, from Mrs. Waterman to the plaintiff, of all her right, title and interest in the patent and invention, and all her claims or causes of action for the infringement of the patent, and rights to damages or profits by reason thereof.

The circuit court allowed the plea, for reasons stated in its opinion, as follows: "The transfer to Asa L. Shipman is in language so emphatic and exact that there is little opportunity for misapprehension. It matters not what the instrument is called. It matters not that it may be defeated by the payment of $6,500 on November 25, 1887. The fact remains that by virtue of this assignment or mortgage the title to the patent was, on April 24, 1886, when this action was commenced, outstanding in Asa L. Shipman. If it was not absolute, it was a present existing title defeasible upon a condition subsequent. On April 16, therefore, when Sarah E. Waterman assigned all her right, title and interest to the complainant, she had nothing to assign which could at all change the legal status of the parties. She could not vest a clear title to the patent in the complainant, for the obvious reason that she had previously disposed of it and did not own it. The agreement of November 20, 1884, being a license and nothing more, does not enable the complainant to maintain this action without joining the holder of the legal title. The suggestion that, irrespectively of the Shipman assignment, the complainant is entitled to prosecute for infringements alleged to have occurred between February 12 and November 25, 1884, is equally unavailing; for, assuming such a right of action to exist, it could only be maintained on the law and not on the equity side of the court. The plea is allowed. The complainant may amend, upon payment of costs, within ten days." 29 Fed. Rep. 316.

The plaintiff not having filed an amended bill within the ten days, a final decree was entered dismissing his bill, with costs, and he appealed to this court.

Mr. **Walter S. Logan** for appellant.
No counsel for appellees.

Mr. Justice **Gray** delivered the opinion of the court: [25

Every patent issued under the laws of the United States for an invention or discovery contains "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery throughout the United States and the Territories thereof." Rev. Stat. § 4884. The monopoly thus granted is one entire thing, and cannot be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant and convey, either (1st) the whole patent, comprising the exclusive right to make, use and vend the invention throughout the United States; or (2d) an undivided part or share of that exclusive right; or (3d) the exclusive right under the patent within and throughout a specified part of the United States. Rev. Stat. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat. § 4919; *Gayler* v. *Wilder*, 51 U. S. 10 How. 477, 494, 495 [13: 504, 511]; *Moore* v. *Marsh*, 74 U. S. 7 Wall. 515 [19: 37]. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer, and cannot sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent, and perhaps, if necessary to protect the rights of all parties, joining the licensee with him as a plaintiff. Rev. Stat. § 4921; *Littlefield* v. *Perry*, 88 U. S. 21 Wall. 205, 223 [22: 577, 579]; *Paper Bag Cases*, 105 U. S. 766, 771 [26: 959, 961]; *Birdsell* v. *Shaliol*, 112 U. S. 485-487 [28: 768, 769]. And see *Renard* v. *Levinstein*, 2 Hem. & M. 628.

Whether a transfer of a particular right or [256
interest under a patent is an assignment or a license does not depend upon the name by

which it calls itself, but upon the legal effect of its provisions. For instance, a grant of an exclusive right to make, use and vend two patented machines within a certain district is an assignment, and gives the grantee the right to sue in his own name for an infringement within the district, because the right, although limited to making, using and vending two machines, excludes all other persons, even the patentee, from making, using or vending like machines within the district. *Wilson* v. *Rousseau*, 45 U. S. 4 How. 646, 686 [11: 1141, 1159]. On the other hand, the grant of an exclusive right under the patent within a certain district, which does not include the right to make, and the right to use, and the right to sell, is not a grant of a title in the whole patent-right within the district, and is therefore only a license. Such, for instance, is a grant of "the full and exclusive right to make and vend" within a certain district, reserving to the grantor the right to make within the district, to be sold outside of it. *Gayler* v. *Wilder*, above cited. So is a grant of "the exclusive right to make and use," but not to sell, patented machines within a certain district. *Mitchell* v. *Hawley*, 83 U. S. 16 Wall. 544 [21: 322]. So is an instrument granting "the sole right and privilege of manufacturing and selling" patented articles, and not expressly authorizing their use, because, though this might carry by implication the right to use articles made under the patent by the licensee, it certainly would not authorize him to use such articles made by others. *Hayward* v. *Andrews*, 106 U. S. 672 [27: 271]. See also *Oliver* v. *Rumford Chemical Works*, 109 U. S. 75 [27: 862].

An assignment of the entire patent, or of an undivided part thereof, or of the exclusive right under the patent for a limited territory, may be either absolute, or by way of mortgage and liable to be defeated by nonperformance of a condition subsequent, as clearly appears in the provision of the Statute, that "an assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration without notice, unless it is recorded in the Patent Office within three months from the date thereof." Rev. Stat. § 4898.

257] Before proceeding to consider the nature and effect of the various instruments given in evidence at the hearing in the circuit court, it is fit to observe that (as was assumed in the argument for the plaintiff) by the law of the State of New York, where all the instruments were made and all the parties to them resided, husband and wife are authorized to make conveyances and contracts of and concerning personal property to and with each other, in the same manner and to the same effect as if they were strangers. *Armitage* v. *Mace*, 96 N. Y. 538; *Adams* v. *Adams*, 91 N. Y. 381.

By the deed of assignment of February 13, 1884, the plaintiff assigned to Mrs. Waterman the entire patent-right. That assignment vested in her the whole title in the patent, and the exclusive right to sue, either at law or in equity, for its subsequent infringement.

The next instrument in order of date is the "license agreement" between them of November 20, 1884, by which she granted to him "the sole and exclusive right and license to manufacture and sell fountain penholders containing the said patented improvement throughout the United States." This did not include the right to use such penholders, at least if manufactured by third persons, and was therefore a mere license, and not an assignment of any title, and did not give the licensee the right to sue alone, at law or in equity, for an infringement of the patent. *Gayler* v. *Wilder*, *Paper Bag Cases* and *Hayward* v. *Andrews*, above cited. The plaintiff not having amended his bill, pursuant to the leave granted by the circuit court, by joining the licensor as a plaintiff, this point requires no further notice.

Nor is it doubted that the circuit court rightly held that, if the plaintiff was entitled to recover only for infringements occurring between February 12 and November 25, 1884, his remedy was at law. *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189 [26: 975].

The remaining question in the case, distinctly presented by the plea, and adjudged by the circuit court, is of the effect of the deed of November 25, 1884, by which Mrs. Waterman assigned to the firm of Asa L. Shipman's Sons all her right, title and interest in the invention and the patent, with an express provision that the assignment [258 should be null and void if she and her husband, or either of them, should pay at maturity a certain promissory note of the same date made by them and payable to the grantees. This instrument, being a conveyance made to secure the payment of a debt, upon condition that it should be avoided by the subsequent payment of that debt at a time fixed, was a mortgage, in apt terms and in legal effect. *Conard* v. *Atlantic Ins. Co.* 26 U. S. 1 Pet. 386, 446, 447 [7: 189, 215]. On the same day, the mortgagees assigned by deed to Asa L. Shipman all their title under the mortgage, and the promissory note thereby secured. Both assignments were recorded in the Patent Office within three months after their date; and the title thereby acquired by Shipman was outstanding in him at the times of the subsequent assignment of the patent-right by Mrs. Waterman to the plaintiff, and of the filing of this bill. This last assignment was therefore subject to the mortgage, though not in terms so expressed.

By a mortgage of personal property, differing in this respect from a pledge, it is not merely the possession or a special property that passes; but both at law and in equity, the whole title is transferred to the mortgagee, as security for the debt, subject only to be defeated by performance of the condition, or by redemption on bill in equity within a reasonable time; and the right of possession, when there is no express stipulation to the contrary, goes with the right of property. Story on Bailments, § 287; Story, Eq. Jur. §§ 1030, 1031; *Conard* v. *Atlantic Ins. Co.* 26 U. S. 1 Pet. 386, 441 [7: 189, 213]; *Casey* v. *Cavaroc*, 96 U. S. 467, 477 [24: 779, 784]; *Boise* v. *Knox*, 10 Met. 40, 43; *Brackett* v. *Bullard*, 12 Met. 308, 310.

A mortgage of real estate has gradually,

partly by the adoption of rules of equity in courts of common law, and partly by express provisions of statute, come to be more and more considered as a mere security for the debt, creating a lien or incumbrance only, and leaving the title in the mortgagor, subject to alienation, levy on execution, dower and other incidents of a legal estate; but the rules upon the subject vary in different States; and a mortgage is everywhere considered as passing the title in the land, so far as may [9] be necessary for the protection of the mortgagee, and to give him the full benefit of his security. *Stelle* v. *Carroll*, 37 U. S. 12 Pet. 201 [9: 1056]; *Van Ness* v. *Hyatt*, 38 U. S. 13 Pet. 294 [10: 168]; *Hutchins* v. *King*, 68 U. S. 1 Wall. 53, 58 [17: 544, 546]; *Brobst* v. *Brock*, 77 U. S. 10 Wall. 519, 529, 530 [19: 1002, 1004]. After the mortgagee has taken possession, the mortgagor has no power to lease; and the mortgagee is entitled to have, and is bound to account for, the accruing rents and profits, damages against trespassers, timber cut on the premises and growing crops. *Keech* v. *Hall*, 1 Doug. 21; *Turner* v. *Cameron's Coalbrook Co.* 5 Exch. 932; *Dawson* v. *Johnson*, 1 Fost. & F. 656; *Fairclough* v. *Marshall*, L. R. 4 Exch. Div. 37, 47, 49; *Scruggs* v. *Memphis & C. R. Co.* 108 U. S. 368, 375 [27: 756, 759]; *Teal* v. *Walker*, 111 U. S. 242 [28: 415]; *Hutchins* v. *King*, above cited; *Gore* v. *Jenness*, 19 Me. 53; *Bagnall* v. *Villar*, L. R. 12 Ch. Div. 812. Even against a mortgagor in possession, the mortgagee may obtain an injunction or damages for such cutting of timber as tends to impair the value of the mortgage security, or as is not allowed by good husbandry or by express or implied license from the mortgagee. *Robinson* v. *Litton*, 3 Atk. 209, 210; *Farrant* v. *Lovel*, 3 Atk. 723; *Hampton* v. *Hodges*, 8 Ves. Jr. 105; *Humphreys* v. *Harrison*, 1 Jac. & W. 581; *King* v. *Smith*, 2 Hare, 239; *Kountze* v. *Omaha Hotel Co.* 107 U. S. 378, 395 [27: 609, 616]; *Verner* v. *Betz*, 46 N. J. Eq. 256, 267, 268; *Page* v. *Robinson*, 10 Cush. 99; *Searle* v. *Sawyer*, 127 Mass. 491; *Waterman* v. *Matteson*, 4 R. I. 539.

A mortgagee of a leasehold or other personal property has the like right to an injunction to stay waste by the mortgagor. *Farrant* v. *Lovel*, above cited; *Brown* v. *Stewart*, 1 Md. Ch. 87; *Parsons* v. *Hughes*, 12 Md. 1. The right of action against a stranger for an injury to goods mortgaged, generally, though not always, depends upon the right of possession. When the right of possession is in the mortgagor, he is usually the proper party to sue. *Sellick* v. *Smith*, 11 J. B. Moore, 459, 475; *Brierly* v. *Kendall*, 17 Q. B. 937; *Luse* v. *Jones*, 39 N. J. L. 707; *Copp* v. *Williams*, 135 Mass. 401. But even a mortgagee out of possession may sometimes maintain an action for an injury to his interest. *Gooding* v. *Shea*, 108 Mass. 360; *Manning* v. *Mona-* [10] *ghan*, 23 N. Y. 539, and 28 N. Y. 585; *Woodside* v. *Adams*, 40 N. J. L. 417, 421, 422. And when the right of possession, as well as the general right of property, is in the mortgagee, the suit must be brought by the mortgagee, and not by the mortgagor or anyone claiming under a subsequent conveyance from him. *Conard* v. *Atlantic Ins. Co.* 26 U. S. 1 Pet. 386 [7: 189]; *Wood* v. *Weimar*, 104 U. S. 786 [26: 779]; *Clapp* v. *Campbell*, 124 Mass. 50; *Watson* v. *Macquire*, 5 C. B. 836, 844. When it is provided by statute that a mortgage of personal property shall not be valid against third persons, unless the mortgage is recorded, a recording of the mortgage is a substitute for, and (unless in case of actual fraud) equivalent to, a delivery of possession, and makes the title and the possession of the mortgagee good against all the world. *Aldrich* v. *Ætna Ins. Co.* 75 U. S. 8 Wall. 491, 497 [19: 473, 476]; *Robinson* v. *Elliott*, 89 U. S. 22 Wall. 513, 521 [22: 758, 762]; *Bullock* v. *Williams*, 16 Pick. 33; *Coles* v. *Clark*, 3 Cush. 399, 401.

A patent-right is incorporeal property, not susceptible of actual delivery or possession, and the recording of a mortgage thereof in the Patent Office, in accordance with the Act of Congress, is equivalent to a delivery of possession, and makes the title of the mortgagee complete towards all other persons, as well as against the mortgagor. The right conferred by letters-patent for an invention is limited to a term of years; and a large part of its value consists in the profits derived from royalties and license fees. In analogy to the rules governing mortgages of lands and of chattels, and with even stronger reason, the assignee of a patent by a mortgage duly recorded, whose security is constantly wasting by the lapse of time, must be held (unless otherwise provided in the mortgage) entitled to grant licenses, to receive license fees and royalties, and to have an account of profits or an award of damages against infringers. There can be no doubt that he is "the party interested, either as patentee, assignee or grantee," and as such entitled to maintain an action at law to recover damages for an infringement; and it cannot have been the intention of Congress that a suit in equity against an infringer to obtain an injunction and an account of profits, in which the court is authorized to award damages, when necessary to fully compensate the plaintiff, and [261] has the same power to treble the damages as in an action at law, should not be brought by the same person. Rev. Stat. §§ 4919, 4921; *Root* v. *Lake Shore & M. S. R. Co.* 105 U. S. 189, 212 [26: 975, 983].

The necessary conclusion appears to us to be that Shipman, being the present owner of the whole title in the patent under a mortgage duly executed and recorded, was the person, and the only person, entitled to maintain such a bill as this; and that the plea, therefore, was rightly adjudged good.

In the light of our legislation and decisions no weight can be given to the case of *Van Gelder* v. *Sowerby Bridge Flour Society*, L. R. 44 Ch. Div. 374, in which, upon pleadings and facts similar to those now before us, the mortgagor of a patent was treated as a mortgagor in possession, and was allowed to maintain a suit for infringement under the provisions of the English Judicature Act of 1873 and Patent Act of 1883. Stats. 36 & 37 Vict. chap. 66, § 25; 46 & 47 Vict. chap. 57, §§ 23, 46, 87.

Whether, in a suit brought by the mortgagee, the court, at the suggestion of the

mortgagor, or of the mortgagee, or of the defendants, might, in its discretion, and for the purpose of preventing multiplicity of suits or miscarriage of justice, permit or order the mortgagor to be joined, either as a plaintiff or as a defendant, need not be considered, because no such question is presented by this record.

Decree affirmed.

Mr. Justice **Brown,** not having been a member of the court when this case was argued, took no part in its decision.

---

[262] JOHN D. BEARDSLEY, *Appt.*,
v.
PAUL F. BEARDSLEY.

(See S. C. Reporter's ed. 262-271.)

Contract for sale of stock—interpretation—conditional sale.

1. A contract by which defendant states that he holds certain shares of stock of a company, which "is sold" to plaintiff "and which, though standing in my name, belongs to him, subject to a payment of $8,000, with interest," is not a contract to sell, but a sale with reservation of security, and the ownership, equitable if not legal, is in plaintiff.
2. Although the relations of plaintiff and defendant to a railroad corporation are evidenced by stock certificates, yet it may be shown by other testimony that the relation between them was not that of mere stockholders in the corporation, but that of joint owners in the common enterprise of the construction of the road, the profits and losses of which were to be shared between them; and, upon the evidence in this case, the court below properly held that they were such joint owners.
3. Where the buyer of goods is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.

[No. 119.]

Submitted Dec. 12, 1890. Decided Feb. 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Arkansas in favor of plaintiff in an action to establish his right as owner of one third in a contract for the construction of a railroad. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

The undisputed facts of this case are as follows: On January 1, 1882, appellant signed and delivered to appellee the following instrument:

"W. H. Carruth, President.
"J. D. Beardsley, Superintendent.
"Superintendent's Office, Washington and Hope Railway Company,
"Washington, Ark., Jan. 1st, 1882.

"I hold of the stock of the Washington and Hope Railway Company thirty-three thousand two hundred and fifty dollars, or thirteen hundred and fifty shares, which is sold to Paul F. Beardsley, and which, though standing in my name, belongs to him, subject to a payment of eight thousand dollars, with interest at same rate and from same date as [264] interest on my purchase of Mr. Alderman's stock.

"Witness: J. H. Burt. J. D. Beardsley."

The parties to the litigation are brothers. Prior to the execution of this instrument, and in 1877, the Washington and Hope Railway Company had been incorporated for the purpose of building a railroad between Washington, in Hempstead County, and Hope Station, on the Iron Mountain and Southern Railway, a distance of ten miles. On September 10, 1879, the company, having graded a roadbed, entered into a contract with appellant for the completion and equipment of the road, the consideration of which contract, on the part of the railroad company, was, among other things, the transfer, practically, of the entire stock in the company to appellant. In the execution of this contract appellant associated Vinton Alderman, under an agreement that they would contribute equally to the expense and divide equally the stock of the company. By the first of January, 1881, the contractors had complied with the contract and completed the road, and it was accepted as of that date by the company; and paid-up stock to the amount of one hundred thousand dollars was issued to them, excepting therefrom a few shares to persons to qualify them to be directors of the company. Alderman became tired of his investment and proposed to sell his interest. This proposition, made to J. W. Paramore, president of the Texas and St. Louis Railway Company, came to the knowledge of appellant. Fearing complications if the sale should be made to that party, he wrote to Alderman offering to buy the stock for twelve thousand dollars, on a credit. This offer was accepted, and the stock transferred to appellant, who thereby became the owner of substantially all the paid-up stock of the company. After such purchase he executed the instrument of January 1, 1882. Prior to this purchase from Alderman by appellant, appellee had come from California and commenced working on the road. Appellant continued, under construction contracts, in possession and control of the road until February, 1886, a period of a little more than [264] four years from the date of the agreement. During these years both brothers were giving up their time and labor to the operation and extension of this railroad, appellant having the principal charge, as superintendent or manager. The road was widened from a narrow to a standard gauge. Two corporations were organized, the one looking towards an extension of the road eastward, and the other to a like extension westward; and in those extensions contracts were entered into between the several companies and the appellant, and much work was done thereunder. In the execution of those contracts the appellant associated with himself other parties, the details of which contracts and arrangements with his associates are immaterial to the matter in controversy. Until about the first of January, 1886, the brothers worked harmoniously together in this enterprise, the appellee contending that all this time their relations were

substantially those of joint owners, their respective interests being in the proportion of two thirds to appellant and one third to appellee. About the first of January, 1886, differences arose between the brothers, in consequence of which the appellee was discharged from service on the road by the appellant, acting as general manager. At the same time the appellant repudiated all interest of the appellee in the enterprise. After this disagreement and discharge the appellee brought this suit to establish his rights as the owner of substantially one third of the property. The case went to proofs and hearing, and the circuit court granted a decree in appellee's favor. From such decree appellant has appealed to this court.

Messrs. **John M. Moore, A. H. Garland** and **H. J. May** for appellant.

Messrs. **Dan. W. Jones** and *Thos. B. Martin* for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The first and principal question in this case arises on the contract of January 1, 1882. By the appellant it is claimed that this is a mere executory contract, an agreement to sell; by the appellee, that it is an executed contract, a sale with reservation of security. The distinction is obvious, and the significance important. If an agreement to sell, the moving party must be the purchaser. If a sale, an executed contract with reservation of security, the moving party is the vendor, the one retaining security. If an agreement to sell, the moving party, the purchaser, must within a reasonable time tender performance or make excuse therefor. If an executed contract, a completed sale, then the moving party is the vendor, the security holder, and he assumes all the burdens and risks of delay. What, therefore, is the significance and import of this instrument? This, as claimed by the appellant, is not to be determined by any separate clause, but by the instrument as a whole. The rule is well stated by *Mr. Justice* Strong, delivering the opinion of this court in *Heryford* v. *Davis*, 102 U. S. 235, 243 [26: 160, 162], where he says: "The answer to this question is not to be found in any name which the parties may have given to the instrument, and not alone in any particular provisions it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. It is the legal effect of the whole which is to be sought for. The form of the instrument is of little account."

It is not always easy to determine whether an instrument is a contract of sale or one to sell; yet certain rules of interpretation have become established. These rules are noticed in the opinion delivered in the *Elgee Cotton Cases*, 89 U. S. 22 Wall. 180, 188 [22: 863, 868]. Two of these rules have no application here, as they refer to those steps necessary to put the property into a deliverable state, or the determination of the price by weighing, measuring and testing. The third only is significant, which is there stated in these words: "Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer."

Tested by this rule, this instrument must be adjudged not a contract to sell, but a sale with reservation of security. Note the language of the instrument: "which is sold." Again, "which, though standing in my name, belongs to him." These words imply nothing executory, but something executed. It is not that the vendor will sell, but has sold. Not that the title remains in the vendor, yet to be transferred, but that it already has been transferred. The ownership, equitable if not legal, is in the vendee. It is not that the stock belongs to the vendee, upon payment, [26
as appeared in the case of *French* v. *Hay*, 89 U. S. 22 Wall. 231 [22: 799], but that it is now his, subject to a lien. Its meaning is therefore that of a sale, with retention of the legal title as security for purchase money. It is an equitable mortgage, and the rights created and assumed by it are like those created and assumed when the owner of real estate conveys by deed to a purchaser and takes back a mortgage as security for the unpaid purchase money. Under those circumstances action is the duty of the vendor and mortgagee, and delay imperils no right of the purchaser and mortgagor. We have little doubt as to the significance of this contract, and hold that its effect was to make the appellee one-third owner with the appellant of the stock of the railroad company. Such, obviously, is the import, and therefore such must be adjudged the intention of the parties by this contract. With this construction of the instrument, it is unnecessary to consider the various suggestions made by counsel for appellant upon the theory that the contract was purely executory, a mere contract to sell. Taking it as an executed contract, one by which the ownership passed to the appellee, with a reservation of title simply as security for the purchase money—in other words, an equitable mortgage—we pass to the second and most difficult matter in the case.

Appellant contends that it was a mere stock transaction, while appellee contends that it is not only in harmony with, but a part of, the full arrangement between the brothers, to wit, a joint interest in the railroad enterprise, on the basis of a two-thirds share in the appellant and a one-third in the appellee. The instrument, by itself considered, expresses a stock transaction. If that was the extent of the arrangement between the brothers, then the appellant might enter into subsequent contracts with the railroad company, or any new corporations organized by the parties interested in the old company, without thereby interesting his brother in such contracts, or entitling him to a share in the proceeds thereof. He, of course, could not deprive him of any interest in the corporation, or the corporate property, evidenced by his ownership of stock; but ownership of stock of a corporation does not of right give a [26

proportional interest with every contractor in the contracts made by him with the corporation. Was this instrument part and parcel of a general arrangement between the brothers that they should be jointly interested in the railroad enterprise, looking at it as a whole, in proportions of one third and two thirds? Along this line of inquiry there is a painful contradiction between the brothers, the two parties who alone fully understood their relations and who are necessarily the principal witnesses concerning them. In a general way, it may be said that the testimony of appellee is, that the understanding between the brothers was that they were to be jointly interested in the whole enterprise in the proportion stated; while, on the other hand, that of the appellant is, that there was no talk or thought of partnership, or unity of ownership, and all that was thought of or agreed upon between them was expressed by the written contract—a mere contract to sell stock. A great deal of testimony was introduced as to what was apparent to other parties employed on this railroad as to the relations between the brothers, and as to what they knew and understood to be those relations. The significance of such testimony is limited. The brothers were in fact engaged in the operation and extension of the road, each holding a position in the corporate management. If there was a personal arrangement between them, it is not strange that the terms and the extent of it were not known by the employés, or disclosed to or talked of with them. Obviously, during the years 1882 to 1886, the relations between the brothers were harmonious, and neither thought of misunderstanding or difference. That they consulted together, often, about the enterprise, appears from the testimony of the appellant as well as that of the appellee, and, while the appellant limits the effect of his testimony by the statement that he also consulted with the other employés, the fact remains conceded by him, and asserted by appellee, that during those years they consulted about the operation, the management and the extension of the railroad enterprise. In the midst of this unpleasant contradiction we notice these significant facts: After the completion of the ten miles of narrow-gauge road provided for by the original organization, the enterprise [269] grew larger in the contemplation of its promoters and owners. A broadening of the road from a narrow to a standard gauge, and an extension eastward and westward, became their scheme. For this, two corporations were organized; one, as stated, looking to its extension eastward, and the other to a like extension westward. In the organization of these corporations four hundred shares were taken by the appellant and two hundred by the appellee. This is upon the same basis of interest claimed by appellee in the whole railroad enterprise. These two subscriptions covered practically the entire stock, so that the new corporations were owned as the original. Interpreting these transactions, it must be borne in mind that neither brother was putting into this enterprise, to any extent, his individual property. The thought was to make the enterprise pay for itself, and out of it, and out of local aid and out of their efforts to promote it and secure outside assistance, the accomplishment of the scheme, with its resultant benefits, was contemplated. So that, when into these new enterprises the brothers passed, with the same proportional interests as in the old, it is very significant, in the face of disputed testimony, as to their unity of interest in the whole railroad enterprise.

Further than this, the letter of appellant to appellee, of date February 7, 1886, and after differences had arisen between the brothers, is worthy of note. In that letter, after referring to the fact that Alderman and himself had undertaken to build the road, that thereafter Alderman desired to sell, and that he had purchased his interest, he says: "Some time after this Mr. Alderman desired to sell me his interest in the road, but I declined to purchase it. In the course of the next six months I declined it several times. Later, Col. Paramore, of the Texas and St. Louis Railway, wrote me that Mr. Alderman had offered him his interest at $12,000, and that he was considering the purchase. Finding this, if carried out, would involve us in trouble with the Iron Mountain Railway, I wrote Mr. Alderman that day, saying I would take his interest at $12,000, and by return mail he advised me that he considered it sold to me. After I had purchased this interest you importuned me to let you have it. This I declined to do, but I [2 finally consented to let you have two thirds of the purchase, you to pay me $8,000, with interest from the time of my purchase, and at the same rate I paid Mr. Alderman, stock to remain in my hands until paid for. Previous to this time the road had been legally valued at $100,000, and stock to that amount had been issued or was ordered to be issued. At the time of your purchase you represented that you expected to get a considerable sum of money from a mine in California, and you would pay this on the purchase. So far, however, I believe you have not paid anything. Some time afterwards, knowing that, as our understanding was purely verbal, you would have no rights whatever in case of my death, I made a written memorandum showing that you were entitled to one third of the stock then standing in my name, or $33,333, subject, however, to a payment of $8,000, with interest as aforesaid. This memorandum I gave you, and I presume you still have it. Here the business part of our transaction so far as interest in the property is concerned rests."

Now, the transactions between appellant and Alderman were not mere stock transactions. They were jointly interested in the construction contract, and by the completion thereof became practically joint owners of the road. That their relations to the corporation were evidenced by stock certificates does not preclude the fact that, as between themselves, they were joint owners. So, when Alderman sold to him his one-half interest and he transferred to his brother the two thirds of that one-half interest, the significance of it, as expressed by the appellant himself, was something more than a mere stock transaction. As he says in his letter, after pur-

chasing Alderman's interest he consented to let appellee have two thirds of such purchase. It is difficult to believe that, by this transaction, nothing more was meant than a transfer of stock. Obviously, he understood that two thirds of Alderman's interest passed to appellee. Suppose Alderman had not sold, can it be doubted that equity would regard them as jointly the owners of this property, although their ownership was evidenced by separate shares of stock? Would equity tol-
1] erate any transaction by which appellant, securing the influence of a few shares of stock held by the nominal directors, should obtain bonds or contracts by which the value of the stock would be substantially destroyed, and he become the real owner? Bonds issued might be valid in law, and apparently prior to the stock; contracts might give superior rights; yet, is it not clear that equity would interfere if he, by collusion with the resident directors, attempted to ignore Alderman and create in himself a supremacy of ownership? That which is true when there was equality of ownership between himself and Alderman is also true when, by a subdivision of Alderman's interest, a like ownership as between himself and his brother was established on a different basis.

We conclude, therefore, that the circuit court was right, when, in view of this contract and the other testimony, it adjudged that the relationship between the brothers was not that of mere stockholders in a corporation, but that of joint owners in a common enterprise, the profits and losses of which were to be shared between them in the proportion of their respective interests. If that be, as we think, the true interpretation of the relations between them, we do not understand that the appellant presents any substantial objection to the form and terms of the decree. *It is therefore affirmed.*

Mr. Justice **Brown** did not sit in this case and took no part in its decision.

365] ANNIE M. UPSHUR ET AL., *Plffs. in Err.*,
v.
MARY E. BRISCOE ET AL.

(See S. C. Reporter's ed. 365-379.)

Trusts—when an instrument does not constitute a trust—Bankruptcy Act—meaning of fraud and fiduciary character—widow of bankrupt, when may plead his discharge.

An instrument appointing a person as attorney to receive moneys for the benefit of another and to pay the interest annually to such other during life and at her death to pay the principal sum to her legal issue, or if she dies without legal issue said sum to revert to the maker of the instrument, accompanied by the agreement of the attorney to faithfully carry into effect the instrument, creates between the attorney and the beneficiaries the relation of debtor and creditor and does not create a trust in its technical sense, nor a debt of a "fiduciary character" within the meaning of the Bankrupt Act, although the obligation is called "a trust" and the attorney "a trustee" in the instrument and accompanying papers. The failure of the attorney to pay the moneys is a breach of contract and not a breach of trust.

2. Within the meaning of the exception in the Bankruptcy Act, a debt is not created by a person while acting in a "fiduciary character," merely because it is created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of those terms.

3. The exception of a debt created by "the fraud" of the bankrupt, in sec. 33 of the Bankruptcy Act of 1867, means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law.

4. Sec. 33 of the Act of 1867, which excepts debts created by the bankrupt "while acting in any fiduciary character," seems to apply only to a debt created by a person who was already a fiduciary when the debt was created.

5. A widow of a bankrupt to whom his property has been transferred may avail herself of his discharge and plead it in her own defense, and cannot be deprived of the benefit of it by the failure of his heirs to plead it.

[No. 146.]

Submitted Jan. 12, 1891. Decided Feb. 2, 1891.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment amending and affirming a judgment of the Ninth District Court for the Parish of Tensas, Louisiana, in favor of plaintiffs for the recovery of moneys from the property and effects of the succession of William J. Briscoe. *Affirmed.*

The facts are stated in the opinion.

Mr. **Wade R. Young** for plaintiffs in error.

Mr. **Wm. A. Maury** for defendants in error.

Mr. Justice **Blatchford** delivered the opinion of the court:

On the 25th of January, 1857, James Andrews, of the Parish of Tensas, in the State of Louisiana, executed and delivered to William J. Briscoe, also of said parish and State, the following instrument in writing:

"James Andrews
"to } Donation.
"Annie M. Andrews.

"State of Louisiana,
"Parish of Tensas.

"Know all men by these presents that I, James Andrews, of said parish and State, do nominate, constitute and appoint William J. Briscoe, also of said parish and State, my true and lawful attorney for me and in [3
my name to pay or cause to be paid to Annie M. Andrews the sum of seven hundred dollars ($700) annually, said amount to be paid at the counting-house of some commission merchant, or at some banking-house, in the City of New Orleans, in equal quarterly

NOTE.—*As to fiduciary position of directors; their contracts and dealings with corporations,*—see *note* to Koehler v. Black River Falls Iron Co., 17: 340.

That one who acquires a trust estate, with knowledge of the trust, is subject to the same duties, as to the trust, as the original trustee; cestui que trust *may follow property,*—see *notes* to Hughes v. Edwards, 6: 142; Wormley v. Wormley, 5: 651.

installments of one hundred and seventy-five dollars each, said commission or banking-house to be named and specified before the day of payment, by the said W. J. Briscoe to the said Annie M. Andrews. The said payments are to be made commencing with the date of this instrument, and continuing during the natural life of the said Annie M. Andrews, subject to the conditions and restrictions hereinafter enumerated, viz.: The payments are to be regularly made as above set forth, according to the discretion of the said William J. Briscoe of the general good conduct of the said Annie M. Andrews, which conduct must in all respects comport with the character and bearing of a discreet, prudent female.

"The said William J. Briscoe, being here present, accepts this appointment and trust, and binds himself to carry out the provisions of the same according to its true intent and meaning; and I do further constitute and appoint the said William J. Briscoe my attorney-in-fact to have and receive the sum of ten thousand dollars ($10,000), to be held by him for the benefit of the said Annie M. Andrews, subject to the conditions hereinafter enumerated, viz.: It is understood that the annual payment of seven hundred dollars, as above secured, shall be considered as interest upon said amount of ten thousand dollars; and, first, it is provided that in case the said Annie M. Andrews shall hereafter marry and leave issue, this amount of ten thousand dollars shall remain invested as heretofore in the hands of said William J. Briscoe, and the interest shall continue to be paid as heretofore mentioned; and, in case of the death of the said Annie M. Andrews, such children, legal issue of her, shall become possessed of the above amount of ten thousand dollars unconditionally in full possession, to be paid by the said William J. Briscoe.

"Second. It is provided that, in case of my death occurring before that of the said
37] Annie, the above amount of ten thousand dollars shall be placed unconditionally in her hands by the said William J. Briscoe, provided only she shall have no legal issue. In case, however, she shall, at the time of my death, have any child or children, legal issue of her body, that the provisions heretofore enumerated shall be strictly adhered to.

"And, third, It is provided that, in case of the death of the said Annie M. Andrews without legal issue of her body surviving, then the above sum of ten thousand dollars shall revert to me, my heirs or assigns.

"Thus done and signed, at St. Joseph, in said parish and State, this 25th day of January, A. D. 1857, in presence of Geo. W. Williams and Edgar D. Farrar, competent witnesses.

"James Andrews.

"G. W. Williams.
"E. D. Farrar."

On the same day, and on the same paper, Briscoe signed the following instrument:

"And now to these presents also comes William J. Briscoe, who accepts this mandate in all its clauses, and binds himself faithfully to carry the same into effect, and the more effectually to secure the faithful performance of the same he also binds himself as surety for the said James Andrews, that the within mandate and all the stipulations therein contained shall be well and faithfully executed, and that the same shall be complied with in all its clauses.

"Thus done and signed, at St. Joseph, on the 25th of January, A. D. 1857, in the presence of G. W. Williams and Edgar D. Farrar.

"Witnesses: W. J. Briscoe.
"G. W. Williams.
"E. D. Farrar."

Annie M. Andrews, named in the paper signed by James Andrews, at the same time and place signed the following instrument:

"And at the same time and place also came [3
the said Annie M. Andrews, who hereby declares that she accepts the above in all its parts and clauses, ratifying and accepting the said appointment of the said William J. Briscoe as her trustee, and binding herself to confirm and abide by the above mandate in all its provisions.

"Thus done and signed, at St. Joseph, on the 26th of January, A. D. 1857, in presence of Geo. W. Williams and Edgar D. Farrar.

"Witnesses: Annie M. Andrews.
"G. W. Williams.
"E. D. Farrar."

On the 18th of February, 1857, these papers were all of them recorded in the office of the recorder of the parish, in a "Book of Wills and Donations."

On the 1st of August, 1881, Annie M. Andrews, who had become by marriage Annie M. Upshur, and whose husband had died, and her son, James A. Upshur, an adult, filed their petition in the Ninth District Court for the Parish of Tensas, Louisiana, against Mary E. Castleman, widow of William J. Briscoe, who had died about September, 1880, intestate, and his three daughters and heirs-at-law and legal representatives, Mrs. Elizabeth Clinton, Mrs. Frances Chamberlain and Mrs. Betty Scott Goldman, and their respective husbands. The petition set forth the three instruments signed, respectively, by James Andrews, W. J. Briscoe and Annie M. Andrews, and averred as follows: William J. Briscoe received from James Andrews the sum of $10,000, and paid to the female plaintiff annually $700, until about January, 1861. On February 26, 1866, Briscoe, to secure the payment of his five promissory notes for $10,000 each, given for borrowed money, mortgaged to Given, Watts & Co., of New Orleans, all the property owned by him, consisting of a cotton plantation in the Parish of Tensas, known as the Mound plantation, embracing 4,357 acres, with all the growing crops, buildings, household furniture, machinery, corn, stock, fodder, hay and all other appurtenances. On November 29, 1866, [36
he intermarried with the defendant Mary E. Castleman. On January 14, 1868, Mrs. Mildred Gregory, as holder of three of the five notes secured by said mortgage, instituted suit thereon against Briscoe, and on March 7, 1868, caused the property described in it to be adjudicated to her for $20,000. On

April 1, 1868, Briscoe was adjudged a bankrupt, and was duly discharged December 19, 1868. The petition states that duly certified copies of the proceedings in bankruptcy are annexed to it, but they are not found in the record. On November 13, 1868, the defendant Mary E. Castleman instituted suit against her husband, Briscoe, for a separation of property, and a judgment was entered on the same day decreeing her to be separate in property from her husband, and dissolving the community of acquests and gains between them. On December 12, 1868, Mrs. Mildred Gregory, for the consideration of $4,517.82 in cash and $25,000 in notes, conveyed to Mary E. Castleman the Mound plantation, together with all the growing crops, stock, material and other property acquired by her at the sheriff's sale. Briscoe at his death left no other property. The female plaintiff was married in July, 1858, and the other plaintiff, the sole issue of such marriage, was born in 1859. James Andrews died about January, 1860, and by the terms of the constitution of mandate, the female plaintiff then having one child, the said sum of $10,000 was to remain invested in the hands of Briscoe, the interest to continue to be paid to her; but she had not received from Briscoe any part of the principal, nor any part of the stipulated interest since about April, 1867, and there is now due to the plaintiffs, to be paid from the property and effects of Briscoe, wherever found, the sum of $10,000, with arrears of interest at the rate of $700 per year since January 1, 1861, less the sum of about $700 paid about April, 1867, with legal interest on the stipulated annual payments of $700, from January 1 of each year, from the year 1862, inclusive. The conveyance of the property by Mrs. Mildred Gregory to Mary E. Castleman, December 12, 1868, was a fraudulent simulation, contrived and intended by Briscoe to defraud the plaintiffs and to defeat the execution of the trust, and Mary E. Castleman received the title of the property for the use of Briscoe, who paid the consideration expressed therefor and continued in possession of the property. He procured Mrs. Mildred Gregory, a preferred creditor, to provoke the seizure and sale of all his property and accept the adjudication thereof, and he then made a surrender in bankruptcy, and was adjudicated a bankrupt and discharged. He then procured Mary E. Castleman to obtain the judgment of separation, and Mrs. Mildred Gregory to convey the entire property to her. Briscoe, up to the time of his death, retained the exclusive control of the property and of the business relating to it, and himself paid to Mrs. Gregory the said sum of $4,517.82, from the proceeds of the crops of 1868. The plaintiffs very recently, for the first time, have been informed that Briscoe procured the conveyance of the property to Mary E. Castleman with the intent to defraud them and prevent the enforcement of the trust. The prayer of the petition is, that the defendants pay to the plaintiffs the sum of $10,000, with 7 per cent per annum interest from January 1, 1861, less the sum of $700 paid about April 1, 1867, with 5 per cent per annum interest on each annual payment of $700, from January 1 of each year, from the year 1862, inclusive; that the conveyance of December 12, 1868, be declared simulated and fraudulent, and the property be declared to be the property of the estate of Briscoe and subject to the payment of his debts and obligations; and for general relief.

Mary E. Castleman, by the name of Mary E. Briscoe, filed exceptions to the petition, also an answer, which set up as a defense the discharge of Briscoe in bankruptcy, with other defenses. Mrs. Goldman and her husband answered the petition, but did not set up the discharge in bankruptcy.

In November, 1882, the plaintiffs filed an amendment to their original petition, adding further allegations intended to show that the transfer of the property from Briscoe to his wife was void; that at least one undivided half of it belonged to his succession, subject to a settlement of the community between him and his wife; and that the pretended judgment of separation was a nullity.

Mary E. Briscoe (now Mary E. Castleman) answered the amended petition, and reaffirmed [37] all the averments of her original answer. She also pleaded a prescription of five years. Mrs. Goldman and her husband, for answer to the amended petition, adopted all the allegations of their original answer, but did not plead the discharge in bankruptcy. Mrs. Clinton and her husband and Mrs. Chamberlain and her husband answered the petition and amended petition, but did not set up the discharge in bankruptcy.

The case was tried by the district court, which entered a judgment in favor of Mary E. Briscoe, and adjudged a recovery in favor of the plaintiffs against the heirs of Briscoe, for $700 annually from January 1, 1872, with 5 per cent interest, as claimed, and costs, restricting the judgment as to those sums to the property and effects of the succession of Briscoe, wherever found, reserving the right to his heirs to renounce or accept the succession, with the benefit of inventory thereafter, and rejecting the demand of the plaintiffs for $10,000, set out in the petition, as premature in respect to the heirs of Briscoe.

The plaintiffs appealed from this judgment to the Supreme Court of Louisiana. The opinion of that court was given May 19, 1884, by *Mr. Justice* Manning, and is reported in 37 La. Ann. 138. It considered the question whether the obligation assumed by Briscoe was fiduciary, within the meaning of section 33 of the Bankruptcy Act of March 2, 1867, chap. 176 (14 Stat. 533), which is the Statute applicable to the present case, and reads as follows: "That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this Act; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this Act shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise." The court arrived at the conclusion that the instrument signed by

Andrews created a trust; that the debt of Briscoe to the plaintiffs was a debt created by him while acting in a fiduciary character, [372] within the meaning of section 33; and that his discharge in bankruptcy did not affect his liability for the obligation which he assumed.

On the same day, the court entered a judgment reversing the judgment of the district court in these particulars: "That, instead of rejecting the plaintiffs' demand the same is maintained, and the sales and conveyances by which Mildred Gregory received title to the Mound plantation and its appurtenances from the sheriff, and by which she afterwards conveyed title to Mary E. Briscoe, are annulled, canceled and set aside, and the property thus conveyed is declared to belong to the succession of William J. Briscoe, and to be liable to plaintiffs herein for the satisfaction of this judgment;" that the plaintiffs recover of the succession of Briscoe $700, with 5 per cent interest thereon from January 1, 1872, and the same sum with the same interest from January 1 of each succeeding year until paid, and the further sum of $10,000, and costs of suit; and that in other respects the judgment be affirmed. Five days afterwards the heirs of Briscoe applied for a rehearing, which was granted, and the case was argued orally in November, 1884.

On the 16th of March, 1885, the court filed an opinion, delivered by *Mr. Justice* Fenner, reported in 37 La. Ann. 148, and concurred in by *Mr. Justice* Manning in a separate opinion. 37 La. Ann. 154. The court held, in regard to the discharge in bankruptcy, that the decision of this court in *Hennequin* v. *Clews*, 111 U. S. 676 [28: 565], made since the original opinion and judgment, had altered its conclusions as to the effect of such discharge. It also cited the cases of *Chapman* v. *Forsyth*, 43 U. S. 2 How. 202 [11: 236]; *Neal* v. *Clark*, 95 U. S. 704 [24: 586], and *Wolf* v. *Stix*, 99 U. S. 1 [25: 309], as showing that its former conclusion was erroneous; and held that the debt of Briscoe was not created by him while acting in a fiduciary character. The views it announced were as follows: "Andrews delivered to Briscoe $10,000, for which Briscoe obligated himself to pay seven per cent interest annually. This interest was to be paid to Annie M. Andrews, during her life or that of Briscoe, with the discretion, however, of withholding it from her in case of her improper deportment. But the obligation to pay the interest was nevertheless absolute [373] and unconditional, and if he judged Annie M. Andrews unworthy to receive it, it would have remained as a debt due to the ultimate beneficiary of the capital. This is apparent from the absence of any indication of a purpose to let Briscoe have the use of the money without interest, and from the incongruity of construing otherwise the discretion confided to him of judging of her worthiness to receive it; for if, by deciding against the propriety of her conduct, he could absolve himself from the obligation of paying the interest at all, it would create an antagonism between his duty and his interest, which could find no support in a rational interpretation of the writing. Therefore, we say, he was absolutely and unconditionally bound to pay interest on the money as long as he held it. This, unquestionably, implied the right to use the money, and to use it as his own; for no authority is given to make particular investments of it for account of the beneficiary, and such investments would have been at his own exclusive risk; and if unfortunate, however prudently made, they would have furnished him no excuse for nonpayment of either principal or interest. It imposed the further obligation of returning the $10,000 (together, as we have shown, with any unpaid interest) to the beneficiary named, or to Briscoe or his heirs or assigns, in certain definite contingencies named and not necessary here to detail. Such is the plain import of the provisions of the so-called 'trust.'" It said that the trust reposed in Briscoe was a trust simply in his "punctuality" and "integrity," the same trust which lies at the base of every agency and of every loan or other credit; that the fact that the trust was expressed in the instrument added nothing to its nature, force or effect; and that if the word "trust" had not been used, it would, nevertheless, have been implied in identical measure and strength.

On the same day, the court entered a judgment revoking and setting aside its former judgment, and amending the judgment of the district court so as to condemn the succession of Briscoe to pay to the plaintiffs the sum of $700, with five per cent interest from January 1, 1872, and the same sum with like interest for each succeeding year, and the further sum of $10,000 and costs of suit, and affirming the judgment in all other respects, including the limitations on the moneyed judgment, the plaintiffs to pay the costs of the appeal.

The plaintiffs have sued out a writ of error from this court, and have assigned as errors that the Supreme Court of Louisiana erred in deciding (1) that Mrs. Briscoe could plead the discharge in bankruptcy of her husband, and (2) that the obligation of Briscoe was affected by his discharge in bankruptcy.

In regard to the character of the obligation assumed by Briscoe, we concur with the views of the Supreme Court of Louisiana in its second opinion. By the instrument signed on the 25th of January, 1857, the relation of debtor and creditor was created between Briscoe and the beneficiaries. It was stated expressly that the annual payment of $700 was to "be considered as interest upon the said amount of $10,000;" and that, in case Annie M. Andrews should marry and leave issue, the $10,000 should remain invested as theretofore in the hands of Briscoe, and the "interest" should continue to be paid as theretofore mentioned. These terms made Briscoe the owner of the $10,000 in his own right. He had the right to use the money in any way he thought proper. Presumably, he could not pay interest on it unless he invested it. The right to use it in any way he thought proper was repugnant to the idea of any fiduciary relation to the money, for there was no obligation upon him to keep it separate from his own money, or to put upon it

any marks of identification or to invest it in any particular securities. The statement in the paper signed by Andrews, that Briscoe accepts the "trust," the statement in the paper signed by Briscoe, that he accepts the "mandate," and the statement in the paper signed by Annie M. Andrews, that she accepts the appointment of Briscoe "as her trustee," do not create a "trust" in its technical sense, or make the debt of Briscoe one created by him while acting in a "fiduciary character." The relation created was merely the usual one of contract between debtor and creditor. Within the meaning of the exception in the Bankruptcy Act, a debt is not created by a person while acting in a "fiduciary character," merely because it is created under circumstances in which trust or confidence is reposed in the debtor, in the popular sense of those terms.

The case of *Chapman* v. *Forsyth*, 43 U. S. 2 How. 202 [11: 236], arose under the Bankruptcy Act of August 19, 1841, chap. 9 (5 Stat. 440), the first section of which provided for the discharge from debts "which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." In that case, it was said that the exception applied to the debts and not to the person, if he owed other debts; and that, if the Act embraced, as a fiduciary debt, the debt of a factor who retains the money of his principal, it would be difficult to limit its application. The court added: "It must include all debts arising from agencies, and indeed all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the Act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian' or 'trustee,' are not cases of implied, but special, trusts, and the 'other fiduciary capacity' mentioned must mean the same class of trusts. The Act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the Act."

The construction by this court of section 33 of the Bankruptcy Act of 1867 has been as follows:

In *Neal* v. *Clark*, 95 U. S. 704 [24: 586], the question was as to the meaning of the expression in that section, of the exception of a debt created by "the fraud" of the bankrupt; and it was held that the "fraud" referred to in that section meant positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does "embezzlement," with which "fraud" was directly associated in the section, and not implied fraud or fraud in law, which might exist without the imputation of bad faith or immorality.

In *Wolf* v. *Stix*, 99 U. S. 1 [25: 309], the case of *Neal* v. *Clark* was approved; and it was held that the "fraud" intended by section 33 of the Act of 1867 did not include such fraud as the law implied from the purchase of property from a debtor with the intent by him thereby to hinder and delay his creditors in the collection of their debts.

In *Hennequin* v. *Clews*, 111 U. S. 676 [28: 565], it was held that one hypothecating, to [377 secure a debt due from himself, securities which had been pledged to him to secure the obligation of another to him, and failing to return them when the latter obligation was discharged, did not create thereby a debt by fraud, or in a fiduciary character, so that such debt was excepted by section 33 of the Act of 1867 from the operation of a discharge in bankruptcy. *Mr. Justice* Bradley, delivering the opinion of the court, said: "There is no more—there is not so much—of the character of trustee in one who holds collateral securities for a debt as in one who receives money from the sale of his principal's property—money which belongs to his principal alone, and not to him, and which it is his duty to turn over to his principal without delay. The creditor who holds a collateral, holds it for his own benefit under contract. He is in no sense a trustee. His contract binds him to return it when its purpose as security is fulfilled; but if he fails to do so, it is only a breach of contract and not a breach of trust."

In *Palmer* v. *Hussey*, 119 U. S. 96 [30: 362], the case of *Hennequin* v. *Clews* was affirmed and followed, in holding, on similar facts, that there was no such fraud in the creation of the debt, and no such trust in respect to the possession of the securities, as to bar the operation of a discharge in bankruptcy. See also *Strang* v. *Bradner*, 114 U. S. 555 [29: 248]; *Noble* v. *Hammond*, 129 U. S. 65 [32: 621], and *Ames* v. *Moir*, 138 U. S. 306 [34: 951], decided herewith.

There is no appreciable distinction between the failure of the bankers to return the collaterals, in *Hennequin* v. *Clews*, and the failure of Briscoe to pay the interest in question.

In *Cronan* v. *Cutting*, 104 Mass. 245, it was held that the provision of section 33 of the Bankruptcy Act of 1867, excepting from the effect of a discharge debts created by the bankrupt while acting in any fiduciary character, did not include the obligation of a creditor, to whom the debtor delivered property with directions to sell it and apply in satisfaction of the debt so much of the proceeds as might be necessary for the purpose, to pay over to the debtor the balance of the proceeds of the sale remaining after such satisfaction; but rather implied a fiduciary relation existing previously to, or independently of, the transaction from which the ex- [378 cepted debt arose; and that, if such an obligation constituted a fiduciary relation such as the Statute contemplated, almost all pecuniary obligations, especially those implied by law, would be included in the exemption. The court said: "The debt, in this case, arose exclusively out of a single transaction between the parties. Its creation involved no element other than that of contract. The existence of the liability did not spring from any breach of trust. The only

default consisted in the nonpayment of the balance due to the plaintiff, after satisfying the purpose of the pledge. The debt did not result from, but preceded, that default." In the present case, the debt of Briscoe preceded his default, and was not created by his failure to carry out the provisions of the mandate.

It is to be noted that the language of section 33 of the Act of 1867 excepts debts created by the bankrupt "while acting in any fiduciary character;" and the language would seem to apply only to a debt created by a person who was already a fiduciary when the debt was created. In this view, it was said in *Cronan* v. *Cutting*, *supra:* "We are inclined to the opinion that the phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arises. The collocation tends to favor this interpretation. If the phrase 'while acting,' etc., be referred to that which immediately precedes, it implies something in the nature of defalcation. If it be referred to the first branch of the provision, its association with fraud and embezzlement carries the implication of a debt growing out of some fraudulent misappropriation, or, at least, breach of trust."

It is also assigned for error that the plea of the discharge of Briscoe in bankruptcy was personal to him and his representatives, and could not avail his widow; and the case of *Moyer* v. *Dewey*, 103 U. S. 301 [26: 394], is relied on to sustain this view. But it is not applicable. In that case the bankrupt, after his discharge, confessed judgment founded on debts which existed prior to his discharge, and the suit was brought to reach property which had been conveyed by him to the defendants, before his bankruptcy, in [379] fraud of his creditors. The defendants other than the bankrupt pleaded the discharge in bankruptcy, and he failed to answer. This court held that, so far as the discharge was concerned, its only effect was personal to the bankrupt, and did not avail to release the fraudulent grantees from liability for the fraud committed by them. It is manifest that the discharge would not have availed the bankrupt if he had pleaded it, and that it could not avail his fraudulent grantees. Moreover, in *Moyer* v. *Dewey*, the transfer of property which was attacked took place prior to the bankruptcy, while that assailed in the present case was made subsequently thereto, so far as Mrs. Briscoe is concerned; and in that case the judgments which were rendered against the debtor subsequently to the discharge were founded on debts which existed prior to the discharge. Therefore, the attacking creditors in that case were creditors at the date of the fraudulent transfer, and remained such, by the subsequent judgments, at the date they brought their suit to set aside the fraudulent transfer. But in the present case the transfer to Mrs. Briscoe took place after the bankruptcy, and the debts here sued on were barred, and they were not revived by judgments taken subsequently to the discharge. As she derived her title, as is alleged, from Briscoe, she is entitled to the full benefit of the position in which he stood at the time the alleged fraudulent transfer was made, and to all defenses resulting therefrom. She is entitled to plead the discharge in her own defense, and cannot be deprived of its benefit by the failure of his heirs to plead it. See also *Botts* v. *Patton*, 10 B. Mon. 452, 455.

Judgment affirmed.

J. M. NORTH, *Appt.*,
v.
ANDREW PETERS.

(See S. C. Reporter's ed. 271-285.)

Suit in equity to restrain taking property by sheriff—additional findings of fact—sheriff, when proper defendant—action against—appeal from Territory.

1. A suit in equity may be maintained against a sheriff to restrain him from attaching and taking or interfering with property of plaintiff and from removing the property attached, where the taking and removing of the property would inflict irreparable injury and damage to plaintiff and would destroy his business and credit, and where such suit would prevent a multiplicity of suits at law; an action at law of trespass or replevin would not afford a complete, prompt and efficient remedy in such a case.
2. Under the Dakota Code of Civil Procedure, the omission to file findings of facts, judgment having been entered, is a mere irregularity which the court has authority to cure by supplying additional findings until an appeal is taken, or a bill of exceptions is settled and signed by the judge.
3. A suit in equity to restrain the attaching and taking property of plaintiff, on grounds justifying relief in equity, may be commenced against the sheriff who has attached the property and is about serving other attachments thereon.
4. Where the sheriff has exceeded his authority, he may be proceeded against either by an action for damages, if such remedy be sufficient, or by a writ of injunction to restrain the continued wrong-doing; and it is not essential that the plaintiffs in the writs be joined as parties defendant where it does not appear that they advised or directed the sheriff to seize the property.
5. The Enabling Act admitting the two Dakotas, Montana and Washington Territories as States authorizes this court to hear and determine appeals from the Supreme Courts of such Territories.

[No. 148.]

Argued Jan. 13, 1891. *Decided Feb. 2, 1891.*

APPEAL from a judgment of the Supreme Court of the Territory of Dakota, affirming a judgment of a District Court of that Territory enjoining the sheriff in Lincoln County in that State from interfering or meddling with certain goods which he had levied upon and seized and from again seizing and levying upon the same property. *Affirmed.*

NOTE.—*As to equity jurisdiction after trial at law*, see *note* to Smith v. M'Iver, 6: 152.

As to jurisdiction of equity to restrain trespass and wrongs, see *note* to Northern Ind. R. Co. v. Michigan Cent. R. Co., 14: 674.

As to necessary parties in equity, see *note* to Marshall v. Beverley, 5: 97.

2] Statement by *Mr. Justice* **Lamar:**

This suit was brought in November, 1883, by Andrew Peters against J. M. North, sheriff of Lincoln County, Dakota Territory (now in the State of South Dakota), in a district court of that Territory, to compel the defendant to surrender certain merchandise which he had seized and levied upon as the property of the firm of P. M. Lund & Co., and to restrain and enjoin him from again seizing and levying upon the same property as the property of that firm, all of which the plaintiff himself claimed to own.

The amended complaint alleged that plain-
3] tiff was, and since November 12, 1883, had been, the owner of a stock of merchandise worth $10,000, which was situated in a store lately occupied by P. M. Lund & Co. in Canton, Dakota Territory; that on November 15, 1883, the clerk of the court in which this suit was brought issued pretended and informal writs of attachment against the property of Lund & Co., and was about to issue many more such writs for the purpose of annoying and vexing plaintiff; that the defendant, the sheriff of the county, had maliciously and excessively levied those writs upon the property of plaintiff above described, well knowing it to be plaintiff's property, and threatened to levy many more, and had entered into a conspiracy with divers persons to annoy, oppress and defraud the plaintiff; that neither said Lund & Co. nor anyone else but plaintiff had any right, title or interest in and to said property; that the property levied upon had been purchased for the current season, and was of a perishable nature; that plaintiff had to borrow some money in order to make the purchase, and depended on his sales to repay the same; that he was an old man, with a family partly dependent upon him for support, and had always borne a good name and credit, which was about to be destroyed by the acts of the defendant, complained of; that unless the sheriff was restrained from levying those writs, irreparable injury and damage would result to him; that he feared he would not be able to give the bonds required to retake the property; that the sheriff's official bond was inadequate to afford him protection; that if he was not allowed to pursue his business peaceably, the injury to him could not be amply compensated in damages; that the property was situated in a wooden building, amongst a row of similar buildings, and was insured for $8,000; that, by reason of the premises, the insurance companies were about to cancel said insurance and other companies would refuse to carry the risk, by reason of the litigation; that if the property should be destroyed by fire, great and irreparable damage would result to the plaintiff; that plaintiff was the bona fide owner of the property levied upon, having purchased it from Lund & Co., together with the good-will and trade of that firm, for a valuable
4] consideration, and before purchasing caused the records of the county to be searched to ascertain whether there were any claims, liens or incumbrances against the property; and that the records were clear from any such claims or liens, and Lund & Co. informed plaintiff that there was nothing due for the property, but that the same was free and clear.

The prayer of the bill was for an injunction to restrain the defendant, or anyone acting through or for him, from interfering with the property in any way whatever, and to compel him to surrender and replace the property which he had already levied upon, and for other and further relief.

Upon the filing of the complaint, accompanied by an affidavit of the plaintiff setting forth a more detailed account of the injury complained of, the court issued a temporary restraining order. The defendant thereupon filed his answer denying all the material averments of the bill, except the one relating to the levy upon the property. With respect to that averment, by way of justification, he alleged that, as sheriff of Lincoln County, he had received certain specified writs of attachment directed to him, requiring him to attach the property of Lund & Co., and that, under and by virtue of those writs, he had levied upon the property described in the complaint, as the property of Lund & Co; and that it was in fact the property of Lund & Co., having been transferred to the plaintiff by a pretended and fraudulent sale made for the purpose of putting it beyond the reach of the creditors of Lund & Co., who had sued out the writs of attachment, which sale was known to plaintiff to be fraudulent.

The case coming on for trial, the question as to the validity of the sale from Lund & Co. to the plaintiff was by order of the court submitted to a jury, which found the issue in favor of the plaintiff, thus recognizing the validity of the sale.

At the trial the allegations of fraud, malice, oppression and collusion, on the part of the defendant, were stricken from the complaint, upon the motion of plaintiff's attorney, and no evidence was introduced tending to show that the writs of attachment were pretended and informal. The defendant then moved to dismiss the complaint and action, which motion the court overruled, and upon considera- [275
tion of the verdict of the jury, and arguments of counsel, it made and filed the following findings of fact and conclusions of law:

"1. On the 18th day of November, 1883, one P. M. Lund was the owner of property described in the plaintiff's complaint.

"2. On said 18th day of November, 1883, said Lund sold and conveyed the said property to the plaintiff, and he, plaintiff, entered into immediate possession thereof.

"3. That said sale by Lund to Peters, the plaintiff, was made by Lund for the purpose of putting said property and proceeds thereof beyond the reach of his (Lund's) creditors and to defraud said creditors.

"4. That the plaintiff at the time of purchase of said property from said P. M. Lund had no knowledge of Lund's purpose in the disposition of said goods.

"5. That the defendant is, and at the time of said sale and transfer of said property was, sheriff of said Lincoln County; that on the 15th and 16th days of November, 1883, he, the said defendant, as sheriff aforesaid, levied upon the said property as the property of said

Lund, the same then being in the possession of the plaintiff, under and by virtue of certain warrants of attachment issued out of this court at the suit of various creditors of said Lund, being the same warrants of attachment the enforcement of which against said property is sought to be enjoined in this action.

"6. That at the trial by the jury of the question of fact, as hereinbefore stated, all the allegations of fraud, malice, oppression and collusion on the part of the defendant were stricken from the plaintiff's complaint on the motion of plaintiff's attorney.

"7. That no evidence was adduced that the plaintiff would suffer any irreparable injury in consequence of the seizure by the sheriff of said property.

"*Conclusions of Law.*

"1. That the verdict of the jury heretofore rendered in this case on the question of fact, [276] as herein stated, is but an advisory verdict, and should be received and accepted only as such by the court in determining the issues in this action.

"2. Under the pleadings and proofs herein the plaintiff is entitled to the relief demanded in his complaint; that the preliminary injunction heretofore issued should be made perpetual and final in accordance with the prayer of plaintiff's petition. Let judgment be entered accordingly."

Judgment was entered in accordance with the findings and conclusions of law. Afterwards a motion for a new trial was denied by the court, at which time the court found the following facts and conclusions of law, in addition to those theretofore found, to wit:

"First. That the purchase by plaintiff from P. M. Lund of the goods and chattels mentioned in the complaint included the good-will of the business heretofore carried on by the said Lund under the name of P. M. Lund & Co.

"Second. That the consideration for the said sale and transfer from the said P. M. Lund to the plaintiff was the sum of ten thousand three hundred and eighty dollars, then and there paid by plaintiff to said Lund, and that said consideration was fairly adequate.

"Third. That at the time of the seizure by the defendant of the goods and chattels mentioned in the complaint and composing the former stock of P. M. Lund & Co. the plaintiff was in possession thereof as the owner, conducting a profitable business as a retail merchant, and that the acts and threatened acts of the defendant under and by virtue of the said attachments mentioned and referred to in the pleadings would, unless restrained by the court, necessarily destroy plaintiff's said business and deprive him of the probable profits that might be realized therefrom, and that it would be extremely difficult to ascertain or estimate the pecuniary detriment which the plaintiff would sustain thereby.

"Fourth. That the said goods and chattels mentioned in the complaint and the plaintiff's said business comprised his entire property and pecuniary resources.

"Fifth. That it is admitted by the pleadings and appears as a fact that at the time referred to in the complaint the defendant, as sheriff of Lincoln County, seized the said goods and chattels under and by virtue of sundry warrants of attachment sued out against the property of P. M. Lund; that the defendant, as such sheriff, then had in his hands many more such attachments against the said Lund which he threatened to levy upon the said goods and chattels, and that numerous other creditors of said Lund were then threatening to sue out and place in the hands of defendant additional warrants of attachment for the purpose of having the same levied upon the said goods and chattels as the property of the said Lund.

"*Conclusions of Law.*

"1. That it would be extremely difficult to ascertain the amount of compensation which would afford the plaintiff adequate relief from the acts done and threatened to be done by the defendant.

"2. That it is necessary to restrain the acts threatened to be done by the defendant to prevent a multiplicity of judicial proceedings.

"3. That the plaintiff is entitled to the relief demanded in the complaint."

An appeal was taken to the Supreme Court of the Territory, which, on October 9, 1886, rendered a judgment affirming the judgment of the court below, without delivering any opinion in the case. An appeal from that judgment brings the case here.

Messrs. **Enoch Totten** and *Fred B. Dodge*, for appellant:

A public ministerial officer cannot be made a party to an action for an injunction to restrain the enforcement of a judgment or other process of a court. If so made, no decree can be taken against him.

Stout v. *McNeill*, 98 N. C. 1-3; *Edney* v. *King*, 4 Ired. Eq. 465-474; *Lackay* v. *Curtis*, 6 Ired. Eq. 199-201; *Howell* v. *Foster*, 122 Ill. 276-278; *Stephens* v. *Forsyth*, 14 Pa. 67; *Ashton* v. *Parkinson*, 8 Phila. 338; *Olin* v. *Hungerford*, 10 Ohio, 268-272; *Allen* v. *Medill*, 14 Ohio, 446-454; *Montgomery* v. *Whitworth*, 1 Tenn. Ch. 174-176; *Bloomstein* v. *Brien*, 2 Tenn. Ch. 778; *Holmes* v. *Chester*, 26 N. J. Eq. 79, 80; 1 Daniell, Ch. Pr. (Cooper's ed.) 296; High, Inj. § 1551; Hillard, Inj. § 139.

Without necessary parties the court cannot pass to a decree.

Story, Eq. Pl. 83; *Shields* v. *Barrow*, 58 U. S. 17 How. 130, 140 (15: 158, 160); *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 280-286 (18: 825, 826).

Irreparable injury was the sole ground upon which the court could acquire or take jurisdiction of the subject matter of the action.

A party bringing an equitable action must maintain it on equitable grounds or fail.

Mann v. *Fairchild*, 2 Keyes, 106 *et seq.*

Under the Dakota Code, the absence of a finding or failure to find on a material question at issue is fatal to the judgment.

Dakota Code Civ. Proc. § 267; *Dole* v. *Burleigh*, 1 Dak. 218-226; *Holt* v. *Van Eps*, 1 Dak. 198-212; *Uhlig* v. *Garrison*, 2 Dak. 99-111.

Facts and conclusions of law in addition to

those heretofore found cannot be found after judgment.

Dole v. *Burleigh*, 1 Dak. 218-226; *Holt* v. *Van Eps*, 1 Dak. 198-212; *Bank of United States* v. *Moss*, 47 U. S. 6 How. 31-38 (12: 331, 334); *McLean* v. *Stewart*, 14 Hun, 472-476; *Rockwell* v. *Carpenter*, 25 Hun, 529-533.

There existed a plain, adequate and complete remedy at law.

Powell v. *Bradlee*, 9 Gill & J. 274; *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); Wells, Replevin, § 260; Cobbey, Replevin, § 300; *Tomlinson* v. *Rubio*, 16 Cal. 203-207; *Baker* v. *Rinehard*, 11 W. Va. 238, 245, 247; *Davidson* v. *Floyd*, 15 Fla. 667-671; *Bouldin* v. *Alexander*, 7 T. B. Mon. 425, 426; *Johnson* v. *Conn. Bank*, 21 Conn. 148-156.

Mr. **J. W. Taylor**, for appellee:

The sheriff was a proper party.

Wingard v. *Banning*, 39 Cal. 543; *Jacobs* v. *Latour*, 5 Bing. 130; *Grigsby* v. *Burnett*, 31 Cal. 406; *Scott* v. *Onderdonk*, 14 N. Y. 9; *Macklot* v. *Davenport*, 17 Iowa, 379; *Hart* v. *Albany*, 3 Paige, 212, 3 N. Y. Ch. L. ed. 121; *Treadway* v. *Schnauber*, 1 Dak. 236; *Ryan* v. *Brown*, 18 Mich. 196.

The trial court had full power to amend its record at any time up to appeal.

Meacham v. *Burke*, 54 N. Y. 217; *Quincey* v. *Young*, 53 N. Y. 504; *Morgan* v. *Mulligan*, 50 N. Y. 665; *Lefler* v. *Field*, 47 N. Y. 407; *Van Slyke* v. *Hyatt*, 46 N. Y. 259; *Hayes* v. *Wetherbee*, 60 Cal. 396; *Ogburn* v. *Connor*, 46 Cal. 346.

And when additional findings are called for they may be filed subsequent to the entry of judgment.

Bilansky v. *State*, 3 Minn. 427; *Browner* v. *Davis*, 15 Cal. 9; *O'Connell* v. *Cotter*, 44 Iowa, 48; *Wyman* v. *Buckstaff*, 24 Wis. 477; *Hill* v. *Hoover*, 5 Wis. 386; *Walker* v. *State*, 102 Ind. 502, 3 West. Rep. 354; *Batchelder* v. *Brickell*, 75 Cal. 373; *Truly* v. *Lane*, 7 Smedes & M. 325, 45 Am. Dec. 305; *Tillotson* v. *Cheetham*, 3 Johns. 95; *Stakes* v. *Campbell*, 7 Cow. 425.

0] *Mr. Justice* **Lamar** delivered the opinion of the court:

There are thirty-two assignments of error found in the record, which it is not necessary to discuss in detail.

We are of opinion that the findings of fact by the district court, taken in connection with the verdict of the jury upon the sole issue submitted to it, entitled the appellee to the equitable relief sought, and are sufficient to sustain the judgment of the Supreme Court of the Territory. They fully establish the allegations of the complaint that the appellee, Peters, was the true owner of the stock of merchandise, levied upon and seized as the property of P. M. Lund & Co.; that he bought the stock from Lund & Co., paying the adequate consideration of $10,000 and upwards, for the entire stock, including the good-will of the business carried on by Lund & Co. at the same stand; that, though Lund & Co. sold the stock for the purpose of defrauding their creditors, the appellee was no party to the fraud, and had no knowledge of the purpose of Lund & Co. in disposing of said stock and business; that, at the time the appellant, North, as sheriff of the County of Lincoln, levied upon the goods and merchandise, the appellee was in possession of them, and was conducting a profitable business; that the acts of the sheriff, in levying upon and seizing the property by virtue of the writs of [28
attachment, described in the complaint, and the threatened acts, under and by virtue of other writs, unless restrained by the court, would have destroyed the appellee's business; that it would be extremely difficult to ascertain or estimate the pecuniary injury the appellee would sustain; that the merchandise and the business above mentioned comprised all the property owned by the appellee, and all his pecuniary resources; that the appellant, North, as sheriff of Lincoln County, at the time the suit was brought, had in his hands a large number of writs of attachment, which he threatened to levy upon the merchandise belonging to the appellee; and that creditors of P. M. Lund & Co. were about to sue out writs of attachment, and place them in defendant's hands to be levied on the same property.

Upon these facts the judgment of the Supreme Court of the Territory must be affirmed unless the appellant can show some legal ground for making this particular case an exception to the general rules upon the subject of equitable relief.

The main ground relied on by the appellant is, that the relief sought should be refused because the appellee had a plain, adequate and complete remedy at law, to wit, either the action of trespass or replevin. The answer to this is, that the measure of damages in an action of trespass could not have exceeded the value of the property seized, with interest thereon from the date of the seizure; and that the only remedy in an action of replevin would have been limited to a recovery of the property and damages for its detention, with costs. It does not need argument to show that neither of these actions would afford as complete, prompt and efficient a remedy for the destruction of the business which, with the goods levied upon, constituted the appellee's entire estate and pecuniary resources, as would be furnished by a court of equity in preventing such an injury. The case of *Watson* v. *Sutherland*, 72 U. S. 5 Wall. 74, 78, 79 [18: 580, 582], is, in its material facts, similar to this case. In that case a bill was filed by one Sutherland to enjoin the further prosecution of certain writs of *fieri facias* levied by the sheriff, Watson, on a lot of goods claimed to belong exclusively to the plaintiff, so as to prevent what the plaintiff alleged to be an irreparable injury, to wit, [28
the ruin of his business as a merchant. The defense set up was, as in this case, that the injunction should have been refused because the action of trespass furnished a complete and adequate remedy at law. In answer, the court, *Mr. Justice* Davis delivering the opinion, said: "How could Sutherland be compensated at law, for the injuries he would suffer, should the grievances of which he complains be consummated? . . . Commercial ruin to Sutherland might, therefore, be the effect of closing his store and selling his goods, and yet the common law fail to reach the mischief. To prevent a consequence like this, a court of equity steps in,

arrests the proceedings *in limine*, brings the parties before it, hears their allegations and proofs, and decrees, either that the proceeding shall be unrestrained, or else perpetually enjoined."

It is further argued by the appellant that the district court, after making and filing the first findings of fact and conclusions of law and ordering judgment thereon (which was duly entered), had not the power, after the term had closed, to make additional findings in support of its judgment, upon a motion for a new trial. We think this point not well taken. The appellant, in support of his motion for a new trial, claimed that the court had omitted to find upon certain material issues in the case. The court refused to grant the motion, and made additional findings, more explicitly responsive to the questions presented by the pleadings. We are of opinion that the court, if, in the consideration of such a motion, it considers that material findings have been omitted or imperfectly stated, has authority to make such additional findings as will cure the omission so that its record will be amended, and made to conform to the truth. When the court below made its decree it made a concurrent order giving the defendant (the appellant) until a certain day within which to prepare and serve his motion for a new trial. The record, therefore, had not passed out of the control of the court by appeal when those additional findings were made.

Counsel for appellant is mistaken in saying that the rule of practice, under the Dakota
283] Code of Civil Procedure (secs. 266, 267), as established by the decisions of the Supreme Court of that Territory, does not allow the trial court to make additional findings after judgment has been ordered and entered. The cases cited are inapplicable and do not sustain the position assumed. None of them were cases in which the trial court made additional findings, and that question was not presented in any of them. In the case of *Dole* v. *Burleigh*, 1 Dak. 227, on which counsel for appellant mainly relies, the trial court omitted to find upon a material issue presented by the pleadings, but it made no additional findings. The court laid down and applied the long-established principle, nowhere controverted, that the findings of fact by a court, like a special verdict, must decide every point in issue, and that the omission to find any material fact in issue is an error which invalidates the judgment. A remark of the judge, in his opinion, favoring the view taken by appellant, is *obiter*, and contrary to adjudged cases on like questions, in the highest courts of those States whose statutory provisions respecting the trial by the court of questions of fact correspond in almost every particular with §§ 266, 267, of the Dakota Code, *supra*. Those authorities hold that the omission to file findings of fact, judgment having been entered, is an irregularity which the court has authority to cure by supplying additional amendments until an appeal is taken, or a bill of exceptions is settled and signed by the judge. *Williams* v. *Ely*, 13 Wis. 1; *Pratalongo* v. *Larco*, 47 Cal. 378; *Ogburn* v. *Connor*, 46 Cal. 346; *Bosquett* v. *Crane*, 51 Cal. 505; *Hayes* v. *Wetherbee*, 60 Cal. 396; *Swanstrom* v. *Marvin*, 38 Minn. 359; *Vermule* v. *Shaw*, 4 Cal. 214.

A further ground relied on by the appellant is, that there was no proper party defendant of record against whom the court had jurisdiction to proceed; and that the defendant below, acting in the capacity of sheriff, had no material interest in the subject matter of the suit, and was not, therefore, the proper defendant thereto. We think there is no merit in this proposition.

By the terms of the writs of attachment the sheriff was commanded to levy upon and attach personal property belonging to P. M. [1
Lund & Co. Those writs did not authorize him to seize the property of any other person; and when he did seize other property he became a trespasser, and was not protected by the law. The rule in this respect was tersely stated by *Mr. Justice* Miller, who delivered the opinion of the court in *Buck* v. *Colbath*, 70 U. S. 3 Wall. 334, 343, 344 [18: 257, 261]. Speaking of the variety of writs, orders or processes of the court, under which property may be seized by an officer, the learned justice divided them into two general classes: (1) "those in which the process or order of the court describes the property to be seized, and which contain a direct command to the officer to take possession of that particular property;" and (2), "those in which the officer is directed to levy the process upon property of one of the parties to the litigation, sufficient to satisfy the demand against him, without describing any specific property to be thus taken." Referring to the second class he said: "In the other class of writs to which we have referred, the officer has a very large and important field for the exercise of his judgment and discretion,—*first*, in ascertaining that the property on which he proposes to levy is the property of the person against whom the writ is directed; *secondly*, that it is property which by law is subject to be taken under the writ; and, *thirdly*, as to the quantity of such property necessary to be seized in the case in hand. In all these particulars he is bound to exercise his own judgment, and is legally responsible to any person for the consequences of any error or mistake in its exercise to his prejudice. He is so liable to plaintiff, to defendant or to any third person whom his erroneous action in the premises may injure. And what is more important to our present inquiry, the court can afford him no protection against the parties so injured; for the court is in no wise responsible for the manner in which he exercises that discretion which the law reposes in him, and in no one else." See also Cooley on Torts, 396.

In a case where the officer has exceeded his authority, he may be proceeded against either by an action for damages, if such remedy be sufficient, or by a writ of injunction to restrain the continued wrong-doing; and it is [2
not essential that the plaintiffs in the writs be joined as parties defendant, where, as in this case, it does not appear, either from the pleadings or the proofs, that they advised or directed the sheriff to seize the particular property, as the property of their judgment debt-

or. In our opinion injunction was the proper remedy, the remedy at law being wholly inadequate to prevent or repair the injuries set forth in the pleadings, and stated in the findings of the court.

We have not deemed it necessary to discuss the jurisdictional question raised by the appellee. It is clear that the appeal in this case was allowed by the proper court; that all the proceedings relative to the perfecting of an appeal were taken within two years from the date of entering the judgment of the court below, and that the Enabling Act admitting the two Dakotas, Montana and Washington Territories as States authorizes us to proceed to hear and determine cases of this character.

Judgment affirmed.

---

[226] CITY OF ST. LOUIS, Survivor of BENJAMIN SEEGER, *Plff. in Err.*,

v.

EDWARD RUTZ.

(See S. C. Reporter's ed. 226-251.)

Trial by court, review of—riparian rights—construction of deed—description in deed—stream as boundary—lands on Mississippi River—sudden loss of land—gradual washing away—right of access to river—accretions caused by dykes—rights of owner—island in river—St. Louis—boundary line between Illinois and Missouri—state law governs accretions—how far accretions can extend—accretion to island—movable island.

1. Where by stipulation the case was tried by the court without a jury, this court will not review the findings of fact nor the refusal to find other facts, but will only inquire whether the facts found are sufficient to support the judgment; nor will this court review in such case the refusal of the court to find mixed questions of law and fact which it was asked to find.

2. The Supreme Court of Illinois has established and maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river; this is a question in regard to a rule of property which is governed by the local law of Illinois.

3. In construing a deed all the words of the description must be given effect, if possible.

4. Where the description in a deed of land in Illinois, after saying "to low-water mark of the Mississippi River," says, "thence down to the extended line between surveys" 156, 157, without specifying whether it was down the river generally or down the line of low-water mark, the word "down" means down the river; this description makes the river the boundary of the land and the land extends to the middle of the river.

5. Where the calls in a conveyance of land are for two corners at, in or on a stream or its banks and there is an intermediate line extending from one such corner to another, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise.

6. Where, in a deed of lands in Illinois to the Mississippi River, there is added in the description the words "together with all rights as riparian owner to the accretion or sand-bar lying northwesterly and between the extended lines of said land herein described, situated in the County of St. Clair and State of Illinois," the grantor conveys all his riparian rights appurtenant to the surveys between the extended lines of them in the County of St. Clair and does not retain to himself any interest in the fee of the bed of the river.

7. The sudden and perceptible loss of land of a riparian proprietor, which is visible in its progress, does not deprive him of his fee in the submerged land nor change his boundaries on the river front as they existed when the land commenced to be washed away.

8. If the bed of a stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but if the change is by reason of a freshet and occurs suddenly, the line remains as it was originally.

9. A riparian owner of lands bordering on a navigable river has a right of access to the navigable part of the river from the front of his land, and the right to make a landing, wharf or pier for his own use or the use of the public.

10. Where the washing away of the bank of the plaintiff's land on the Mississippi River was caused by dykes built by the City of St. Louis, on the opposite side of the river, which caused its current to flow to and against the eastern shore, and land was formed again on the place where the same had been washed away, it became the property of the plaintiff as a deposit on that part of the bed of the river which was owned by him in fee, although the land thus newly formed extended into the old bed of the river beyond the former shore line.

11. Where the government built a dyke from plaintiff's land on the eastern shore of the Mississippi River to a bar or island in the river in front of plaintiff's land, so as to cause the water between the river bank of plaintiff's land and the island to be filled up so that it became dry land, such new land became the property of plaintiff, and the fact that more land has been restored to plaintiff than was previously washed away cannot deprive him of his riparian right or of his access to the river.

12. The owner in fee of the bed of a river or other submerged land is the owner of any bar, island or dry land which subsequently may be formed thereon.

13. By the Act of June 13, 1812 (2 Stat. 748), and sec. 2 of the Act of May 26, 1824 (4 Stat. 66), and sec. 2 of the Act of Jan. 27, 1831 (4 Stat. 435), the Village of St. Louis was authorized only to acquire title to lands within said village in the Territory or State of Missouri; and it obtained no right thereby to acquire title to lands in the State of Illinois.

14. By the Acts of April 18, 1818, and of March 6,

NOTE.—*As to alluvion or accretion and reliction; right to, and ownership of; by what law title to is determined; rule of division among riparian owners,*—see *notes* to Kennedy v. Hunt, 12: 829; St. Clair County v. Lovingston, 23: 59.

As to right of the United States and the States to shore lands and accretions against piers, see *note* to Hallett v. Beebe, 14: 35.

As to what is seashore; how far lands bounded on extend,—see *note* to United States v. Pacheco, 17: 865.

As to title of water by appropriation; common-law rule; rule of mining States,—see *note* to Atchison v. Peterson, 22: 414.

As to right to accretions and alluvion, see *note* to Jefferis v. East Omaha Land Co. 33: 872.

1820, under which Illinois and Missouri were severally admitted as States, the common boundary line between Missouri and Illinois is the middle of the main channel of the Mississippi River; an island in such river easterly of the middle of its main channel is in the State of Illinois.

15. The title to land acquired by accretion is a title acquired under the operation of the law of the State, which each State determines for itself.

16. As the law of Illinois confers upon the owner of land in that State which fronts on the Mississippi River the title in fee to the bed of the river to the middle thereof, so far as the boundary of the State extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of the middle of its channel, and it is impossible for the owner of an island which is situated on the west side of the middle of the river and in the State of Missouri to extend his ownership by mere accretion to lands situated in the State of Illinois.

17. The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors.

18. Where an island is a mere moving mass of alluvial deposits, to such a movable island, traveling for more than a mile and from one State to another, the law of title by accretion has no application; an instantaneous transfer of a quarter of a mile of land is not a title by accretion.

[No. 1096.]

Submitted Jan. 5, 1891. Decided Feb. 2, 1891.

IN ERROR to the Circuit Court of the United States for the Southern District of Illinois to review a judgment in favor of plaintiff in an action of ejectment, adjudging that defendants were guilty of unlawfully withholding the lands, and that plaintiff owned the lands, and that he recover possession of them. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Leverett Bell** and *W. C. Kueffner*, for plaintiffs in error:

The French grant of 1772 conveyed no title to the bed of the Mississippi River.

Pothier, pt. 1. *c*, sec. 3, art. 2; *Kissell* v. *St. Louis Pub. Schools*, 59 U. S. 18 How. 19 (15: 324).

A proper application of the doctrines of the common law limits the title of the owner of land on the Mississippi River to the water's edge.

St. Paul & P. R. Co. v. *Schurmeier*, 74 U. S. 7 Wall. 272 (19: 74); *Schurmeier* v. *St. Paul & P. R. Co.* 10 Minn. 82; *Barney* v. *Keokuk*, 94 U. S. 324 (24: 224); *McManus* v. *Carmichael*, 3 Iowa, 1; *Rundle* v. *Delaware & R. Canal Co.* 55 U. S. 14 How. 80 (14: 335): *The Daniel Ball*, 77 U. S. 10 Wall. 557 (19: 999); *The Montello*, 87 U. S. 20 Wall. 430 (22: 391); *Carson* v. *Blazer*, 2 Binn. 475; *Cates* v. *Wadlington*, 1 McCord, L. 580; *Wilson* v. *Forbes*, 2 Dev. L. 30; *Bullock* v. *Wilson*, 2 Port. 436; *Elder* v. *Burrus*, 6 Humph. 358; *Canal Comrs.* v. *People*, 5 Wend. 423; *Benson* v. *Morrow*, 61 Mo. 345; *Martin* v. *Waddell*, 41 U. S. 16 Pet. 410 (10: 1012); *Jones* v. *Soulard*, 65 U. S. 24 How. 65 (16: 608); *St. Clair County* v. *Lovingston*, 90 U. S. 23 Wall. 46 (23: 59); *St. Louis* v. *Myers*, 113 U. S. 566 (28: 1131).

The defendant in error exhibited no title to the bed of the Mississippi River west of low-water mark in front of surveys 149 to 156 inclusive of the common fields of Prairie du Pont.

Middleton v. *Pritchard*, 4 Ill. 519; *Piper* v. *Connelly*, 108 Ill. 646; *Buttenuth* v. *St. Louis Bridge Co.* 123 Ill. 535; Gould, Waters, §§ 199, 200; *Hatch* v. *Dwight*, 17 Mass. 289; *Bradford* v. *Cressey*, 45 Me. 9; *Child* v. *Starr*, 4 Hill, 369; *Lamb* v. *Rickets*, 11 Ohio, 311; *Rockwell* v. *Baldwin*, 53 Ill. 19; *Cook* v. *McClure*, 58 N. Y. 437.

The premises in dispute are the property of the City of St. Louis. Land bounded by the Mississippi River is entitled to the accretion attaching to it.

New Orleans v. *United States*, 35 U. S. 10 Pet. 662 (9: 573).

The above doctrine applies to the islands in the river as well as to the main shore.

Benson v. *Morrow*, 61 Mo. 345; *Buse* v. *Russell*, 86 Mo. 209; *Elwood* v. *Flannigan*, 104 U.S. 562 (26: 842); *Jefferis* v. *East Omaha Land Co.* 134 U. S. 178 (33: 872).

Messrs. **James K. Edsall** and **A. S. Wilderman**, for defendant in error:

In cases of this character, this court will not review the action of the trial court upon questions of fact.

Norris v. *Jackson*, 76 U. S. 9 Wall. 125, 129 (19: 608, 609); *Martinton* v. *Fairbanks*, 112 U. S. 670 (28: 862).

Upon this record there arises no question of law, subject to review in this court.

Meath v. *Mississippi Levee Comrs.* 109 U. S. 268, 271 (27: 930); *Boardman* v. *Toffey*, 117 U. S. 271, 272 (29: 898); *Republican River Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315, 318 (23: 515); *Cooper* v. *Omohundro*, 86 U. S. 19 Wall. 65 (22: 47); *Beaver* v. *Taylor*, 93 U. S. 46, 54 (23: 797, 793); *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 295 (23: 898, 899).

The question as to whether the fee of the riparian proprietors on the Mississippi extends to the water's edge, or to the thread of the stream, is a rule of property, governed by the local law in each State.

Barney v. *Keokuk*, 94 U. S. 324, 338 (24: 224, 228); *St. Louis* v. *Myers*, 113 U.S. 566 (28: 1131).

The fee of the riparian owner on the Mississippi River, in Illinois, extends to the "middle of the main channel" of the river.

Braxon v. *Bressler*, 64 Ill. 488, 493; *Houck* v. *Yates*, 82 Ill. 179; *Brooklyn* v. *Smith*, 104 Ill. 429, 438; *Washington Ice Co.* v. *Shortall*, 101 Ill. 46; *Cobb* v. *Lavalle*, 89 Ill. 331, 334; *Lavalle* v. *Strobel*, 89 Ill. 370; *Buttenuth* v. *St. Louis Bridge Co.* 123 Ill. 535.

The Mississippi River was the boundary of the land conveyed to Edward Rutz, under the deed from Blumenthal.

3 Washb. Real Prop. (4th ed.) 409, § 46; *Sleeper* v. *Laconia*, 60 N. H. 201; *Piper* v. *Connolly*, 108 Ill. 646; *Berry* v. *Snyder*, 3 Bush, 266; *Cole* v. *Wells*, 49 Mich. 450; *Mansur* v. *Blake*, 62 Me. 38; *Lowell* v. *Robinson*, 16 Me. 357; *Richardson* v. *Prentiss*, 48 Mich. 88; Angell, Watercourses (7th ed.) § 29, and *notes*; *Luce* v. *Carley*, 24 Wend. 451; *Cold Spring Iron Works* v. *Tolland*, 9 Cush. 495.

The washing away of more than one-half mile from off the river front of these surveys, suddenly and perceptibly, in the annual floods, between 1865 and 1873, neither changed the

boundaries nor deprived the riparian owner of his fee in the submerged land.

Lynch v. *Allen*, 4 Dev. & B. L. 62; Angell, Tide Waters, 265, 266; Phear, Rights of Water, 12, 43; 2 Hilliard, Real Prop. (4th ed.) 195, § 10; Gould, Waters, §§ 155, 158, 166; Schultes, Aquatic Rights, 122; Hargraves, Law Tracts, 15, 29, 36, 37; Tyler, Boundaries, 74, 76, 79; *Mulry* v. *Norton*, 100 N. Y. 424, 434, 1 Cent. Rep. 748.

The title to the soil to the middle of that river, or to the thread of the stream, was in those persons under whom the plaintiff claims title.

Middleton v. *Pritchard*, 4 Ill. 510; *Illinois & Mich. Canal Trustees* v. *Haven*, 11 Ill. 554; *Chicago* v. *Laflin*, 49 Ill. 172; *Ensminger* v. *People*, 47 Ill. 384; *Warren* v. *Thomaston*, 75 Me. 329; *Arnold* v. *Munday*, 6 N. J. L. 1; *Municipality No. 2* v. *Orleans Cotton Press*, 18 La. 122; *Walker* v. *Shepardson*, 4 Wis. 513; *Ryan* v. *Brown*, 18 Mich. 196; *Berry* v. *Snyder*, 3 Bush, 266; *Norcross* v. *Griffiths*, 65 Wis. 599.

When the alluvion forming the so-called Arsenal Island was deposited upon the soil of Blumenthal, although that soil was under the waters of the Mississippi River, it became a part of his soil and was his land.

New Orleans v. *United States*, 35 U. S. 10 Pet. 662 (9: 573).

An island in a river deemed in law unnavigable, but subject to the public easement of navigation, belongs to those whose lands are bounded upon the river.

Houck v. *Yates*, 82 Ill. 179; *Ingraham* v. *Wilkinson*, 4 Pick. 268; *Deerfield* v. *Ames*, 17 Pick. 41; *Trustees of Hopkins Academy* v. *Dickinson*, 9 Cush. 544; *McCullough* v. *Wall*, 4 Rich. L. 68; *Stanford* v. *Mangin*, 30 Ga. 355; Tyler, Boundaries, 75, 76, 77.

The owner of the island will not be entitled to alluvion deposited by the river at the lower end, or foot, of the island.

Clark v. *Campau*, 19 Mich. 325; *Richardson* v. *Prentiss*, 48 Mich. 88; Gould, Waters, § 162, and *notes*.

Grants bounded upon rivers or their margins, above tide-water, carry the exclusive right and title of the grantee to the centre thread of the stream, unless the terms of the grant expressly declare the intention to stop at the margin, or so clearly evince it as to leave no doubt.

Helmer v. *Castle*, 109 Ill. 664; *Piper* v. *Connolly*, 108 Ill. 646; *Illinois & Mich. Canal Trustees* v. *Haven*, 11 Ill. 554; *Watson* v. *Peters*, 26 Mich. 508; *Ryan* v. *Brown*, 18 Mich. 196; *Luce* v. *Carley*, 24 Wend. 451; *Dillingham* v. *Roberts*, 75 Me. 469; *Salter* v. *Jonas*, 39 N. J. L. 469; *Ex parte Jennings*, 6 Cow. 518; *Oxton* v. *Groves*, 68 Me. 371; *Kneeland* v. *Van Valkenburgh*, 46 Wis. 434; *Norcross* v. *Griffiths*, 65 Wis. 599; *Sleeper* v. *Laconia*, 60 N. H. 201; 3 Kent, Com. 427.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is an action of ejectment, commenced January 29, 1884, by Edward Rutz against Benjamin Seeger, in the Circuit Court of the County of St. Clair, in the State of Illinois, to recover the possession of certain land situated in said county, described in the first count of the declaration as follows: "Commencing the survey thereof at a point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-nine, in the common fields of Prairie du Pont, from which the southernmost corner of said survey number one hundred and forty-eight, at the bluffs, bears S. 33¼° E. (var. 6°) two hundred and forty-nine and $\frac{85}{100}$ (249.25) chains; thence north 33¼° W., with said line of said surveys extended, to the centre thread of the Mississippi River; thence along the centre thread of said river to the line between survey one hundred and fifty-six (156) and survey one hundred and fifty-seven (157) extended to said centre thread of said river, making the right-angle distance between the said extended lines 34.60 chains; thence south 33¼° E. along said last-mentioned extended line to a point in the line between said surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) of said common fields, from which the most southern corner of said survey one hundred and fifty-six bears south 33¼° east two hundred fifty-four chains distant; thence along the meanders of the original bank of the Mississippi River as surveyed by the United States government in surveying said common fields, to the point of beginning, with the appurtenances."

Seeger put in a plea of the general issue; and the City of St. Louis, a municipal corporation of Missouri, and the landlord of Seeger, was made, by an order of the court, a co-defendant with Seeger, and was given the sole control and direction of the defense of the suit; and it put in a plea of the general issue. Afterwards, on the petition of the City of St. Louis and of Seeger, the suit [228 was removed into the Circuit Court of the United States for the Southern District of Illinois, and that court took jurisdiction of it. By a written stipulation filed, the case was tried by the court without the intervention of a jury, and the court, held by the district judge, made the following findings of fact:

"1. That in the years 1849 and 1850 one Augustus A. Blumenthal acquired, by deeds from the parties then in actual possession of said premises as the owners thereof, the title in fee to surveys numbered 149, 150, 151, 152, 153, 154, 155 and 156 of the common fields of Prairie du Pont, in the County of St. Clair, in the State of Illinois, and that Edward Rutz, the plaintiff in this suit, acquired from said Blumenthal his said title to said land prior to the commencement of this suit.

"2. That the map or plat made by G. F. Hilgard, county surveyor of St. Clair County, Illinois, produced in evidence and marked 'Plaintiff's Exhibit B,' is a correct map and plat of the said premises and the several surveys and lines indicated thereon; which said map is hereby included in and made a part of these findings, and to which reference is made for greater certainty.

"3. That, as appears from the evidence and plats read and produced in evidence, the said surveys numbered 149, 150, 151, 152, 155 are each one arpent (or about twelve rods) in width, and the said surveys 153 and 154 are each two arpents (or about twenty-four

rods) in width, and that the said survey numbered 156 is three arpents (or about thirty-six rods) in width, and that said several surveys adjoin each other and lie side by side in the order the same are respectively numbered, survey 149 being upon the extreme northerly, and survey 156 being upon the extreme southerly, side of the entire tract, and that each and all of said surveys extended to and were bounded by the Mississippi River on the northwesterly ends thereof, and extend southeasterly from the Missisippi River, the average distance of about one thousand rods, to the hills or bluffs on the Illinois side of said river.

"4. That said Blumenthal, under said deeds to him, whereby he acquired title to said surveys, in the year 1850 entered upon [229] and took the actual possession of said surveys, including, as a part thereof, the accretions thereto formed on the river front of said surveys embraced within the side lines of said surveys, extended without deflection in a direct line across such accretions northwesterly to the Mississippi River, and said Blumenthal so held such possession of said premises and paid all taxes thereon each year from January 23, 1850, to December 23, 1873, at which said last-mentioned time said Blumenthal conveyed 500 acres off from the northwestern end of said premises, by deed, to said Edward Rutz, and others, whose title the plaintiff acquired in fee on and prior to the 7th day of March, 1883, and thereupon succeeded to said Blumenthal's said title to and possession of said premises; and that the said Blumenthal, from whom the plaintiff so derived such title and possession as aforesaid, and the several owners of the surveys and lands in the said Prairie du Pont common fields adjoining said surveys 149 to 156, both on the northerly and southerly sides thereof, have each, ever since the year 1850, up to the present time, claimed, possessed, fenced, inclosed, used and occupied as a part of their said several surveys and lands, respectively, that portion of the said accretions thereto embraced within the side lines of their respective surveys extended without deflection in direct lines northwesterly to said river; and that ever since the year 1849 the several owners of said surveys have, by common consent, recognized and acted upon such extension of the side lines of their several surveys in a direct course across said accretions to the river, as the true and proper boundary and division lines between them, in respect to the accretions formed on the river front of said surveys.

"5. That the premises described in the declaration and sued for are located at the present time, and were at the commencement of this suit, eastwardly of the centre of the main channel of the Mississippi River, and in the County of St. Clair, in the State of Illinois.

"6. And the court further finds that, as appears from the evidence and from the survey of said lands made by William L. Deneen, as the county surveyor of St. Clair County, [230] Illinois, on November 15, 1850, produced in evidence, at that time, the dry land of said surveys numbered 149 to 156, inclusive, extended westwardly to the line indicated by the words 'River bank, 1850, by Deneen,' on the map marked 'Plaintiff's Exhibit B;' and that the main land of said surveys numbered 149 to 156, inclusive, in the year 1850, extended westwardly over and across, and included about sixty rods in width of, the lands described in the declaration, to wit, that portion of said lands lying between the river bank in 1850, as indicated by said Deneen's survey, and the line marked 'Old surveyed river bank, 1814,' as said lines are respectively designated on said map; and that, in the year 1863, the main and dry lands of the survey 149 to 156 extended about fifteen chains or sixty rods further westward and beyond the line of the river bank so surveyed by said Deneen in 1850, and that the eastern bank of the river in 1863 was about one half a mile west of a certain dwelling-house hereinafter mentioned, then standing on said survey No. 151, and so continued until the year 1865.

"7. That the greater part of the so-called Arsenal Island, which now extends over and is embraced within the boundaries of the lands described in the plaintiff's declaration, is located upon the site of the dry lands of said surveys numbered 149 to 156, inclusive, as the same existed from 1850 to 1865, and that the residue thereof (being about one eighth of the entire width of the same) is located upon the bed of the Mississippi River as it then existed, and easterly of the thread or middle line of said river.

"8. That between the years 1865 and 1873 the river front of the said surveys numbered 149 to 156 was washed away, so that, in July, 1873, the river front of said lands only extended to the line marked 'River bank, 1873,' on said map, and that said river bank thereafter continued to wash away and cave in until it reached the line marked 'River bank, 1884,' on said map.

"9. And the court further finds, from the evidence, that such washing away of said river bank did not take place slowly and imperceptibly; but, on the contrary, the caving in and washing away of the same [2 was rapid and perceptible in its progress; that such washing away of said river bank occurred principally at the spring rises or floods of high water in the Mississippi River, which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasting from four to eight weeks, before the waters of the river would subside to its ordinary stage or level; that during each flood there was usually carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river and were carried away at one time; that in the spring of the year 1872 Mr. Augustus A. Blumenthal, Jr., the occupant of the land at the time, lived in the dwelling-house situated on said survey No. 151, and the river had, since the year 1865, so encroached upon the

land that the house was then but about four or five hundred feet back from the river bank and water's edge, as it then existed. When the spring rise or flood occurred that year, the said Blumenthal became alarmed for the safety of his house, and immediately commenced taking said house down and removing the same further from the river bank, and, in so doing, worked 6 or 8 days in succession, at the expiration of which time the bank had caved in and washed away so rapidly that the bank and waters of the river had approached within a few feet of the foundation of the house, and before the waters subsided carried away the greater portion of the foundation of the house, and the flood which came in the spring of 1873 carried away the residue of said foundation, with at least 100 feet more of the land; and that such caving in and washing away continued until the building of the dyke at the point indicated on said map, on the eastern side of the river, above the said lands, which dyke was built by the United States government in the years 1876 to 1878.

"10. That the said washing away of the bank on the front of the said surveys was caused by dykes built by the City of St. [232] Louis on the western side of the river, at the points where the same are indicated on said map, by causing the current of the river to flow over to and against the eastern shore; that the western bank of the river opposite the plaintiff's said land is rocky, and there appears to have been no material change in that bank since the first survey thereof by the United States government.

"11. The court further finds that in 1853 there existed an alluvial formation or body of land on the western side of the river and near the Missouri shore, then called Quarantine Island, which, in that year (1853), was surveyed by William H. Cozzens. The location and boundaries of said island are indicated upon said map, the same being shaded red, and having written thereon the words and figures 'Quarantine Island, also called Arsenal Island, as surveyed in 1853.' In 1858 the said island, in low water, extended to and adjoined the main land on the western or Missouri side of the river. At some time between the years 1853 and 1863 the greater portion of said Quarantine Island washed away, so as only to leave remaining that portion thereof embraced within a second survey thereof made by said Cozzens in January, 1863, the location and boundaries of which are indicated upon said map by the words 'Survey No. 411 of St. Louis land, school lands, Arsenal Island, surveyed in 1863;' the letters and lines thereof being shaded green upon said 'Exhibit B.'

"12. Said Quarantine Island, since its survey in 1863, has been called Arsenal Island, and at the time of said surveys of said island in 1853 and 1863 the same was situated on the west side of the main channel of the Mississippi River and about a mile higher up the river than the lands described in the declaration, and no part of the same then extended down the river opposite said plaintiff's said lands.

"13. On February 10th, 1863, a part of the said island, designated as 'Survey No. 411 of St. Louis school lands,' containing 109 and twenty-two hundredths acres, was assigned to the St. Louis public schools, in pursuance of the Act of Congress of June 13th, 1812, entitled 'An Act Making Further Provision for the Settling Claims of Land in the Territory of Missouri' (2 U. S. Stat. at L. p. [233] 748), and of the supplementary Act of May 26th, 1824 (4 U. S. Stat. at L. p. 66), and the residue of said island, as so surveyed in 1863, being nine and sixty-five hundredths acres on the northern end thereof, appears to have been also assigned to said St. Louis public schools on August 25th, 1864, as indemnity for school lands lost in section 16, T. 45 N., range 7 east, of the St. Louis district, Missouri.

"14. By deed dated February 8th, 1866, the St. Louis public schools conveyed its right and title to said Quarantine or Arsenal Island to the City of St. Louis, which lands are described in such deed as situated 'in the County of St. Louis and State of Missouri.' As early as the year 1850 the City of St. Louis occupied said Quarantine or Arsenal Island for quarantine purposes, and so continued to occupy the same until the year 1875, when the said City of St. Louis leased said island to the defendant, Benjamin Seeger, who, as such tenant, lived on and occupied the said island up to the time of the commencement of this suit. During the years 1861 to 1865, inclusive, the United States government occupied a portion of said island for the purpose of a military hospital and as a place for the burial of those dying at such hospital. The dry land described in the declaration in this case did not arise or form in the Mississippi River until about the year 1874 and subsequent thereto, the same having, after the year 1865 and prior to 1874, become, in part, submerged and washed away in the manner stated in the 8th paragraph of these findings.

"15. The court further finds, from the evidence, that there is not now, and was not at the time of the commencement of this suit, any land whatever above the surface of the water in said river on the site or within the boundaries of said Quarantine Island as so surveyed in 1853, nor upon the site or within the boundaries of said island as so surveyed in 1863, but that the same was subsequently wholly washed away.

"16. The court further finds that, in the floods in the Mississippi River, before mentioned, large portions of the upper or northern end of said island washed away; that in such floods a bar formed each year below, and [234] joined to the foot of the island, extending down the river for the distance of a quarter of a mile or more; that when the water subsided after such a spring flood the surface of such bar appeared in sight above the surface of the water, but nearly on a level with the water, for the greater length of such bar; that during the first summer after such bar had formed, willows grew upon it, and the flood which occurred the next succeeding spring deposited more sand and soil on the bar, which was retained by the willows, and the bar so formed was thus raised higher, in

each successive annual flood, so long as it was overflowed in high water, and this process was repeated at each succeeding flood by the formation of another bar below that formed by the preceding flood, which in turn was covered with a growth of willows and raised higher by each succeeding flood until it ceased to be overflowed.

"17. The court further finds, that such bars were not formed by accumulations of sand or soil washed up against the lower end of the island, but by the deposits, in times of flood, of soil and sediment upon the bed of the river below the island.

"18. And the court further finds, that before the said island was washed away the main and navigable channel of the Mississippi River was eastwardly of the island, but after the said bar was formed lower down the river in front of the plaintiff's land the main and navigable channel of the river has been, and still is, on the west side of the said bars or island, and that since the said bars or island had so formed in the river in front of said surveys the boats navigating the river have not run between the bar or island and the bank of the eastern or Illinois shore of the river.

"19. The court further finds, that in the years 1876 to 1878 the United States government built a dyke from the eastern or Illinois shore of the river to the bar or island, as it then existed, about sixty rods northerly, or higher up the river than the north line of the plaintiff's said land, and which said dyke is indicated on said map by the line having the word 'dyke' written beneath the [235] same. And that in the years 1878 to 1882 the United States government built a dam above said dyke from a point near the head of said bar or island to the eastern or Illinois shore, on the line designated 'dam' on said map; and after said dyke and dam were built the flow of the water through the channel or space occupied by water between the said bar or island which had so formed in front of the river bank of plaintiff's land, as it existed at that time, was thereby impeded and the channel or space gradually filled up by deposits from the river, so that by the year 1884 the same became dry land from the line in front of the said surveys 149 to 156, marked 'River bank, 1884,' out to the western side of the said bar or island on the northwestern end of said surveys, as indicated on said map, and that the same has since continued to be and is now dry land, except in extremely high water, and that the lands described in the declaration embrace so much thereof as lies westerly of the line marked on said map with the words 'Old surveyed river bank, 1814,' and easterly of the middle or thread of the main channel of the Mississippi River, and between the extended lines of said surveys, as indicated on said map marked 'Plaintiff's Exhibit B.'

"20. The court further finds, that the plaintiff is, and was on and prior to the first day of January, A. D. 1884, and at the time of the commencement of this suit, the owner in fee of said lands described in the first count of the declaration, situated in the County of St. Clair and State of Illinois, and that the defendants are guilty of unlawfully withholding the possession thereof from the plaintiff, in manner and form as alleged in the declaration.

"21. And that the value of the said lands in controversy in this suit exceeds sixteen thousand dollars."

On these findings, the court entered a judgment which found that the defendants were guilty of unlawfully withholding from the plaintiff the premises above described; and that the plaintiff, at the time alleged in the declaration, owned the lands in fee; and adjudged that he recover the possession of them in fee from the defendants, according to the finding of the court. A motion for a new trial was made and overruled.

There is in the record a bill of exceptions, which shows that at the trial the defendants [2 moved the court to make the findings of fact and declarations of law which are set forth in the margin,[1] but that the court overruled such motion and the defendants excepted. [2 The bill of exceptions states that no declaration of law was given by the court, except so far as the same may be included in the [2 findings which the court made; and that the defendants excepted to the findings of fact made by the court, and to the rendering of [2 judgment for the plaintiff, and to the overruling of the motion for a new trial.

Seeger and the City of St. Louis sued out a writ of error from this court to review the judgment. During the pendency of the writ of error in this court, Seeger has died, and the City of St. Louis is the surviving plaintiff in error.

The general question involved in the case is, whether the land in dispute is a part of

---

Defendants' Rejected Findings of Fact.

This is an action of ejectment instituted in the State Circuit Court of St. Clair County, Illinois, on January 29, 1884, to recover certain premises alleged to be in St. Clair County, Illinois, and described as follows, to wit: Bounded east by the meanders of the original bank of the Mississippi River, as surveyed by the United States government and established in United States surveys 149 to 156, inclusive, of the common fields of Prairie du Pont; bounded west by the centre thread of the Mississippi River; bounded north by the north line of survey 149 aforesaid, produced westwardly to the centre thread of the Mississippi River, and south by the south line of survey 156 aforesaid, produced westwardly to the centre thread of the Mississippi River.

The action was originally commenced against Benjamin Seeger, alleged to be in possession, and subsequently the City of St. Louis, a municipal corporation existing under the laws of the State of Missouri, claiming to be the owner of the premises occupied by said Seeger and the landlord of said Seeger, was, on its motion, made co-defendant, and afterwards the cause, on the application of said defendants, was duly removed into this court.

At the trial of this cause before the court, a jury being waived, it appeared that one Blumenthal, in 1849, took possession, under deeds from Dushanan, Lacroix and Pensoneau, of surveys 149 to 156, inclusive, of the common fields of Prairie du Pont, St. Clair County, Illinois, and paid taxes thereon until 1873, when he conveyed to the plaintiff and others, under whom the plaintiff now claims. The deed from Blumenthal, on which the title and possession of plaintiff now rests, describes the property as bounded northwestwardly by low-water mark of the Mississippi River.

It appeared that Blumenthal, in 1849, took possession, under his deeds, of the property mentioned therein, and that his actual possession never extended further west than the easterly edge of the Mississippi River, and that the plaintiff succeeded

surveys 149 to 156, inclusive, in the common fields of Prairie du Pont, with the accretion thereto, situate on the Illinois side of the Mississippi River, in St. Clair County, Illinois, and is owned by the plaintiff, or whether it is owned by the surviving defendant, the City of St. Louis, as an accretion to, and part of, an island in that City, called "Arsenal Island" or "Quarantine Island," on the western or Missouri side of the Mississippi River, which was originally an island more than a mile higher up the river than the surveys in question.

The assignments of error made are, that the circuit court erred (1) in holding that the title and ownership of the plaintiff extended to the middle of the main channel of the Mississippi River and embraced the premises in controversy; and (2) in refusing to hold that the premises in controversy were an accretion to Arsenal Island, and the property of the City of St. Louis.

We cannot review the action of the circuit court in finding the facts which it did find and refusing to find the facts which it was asked to find and did not find. We can only inquire whether the facts found are sufficient to support the judgment. The "defendants' refused declarations of law" do not appear to have been based upon the facts found by the court, but upon the defendants' proposed findings of fact, which were rejected by the court. These "refused declarations of law" contained mixed questions of law and fact; and where such questions are submitted to the court in a trial without a jury, this court will not, on a writ of error, review such questions, any more than it will pure questions of fact.

The question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi River, extends to the middle thread of the stream, or only to the water's edge, is a question in regard to a rule of property, which is governed by the local law of Illinois. *Barney* v. *Keokuk*, 94 U. S. 324, 338 [24: 224, 228]; *St. Louis* v. *Myers*, 113 U. S. 566 [28: 1131]; *Packer* v. *Bird*, 137 U. S. 661 [34: 819]. In *Barney* v. *Keokuk* it is said that if the States "choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections."

The Supreme Court of Illinois has established and steadily maintained, as a rule of property, that the fee of the riparian owner of lands in Illinois bordering on the Mississippi River extends to the middle line of the main channel of that river. *Middleton* v. *Pritchard*, 4 Ill. 510; *Braxon* v. *Bressler*, 64 Ill. 488; *Houck* v. *Yates*, 82 Ill. 179; *Cobb* v. *Lavalle*, 89 Ill. 331; *Lavalle* v. *Strobel*, 89 Ill. 370; *Washington Ice Co.* v. *Shortall*, 101 Ill. 46; *Brooklyn* v. *Smith*, 104 Ill. 429, 438; *Trustees of Schools* v. *Schroll*, 120 Ill. 509, 518, 519; *Buttenuth* v. *St. Louis Bridge Company*, 123 Ill. 535, 550.

The findings of fact by the court make no specific reference to a deed dated December 28, 1873, from Augustus A. Blumenthal and wife to the plaintiff and others, the substance of which is set forth in the bill of exceptions, but state merely that Blumenthal acquired by deeds the title in fee to surveys 149 to 156, and that the plaintiff acquired from Blumenthal "his said title to said land prior to the commencement of this suit."

---

to the said possession of Blumenthal prior to the commencement of this action. It appeared that between 1814 and 1850 the Mississippi River in front of the property receded in a westwardly direction, so that surveys 149 to 156, inclusive, gained forty acres of ground, and that from 1850 to the present time the river has encroached on the premises so that the same have lost one hundred acres of ground, the net loss being sixty acres of ground.

It appeared that an approved survey of Arsenal, then Quarantine, Island, was made by William H. Cozzens, in 1853, under the instructions of the U. S. surveyor-general; also, that said island was assigned by the Secretary of the Interior to the St. Louis public schools, in 1863 and 1864. The first assignment bears date February 10, 1863, and covers 109.92 acres of the island. The second assignment is dated September 8, 1864, and conveys 9.65 acres. The two assignments embrace the entire island, which contained 119.57 acres; also, that said island was sold and conveyed by the public schools for the sum of $32,000 to the City of St. Louis, in 1866; also, that surveys of the island were made in 1853, 1863, 1881 and 1883, showing its location at these various periods. Witnesses were produced who had known the island as early as 1847. The island was originally in the City of St. Louis and State of Missouri, opposite the arsenal and west of the main channel of the river and of the centre thread of the river. It has moved south and westwardly. The change effected in the location of the island since 1847 has been gradual in its character, and has been caused by the action of the water of the river washing the head of the island and adding new ground to the foot thereof. The City of St. Louis has been in possession of the island from 1850 to the present time. The defendant Seeger occupies the island as the tenant of the City of St. Louis. He cultivates the land and resides thereon. Since 1847, Arsenal Island has always existed as an island in the Mississippi River.

The island existing at the commencement of this action is the same island that existed in 1847, except that its location had changed as above stated, and it had become attached to the Illinois shore, in the manner hereinafter stated. At no time had the island ceased to exist. Prior to 1874 the navigable channel of the Mississippi River was between Arsenal Island and the Illinois shore.

In 1874 boats commenced navigating between the island and the Missouri shore. In or about the years 1878 to 1882 the United States government caused to be constructed a stone dyke leading from the head of the island to the Illinois shore, and subsequently a dam south of the dyke, between the island and the Illinois shore. The effect of these structures has been to stop the flow of water at low water between the island and the Illinois shore, and, as a necessary result, land has been created connecting the island with the Illinois shore in front of the Prairie du Pont common fields. During the yearly high stage of high water the water flows between the island and the Illinois shore, and at the date of the trial—July 5, 1888—it was so flowing.

Defendants' Refused Declarations of Law.

1. The court declares the law to be, that, under the facts in this cause, the plaintiff has shown no title to the premises known as Arsenal Island at and prior to the commencement of this action, and the judgment, therefore, must be for the defendants.

2. The court declares the law to be, that, under the facts in this cause, the plaintiff has exhibited no title to the bed of the Mississippi River beyond low-water mark in front of surveys 149 to 156, inclusive, of the common fields of Prairie du Pont.

3. The court declares the law to be, that, under the facts in this cause, Arsenal Island is not an accretion to plaintiff's land and the plaintiff has no claim to the ownership of said island or any part thereof under the law of accretion.

4. The court declares the law to be, that the title to Arsenal Island held by the City of St. Louis under the United States, and the possession of said premises by said defendant, extending from 1850 to

The defendant, however, refers to the deed of December 23, 1873, and relies upon the fact that the description of the premises contained in it describes the line between surveys 148 and 149 as running north 33¼ degrees west, 142.51 chains "to the present bank of the Mississippi River," thence along the extended line between surveys 148 and 149, [243] north 33¼ degrees west, "to low-water mark of the Mississippi River," and "thence down to the extended line between surveys" 156 and 157. The description further says: "The tract hereby conveyed containing 500 acres, more or less; together with all rights as riparian owner to the accretion or sand-bar lying northwestwardly and between the extended lines of said land herein described, situated in the County of St. Clair and State of Illinois." The deed also describes the property conveyed as "being the northwestern part of surveys numbered" 149 to 156, both inclusive, in the Prairie du Pont common fields.

The contention of the defendant is, that this deed did not convey to the grantees the fee of the bed of the river beyond low-water mark. But we think this contention is erroneous. In construing the deed, all the words of the description must be given effect, if possible. The property conveyed is described as "the northwestern part of surveys" numbered 149 to 156. This makes it impossible that the grantor should retain the ownership of any part of the surveys northwest of that which he conveyed to his grantees. Again, the description, after saying "to low-water mark of the Mississippi River," does not say "thence down low-water mark to the extended line between surveys" 156 and 157, but says only "thence down to the extended line between surveys" 156 and 157. The word "down" properly means down the river. As was said in *St. Clair County* v. *Lovingston*, 90 U. S. 23 Wall. 46, 64 [23: 59, 62], "where the calls in a conveyance of land are for two corners at, in or on a stream or its bank, and there is an intermediate line extending from one such corner to another, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." Here the next preceding call was a point at "low-water mark of the Mississippi River," and the next call was an intermediate line "down to the extended line between surveys" 156 and 157, without specifying whether it was down the river generally or down the line of low-water mark. This description made the river the boundary of the surveys on their northwestern ends, although the termination of the last preceding call was at low-water mark of the river. The river always had been the [244] boundary of the surveys on their northwestern ends; and there is nothing to show that the parties to the deed intended to make anything but the river the boundary at the northwestern end of what the deed conveyed.

It is plain that the fee of Blumenthal in the surveys extended to the middle of the river; and the contention of the defendant is, that Blumenthal, instead of conveying by the deed all the land which he owned on the northwestern end of the surveys, conveyed only to low-water mark. This would be repugnant to that clause of the description

---

the present time, have not been devested by the movement of the island in the Mississippi River.

5. The court declares the law to be, that the deed of Augustus A. Blumenthal and wife to Edward Rutz and others, introduced in evidence, did not convey title to the bed of the Mississippi River beyond low-water mark in front of surveys 149 to 156, inclusive, of the common fields of Prairie du Pont, except to the accretion or sand-bar lying northwestwardly and between the extended lines of said surveys.

6. The court declares the law to be, that if the property known as Arsenal Island was granted by the United States to the public schools of the City of St. Louis, and that at the time of such grant the same was an island in the Mississippi River situate in the State of Missouri, then the ownership of accretions attaching themselves to such island while said island remained in said State is governed by the laws of the State of Missouri; and if said island was situated entirely up-stream a mile or two miles north of the northernmost point of land of the plaintiff fronting on the Mississippi River, and if accretions thereupon formed at the lower or down-stream end of said island in said State until they reached a point opposite to or in front of the river front of the plaintiff's land, or between the extended lines of his surveys 149 to 156 described in the declaration, such accretions became and were the property of the owner of the island shore to which they had become attached, and the title of such owner is not devested by the fact that the navigable channel of the Mississippi River changed its course so as to run between said island and the eastern shore of the State of Missouri, and the further fact that, by means of a dyke and a dam run out from the east shore of the Mississippi River (the Illinois shore) said island has become attached to the Illinois shore, and the intervening space has been filled up by deposits of mud, so that, except in high stages of water, there is no water running between said island and the Illinois shore of said river.

7. The court declares the law to be, that if the current of the Mississippi River undermined the west shore or bank of the land of the plaintiff or of his grantor, Blumenthal, fronting on the Mississippi River, and that by reason thereof perceptible pieces of the shores and banks of said land fell into the river and were washed away, whereby the bed of the river was changed, thereby the west boundary line of the land of the plaintiff or of his grantor changed accordingly, and to correspond with the changes in the bed and centre thread of said river opposite said land.

8. The court declares the law to be, that the boundary line between the States of Illinois and Missouri is the centre thread of the Mississippi River.

9. The court declares the law to be, that if accretions formed and attached themselves to the down-stream end of Arsenal Island, in the State of Missouri, and thereafter other accretions attached themselves to the first-mentioned accretions on the east side of the island, toward the Illinois shore, the last-mentioned accretions belong to the owner of the first accretions, notwithstanding they extended eastwardly of the centre thread of the river.

10. The court declares the law to be, that if a sand-bar extended southwestwardly from the foot of Arsenal Island, in the State of Missouri, and subsequently accretions attached themselves to the east side of said sand-bar and extended eastwardly across the centre thread of the river into the State of Illinois, the owner of the island was and is the owner of said sand-bar and said accretions.

11. The court declares the law to be, that if the current of the Mississippi River gradually undermined the west shore or bank of the land of the plaintiff or of his grantor, Blumenthal, fronting on the Mississippi River, and that by reason thereof perceptible pieces of the shores and banks of said land fell into the river and were washed away, whereby the bed of the river was gradually changed, thereby the western boundary line of the land of the plaintiff or said grantor changed accordingly to correspond with the changes in the bed and centre thread of the river opposite said land.

which conveys "the northwestern part of surveys" 149 to 156. Then we have the description "together with all rights as riparian owner to the accretion or sand-bar lying northwestwardly and between the extended lines of said land herein described, situated in the County of St. Clair and State of Illinois." These words show that the grantor intended to convey all his riparian rights appurtenant to the surveys, "between the extended lines" of them, in the County of St. Clair; and it cannot be held, consistently with the terms of the deed, that he intended to retain to himself any interest in the fee of the bed of the river. The accretion or sand-bar mentioned in the deed evidently existed at its date, and it was the nucleus of the bar which subsequently developed into the land in dispute. If the boundary terminated at low-water mark on the margin of the river it could not have included all the rights of the grantor as riparian owner to the accretion or sand-bar lying northwestwardly in the river opposite the surveys. *Piper* v. *Connolly*, 108 Ill. 646.

The finding by the court that the plaintiff acquired from Blumenthal, prior to the commencement of the suit, Blumenthal's title to the premises in question, which title was one in fee to such premises, acquired by him by deeds from the parties then in their actual possession as owners thereof, amounts to a finding that the accretion or sand-bar mentioned in the deed of December 23, 1873, was the same sand-bar which first appeared earlier in 1873, and which by subsequent accretions developed into the land in controversy. This finding is conclusive to show that the land conveyed by Blumenthal was not limited by the line of low-water mark on the river. It does not appear that Blumenthal or anyone claiming under him asserted any interest in the land after the making of the deed. *Jefferis* v. *East Omaha Land Co.* 134 U. S. 178, 197 [33: 872, 879].

The next question concerns Arsenal Island. By findings of fact 6 to 9 the sudden and perceptible loss of land on the premises conveyed to the plaintiff, which was visible in its progress, did not deprive Blumenthal, as riparian proprietor, of his fee in the submerged land, nor in any manner change the boundaries of the surveys on the river front, as they existed in 1865, when the land commenced to be washed away.

It is contended by the defendant, not only that the plaintiff never had any title to the bed of the river, but that, when the dry land of which he was in possession was swept away by the river and ceased to exist, his ownership of that land also ceased to exist. It is laid down, however, by all the authorities, that, if the bed of the stream changes imperceptibly by the gradual washing away of the banks, the line of the land bordering upon it changes with it; but that, if the change is by reason of a freshet, and occurs suddenly, the line remains as it was originally. This principle is recognized by the Supreme Court of Illinois, in *Buttenuth* v. *St. Louis Bridge Company*, 123 Ill. 535, 546, in these words: "The law, as stated by law writers, and in the adjudged cases, seems to be, that where a river is declared to be the boundary between States, although it may change imperceptibly, from natural causes, the river, as it runs, continues to be the boundary. But if the river should suddenly change its course, or desert the original channel, the rule of law is, the boundary remains in the middle of the deserted river bed." It is laid down by all the authorities that, if an island or dry land forms upon that part of the bed of a river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him with the new deposits thereon.

It may be asked, pertinently, What has become of the riparian rights of the plaintiff on the river, if his title to the land in dispute is not sustained? It appears by the findings that the greater part of the so-called Arsenal Island, which is now embraced within the boundaries of the land sought to be recovered by the plaintiff, is located upon the site of the dry land of surveys 149 to 156, as the same existed from 1850 to 1865, and that the residue thereof, being about one eighth of the entire width of the island, is located upon the bed of the Mississippi River as it then existed, and eastwardly of the thread or middle line of the river; that between 1865 and 1873 the river front of the surveys was washed away to the extent mentioned in finding 8, and was further washed away thereafter until 1884; and that such washing away did not take place slowly and imperceptibly, but was rapid and perceptible in its progress, and the particulars are given in finding 9. The plaintiff was a riparian proprietor on the river. If his title to the land in question is not sustained, he is no longer such riparian proprietor and is cut off from access to the river. Among his rights as a riparian owner are access to the navigable part of the river from the front of his land, and the right to make a landing, wharf or pier for his own use or the use of the public. *Dutton* v. *Strong*, 66 U. S. 1 Black, 23 [17: 29]; *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. 7 Wall. 272 [19: 74]; *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497, 504 [19: 984, 986]. [246

No act has been done, or negligence committed, by the plaintiff or his grantor which occasioned any loss of the land or any transfer of the title to it, either to the State of Illinois or to the City of St. Louis. Finding 10 shows that the washing away of the bank of the surveys was caused by dykes built by the City of St. Louis on the western side of the river, which caused its current to flow to and against the eastern shore. When land was formed again on the place where the plaintiff's land had been washed away, it became the property of the plaintiff, and, although the land thus newly formed extended a short distance into the old bed of the river beyond the former shore line, such additional formation belonged to the plaintiff as a deposit on that part of the bed of the river which was owned by him in fee, and not to the State of Illinois or to any third party. Otherwise, the plaintiff would be cut off [247

without his fault from the river front and from his riparian rights.

When the United States government, from 1876 to 1878, as found in finding 19, built the dyke from the eastern shore of the river to the bar or island as it then existed, above the north line of the plaintiff's land, the result was, that the space or channel of water between the bar or island as it had formed in front of the river bank of the plaintiff's land, and the eastern bank of the river as it existed when the cutting away of the plaintiff's land ceased, was filled up, so that by 1884 it had become dry land, and it has since continued to be such on the front of the plaintiff's land out to the western side of the island or land in question. The fact that more land has thus been restored to the plaintiff than was cut away cannot deprive him of his riparian right or of his access to the river. The State of Illinois does not claim any part of such land, but concedes to the riparian proprietor the bed of the river where the land formed.

It is found by findings 17 and 18 that the bars which formed below and were joined to the foot of Arsenal Island were not formed by accumulations of soil washed up against its lower end, but by the deposit, in times of flood, of soil and sediment on the bed of the river below the island; that, before the island was washed away, the main and navigable channel of the river was eastwardly of the island, but after the bar was formed lower down the river in front of the plaintiff's land, the main and navigable channel of the river was removed to the west side of the bar or island, and since that time boats navigating the river have not run between the bar or island and the eastern shore of the river. It therefore appears that the dry land in question was formed on that part of the bed of the river which was owned in fee by the plaintiff, or his grantor, as the riparian owner, and that their rights were governed by the established rules of law in force in Illinois. It is well settled that the owner in fee of the bed of a river, or other submerged land, is the owner of any bar, island or dry land which subsequently may be formed thereon. *Mulry* v. *Norton*, 100 N. Y. 424, 1 Cent. Rep. 748.

[248] It is shown by the findings of the court that the space which was covered by water between the front of the plaintiff's dry land and the bar or island, when the latter first was formed, has since been so filled up by deposits from the river that by the year 1884 it was all dry land on the river front of the plaintiff's land out to the western side of the land in question, except in high water. Therefore, when the bar or island formed in front of Blumenthal's land, within the boundaries over which such land extended prior to 1865, the bar or island which was so formed continued to be the land of Blumenthal, notwithstanding a part of it extended farther westward than the boundary of his dry land in 1865. It was formed upon that part of the bed of the river which was owned in fee by Blumenthal and the plaintiff, and continued in such ownership after it became dry land.

The land described in the declaration is on the eastern side of the Mississippi River, in the County of St. Clair and State of Illinois. The land to which the City of St. Louis acquired title was on the western side of the Mississippi River, more than a mile higher up the river, and situated in the City of St. Louis, in the State of Missouri. The only possible claim of the City of St. Louis to the land is based on the Act of June 13, 1812 (2 Stat. 748), and on section 2 of the Act of May 26, 1824 (4 Stat. 66), and on section 2 of the Act of January 27, 1831 (4 Stat. 435). By the terms of those Acts, the Village of St. Louis was authorized only to acquire title to lands within said village, in the Territory (or State) of Missouri; and it obtained no right thereby to acquire title to land in the State of Illinois.

The Enabling Act of April 18, 1818 (3 Stat. 429, § 2), under which Illinois was organized as a State and admitted into the Union, made "the middle of the Mississippi River" the western boundary of the State. The Enabling Act of March 6, 1820 (3 Stat. 545, § 2), under which Missouri was organized as a State and admitted into the Union, made the "middle of the main channel of the Mississippi River" the eastern boundary of Missouri, so far as its boundary line was coterminous with the western boundary of Illinois. It has been held by the Supreme Court of Illinois (*Buttenuth* v. *St. Louis Bridge Co.* 123 Ill. 535) that these two Enabling Acts are to be construed as *in pari materia*, and that the common boundary line between Missouri and Illinois is the "middle of the main channel of the Mississippi River." [24 The "middle of the main channel of the Mississippi" has been constantly treated as the eastern boundary of the State of Missouri. *Jones* v. *Soulard*, 65 U. S. 24 How. 41 [16: 604]; *The Schools* v. *Risley*, 77 U. S. 10 Wall. 91 [19: 850].

It follows that an island in the Mississippi River, in its course between Illinois and Missouri, must lie wholly in one of those States or the other, because the main channel of the river must run on one side or the other of such island. Arsenal Island, to which the City of St. Louis acquired title, was on the Missouri side of the river in 1863 and 1864, and wholly within that City. The land described in the declaration was never in the City of St. Louis or in the State of Missouri. This follows from the facts stated in finding 18.

The title of the St. Louis public schools to the island is set forth in finding 13, and was acquired in 1863 and 1864, under the Cozzens survey of 1863, mentioned in finding 11. By finding 14, the title of the St. Louis public schools in the island was conveyed, in 1866, to the City of St. Louis by a deed which is stated in such finding to have described it as situated "in the County of St. Louis and State of Missouri." The land described in the declaration, a mile lower down the river and situated in the State of Illinois, on the other side of the river, is manifestly not the land to which the City of St. Louis so acquired title. Dry land which should again form on the site where Arsenal

Island existed when it was surveyed in 1868 would be the property of the City of St. Louis. *Mulry* v. *Norton*, 100 N. Y. 424, 1 Cent. Rep. 748. In such event, could the City hold both tracts of land, a mile distant from each other? Of course it could not.

The City of St. Louis, by virtue of its original title to the island, is still the owner in fee of the submerged site where the island existed before it was washed away. As its right, under the Acts referred to, to acquire land was limited to land situated within the boundaries of the City and on the west side of the middle of the river, it cannot acquire, indirectly and by implication or construction of law, land which it was not authorized to acquire directly and in pursuance of law. Nor is the land described in the declaration an accretion to the land in Missouri which the City of St. Louis acquired, a mile higher up the river, because the middle of the main channel of the river is the eastern boundary of the State of Missouri, and the land described in the declaration is east of the middle of the main channel of the river. The title to land acquired by accretion is a title acquired under the operation of the law of the State, which each State determines for itself. *Barney* v. *Keokuk*, 94 U. S. 324 [24: 224].

As the law of Illinois confers upon the owner of land in that State which is bounded by, or fronts on, the Mississippi River, the title in fee to the bed of the river to the middle thereof, or so far as the boundary of the State extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of the middle of its width. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the State of Missouri, to extend his ownership, by mere accretion, to land situated in the State of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that State.

We must not be understood as implying, that if an island in the Mississippi River remains stable in position, while the main channel of the river changes from one side of the island to the other, the title to the island would change, because it might be at one time on one side and at another time on the other side of the boundary between two States.

The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors. *Mulry* v. *Norton*, 100 N. Y. 424, 436, 437, 1 Cent. Rep. 748. It appears from the map, 'Exhibit B,' that the so-called Arsenal Island extended as far down the river as is shown on that map, which was made from surveys in 1873 and 1884; and if the plaintiff thereby has lost such newly formed land and been deprived of access to the river in front of his surveys, then all the riparian proprietors down the river, as far as the bars have formed or may form hereafter in front of their land, must lose their titles and surrender them to the City of St. Louis, as a part of Arsenal Island. Such rapid changes in these alluvial formations cannot transfer title from one proprietor to another.

This Arsenal Island was the subject of the case of *Carrick* v. *Lamar*, 116 U. S. 423 [29: 677], and in the opinion in that case is described as "a mere moving mass of alluvial deposits." To such a movable island, traveling for more than a mile and from one State to another, the law of title by accretion can have no application, for its progress is not imperceptible, in a legal sense.

As it is found, by finding 16, that the bar formed at the foot of the island in the flood of a single year extended down the river for the distance of a quarter of a mile or more, in front of the surveys in question, and such bar subsequently appeared as a part of the so-called Arsenal Island, the question arises as to when the transfer of it passed, if it did pass, from the plaintiff to the City of St. Louis. Whenever it occurred, whether when the sediment first commenced to form a deposit on that part of the bed of the river, or whether when it formed a bar which, though still submerged, could be discerned by soundings, or whether when it came so near to the surface that its extent could be discerned by navigators, or whether when it arose above the surface and became dry land, there must have been, in order to maintain the contention of the defendant, an instantaneous transfer of a quarter of a mile of land from the plaintiff to the City of St. Louis, at one and the same moment of time. Such a transfer was not a title by accretion, within the meaning of the law on that subject.

Judgment affirmed.

WILSON AMES, *Plff. in Err.*, [306

v.

ROBERT MOIR ET AL.

(See S. C. Reporter's ed. 306-312.)

Fraud, as used in the Bankrupt Act—question of fact—contract of sale of goods, when debt created—fraud in fact, what amounts to.

1. "Fraud," in the Act of Congress defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy, means positive fraud or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality.

2. Whether a debt was created by the fraud of the bankrupt so as not to be discharged in bankruptcy is a question of fact upon which the judgment of the court below is conclusive; the sufficiency of the evidence to establish fraud is a question for the jury.

3. A writing executed by one to another stating that the former has bought of the latter certain highwines on condition that he can call for them on a day named, or, if not called for, the seller has the privilege of delivering on a subsequent day, does not create a debt in favor of the seller until, upon such call, he delivers or offers to deliver to the buyer the highwines at the price stipulated, or until on failure of the buyer to make the call the seller delivers or tenders the

highwines on the day fixed therefor and the buyer fails to pay for them.

Where one purchases goods at an agreed price to be delivered when called for, delivery and payment are concurrent acts: and if the purchaser subsequently calls for the goods with the knowledge that he is then insolvent and with the purpose of getting possession of the goods and shipping them out of the State without paying for them and receives them with that preconceived intent, he is guilty of fraud in fact involving moral turpitude or intentional wrong and is not protected from the claim of the seller by his subsequent discharge in bankruptcy.

[No. 1404.]

Submitted Jan. 12, 1891. Decided Feb. 2, 1891.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming a judgment of the Appellate Court of Illinois, which affirmed a judgment of the Superior Court of Cook County, Illinois, in favor of plaintiffs in an action to recover the value of highwines. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

Wilson Ames, the plaintiff in error, a rectifier and wholesale dealer in whiskies and highwines in the City of Chicago, executed [307] and delivered to Robert Moir & Co., distillers and merchants at Oquawka, Illinois, the following writing, bearing date June 9, 1870: "I have this day bought of Robert Moir & Co. one hundred (100) barrels highwines 'iron bound,' at one dollar seven cents ($1.07) per proof gallon. The conditions of sale are as follows: The buyer can call from 1st July to 20th of same month by giving three days' notice, and if not called for by the 20th July the seller has the privilege of delivering up to the end of July by giving three days' notice; to be delivered in fifty-barrel lots. To insure the fulfillment of this contract a margin of three hundred dollars will be put up by both parties."

On the 15th of July, 1870, Ames made a call upon Phillips & Carmichael, brokers for Robert Moir & Co., in the City of Chicago, for the highwines mentioned in this writing, deliverable on the 18th instant. Shortly before this call the bonded warehouse of Moir & Co. was burned, destroying the wines from which they expected to meet any call by Ames. This made it necessary for the brokers to buy in the Chicago market, on account of their principal, enough highwines to meet the demand of Ames. They obtained for that purpose fifty barrels of such wines from Conklin & Bro. and fifty from Lynch & Co., for delivery on the 18th at Ames' place of business in Chicago; and they were so delivered. The delivery was completed about six o'clock in the afternoon of that day.

In the opinion of the Supreme Court of Illinois in this case (130 Ill. 582) it is said: "After the highwines had been delivered late in the afternoon of July 18th, Ames absented himself from his place of business, and could not be found by the agents of Moir & Co. to make a demand of payment for the highwines; they directed the porter in charge of Ames' warehouse to take care of the goods until morning, when they would call for the pay. When the agents called in the morning Ames was nowhere to be found, and they found that he had shipped fifty barrels of the highwines for New York, and the remaining fifty barrels were loaded in cars ready for shipment. Phillips & Carmichael immediately replevied the fifty barrels which were found in cars in Chicago, and went on to [308] Detroit, Michigan, where they overhauled the other fifty barrels, and they were also replevied. Phillips & Carmichael sold the wines thus replevied to Shufeldt & Co. at ninety-seven cents per gallon, the market price at that time, and deposited the proceeds in bank to await the result of the replevin suits. It appears that between the time the wines were delivered, late in the afternoon of July 18th, and the time the agents reached Ames' store next morning, Ames had sent all the wines to the Michigan Central Depot, shipped them, obtained bills of lading, which were attached to drafts on the consignee in New York, one for $2,800 and the other for $2,900, which drafts he discounted at the National Bank of Commerce on the security of the bills of lading. The replevin suits were defended by the National Bank of Commerce, and the defense interposed, that the bank was the pledgee of the wines from Ames in good faith, and without notice of Moir & Co's rights, was in the end sustained (*Michigan Cent. R. Co.* v. *Phillips*, 60 Ill. 190), and the money realized on the sale of the highwines to Shufeldt & Co. was turned over to the National Bank of Commerce in payment of the drafts."

It should be stated that a judgment by confession was taken against Ames in favor of a former partner, on which execution was issued, and under which the sheriff took possession of and closed up Ames' store. As soon as the levy was made, Ames went to his bank and checked against the proceeds of the drafts that were discounted on the security of the bills of lading in favor of a creditor whom he identified to the officers of the bank as the payee of the checks.

The present suit was brought by the defendants in error in the Superior Court of Cook County, Illinois, to recover from Ames the value of the highwines taken to his place of business on the 18th of July, 1870, for delivery upon payment of the price. One of his defenses—the only one of which this court can take cognizance—was that he was discharged September 13, 1872, by the District Court of the United States for the Northern District of New York, sitting in bankruptcy, from all debts and claims which, [3 by the Act of Congress, were "made provable against his estate, and which existed on the 28th day of March, 1872, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said Act excepted from the operation of a discharge in bankruptcy."

There was a verdict and judgment in favor of the plaintiffs. That judgment was affirmed in the appellate court, and the judgment of the latter court was affirmed by the Supreme Court of Illinois. *Ames* v. *Moir*, 130 Ill. 582. In respect to the defense based upon the discharge in bankruptcy, the Supreme Court of the State said: "It is also

contended that Ames' discharge in bankruptcy was a bar to the action. Section 5117 of the Bankrupt Act is as follows: 'No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy.' Whether the debt in this case was created by the fraud of Ames, was a question of fact upon which the judgment of the appellate court is conclusive. But it is said incompetent evidence was admitted upon this question. No evidence was introduced except such as tended to establish fraud on behalf of Ames, and the sufficiency of the evidence was a question for the jury. But it is said the debt was created when the contract was executed, June 9, 1870, and up to this time there was no fraud on the part of Ames. The debt was not entirely created until Ames induced the agents of Moir & Co. to place the wines in his possession, and if he obtained the possession by fraud, with the intent to ship the goods out of the country, and thus defeat the lien of the vendors, those were facts from which the jury might infer fraud within the meaning of the Bankrupt Law. *Darling* v. *Woodward*, 54 Vt. 101. It is apparent from the evidence that Ames had no intention of paying for the wines when he called for them on the 15th day of July. His object seemed to be to get possession and control of the wines, and convert them to his own use without payment; this the evidence tends to show he did; and thus the debt was created."

Messrs. **John G. Reid** and *William H. Barnum*, for plaintiff in error:

The verdict and judgment are contrary to law and the evidence, and the Supreme Court of the State of Illinois erred in affirming the same.

"Fraud," in United States Bankrupt Act, defined.

§§ 5018, 5067, 5068, 5117, U. S. Rev. Stat.; *Neal* v. *Clark*, 95 U. S. 704 (24:586); *Pierce* v. *Shippee*, 90 Ill. 372; *Hennequin* v. *Clews*, 77 N. Y. 427, 111 U. S. 676 (28: 565); *Palmer* v. *Hussey*, 87 N. Y. 303; *Cronan* v. *Cotting*, 104 Mass. 247; 2 Parsons, Cont. (5th ed.) 773; *Blow* v. *Gage*, 44 Ill. 208; *Wood* v. *Clark*, 121 Ill. 359; *Schroeder* v. *Walsh*, 120 Ill. 403; *Morris* v. *Tillson*, 81 Ill. 607; *Bowden* v. *Bowden*, 75 Ill. 143; Cooley, Torts (ed. 1879) 476, 477; *Mey* v. *Gulliman*, 105 Ill. 285; Bump, Fraud. Conv. (3d ed.) 19, 20, 507; *Hide & Leather Nat. Bank* v. *West*, 20 Ill. App. 61; *Hammond* v. *Noble*, 57 Vt. 193; *Noble* v. *Hammond*, 129 U. S. 65 (32: 621); *Wolf* v. *Stix*, 99 U. S. 1 (25: 309).

"Debt created by the fraud of the bankrupt," in Bankrupt Act, defined, and what is a "debt," and when and how it is created.

Fisher v. *Consequa*, 2 Wash. C. C. 382; *Choteau* v. *Jones*, 11 Ill. 318; Blumenstiel, Bankruptcy, 540; *United States* v. *Rob Roy*, 13 Nat. Bankr. Reg. 235; *Jones* v. *Knox*, 8 Nat. Bankr. Reg. 559; *Re Pitt*, 14 Nat. Bankr. Reg. 59; *Warner* v. *Cronkhite*, 18 Nat. Bankr. Reg. 52; *Shuman* v. *Strauss*, 10 Nat. Bankr. Reg. 300; *Re Williams*, 11 Nat. Bankr. Reg. 145; *Brown* v. *Broach*, 16 Nat. Bankr. Reg. 296, 42 Miss. 536; *Pierce* v. *Shippee*, 90 Ill. 372; Bump, Bankruptcy (10th ed.) 742; *Palmer* v. *Preston*, 45 Vt. 156; *Springfield* v. *Edwards*, 84 Ill. 627, 632, 633; *Law* v. *People*, 87 Ill. 336, 393, 398; *Prince* v. *Quincy*, 105 Ill. 138, 216; *Mattingly* v. *Wulke*, 2 Ill. App. 169; *Erie's Appeal*, 91 Pa. 398; *Wallace* v. *San José*, 29 Cal. 180; *Niles Water Works* v. *Niles*, 59 Mich. 311; *State* v. *Atlantic City*, 49 N. J. L. 558, 8 Cent. Rep. 605; *Culbertson* v. *Fulton*, 127 Ill. 30, 36; *Cronan* v. *Cotting*, 104 Mass. 247; *Hide & Leather Nat. Bank* v. *West*, 20 Ill. App. 61.

Mr. **James K. Edsall**, for defendants in error:

In a case of this character it is the proper practice for the plaintiff to sue or declare on the contract, and when the discharge in bankruptcy is pleaded, reply, showing that the debt was created by fraud of the defendant.

Stewart v. *Emerson*, 52 N. H. 301; *Classen* v. *Schoenemann*, 80 Ill. 304; *Stokes* v. *Mason*, 10 R. I. 261; *Brodnax* v. *Bradford*, 50 Ala. 270; *Strang* v. *Bradner*, 114 U. S. 555, 560 (29: 248, 249).

In order to bring the case within the purview of section 5117 of the Bankruptcy Act it is only required that the debt should be created by fraud.

U. S. Rev. Stat. § 5117; *Hinckley* v. *Lewis*, 45 Ill. 327, 328; *Mathews* v. *Cowan*, 59 Ill. 342, 347.

Debts created either by fraud or embezzlement are not necessarily or exclusively based on contract.

Stokes v. *Mason*, 12 Nat. Bankr. Reg. 498; *Stokes* v. *Mason*, 10 R. I. 261.

The vendors had the right to retain the property as their own on the refusal of the vendee to pay the contract price.

Benj. Sales (2d ed.) 730, § 788; *Dustan* v. *McAndrew*, 44 N. Y. 72; *Hayden* v. *Demets*, 53 N. Y. 426; *Bagley* v. *Findlay*, 82 Ill. 524.

The fraudulent disposition and appropriation of the highwines was sufficient to obviate the discharge under the Bankrupt Law.

Neal v. *Clark*, 95 U. S. 704, 709 (24: 586, 587); 1 Abbott, Law Dict. 421; *Fagnan* v. *Knox*, 8 Jones & S. 41; Whart. Crim. Law, §§ 1, 1946.

A plea averring fraud in the creation of the debt in general terms is sufficient.

Stewart v. *Emerson*, 52 N. H. 301; *Stokes* v. *Mason*, 10 R. I. 261.

This court will not review on appeal or writ of error a question not raised below in the trial or appellate court.

Keyser v. *Hitz*, 133 U. S. 138 (33: 531).

The facts as found by the jury, and affirmed in the appellate court, were conclusive in the State Supreme Court.

Ames v. *Moir*, 130 Ill. 582, 593.

If finding of facts by a jury, or by the court below, is conclusive in the State Supreme Court, the same will be held conclusive in the Supreme Court of the United States.

Republican River Bridge Co. v. *Kansas Pac. R. Co.* 92 U. S. 316, 317 (23: 515).

Mr. Justice **Harlan** delivered the opinion of the court: [3

The only question for the determination of this court is whether Ames' discharge in bankruptcy was a bar to the present action; [3 and that question depends upon the inquiry whether the defendant is sued on account of a debt created by fraud within the meaning

of the Bankruptcy Act. It is the settled doctrine of this court that "fraud" in the Act of Congress defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy means "positive fraud, or fraud in fact involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality." *Neal* v. *Clark*, 95 U. S. 704, 709 [24: 586, 587]; *Wolf* v. *Stix*, 99 U. S. 1, 7 [25: 309, 312]; *Henneqnin* v. *Clews*, 111 U. S. 676, 682 [28: 565, 568]; *Strang* v. *Bradner*, 114 U. S. 555, 559 [29: 248, 249]; *Noble* v. *Hammond*, 129 U. S. 65, 69 [32: 621, 623]; *Upshur* v. *Briscoe*, 138 U. S. 365 [34: 931].

The argument in behalf of the defendant proceeds mainly upon the ground that the claim or debt, on account of which he is sued, was created by the writing of June 9, 1870; and as that writing was executed in good faith, nothing done by him at a subsequent date, for the purpose of obtaining possession of the highwines for which he contracted, could be proved under the issue as to whether the claim or debt was created by fraud. This view of the transaction is inadmissible. The writing referred to did not, in itself, create a debt within the meaning of the Bankruptcy Act. It could not become effective as an instrument creating a debt in favor of plaintiffs until, pursuant to a call by defendant prior to July 20, they delivered, or offered to deliver, to him, the highwines he agreed to take at the price stipulated, or—the defendant failing to make a call for them within the time limited for his doing so—until the highwines were delivered, or tendered, to him by the plaintiffs, after the 20th and before the end of the month of July. When the plaintiffs delivered, or offered to deliver, the highwines at the defendant's place of business on the 18th of July, in fulfillment of the agreement of June 9, and defendant failed to pay for them, then, and not before, was a debt created within the meaning of the Bankrupcty Act. Until the 18th of July, or, at least, until the defendant took possession, without making payment, of the highwines that were left at his place of business in discharge of the plaintiffs' [2] obligation to deliver upon three days' notice, there was no debt for which the plaintiffs could maintain an action against the defendant, or which would have been provable against his estate in bankruptcy. If the month of July, 1870, had passed without any call by the defendant for the highwines, and without the plaintiffs exercising the privilege they reserved of delivering or offering to deliver before the end of that month, the writing of June 9, 1870, would have been of no value to anyone; which fact shows that that instrument did not, in itself, create a debt, and that no debt could be created by it without the exercise by one or the other of the parties of the privilege reserved to each respectively.

The vital inquiry, therefore, is whether the defendant in making the call on the 15th day of July for the highwines, and in taking possession of them without payment on the 18th, and shipping them on the cars, committed such fraud, in fact, as involved moral turpitude or intentional wrong upon his part. As the jury was instructed that Ames' discharge in bankruptcy was a complete defense to the action unless it appeared, by a preponderance of evidence, that he was guilty of positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, it must be assumed that they found that in the creation of the debt in question he had committed fraud of that character. When the wines were delivered, Moir & Co. were entitled to payment. Delivery and payment were, substantially, concurrent acts. And if Ames made his call, with the knowledge that he was then insolvent, and with the purpose of getting possession of the wines and shipping them out of the State without paying for them according to the terms of the executory agreement of June 9, and received them with that preconceived intent,—and there was evidence that justified the jury in so finding,—he was guilty of fraud in fact, involving moral turpitude or intentional wrong, and is not protected against the claim of the plaintiffs by his discharge in bankruptcy. Such was the view taken by the court of original jurisdiction and by the Supreme Court of Illinois.

There is no error in the record in respect to the question of federal law arising in the case, and *the judgment is affirmed.*

WILLIAM H. ALEXANDER, *Plff. in Err.*, [353]
v.
UNITED STATES.

(See S. C. Reporter's ed. 353-360.)

Objection to method of impaneling jury—exception—threats of third persons against deceased, when admissible on trial for murder—communication to counsel, privileged—rule as to communication in furtherance of fraud or criminal purpose.

1. Where defendant made no objection to the method pursued by the court in impaneling a

---

NOTE.—*As to attorney and client; privileged communications between; when attorney will be compelled to testify; how long privilege continues,*—see *note* to Blackburn v. Crawford, 18:188.

As to confessions of accused, when evidence, see *note* to Hopt v. Utah, 28:262.

As to exception, when must be taken, to be available on review, see *note* to Phelps v. Mayer, 14:643.

As to what particularity in exceptions is necessary in order to a review in appellate court, see *note* to Moore v. Bank of Metropolis, 10:172.

What questions the United States Supreme Court will review on writ of error; bill of exceptions. See *note* to Parks v. Turner, 13:863.

The supreme court will not review the discretionary action of the court below. See *note* to Barrow v. Hill, 14:48.

As to jury, of what number; practice in regard to; illness or insanity of one; thirteen or eleven jurors; wrong person serving as juror by mistake,—see *note* to Silsby v. Foote, 14:394.

As to causes of challenge of jurors and their qualifications, see *note* to Clinton v. Englebrecht, 20:659.

As to discharge or withdrawal of juror before verdict; effect of,—see *note* to United States v. Perez, 6:165.

jury, at the time, nor until after conviction, when he made it a ground of motion for a new trial, this court will not regard the objection.

2. It is the duty of counsel seasonably to call the attention of the court to any error in impanneling the jury, in admitting testimony or in any other proceedings during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception.

3. On a trial for murder, where it is shown that another person beside the prisoner had armed himself and was hunting for the deceased, under the belief that the latter had eloped with his wife, the threats of such other person against the deceased and his declarations as to his purpose are admissible as a part of the *res gestæ*.

4. On a trial for murder the statement of the prisoner, made after the death of the one killed, to an attorney in the course of his employment as such by the accused, is privileged and inadmissible; neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege.

5. The rule that a communication to counsel made in furtherance of any criminal or fraudulent purpose is not privileged, does not apply to a case where the communication was made after the crime was committed and it was offered in evidence as an admission tending to show that defendant was concerned in the crime or as a statement contradictory to one he had made upon the stand; such rule is limited to cases where the party is tried for the crime in furtherance of which the communication was made.

6. On the trial of one accused of murdering his partner, his statement to his counsel that his partner was missing and that he had not heard from him, is privileged.

[No. 1309.]

Argued and Submitted Jan. 16, 1891. Decided Feb. 2, 1891.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment imposing a sentence of death upon the plaintiff in error for murder. *Reversed.*

Statement by *Mr. Justice* **Brown:**

This was a writ of error sued out under the sixth section of the Act of February 6, 1889 (25 Stat. 656), to review a judgment of the Circuit Court of the United States for the Western District of Arkansas, imposing a sentence of death upon the plaintiff in error for the murder of David C. Steadman "at the Creek Nation in the Indian country."

The plaintiff in error relied upon the following grounds for reversal:

1. That the court erred in its selection of the jury, in that the defendant was required to make his challenges without first knowing what challenges the government's attorney had made, and thus challenged two jurors, to wit, C. F. Needles and Samuel Lawrence, who were also challenged by the government, whereby he was deprived of two of his challenges contrary to law.

2. That the court erred in excluding the testimony offered by the defendant to prove threats to kill Steadman made by House and others, while they were hunting Steadman under the belief that he had seduced the wife of the said House, and was secreting himself with her in the neighborhood.

3. Because the court erred in admitting the testimony of J. G. Ralls as to confidential communications made to him as the attorney of the defendant.

Messrs. **A. H. Garland** and **H. J. May,** for plaintiff in error:

It was error of the court to require the appellant to exhaust two of his peremptory challenges upon G. E. Needles and Samuel Lawrence, who had already been challenged by the government.

United States v. *Marchant*, 25 U. S. 12 Wheat. 485 (6:700); *United States* v. *Shackelford*, 59 U. S. 18 How. 590 (15:495).

The court has power to make rules for transaction of its business, provided only those rules do not contravene the law of the land.

Fullerton v. *Bank of United States*, 26 U. S. 1 Pet. 604 (7:280); *Barry* v. *Randolph*, 3 Binn. 277; *Du Bois* v. *Turner*, 4 Yeates, 361; *Boas* v. *Nagle*, 3 Serg. & R. 253; *Risher* v. *Thomas*, 2 Mo. 98; *Brooks* v. *Boswell*, 34 Mo. 474; *Kennedy* v. *Cunningham*, 2 Met. (Ky.) 538.

The method of selecting the jury in this case contravenes the law of the land.

2 Bl. Com. bk. 4, p. 285; Forsythe, Trial by Jury, 191; Thompson & Merriam, Juries, 285.

A confidential communication is protected by law from disclosure in the trial of a cause.

Wheeler v. *Hill*, 16 Me. 329; *Brand* v. *Brand*, 39 How. Pr. 193; *Chirac* v. *Reinecker*, 24 U. S. 11 Wheat. 280 (6:474); *Andrews* v. *Simms*, 33 Ark. 771; Hageman, Priv. Com. §§ 3, 28; *Pearse* v. *Pearse*, 1 De G. & Sm. 28, 29; Taylor, Ev. (7th ed.) § 915; 1 Wharton, Ev. § 576.

This protection extends to every communication which the client makes to his legal adviser, for the purpose of professional advice or aid, upon the subject of his rights or liberties.

Greenl. Ev. § 240; *Hunt* v. *Blackburn*, 128 U. S. 464 (32: 488); *State* v. *Squire*, 1 Tyler (Vt.) 147; Bayerd's Peake, Law of Ev. Appendix, 121.

Oral communications are thus protected as well as written instruments.

Chant v. *Brown*, 9 Hare, 790; *Maxham* v. *Place*, 46 Vt. 434; *Higbee* v. *Dresser*, 103 Mass. 523; *Williams* v. *Fitch*, 18 N. Y. 550; *Britton* v. *Lorenze*, 45 N. Y. 571; *Orton* v. *McCord*, 33 Wis. 205; *Chahoon* v. *Com.* 21 Gratt. 823; *Jenkinson* v. *State*, 5 Blackf. 465.

It is not necessary that a fee be paid, or that a suit was or was not pending, to make the communications privileged.

Bacon v. *Frisbie*, 80 N. Y. 394.

The rule of privileged communications, as applied to attorney and client in civil matters, is substantially the same in criminal.

Rex v. *Smyth*, 5 Car. & P. 201, cited in Phillipps, Ev. (ed. 1859) 190; *Rex* v. *Hawkins*, Car. & K. 823; *Rex* v. *Dixon*, 3 Burr. 1687; *Anonymous*, 8 Mass. 370.

Where one communicated to a person who was accustomed to defend and advise criminals, although not admitted to practice, such communications were privileged.

Benedict v. *State*, 44 Ohio St. 679, 9 West. Rep. 425.

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, for defendant in error:

That the verdict was not sustained by the

weight of evidence cannot be assigned for error in this court.

Parsons v. *Bedford*, 28 U. S. 3 Pet. 433 (7: 732); *Hepburn* v. *Du Bois*, 37 U. S. 12 Pet. 345 (9:1111); *Zeller* v. *Eckert*, 45 U. S. 4 How. 289 (11:979); *United States Exp. Co.* v. *Ware*, 87 U. S. 20 Wall. 543 (22:422); *Lancaster* v. *Collins*, 115 U. S. 222 (29:373); *Chicago & N. W. R. Co.* v. *Ohle*, 117 U. S. 123 (29:837); *Barreda* v. *Silsbee*, 62 U. S. 21 How. 146 (16: 86); *Johnston* v. *Jones*, 66 U. S. 1 Black, 209 (17:117); *Gregg* v. *Moss*, 81 U. S. 14 Wall. 564 (20:740); *North Western Union Packet Co.* v. *Mc Cue*, 84 U. S. 17 Wall. 508 (21:705).

The protection accorded to a man's statements in consultation with an attorney is never extended to such communications as are made in furtherance of a scheme to commit a crime.

Reg. v. *Cox*, L. R. 14 Q. B. Div. 153; *Greenough* v. *Gaskell*, 1 Myl. & K. 98; *Coveney* v. *Tannahill*, 1 Hill, 33; Whart. Crim. Ev. § 504, and cases cited; Whart. Ev. § 590.

Threats of third persons against the deceased are not relevant to show that the defendant is not guilty.

Holt v. *State*, 9 Tex. App. 571; *Walker* v. *State*, 6 Tex. App. 576; *Boothe* v. *State*, 4 Tex. App. 202; *Crookham* v. *State*, 5 W. Va. 510; *Banks* v. *State*, 72 Ala. 522; *Alston* v. *State*, 63 Ala. 178; *State* v. *Lambert*, 93 N. C. 618; *State* v. *Davis*, 77 N. C. 483; *State* v. *Duncan*, 6 Ired. L. 236.

A contrary ruling is made in *Leonard* v. *Territory*, 2 Wash. Ter. 381; *Sawyers* v. *State*, 15 Lea, 694; *State* v. *Johnson*, 30 La. Ann. 921; *Com.* v. *Abbott*, 130 Mass. 472; *Com.* v. *Ryan*, 134 Mass. 224; *Mc Inturf* v. *State*, 20 Tex. App. 335; *Kunde* v. *State*, 22 Tex. App. 65, 97.

Mr. Justice **Brown** delivered the opinion of the court:

1. With regard to the first error assigned, it appears from the record that "the court directed two lists of thirty-seven qualified jurymen to be made out by the clerk, and one given to the district attorney and one to the counsel for the defendant; and the court further directed each side to proceed with its challenges independent of the other, and without knowledge on the part of either as to what challenges had been made by the other. To which method of proceeding in that regard defendant at the time offered no objections, but proceeded to make his challenges, and in so doing challenged two jurors, to wit, C. F. Needles and Samuel Lawrence, who had been also challenged by the government." We do not deem it necessary to inquire whether there was error in the method pursued by the court in impaneling this jury. It appears distinctly from the bill of exceptions that the defendant offered no objection to it at the time and made no demand to challenge any of the jury beyond the twenty allowed by Revised Statutes, section 819. Indeed, it does not clearly appear which side made the first challenges, or that defendant had not exhausted his challenges before the government challenged the two jurors in question. If it were [155] a fact that the defendant had made his twenty challenges before the government challenged these two men, it is difficult to see how his rights were prejudiced by the action of the district attorney.

But the decisive answer to this assignment is, that the attention of the court does not seem to have been called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception. *Stoddard* v. *Chambers*, 43 U. S. 2 How. 284 [11: 269]; *De Sobry* v. *Nicholson*, 70 U. S. 3 Wall. 420 [18: 263]; *Canal & Claiborne Streets R. Co.* v. *Hart*, 114 U. S. 654 [29: 226]. Thompson on Trials, §§ 690, 693, 700.

2. To understand fully the force of the second error assigned, it is necessary to state so much of the evidence as exhibits substantially the case made out by the government. The evidence tended to show that the defendant and the deceased, Steadman, had agreed to go into the stock business together, and, upon the day of the murder, were endeavoring to rent a farm for the purpose of wintering their horses, and making a crop the following year. They were returning to their camp, both armed with guns. Defendant was also armed with a pistol. So far as the evidence discloses, Steadman disappeared and was never seen alive again. A few minutes after they were last seen, a witness who had met them saw the two horses, without riders, standing in the road near a wood. Shortly after, eight or nine shots were heard in the wood, and after this the defendant was seen upon the road, sitting upon one of the horses, and leading the other, which had no rider. In about twelve days the body of Steadman was found half a mile from the place from where he and defendant had been seen, and within seventy-five yards of the place where the horses were seen standing. His skull was crushed, and there was a bullet hole in it back of the ear. There was also evidence that Steadman had a large amount of money on his person at the time he disappeared. The defendant offered contradictory explanations of Steadman's disappearance—at one time said he had probably been killed, and at another time suggested suicide, and, at another, pretended to believe a story that had been circulated in the neighborhood that Steadman and a married woman by the name of House had disappeared and were hiding together. Evidence was admitted tending to show that Mrs. House and Steadman had been seen in conference the day before, and that the general impression in the neighborhood at the time was that they had gone off together. House and his friends had armed themselves with guns and pistols and had ridden through the country hunting for them, under the belief that they were hiding together in the neighborhood or had fled the country together. [3

Now, if evidence was admitted to show that House had armed himself, and was hunting for Steadman under the impression that the latter had eloped with his wife, and was secreting himself in that vicinity, it is difficult to see upon what principle his threats in

that connection were excluded. Accepting the theory of the government, that mere threats unaccompanied by acts of a threatening nature were irrelevant to the question of defendant's guilt, it is not easy to understand how the acts themselves could be made pertinent without testimony tending to show the reason why House had armed himself, and, with other parties, was scouring the country for Steadman. Their statements in that connection would be clearly illustrative of the act in question, and a part of the *res gestæ*, within the rule laid down in *Lord George Gordon's Case*, 1 Greenl. Ev. § 108, and within all the authorities upon the subject of declaration as part of the *res gestæ*.

At the same time we recognize a certain discretion on the part of the trial judge to rule out this entire testimony, both of the acts and the declarations of House, if, in his opinion, they were so remote or insignificant as to have no legitimate tendency to show that House could have committed the murder. If, for instance, it were clearly proven that the murder was committed before the threats of House were uttered, or the two occurrences were so remote in time and place as to demonstrate that there could have been no connection between them, it would be the duty of the court to exclude the testimony. But if, on the other hand, the time and the circumstances attending the murder were uncertain or obscure, the conduct and threats of House might have a material bearing upon the identification of the murderer. It is held by some of the authorities that the question whether such evidence should be admitted or excluded is to a certain extent a matter of discretion with the trial judge. *Shailer* v. *Bumstead*, 99 Mass. 112; *Thayer* v. *Thayer*, 101 Mass. 111; *Com.* v. *Abbott*, 130 Mass. 472; *Com.* v. *Ryan*, 134 Mass. 223; *McInturf* v. *State*, 20 Tex. App. 335. In the present case, however, it is assumed, both in the exception noted to the exclusion of the testimony, and in the briefs of counsel, to have been proven as a fact, by the witness Terry, that on the day of the disappearance of Steadman and Mrs. House, he saw Samuel House, her husband, and several others, relatives and friends of House, riding around the neighborhood armed with Winchester guns and pistols, hunting for deceased and Mrs. House, who were then believed to have eloped together, or to be secreting themselves in the neighborhood; and although the testimony of Terry, as set forth in the bill of exceptions, fails to support this statement, or to show definitely what he did intend to swear to, yet, assuming it to be as stated, we think that, if it were shown that House was in search of Steadman, his declarations as to his purpose in so doing stand upon the same basis, with regard to admissibility, as his conduct, and were a part of the *res gestæ*. But in the view we take of the next assignment we find it unnecessary to determine whether there was such error in ruling out this testimony as to require a reversal.

3. The third assignment relates to the admission of the testimony of J. G. Ralls, an attorney at law, to which objection was made upon the ground that it related to a confidential communication made by the defendant, who had consulted Ralls as an attorney at law, and was therefore privileged. Ralls stated in substance that he was practicing law at Muscogee; that defendant came to his office there between the time of Steadman's disappearance and the finding of his body, "and asked me if I was an attorney; I told him I was; he said his name was Alex- [35
ander, and he went on to state that he and his partner had some forty head of horses across the river, in partnership, and that some time before that, probably a week before, his partner was missing, and he hadn't heard from him. He says his partner had a brother in California, and he was afraid his brother would come up there and make some trouble about the horses; he stated at the time his partner had taken off the money, and he wanted to know if he could hold the horses so as to secure his part of the money. I asked him if the horses would pay him for his part, and he said it would; I told him to hold the horses; they could not take them until that was settled." It is evident from this statement that defendant consulted with Ralls as a legal adviser, and while, if he were guilty of the murder, it may have had a tendency to show an effort on his part to defraud his partner's estate, and to make profit out of his death, by appropriating to himself the partnership property, it did not necessarily have that tendency and was clearly a privileged communication. If he consulted him in the capacity of an attorney, and the communication was in the course of his employment, and may be supposed to have been drawn out in consequence of the relations of the parties to each other, neither the payment of a fee nor the pendency of litigation was necessary to entitle him to the privilege. *Williams* v. *Fitch*, 18 N. Y. 546; *Britton* v. *Lorenz*, 45 N. Y. 51; *Bacon* v. *Frisbie*, 80 N. Y. 394; *Andrews* v. *Simms*, 33 Ark. 771.

In the language of *Mr. Justice* Story, speaking for this court in *Chirac* v. *Reinicker*, 24 U. S. 11 Wheat. 280, 294 [6: 474, 477]: "Whatever facts, therefore, are communicated by a client to a counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent."

We are referred, however, to the case of *Reg.* v. *Cox*, L. R. 14 Q. B. Div. 153, as holding the doctrine that where a communication is made to counsel in furtherance of a scheme to commit a crime, the client is not entitled to the privilege. This was a crown case reserved and argued before ten judges of the Queen's Bench Division. The [35
defendants Cox and Railton were indicted for a conspiracy to defraud one Munster. The facts stated show that Munster had obtained a judgment against Railton in an action for libel, upon which an execution had issued, which the sheriff proposed to levy upon the defendant's stock in trade. He was met, however, by a bill of sale from Railton to Cox, the other defendant, antedating the execution. It was claimed that the bill of sale was fraudulent, and made for the purpose of depriving Munster of his rights under the judgment, and Railton and Cox were indicted for conspiracy. The question

was whether an interview had by Railton and Cox with Goodman, a solicitor, as to what could be done to prevent the property from being seized under execution, was competent evidence, or was a privileged communication. No point was made that Goodman was not consulted as an attorney. The court unanimously held that the evidence was competent. *Mr. Justice* Stephen, who delivered the opinion of the court, said, in a very exhaustive discussion, that the question was, "whether, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged? We expressed our opinion at the end of the argument that no such privilege existed. If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose." After citing and commenting upon a large number of cases, he comes to the conclusion that, if the communication be made in furtherance of any criminal or fraudulent purpose, it is not privileged. This case, however is clearly distinguishable from the one under consideration, in the fact that the solicitor was consulted with regard to a scheme to defraud, for which his clients were subsequently indicted and tried, and the testimony was offered upon that trial; while in
360] this case the consultation was had after the crime was committed, and was offered in evidence as an admission tending to show that defendant was concerned in the crime, or rather as a statement contradictory to one he had made upon the stand. Had he been indicted and tried for a fraudulent disposition of his partner's property, the case of *Reg.* v. *Cox* would have been an authority in favor of admitting this testimony, but we think the rule announced in that case should be limited to cases where the party is tried for the crime in furtherance of which the communication was made.

Had the interview in this case been held for the purpose of preparing his defense, or even for devising a scheme to escape the consequences of his crime, there could be no doubt of its being privileged, although he had made the same statement, that his partner was missing and he had not heard from him. Now the communication in question was perfectly harmless upon its face. If it were true that his partner was missing, and he had not heard from him, and that Steadman had taken off the money, there was no impropriety in his consulting counsel for the purpose of ascertaining if he could hold the horses, so as to secure his part of it. Ralls asked him in that connection if the horses would pay him for his part, and defendant said they would; he then told him to hold the horses, that they could not take them until that was settled.

It is only by assuming that he was guilty of the murder that his scheme to defraud his partner becomes at all manifest. His statement that his partner was missing and that he had not heard from him is the only material or revelant part of the conversation, and was plainly privileged.

The judgment of the court below must be reversed, and the case remanded for a new trial.

Mr. Justice **Gray** was not present at the argument and took no part in the decision of this case.

BOOD CRUMPTON, *Plff. in Err.*, [3
v.
UNITED STATES.

(See S. C. Reporter's ed. 361-365.)

Criminal case—sufficiency of evidence—questions for jury—statements in argument of counsel, erroneous, how availed of—delay of trial for witnesses.

1. In a criminal case, the question whether the verdict was contrary to the evidence is not one which can be considered in this court, if there was any evidence proper to go to the jury in support of the verdict.
2. The weight of evidence in a criminal case and the extent to which it was contradicted or explained away by witnesses on behalf of the accused, are questions exclusively for the jury and not reviewable upon writ of error; if the verdict was against the weight of evidence the defendant may move for a new trial on that ground, but the granting or refusing of such a motion is a matter of discretion in the court below.
3. Statements not fully justified by the evidence made by counsel during the argument of the case, where no objection was made at the time and the court was not requested to interrupt them or to caution the jury against their force, and no exception was taken, are not such error as will necessarily vitiate the verdict or require a new trial; it is the duty of the opposing counsel at once to call the attention of the court to the objectionable remarks and request its interposition, and in case of refusal to note an exception.
4. Whether a trial should be delayed for the production of witnesses, in a criminal case where the application was not made until nearly the close of the evidence, and would if granted have delayed the trial a number of days, and the application was to subpœna the witnesses at the expense of government, was a matter of discretion, and the refusal of the application is not reviewable upon writ of error.

[No. 1810.]

Argued and Submitted Jan. 16, 1891. Decided Feb. 2, 1891.

NOTE.—*As to questions of law and fact for court or jury*, see *note* to King v. Delaware Ins. Co. 3:155.

As to what particularity in exceptions is necessary in order to a review in appellate court, see *note* to Moore v. Bank of Metropolis, 10:172.

What questions the United States Supreme Court will review on writ of error; bill of exceptions. See *note* to Parks v. Turner, 13:883.

The supreme court will not review the discretionary action of the court below. See *note* to Barrow v. Hill, 14:48.

As to exception, when must be taken, to be available on review, see *note* to Phelps v. Mayer, 14:643.

IN ERROR to the Circuit Court of the United States for the Western District of Arkansas, to review a judgment imposing a sentence of death upon plaintiff in error for murder. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was a writ of error sued out under the sixth section of the Act of Congress of February 6, 1889 (25 Stat. 656), to review a judgment of the Circuit Court of the United States for the Western District of Arkansas, imposing a sentence of death upon the plaintiff in error for the murder of Sam. M. Morgan, "at the Cherokee Nation, in the Indian country." The plaintiff in error relied for a reversal of the judgment upon the following grounds:

1. That the verdict was contrary to the evidence.

2. That the court erred in permitting the district attorney to refer in his argument to matters not in evidence.

3. That the court erred in refusing to grant [362] the prisoner sufficient time to procure the testimony of three witnesses, whose testimony he claims was material to his defense.

Mr. **A. H. Garland** for plaintiff in error.

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

1. It is clear that the question, whether the verdict was contrary to the evidence, which is the first error assigned, is not one which can be considered in this court, if there were any evidence proper to go to the jury in support of the verdict.

The testimony on behalf of the government tended to show that deceased had, on the 3d of November, about fifty dollars on his person; and that on the morning of that day, which was Sunday, after having slept together the night before, the prisoner and the deceased, riding two horses belonging to the deceased, started out from the house of Mrs. Harris, to visit some young women by the name of Davis, who lived about four miles away. The prisoner was armed with a pistol.

About noon of that day shots were heard by a witness for the government in the neighborhood of the hole where the body of the deceased was afterwards found, and in a short time the defendant was seen riding one horse and leading the other away from this place. Toward evening of the same day the defendant returned to a house in the neighborhood of Mrs. Harris's, with the two horses. When inquired of as to the deceased he said that they had met a man riding in a buggy on the prairie, who had induced the deceased to go with him to the Pawnee Agency. He stated that the deceased had directed him to bring the horses back; to take charge of all his effects, and to pay his debts in case he did not return by a certain time.

Three days before Christmas the body of the deceased was found in the hole above referred to, which was some six or seven feet deep, on the bank of Coody's Creek, and some three miles from Mrs. Harris's. His hat had a bullet hole in it, and his broken skull showed where the bullet had entered it and caused his death. There was no doubt, from what was found on his person, as to whose corpse it was, though the face and front part of his skull had been battered so as to prevent recognition of the features. No money was found in his pockets.

It appeared from other evidence, and was admitted by the defendant, that some time [363] before the disappearance of the deceased the defendant had come upon this hole and was familiar with its location. There was evidence showing that an overcoat belonging to the deceased was in the possession of the defendant the next day after the disappearance of the deceased. Before the finding of the body on the 22d of December, the defendant exhibited two letters which he clamed to have received from the deceased at the Pawnee Agency. They were letters without envelopes. Defendant explained the absence of envelopes by saying that the children had destroyed them. On the trial the letters themselves could not be found, and were not produced. When the body of the deceased was found, and the report of it came to the defendant, he immediately left the settlement in which he lived and went away some twenty or twenty-five miles, where he was arrested.

The evidence for the defendant was conflicting. One man testified that he saw a government witness, Burt by name, in a carriage with the deceased, on the Sunday in question, going toward the place where the body was found, and that later he saw him returning without the deceased. This evidence was at variance with the statement of the defendant himself, who swore that the man in whose buggy the deceased drove away was not Burt.

There is no doubt that this testimony was sufficient to lay before the jury, and it would have been improper to direct a verdict for the defendant. The weight of this evidence and the extent to which it was contradicted or explained away by witnesses on behalf of the defendant, were questions exclusively for the jury, and not reviewable upon writ of error. If the verdict were manifestly against the weight of evidence, defendant was at liberty to move for a new trial upon that ground; but that the granting or refusing of such a motion is a matter of discretion is settled in *Freeborn* v. *Smith*, 69 U. S. 2 Wall. 160 [17:922]; *Pittsburgh, C. & St. L. R. Co.* v. *Heck*, 102 U. S. 120 [26: 58]; *Lancaster* v. *Collins*, 115 U. S. 222 [29: 373], and many other cases in this court.

2. The second assignment of error is clearly untenable. It appears that during the argument of the case the defendant's counsel said [364] to the jury: "Either the defendant or Burt [a government witness] is guilty of this crime. I will show you that Burt is guilty, and, therefore, that defendant is not." In reply to this, the district attorney, in his closing argument, said: "The issue is squarely made by Mr. Neal, that either the defendant or William Burt is guilty of this crime. I have shown you that Burt is not

guilty; therefore, by his logic, the defendant is guilty." No objection was made at the time to this argument, nor was the court requested to interrupt it, or caution the jury against its force; and no exception appears to have been taken. There is no doubt that, in the excitement of an argument, counsel do sometimes make statements which are not fully justified by the evidence. This is not such an error, however, as will necessarily vitiate the verdict or require a new trial. It is the duty of the defendant's counsel at once to call the attention of the court to the objectionable remarks, and request its interposition, and, in case of refusal, to note an exception. Thomp. on Trials, § 962.

In the present case it is by no means clear that the district attorney transcended the proper limits of an argument. Counsel for the defendant had tendered the issue to the jury, that either his client or Burt was guilty of the crime, and we perceive no impropriety in the district attorney accepting the challenge and attempting to demonstrate that Burt was not guilty, and arguing that the jury, upon the issue thus presented, had a right to infer that the defendant was guilty.

3. The third assignment is based upon the refusal of the court to grant an application by the prisoner for process for three witnesses, such process to be served at the expense of the government. The trial was begun on the 27th of May, 1890; the application was not made until the 31st day of May, just before the defendant was called as the last witness in his own behalf. It would probably have delayed the trial a number of days to send the process into the Indian Territory, make service of it there, and bring in these witnesses to testify. Whether the trial should be delayed for the production of these witnesses was clearly a matter of discretion and not reviewable upon a writ of [365] error. The testimony of the proposed witnesses seems to have been of little importance, and the application was to subpœna these witnesses at the expense of the government, which would of itself have been a matter of discretion, even had the application been made before the trial began. Rev. Stat. § 878. It is clear that the ruling of the court is not subject to review. *Silsby* v. *Foote*, 55 U. S. 14 How. 218 [14: 394]; *Cook* v. *Burnley*, 78 U. S. 11 Wall. 672, 676 [20: 84, 86].

There is no error in the proceedings in the court below, and *the judgment must be affirmed.*

---

[293] UNITED STATES, *Appt.*,

v.

JAMES G. GREEN.

(See S. C. Reporter's ed. 293-298).

Longevity pay to naval officers—Act of July 15, 1870.

1. Under the Act of March 3, 1883, an officer of the navy, who was a lieutenant for several days succeeding June 30, 1870, when the Act of July 15, 1870, took effect, and was promoted to be lieutenant-commander July 3, 1870, and to be commander March 6, 1887, is entitled to longevity pay as lieutenant, and not as lieutenant-commander, the lowest grade held by him having graduated pay being that of lieutenant.

2. The Act of July 15, 1870, was not invalid as disturbing vested rights, so far as it operated in reduction of earned compensation for services rendered during the fifteen days succeeding June 30, 1870. The order of the Secretary of the Navy of May 23, 1866, fixing a rate of compensation, was not a contract with the naval officers independent of congressional action.

[No. 1343].

Submitted Jan. 9, 1891. Decided Feb. 2, 1891.

APPEAL from a judgment of the Court of Claims in favor of claimant for $796.08, longevity pay, under the Act of March 3, 1883, to officers of the navy. *Reversed and cause remanded with directions to enter judgment for $4.17 in favor of claimant.*

The facts are stated in the opinion.

Mr. **Wm. H. Taft,** *Solicitor-Gen.*, for appellant.

Messrs. **John Paul Jones** and **Robert B. Lines** for appellee.

Mr. Chief Justice **Fuller** delivered the [1 opinion of the court:

This is an action to recover longevity pay under the clause of the Act of March 3, 1883, providing that "all officers of the navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer army or navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided, further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer army or navy." 22 Stat. 473, chap. 97.

The plaintiff is a commander in the navy of the United States, with the following record of entry and promotion: In the volunteer service, acting master's mate, May 7, 1861; acting ensign, November 27, 1862; acting master, August 11, 1864. In the regular service, master, March 12, 1868; lieutenant, December 18, 1868; lieutenant-commander, July 3, 1870; commander, March 6, 1887. He has never received any benefit of longevity pay under the Act of March 3, 1883. The court below held that his prior [2 service should be credited on his grade of lieutenant-commander, not on that of lieutenant, and gave judgment in his favor for $796.08. If such prior service had been credited on his grade of lieutenant, the judgment would have been for only $4.17.

By section 3 of the Act of July 15, 1870, making appropriations "for the naval service for the year ending June 30, 1871, and for other purposes" (16 Stat. 321, 330, 332, chap.

NOTE.—*As to extra pay or compensation to officers, see note* to United States v. Macdaniel, 8: 587.

295), it was provided "that from and after the thirtieth day of June, eighteen hundred and seventy, the annual pay of the officers of the navy on the active list shall be as follows:

* * * * * *

"Lieutenant-commanders, during the first four years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave or waiting orders, two thousand dollars; after four years from such date, when at sea, three thousand dollars; on shore duty, two thousand six hundred dollars; on leave or waiting orders, two thousand two hundred dollars. Lieutenants, during the first five years after date of commission, when at sea, two thousand four hundred dollars; on shore duty, two thousand dollars; on leave or waiting orders, one thousand six hundred dollars; after five years from such date, when at sea, two thousand six hundred dollars; on shore duty, two thousand two hundred dollars; on leave or waiting orders, one thousand eight hundred dollars." And section 4 provided: "That the pay prescribed in the next preceding section shall be the full and entire compensation of the several officers therein named, and no additional allowance shall be made in favor of any of said officers on any account whatever, and all laws or parts of laws authorizing any such allowance shall, on the first day of July, eighteen hundred and seventy, be repealed. . . . And from and after the thirtieth day of June, eighteen hundred and seventy, so much of the fourth section of the Act approved July fourteen, eighteen hundred and sixty-two, 'making appropriations for the naval service for the year ending June thirty, eighteen hundred and sixty-three, and for other purposes' as allows to persons in the naval service five cents per day in lieu of the spirit ration, is hereby repealed; and from and after that day thirty cents shall in all cases be deemed the commutation price of the navy ration."

By the same Act appropriations were made for the payment of officers and seamen at the designated rates, and all Acts or parts of Acts inconsistent with that Act were thereby repealed.

Under the Statute of July 16, 1862 (12 Stat. 583, 586), in force up to June 30, 1870, the pay of lieutenants was not graduated, but by the Act of July 15, 1870, their pay, and that of lieutenant-commanders and other officers therein mentioned, was graduated from and after June 30, 1870. The lawful pay of lieutenants ceased to be what it had been during the prior fiscal year and years preceding, and became for the fiscal year commencing July 1, 1870, as prescribed by the Act of July 15. Claimant accordingly received pay for his services on July 1, 2 and 3, 1870, under the latter Act, which furnished the measure of his compensation. There was no other statute and no other appropriation in accordance with which his pay was regulated, disbursed and received. Nearly thirteen years after this the Act of 1883 was passed, and the extent to which the claimant could avail himself of it depends upon what was the lowest grade having graduated pay held by him since last entering the service; and, as he was a lieutenant during some days succeeding June 30, 1870, when the Act of July 15 took effect, we are constrained to hold that the lowest grade he held having graduated pay was that of lieutenant. If the Act had been passed ten days before June 30, to take effect on that day, and claimant had become lieutenant-commander within the ten days, the lowest grade held by him having graduated pay attached would have been that of lieutenant-commander, notwithstanding when the Act was passed he held a lower grade. And though this Act was passed after June 30, yet as Congress directed that it should take effect as of that date, the result must be the same.

In *United States* v. *Rockwell*, 120 U. S. 60 [30: 561], Rockwell re-entered the service as master in March, 1868, and subsequently during that year became lieutenant, and continued in such position until 1878. The government contended that the lowest grade [2 having graduated pay held by him was that of master, masters being entitled to graduated pay under the Act of 1870, but it was held that this view was incorrect, and that the Act of 1883 referred to the lowest grade having graduated pay held by the officer after the Act providing for graduated pay took effect. Rockwell had ceased to be a master for nearly two years before the Act in respect to graduated pay was passed, and consequently that Act became operative as to him when he was holding the rank of lieutenant.

In this case, the only law under which claimant could receive pay after June 30, 1870, was the Act of July 15, 1870, and as it took effect as of June 30, he was holding the grade of lieutenant at that time, and that fact disposes of this controversy.

It is suggested that the Act of July 15, 1870, operated in reduction of earned compensation for services rendered during the fifteen days succeeding June 30, and to that extent was invalid, upon the ground that while the pay of a lieutenant as fixed by the Act of 1862 was in terms increased by the Act of 1870, yet part of his prior compensation given in lieu of allowances was cut off, and that his total compensation by reason of the equivalent for allowances was larger during the fiscal years prior to June 30, 1870, than that fixed by the Act of July 15. But the payments referred to were made in accordance with an order of the Secretary of the Navy of May 23, 1866, which established a fixed rate of compensation in lieu of prior extra allowances at a sum equal to thirty-three and one-third per cent of the pay, and the validity and force of the order depended on the appropriation by Congress of moneys for specified objects connected with the naval service, to the distribution of which the order related. It was upon this view that the opinion of the court, delivered by *Mr. Justice* Harlan, proceeded in *United States* v. *Philbrick*, 120 U. S. 52. 58 [30: 559, 561], where "the power of the Secretary to establish rules and regulations for the apportionment of the sums set apart by Congress, in gross,

for such objects as those involved in the allowances here in dispute," was sustained. The order was not a contract with the naval officers by the Department, and independent of congressional action.

298] The appropriation by Congress in this instance was by the Act of July 15, 1870, and that Act in terms prohibited any extra allowances from and after June 30, so that the Act increased the actual pay and did not so disturb any vested rights of the claimant as to give force to his position in this regard, if it would in any aspect have affected the conclusion reached.

The judgment of the Court of Claims is reversed and the cause remanded with directions to enter judgment for $4.17 in favor of claimant.

---

[285] CLARA KAUFFMAN, *Plff. in Err.*,
v.
JAMES C. WOOTERS.

(See S. C. Reporter's ed. 285-287).

State legislation, when not unconstitutional.

State legislation simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process, is not forbidden by the Fourteenth Amendment of the United States Constitution.

[No. 1360.]

Submitted Jan. 5, 1891. Decided Feb. 2, 1891.

IN ERROR to the Supreme Court of the State of Texas to review a judgment of that court affirming a judgment of the District Court of that State in and for the County of Galveston against Clara Kauffman for the value of certain bales of cotton.

On motion to dismiss or affirm. *Affirmed.*

The facts are stated in the opinion.

Messrs. **A. H. Garland** and **H. J. May**, for defendant in error, for motion.

Mr. **T. N. Waul**, for plaintiff in error, against motion.

286] *Mr. Justice* **Harlan** delivered the opinion of the court:

This case is before us upon a motion to dismiss the writ of error for want of jurisdiction in this court to re-examine the judgment below; or, if this court has jurisdiction, to affirm the judgment upon the ground that the question on which our right of review depends is too frivolous to require argument upon it.

Certain provisions of the Statutes of Texas relating to the service of process are, it is contended, in violation of the clause of the Fourteenth Amendment, declaring that no State shall deprive any person of property without due process of law. These provisions are as follows:

"Article 1240. The defendant may accept service of any process, or waive the issuance of service thereof, by a written memorandum signed by him or his duly authorized agent or attorney, and filed among the papers of the cause, and such waiver or exceptions shall have the same force and effect as if the citation had been issued and served as provided by law. 1241. The defendant may in person, or by attorney, or by his duly authorized agent, enter an appearance in open court, and such appearance shall be noted by the judge upon his docket and entered in the minutes, and shall have the same force and effect as if citation had been duly issued and served as provided by law. 1242. The filing of an answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance of service of citation upon him. 1243. Where the citation or service thereof is quashed on motion of the defendant, the case may be continued for the term, but the defendant shall be deemed to have entered his appearance to the succeeding term of the court. 1244. Where the judgment is reversed on appeal or writ of error taken by the defendant for the want of service, or because of defective service of process, no new citation shall be issued or served, but the defendant shall be presumed to have entered his appearance to the term of the court at which the mandate shall be filed. 1245. No judgment shall in any case be rendered against any defendant unless upon service, or acceptance, or waiver of process, or upon an appearance by the defendant, as prescribed in this chapter, except where otherwise expressly provided for by law."

The Supreme Court of Texas, construing these statutory provisions, has held, and it so held in this case, that a defendant who appears only to obtain the judgment of the court upon the sufficiency of the service of process upon him, is thereafter subject to the jurisdiction of the court, although the process against him is adjudged to have been insufficient to bring him into court for any purpose. The question here is whether such legislation is consistent with "due process of law." That question, arising upon the above Statute, was presented in *York* v. *Texas*, 137 U. S. 15, 19 [34:604], and it was there held that state legislation "simply forbidding the defendant to come into court and challenge the validity of service upon him in a personal action, without surrendering himself to the jurisdiction of the court, but which does not attempt to restrain him from fully protecting his person, his property and his rights against any attempt to enforce a judgment rendered without due service of process," was not forbidden by the Fourteenth Amendment.

Upon the record of this case there was color for the motion to dismiss, and upon the authority of *York* v. *Texas*, the motion to affirm the judgment is sustained.

Affirmed.

NOTE.—*As to what is due process of law*, see *note* to Pearson v. Yewdall, 24: 436.

[298] KANSAS CITY, FORT SCOTT & MEMPHIS RAILROAD COMPANY, *Plff. in Err.*,

v.

R. S. DAUGHTRY, Administrator of JOHN W. DAUGHTRY, Deceased.

(See S. C. Reporter's ed. 298-306.)

Removal of cause to federal court—issues of fact upon petitions for removal, where tried—service on corporation.

1. Application to remove a cause from a state to a federal court must be made at or before the time when the plea therein is due, and the time for removal cannot be extended because a plaintiff in error does not take advantage of his right to take judgment by default; it is too late to remove a cause after the lapse of four terms after the plea was due.
2. Issues of fact raised upon petitions for removal of causes from a state court must be tried in the circuit court of the United States.
3. In Tennessee service of a summons upon the superintendent, the highest officer of a corporation to be found in the county, is sufficient service upon the corporation, although the return of service does not show that the president or other head of the corporation was absent from the county; the presumption is that the sheriff has served upon the proper party.

[No. 1361.]

Submitted Jan. 19, 1891. Decided Feb. 2, 1891.

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment of that court affirming a judgment of the Circuit Court of Shelby County in that State in favor of plaintiff in an action for damages for the death of John W. Daughtry by the negligence of defendant.

On motion to dismiss or affirm. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Luke E. Wright** and **George Gantt,** for defendant in error, for motion.

Mr. **Wallace Pratt,** for plaintiff in error, against motion.

[299] *Mr. Chief Justice* **Fuller** delivered the opinion of the court:

This was an action commenced in the Circuit Court of Shelby County, Tennessee, by R. S. Daughtry as administrator of John W. Daughtry, deceased, against the Kansas City, Fort Scott and Memphis Railroad Company and the Kansas City, Memphis and Birmingham Railroad Company on the 16th of August, 1888, for the recovery of damages for the death of John W. Daughtry, alleged to have been occasioned by the negligence of defendants. The summons was returnable on the third Monday of September, 1888, and alleged as to the defendants, "both of which are railroad corporations conducting business in Shelby County, Tennessee, with offices and agencies in said county and State." The return of the sheriff was as follows: "Came to hand 16th day of August, 1888. Executed on the Kansas City, Fort Scott and Memphis Railroad Company by reading the contents of this writ to J. H. Sullivan, sup't of said Railroad Co., he being the highest officer to be found in my county, and executed on the Kansas City, Birmingham and Memphis Railroad Company by reading the contents of this writ to J. H. Sullivan, sup't, he being the highest officer of said Co. to be found in my county. This 23d day of August, 1888." The declaration was filed September 17, 1888, and averred, in the first count, defendants to be "corporate persons, doing business as such in Tennessee (under license and by consent of the State);" and in the second count described the defendant corporations as "doing business in Tennessee as aforesaid." It was also alleged in the first count that defendants "are and were on and prior to the 16th of August, 1888, engaged in operating important lines of railway under one common or general management, with depots and terminal facilities in the taxing district of Shelby County;" and in the second count, that "on or about the 12th day of August, 1888, defendant companies were operating cars and engines on their railroad lines leading into the Taxing District of Shelby County."

The Statutes of Tennessee provide as follows:

"4238. The declaration of the plaintiff shall be filed within the first three days of the term to which the writ is returnable, otherwise the suit may, upon motion of the defendant, be dismissed at plaintiff's cost.

"4239. The defendant shall appear and demur or plead within the first two days after the time allotted for filing the declaration; otherwise the plaintiff may have judgment by default.

"4240. The plaintiff and defendant shall, within the first two days after each subsequent step taken by the other in making up an issue, demur or plead thereto, on penalty of having the suit dismissed, or judgment taken by default, according as the failure is by the plaintiff or defendant.

"4241. The court may, however, enlarge the time for pleading, upon application of either party, in proper cases, or excuse the failure to plead within the time prescribed, upon good cause shown." 2 Thompson and Steger's Tenn. Stats. 1871, p. 1714 *et seq.*;

NOTE.—*As to removal of causes, under Act of 1875; citizenship.*—see *note* to Meyer v. Delaware R. Construction Co. 25: 598.

As to removal by one of two or more defendants; separable controversies.—see *note* to Sloane v. Anderson, 29: 899.

As to removal of causes to United States courts for local prejudice, see *notes* to Gaines v. Fuentes, 23: 524; Jefferson v. Driver, 29: 897.

As to removal of causes from state to federal courts where United States Constitution, Act of Congress or treaty comes in question, see *note* to Little York Gold Wash. & W. Co. v. Keyes, 24: 656.

As to civil rights; removal of causes, when denied.—see *note* to Civil Rights Cases, 27: 835.

As to removal of actions against officers; Rev. Stat., sec. 643,—see *note* to Davis v. South Carolina, 27:574.

That appearance cures all defects in service of process or its non-service, except want of jurisdiction of subject matter; service of summons by party or other improper person a mere irregularity,—see *note* to Knox v. Summers, 2: 510.

Milliken and Vertrees' Code of Tenn. 1884, p. 949.

The declaration was filed on the first day of the term to which the writ was returnable, and the defendants' pleas were due during that week. Upon the 25th of September the Kansas City, Memphis and Birmingham Railroad Company filed its plea of the general issue. The Circuit Court of Shelby County had five regular terms, "commencing on the third Mondays in January, March, May, September and November of each year." Acts Tenn. 1883, p. 257; Milliken and Vertrees' Code, § 129, p. 49.

On the 29th of May, 1889, after the lapse of four terms, the Kansas City, Fort Scott
[91] and Memphis Railroad Company filed its petition and bond for the removal of the suit to the Circuit Court of the United States for the Western District of Tennessee. This petition commenced: "Comes your petitioner, the Kansas City, Fort Scott and Memphis Railroad Company, and shows to the court" that the matter in dispute, exclusive of interest and costs, exceeds the sum or value of $2,000; "that the controversy in said suit is between citizens of different States; that your petitioner, the Kansas City, Fort Scott and Memphis Railroad Company, was at the time when this suit was commenced and still is a corporation created and existing under and by virtue of the laws of the States of Missouri, Arkansas and Kansas, and was and still is a citizen of said States; that the plaintiff, R. S. Daughtry, administrator, was, at the beginning of this suit, and still is, a citizen and resident of the State of Tennessee;" that there is in the suit a controversy wholly between the administrator and the petitioner, which can be fully determined as between them without the presence of petitioner's co-defendant; "that its said co-defendant, the Kansas City, Memphis and Birmingham Railroad Company, is a corporation created and existing under and by virtue of the laws of the State of Tennessee, and that it is a citizen thereof;" that the acts alleged to have been done jointly by petitioner and its co-defendant were, if done at all, done by petitioner alone, and its co-defendant did not at the time, and "does not now, and never did, own, possess, control or use the said railroad track upon which said acts were done," etc.; "that the said Kansas City, Memphis and Birmingham Railroad Company has been joined in this action as a nominal party defendant for the sole purpose of preventing your petitioner from removing this case to the circuit court of the United States."

Upon the first of June, 1889, the affidavit of Daughtry, the administrator, was filed, stating "that he is a citizen of the State of Arkansas and has been a citizen of said State for the last ten years; that all beneficiaries in said suit are also citizens of the State of Arkansas and have been for the last ten years." On that day the state circuit court entered this order:

[92] "This day the defendant the Kansas City, Fort Scott and Memphis Railroad Co. presented to the court its petition and bond to remove this case to the Circuit Court of the United States for the Western Division of the Western District of Tennessee, which was filed herein on May 29th, 1889; and the court, having duly considered said petition, together with the affidavit of R. S. Daughtry filed herein June 1st, 1889, and heard argument of counsel, is of the opinion that upon said petition and affidavit said defendant is not entitled to the order of removal prayed in its said petition, and its application in that behalf is denied and said defendant is allowed one day to plead to the merits; to all of which the said Kansas City, Fort Scott and Memphis Railroad Company, by its attorney, excepts and asks that its exceptions be noted of record, which is accordingly done."

Thereupon, on the 6th day of June, the cause came on for trial before a jury duly impaneled, and on the 7th was dismissed by plaintiff as against the Kansas City, Memphis and Brimingham Railroad Company. Verdict and judgment then passed in favor of the plaintiff and against the Kansas City, Fort Scott and Memphis Railroad Company, whereupon the latter took the cause by appeal to the Supreme Court of Tennessee, where, among other errors assigned, was one that "it was error to refuse to order the case removed to the circuit court of the United States." The judgment of the Circuit Court of Shelby County was affirmed by the Supreme Court of Tennessee, which, as to the question of removal, referred to the case of *Railway Companies* v. *Hendricks, Adm'r*, just disposed of by it, as governing that question. Both cases are reported in 88 Tenn. 710, 721. The cause was brought to this court by writ of error, and a motion to dismiss or affirm has been made by the defendant in error.

The Supreme Court of Tennessee was of opinion that it was competent for the state circuit court to pass upon the issue of fact made by the affidavit of Daughtry upon the statement in the petition in regard to his citizenship, and to retain the suit, because on that issue the railroad company had not shown that he was a citizen of Tennessee; but it is thoroughly settled that issues of fact raised [93] upon petitions for removal must be tried in the circuit court of the United States. *Crehore* v. *Ohio & M. R. Co.* 131 U. S. 240 [33: 144]; *Burlington, C. R. & N. R. Co.* v. *Dunn*, 122 U. S. 513 [30: 1159]; *Carson* v. *Hyatt*, 118 U. S. 279 [30: 167]. In *Louisville & N. R. Co.* v. *Wangelin*, 132 U. S. 599 [33: 474], the case came before us on a writ of error, bringing under review the judgment of the circuit court remanding the cause to the state court, and the language of the opinion has no relation to the action of the latter court.

It is true that the petition was not verified, contrary to good practice, and that Daughtry's affidavit was explicit, so that if the record had been filed in the circuit court, the cause would, as it then stood, have been remanded, but this would not justify the state court in acting upon the facts, though it arrived at the same result. If, however, the denial of the application was right as matter of law, the judgment should not be

reversed. And it is apparent that if the service of process upon the defendant was sufficient, a plea was required from it at the September Term, 1888, and that its application for removal came too late, for section 3 of the Act of Congress of March 3, 1887, as corrected by the Act of August 13, 1888, provides that the party desiring to remove must file his petition "at the time, or any time before, the defendant is required by the laws of the State or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." 24 Stat. chap. 373, p. 554; 25 Stat. chap. 866, p. 435.

The Statute is imperative that the application to remove must be made when the plea is due, and because a plaintiff in error does not take advantage of his right to take judgment by default, it cannot be properly held that he thereby extends the time for removal. The lapse of four terms before the petition was filed dispenses with argument on this question, if the petitioner was properly in court.

The law of Tennessee relating to service of process on corporations is embraced in the following sections:

"2831. Service of process on the president or other head of a corporation, or, in his absence, on the cashier, treasurer or secretary, or, in the absence of such officers, on any director of such corporation, shall be sufficient.

"2832. If neither the president, cashier, treasurer nor secretary resides within the State, service on the chief agent of the corporation, residing at the time in the county where the action is brought, shall be deemed sufficient.

"2833. If the action is commenced in the county in which the corporation keeps its chief office, the process may be served on any one of the foregoing officers, in the absence of those named before him.

"2834. When a corporation, company or individual has an office or agency in any county other than that in which the principal resides, the service of process may be made on any agent or clerk employed therein, in all actions growing out of or connected with the business of the office or agency.

"2834*a*. That sections 2831, 2832, 2833 and 2834 be so amended, that hereafter when a corporation, company or individual has an office or agency, or resident director in any county other than that in which the chief officer or principal resides, the service of process may be made on any agent or clerk employed therein in all actions brought against said company growing out of the business of, or connected with, said company or principal's business. Act 1859-60, chap. 89, sec. 1.

"2834*b*. The provisions of this Act shall only apply to cases where the action is brought in such counties as such agency, resident director or office is located." Id. sec. 2.; 2 Thompson and Steger's Stats. Tenn. 1871, p. 1190; Milliken and Vertrees' Code Tenn. p. 660.

On the 29th of March, 1887, an Act was passed by the Legislature of Tennessee, entitled "An Act to Subject Foreign Corporations to Suit in This State" (Acts 1887, p. 386), which defendant in error contends should control here; but in *Telephone Co.* v. *Turner*, 88 Tenn. 265, it was held that this Act did not apply to foreign corporations having an office and resident agent in the State, and already subject to suit, but only to such foreign corporations as engaged in business in the State without such office and agent; that it was not a limitation but an enlargement of the jurisdiction over foreign corporations; and that sections 2831, 2832, 2833 and 2834 of the Code regulated the mode in which corporations might be sued, and applied equally to domestic and foreign corporations having an office or agency and a resident local agent in the county in which suit was brought. We perceive no reason for declining to accept the conclusions of the Supreme Court of the State upon this subject, and the Act of 1887 need not, therefore, be considered. [30

From the summons it appeared that the two defendants were railroad corporations conducting business in Shelby County, Tennessee, with offices and agencies in that county and State; from the petition for removal that the petitioner was a citizen of the States of Missouri, Arkansas and Kansas; and from the return, that J. H. Sullivan, superintendent of the petitioning Railroad Company, was the highest officer of that Company to be found in Shelby County.

The return, in its statement, that the superintendent was the highest officer of the Company to be found in the county, excluded the assumption that others were or could have been so found, and, indeed, while there may be exceptions, officers of a foreign corporation, of the character of president, cashier, treasurer and secretary, do not ordinarily reside in a State of which the corporation is not a citizen. At all events, a return that a party is not to be found is regarded in Tennessee as more correct than a return of not found, because indicative of proper exertion to find him (*Hill* v. *Hinton*, 2 Head, 124); and it has been distinctly laid down that service on the chief agent of a corporation, residing in the county, is sufficient, although the return does not show that the president or other head of the corporation, or the cashier, treasurer, secretary or director thereof, were absent or nonresident, and that "the presumption in all such cases is that, until the contrary is made to appear, the sheriff has done his duty, and has served the process upon the proper party." *Wartrace* v. *Wartrace & B. Turnp. Co.* 2 Coldw. 515.

At common law, service was made on such head officer of a corporation as secured knowledge of the process to the corporation, and the provisions of this Statute seem constructed *ex industria* to increase the number of officers or agents, service upon either of whom would be sufficient. In view of the state legislation and decisions, service upon the highest officer of the corporation to be found in the county, and that officer the superintendent there, was within the spirit of the rule and the intent and meaning of the Statute. [30

The petition for removal did not question the sufficiency of the service, and the state court apparently assumed it to be sufficient, for it allowed but one day to plead to the merits.

Under all the circumstances, we hold that the application came too late, *and the judgment is therefore affirmed.*

223] MARTHA A. MILLER, *Appt.*,
v.
EMMA J. CLARK ET AL.

(See S. C. Reporter's ed. 223-225.)

Jurisdiction as to amount.

In an action by a legatee under a will against the executor and three other defendants to compel the latter defendants to turn over to the executor bank books and moneys entered therein, deposited in a savings bank, and to compel the executor to include the moneys as assets of the estate in the inventory, the three defendants claiming to hold them as gifts from the testatrix, this court has not jurisdiction on appeal where the amount represented by each of the three bank books did not exceed the sum of $1,792.61, the aggregate of the three being $5,377.83, and the interest of the plaintiff in the latter sum under the will as legatee being only one sixth thereof, or $896.30½.

[No. 1366.]

Submitted Jan. 19, 1891. Decided Feb 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the District of Connecticut in favor of defendants in a suit to compel three of the defendants to turn over to the executor of an estate books and money claimed to belong to the estate, but which such defendants claim as gifts from the testatrix, and to compel the executor to include the same in his inventory and take possession of the same as part of the estate.

On motion to dismiss or affirm. *Dismissed.*

The facts are stated in the opinion.

Mr. **William B. Stoddard,** for appellees, for motion:

The claim is against each defendant severally.

Stewart v. *Dunham*, 115 U. S. 61 (29: 329); *Ballard Paving. Co* v. *Mulford*, 100 U. S. 147 (25: 591).

The amounts in controversy against all of the defendants cannot be added together to give this court jurisdiction.

Gibson v. *Shufeldt*, 122 U. S. 27 (30: 1083); *Minor* v. *Rogers*, 40 Conn. 520; *Boone* v. *Citizens Sav. Bank*, 84 N. Y. 83.

There was, beyond all question, a valid and completed gift in each case, and the estate of Mrs. Clark has no interest in the matter.

Camp's Appeal, 36 Conn. 88; *Kerrigan* v. *Rautigan*, 43 Conn. 17; *Gerrish* v. *New Bedford Savings Inst.* 128 Mass. 159; *Martin* v. *Funk*, 75 N. Y. 134; *Blaedel* v. *Locke*, 52 N. H. 238; *Howard* v. *Windham Co. Sav. Bank*, 40 Vt. 597; *Ray* v. *Simmons*, 11 R. I. 266.

Messrs. **J. M. Buckingham** and **Simeon E. Baldwin,** for appellant, against motion:

The decree settles the right of the estate as to the whole fund, as an entirety.

Knapp v. *Banks*, 43 U. S. 2 How. 73 (11: 184); *Shields* v. *Thomas*, 58 U. S. 17 How. 3 (15: 93); *Freeman* v. *Dawson*, 110 U. S. 264 (28: 141); *The Connemara*, 103 U. S. 754 (26: 322); *Kenaday* v. *Edwards*, 134 U. S. 117, 123 (33: 853, 856).

The gift was incomplete and testamentary.

Basket v. *Hassell*, 107 U. S. 602, 610, 614 (27: 500, 502).

There was no delivery of the bank books to the intended donees, and this is fatal to their claim.

Pierce v. *Boston Five Cent Sav. Bank*, 129 Mass. 430.

The transfers to the names of the donees on the bank ledger and pass-books are explained and controlled by the additions of "Irene Clark, trustee," and "only Irene Clark has power to draw."

Dougherty v. *Moore*, 71 Md. 248.

No written assignment of a chose in action undelivered affects the title.

Hough v. *Bailey*, 32 Conn. 288, 290.

No deposit in the donor's name as trustee for another, though coupled with a declaration to the donee that he has done so, passes title, if the owner meant to retain control of the fund during his life.

Nutt v. *Morse*, 142 Mass. 1; *Burton* v. *Bridgeport Sav. Bank*, 52 Conn. 398, 402.

Mr. Justice **Blatchford** delivered the opinion of the court: [2

On or about the 14th of April, 1887, Mrs. Irene Clark, of Milford, New Haven County, Connecticut, died, leaving a will which contained the following provisions: (1) She gave to her husband, Bela Clark, all of her household furniture, including beds and bedding, pictures and silver-plated ware; (2) She gave to her grandniece, Martha A. Buckingham, and to five other persons, one of whom was Emma J. Clark, the wife of Albertus N. Clark, one Mary Bell Clark and one Ellen C. Platt, all of her personal estate, including her wearing apparel, to be equally divided between them; and (3) she appointed Albertus N. Clark to be her executor. This will was duly admitted to probate in the proper court on the 16th of April, 1887, and Albertus N. Clark qualified as executor. The inventory of the estate showed that she had $7,509.83 in cash, deposits in savings banks and bank stock; $191.30 in household goods, and $48.50 in wearing apparel.

Martha A. Buckingham, who had become Martha A. Miller by marriage, a citizen of Iowa, filed a bill in equity, on the 3d of January, 1889, in the Circuit Court of the United States for the District of Connecticut, against Emma J. Clark, Mary Bell Clark, Ellen C. Platt and Albertus N. Clark, citizens of Connecticut. The bill sets forth the death of Irene Clark, her will and its admission to probate, and the qualifying of Albertus N. Clark as executor. It further alleges that the de-

NOTE.—*As to gifts causa mortis, requisites of; what revokes,*—see *note* to Basket v. Hassell, 27: 500.

ceased left, as a part of her estate, $4,500 and accrued interest, deposited in the Connecticut Savings Bank of New Haven, Connecticut; that such sum was evidenced by three bank-books, one in the name of Ellen C. Platt, one in the name of Mary Bell Clark and one in the name of Emma J. Clark, each of which books represented the deposit of the sum of $1,500 and accrued interest; that such books were in the possession of Irene Clark at the time of her death, and came into the possession of Albertus N. Clark, as executor, who, as such executor, was rightfully entitled to the possession of them and to such deposits of money; that he wrongfully parted, or was intending to part, with the possession of such books and deliver them respectively to the three parties in whose names they stood; that such books were then wrongfully in the possession of said parties; that the money represented by them was, at the time the executor made his inventory, and also now, in said Connecticut Savings Bank; that he had wrongfully neglected to include in his inventory the said $4,500; and that that sum is wrongfully withheld from said estate.

The prayer of the bill is for a decree compelling the three other defendants to turn over to the executor the said bank-books, and ordering him to receive them and the money deposited in the Connecticut Savings Bank, and to include the said sum of $4,500 and accrued interest as assets of the estate of Irene Clark, and to amend his inventory so as to include the same, and to make final disposition of said money according to the provisions of the will of the deceased. An answer on oath is waived. The defendants joined in a demurrer to the bill, which was overruled; and they then joined in an answer, to which there was a replication, and proofs were taken.

The court, held by *Judge* Shipman, entered a decree dismissing the bill. The court (40 Fed. Rep. 15) decided the case in favor of the defendants on the merits, the opinion holding that, on the facts proved, the gifts of the moneys to the three female defendants were valid as gifts *inter vivos*, and were accepted by the donees during the lifetime of the testatrix. The plaintiff has appealed to this court. The amount represented by each of the three bank-books, on the 15th of January, 1889, did not exceed the sum of $1,792.61, the aggregate of the three being $5,377.83. The defendants now move to dismiss the appeal, for want of jurisdiction, because the matter in dispute as to each of the defendants other than the executor does not exceed the sum or value of $5,000. United with it is a motion to affirm.

We are of opinion that the appeal must be dismissed, on the ground that the interest of the plaintiff does not exceed $5,000. As the total amount involved is only $5,377.83, and the interest of the plaintiff in that sum is, under the will, only one sixth thereof, or $896.30½, this court has no jurisdiction of her appeal.

Appeal dismissed.

WHEELING & BELMONT BRIDGE COMPANY, *Plff. in Err.*, [287]
v.
WHEELING BRIDGE COMPANY.

(See S. C. Reporter's ed. 287-298.)

Judgment of state court, when final—Virginia law as to ferries, not a contract—transfer of ferry rights—surrender of power of government.

1. A judgment for the condemnation of lands which the Supreme Court of a State holds to be final will be considered a final judgment in this court, in exercising its appellate jurisdiction; the estimate of the compensation may be treated as a distinct proceeding.
2. The Virginia Law of 1840, prohibiting the courts of the counties from licensing a ferry within half a mile from an established ferry, was not a contract, but was subject to be repealed at any time.
3. The mere transfer from vendor to vendee of the existing rights and privileges of a ferry company does not add anything to such rights and privileges, nor give them any additional force or validity.
4. An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions.

[No. 1425.]

Submitted Dec. 15, 1890. Decided Feb. 2, 1891.

IN ERROR to the Supreme Court of Appeals of West Virginia, to review a judgment of that court affirming a judgment of the Circuit Court of Ohio County in that State for the condemnation of property for a bridge over the Ohio River.

On motion to dismiss or affirm. *Affirmed.* [288]

Statement by *Mr. Justice* **Field**:

This was a proceeding commenced by petition in a court of West Virginia by the Wheeling Bridge Company, a corporation under the laws of that State, to condemn for its use a parcel of ground owned by the Wheeling and Belmont Bridge Company, a corporation formed under the laws of Virginia, of which the territory composing West Virginia was then a part. The petitioner represents that it was created a corporation for the purpose of constructing and maintaining a bridge across the Ohio River, from a point on the east side of its main channel, north of the public landing in the City of Wheeling, to a point nearly opposite on Wheeling Island in that city—the bridge to be for public use; and that in order to construct it and its approaches it is necessary to build over and to take a parcel of land belonging to the Wheeling and Belmont Bridge Company on Wheeling Island, which parcel is described in the

NOTE.—*What is final judgment from which appeal lies.* See *note* to Gibbons v. Ogden, 5:302.

As to constitutionality of laws or of repeal or modification of statute, see *note to* Fletcher v. Peck, 3:162.

petition and designated on an accompanying plat, and contains about thirty perches.

The petitioner avers that there is no lien or charge upon the parcel of land; that it is unable to agree with the Wheeling and Belmont Bridge Company on the terms of purchase, and that the land is necessary for the construction of the proposed bridge and the approaches to it. It therefore prays that notice may be given to the Wheeling and Belmont Bridge Company of the filing of the application, and that the same will be heard on a day [289] designated; that commissioners may be appointed by the court to ascertain what will be a just compensation for the land, and that upon the payment of the compensation thus ascertained the title may be vested in the petitioner.

To this petition the Wheeling and Belmont Bridge Company appeared and tendered seven pleas, in the first four of which the defendant joined issue, raising the question of the necessity of the parcel of land desired for the purpose of maintaining the proposed bridge of the petitioner and its approaches, and of the necessity of the parcel and certain structures thereon for the proper exercise by the defendant of its franchise. The issues were found in favor of the petitioner by a jury, establishing the fact that the land desired was essential to the proposed work of the petitioner and was not essential to the proper exercise of the franchise of the defendant. No questions were raised as to the correctness of the rulings upon the trial of these issues, at least none which can be considered by the court.

The other three pleas raised the question of the power of the Legislature to authorize the construction of a new bridge within half a mile either way from the bridge of the defendant, to transport persons and property across the Ohio River, the defendant contending that by its charter and the privileges of owners of ferries which it had acquired it had become invested with the exclusive right to thus transport persons and property within that distance of its bridge. The court held the pleas insufficient, and rejected them and rendered judgment sustaining the proceedings for the condemnation of the property, adjudging that it was necessary for the petitioner to take it for the purpose of prosecuting its proposed work and was not necessary to the defendant for the exercise of its franchise. The court thereupon named commissioners to ascertain what would be just compensation for the land. A writ of error was subsequently allowed, the proceedings of the commissioners stayed and the case taken to the supreme court, where the judgment of the lower court was affirmed. To review this latter judgment the case is brought here.

[290] *Mr.* **W. P. Hubbard,** for defendant in error, for motion.

Messrs. **Daniel Lamb, A. J. Clarke** and **Henry M. Russell,** for plaintiff in error, against motion.

Mr. Justice **Field** delivered the opinion of the court:

The defendant in error, the plaintiff below, moves in the alternative to dismiss the appeal on the ground that the judgment recovered is not final, or to affirm the judgment on the ground of the manifest insufficiency of the errors assigned. The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to the defendant for the proper exercise of its franchise. The judgment for the comdemnation was conclusive upon both particulars. A right to condemn, as held by the Supreme Court of the State, is to be determined before the appointment of commissoners to estimate the amount of compensation to be made. *Baltimore & O. R. Co.* v. *Pittsburg, W. & K. R. Co.* 17 W. Va. 812. If the judgment had been different all further proceedings would have been ended. Being for the condemnation, the estimate of the compensation, which was to follow, was to be made by commissioners, to be appointed, and might therefore be treated as being a distinct proceeding. The judgment appears to have been considered by that court as so far final as to justify an appeal from it; and if the Supreme Court of a State holds a judgment of an inferior court of the State to be final we can hardly consider it in any other light, in exercising our appellate jurisdiction. The motion to dismiss must therefore be denied. But upon the motion to affirm, other considerations arise upon the 5th, 6th and 7th special pleas, which were held insufficient and rejected.

The fifth special plea sets forth, in substance, that defendant was organized under a charter from the State of Virginia to erect a bridge across the Ohio River at or near the Town of Wheeling; that in pursuance of the charter it erected and had for many years maintained for public use, in consideration [2 of tolls lawfully exacted, a wire suspension bridge extending from the eastern shore of the river at Tenth Street in the City of Wheeling to the eastern shore of Zane's or Wheeling Island; that it was empowered by the Legislature to purchase, acquire and hold all ferry rights and privileges between Zane's Island and the main Virginia shore at the City of Wheeling; that in the year 1847 there was, and for many years had been, between those points, a ferry maintained and owned by certain parties named, together with the rights and privileges by law incident thereto; that in September, 1847, it acquired by purchase from them the said ferry and the rights and privileges thereof, and has since owned and enjoyed the same; that its present toll bridge was erected and has been maintained substantially in the location of the ferry, and by the use of the bridge for the public it has kept in full force and vigor the rights and privileges appertaining to the ferry. The plea also sets forth that at the time when the defendant acquired the ferry and the rights and privileges incident thereto, one of them was the exclusive right to transport persons, animals and vehicles across the Ohio River within the limits of one half a mile from the ferry; and that the bridge proposed to be built by the petitioner is to be located, and the whole parcel of land proposed to be condemned is situated, within half a mile of the said ferry and of the defendant's bridge.

The sixth special plea embodies substantially the averments of the fifth with an additional one to the effect that out of the powers and authorities granted to the defendant and the acquisition by it of the said ferry and the rights, privileges and franchises thereof, a contract arose between the State of Virginia and the defendant, that it should have and enjoy during its chartered existence the exclusive privilege of transporting persons, animals and vehicles across the Ohio River at all points within half a mile of the location of the ferry; that upon the formation of the State of West Virginia it became a party to the contract and is bound by it, but that the Legislature of the State, not regarding its obligations, in March, 1882, passed an Act providing that corporations might be 2] formed, for the purpose of erecting and maintaining toll bridges over the Ohio River for the transportation of persons, vehicles and other things, and that no ferry privileges or franchises should preclude the erection of such bridges or entitle the owner to damages by reason thereof. The defendant avers that this Act of the Legislature of West Virginia is unconstitutional and void, as impairing the obligation of the contract between West Virginia and Virginia and the defendant. The seventh special plea adds nothing material to the averments of the other two.

The contention of the defendant is, that by the acquisition of the ferry and its privileges and the authority to construct its bridge it has the exclusive right to transport passengers, animals and vehicles over the Ohio River at all points within a half a mile of the bridge. The ferry which it purchased—the one connecting the mainland with Wheeling Island—was licensed at an early day, and no exclusive privileges, such as are claimed now, were then attached to the franchise. The subsequent General Law of Virginia, passed in 1840, prohibiting the courts of the different counties from licensing a ferry within half a mile in a direct line from an established ferry, had in it nothing of the nature of a contract. It was a gratuitous proceeding on the part of the Legislature by which a certain benefit was conferred upon existing ferries, but not accompanied by any conditions that made the Act take the character of a contract. It was a matter of ordinary legislation, subject to be repealed at any time when in the judgment of the Legislature the public interest should require the repeal. The mere purchase by the defendant of existing rights and privileges added nothing to them. It would be absurd to suppose that the transfer from vendor to vendee gave them an additional force or validity. Here the prohibition of the Act of 1840 was only upon the county courts, and that in no way affected the legislative power of the State. *Fanning* v. *Gregoire*, 57 U. S. 16 How. 524 [14:1043]. Nor did the charter of the defendant contain any inhibition upon the State to authorize the establishment of another bridge within the distance claimed whenever the public interest 3] should require it. An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions. As was said substantially in the case of *Charles River Bridge* v. *Warren Bridge*, 36 U. S. 11 Pet. 420, 548 [9:773, 824], whenever it is alleged that a State has surrendered or suspended its power of improvement and public accommodation on an important line of travel, along which a great number of persons must daily pass, the community has a right to insist that its surrender or suspension shall not be admitted, in a case in which the deliberate purpose of the State to make such surrender or suspension does not appear, referring to several adjudications of this court in support of the doctrine. And whatever of exclusiveness there was in the privilege extended by the Act of 1840 within half a mile on each side of an established ferry was repealed in 1882. From that time the defendant could claim no exclusive privilege to transport passengers, animals and vehicles over the Ohio River within the distance mentioned under the repealed Statute, even if it could have done so before.

Judgment affirmed.

UNITED STATES MORTGAGE COMPANY, *Appt.*, [313]
v.
ANSON SPERRY ET AL.

(See S. C. Reporter's ed. 313-352.)

Authority of guardian to mortgage ward's property—Illinois law—right of redemption—New York corporation may loan money at rate of interest of the State where loan is made—state law governs interest—interest on overdue coupons—agreement to take lesser sum—usury—rate of interest on guardian's mortgage after ward becomes of age.

1. By the law of Illinois a guardian has authority, by leave of the county court, to mortgage the real estate of his ward to secure the payment of moneys borrowed to be used in improving the ward's property or to discharge existing mortgages upon it.
2. By the law of that State the whole subject of mortgaging the real estate of the ward is for the

---

NOTE.—Lex loci, *as to usury.* See *note* to Slacum v. Pomery, 8: 205.

That purchase of obligation at less than face value is not usury, see *note* to Nichols v. Fearson, 8: 623.

New securities for usurious loan, when valid. See *note* to Walker v. Bank of Washington, 11: 494.

That usury in a substituted security revives original; valid claim is not invalidated by being included in a usurious security,—see *note* to Newell v. Nixon, 18: 305.

That taking interest in advance is not usury, see *note* to Fleckner v. Bank of United States, 5: 631.

As to usury by national banks, see *note* to Farmers & M. Nat. Bank v. Dearing, 23: 196.

As to who may set up usury; purchaser of equity of redemption, etc.,—see *note* to De Wolf v. Johnson, 6: 343.

As to pleading and proof of usury; question for jury,—see *note* to Levy v. Gadsby, 2: 404.

As to acts of lender's agent; when transaction usurious,—see *note* to Call v. Palmer, 29: 559.

determination of the guardian and the county court, subject to the restrictions that the mortgage, if not in fee, must not extend beyond the minority of the ward, and that the indebtedness mature at a time not beyond such minority, and arise out of and have appropriate connection with the management of the ward's estate.

3. It is not necessary to the validity of a mortgage made by a guardian on his ward's property that it should expressly reserve the right of redemption, where that right is given by the statute; and it will be assumed that the court in granting leave to mortgage discharged its duty by ascertaining upon proper proofs or its personal knowledge the propriety of the mortgage.

4. A corporation of New York authorized by its charter to lend money on bond and mortgage on real estate within the United States is not restricted to the rate of interest permitted by the laws of New York but may contract for such rate of interest as is lawful in the State where the loan is made and where the property mortgaged is situated, although such rate is greater than is allowed in New York and although its charter provides that it shall not loan at a rate of interest exceeding the legal rate.

5. Where a contract of loan was made and is to be performed in a State, interest must be allowed or disallowed as may be required by the law of that State.

6. In Illinois, interest will not be allowed upon overdue interest coupons representing the stipulated interest of a bond and mortgage executed by a guardian upon the real estate of his ward; a party is not bound by a contract made before interest is due for the payment of compound interest.

7. Where a certain sum of money is due and the creditor enters into arrangements with his debtor to take a lesser sum, provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance.

8. In Illinois an agreement made after interest is due to make it a principal sum does not render the transaction usurious; but where a guardian on the settlement of a loan allows interest upon interest, and there was no contract that the creditor should receive usurious interest, the remedy is to correct the settlement and not to forfeit the interest.

9. Although in Illinois a guardian cannot create a debt secured by mortgage that does not mature at or before his ward's majority, nor contract for the payment of interest after the ward reaches full age, yet the rate of interest after his majority is not controlled by the statute, but by the express contract, where the ward allows the debt to remain unpaid after his majority; but when the debt is merged in a judgment or decree the contract ceases to exist and the rate of interest is thereafter controlled by the statute.

[No. 22.]

Argued Jan. 31, Feb. 3, 1890. Decided Feb. 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Illinois, ordering the sale of certain real property in the City of Chicago to satisfy certain bonds and mortgages executed upon it by a guardian. *Reversed.*

Statement by *Mr. Justice* **Harlan:**

This appeal brings up for review a decree (24 Fed. Rep. 838, and 26 Fed. Rep. 727) ordering the sale of certain real property in the City of Chicago, belonging to the appellee Henry W. Kinsgbury, in satisfaction of the aggregate amount found to be due on three bonds given by his guardian to the United States Mortgage Company, with the approval of the County Court of Cook County—by which court the guardian was appointed—for moneys borrowed to be used in improving the ward's property and discharging certain incumbrances upon it. The bonds, all signed by the guardian, were payable, respectively, May 1, 1882, April 1, 1883, and December 1, 1883, and each one was secured by mortgage of distinct parts of the real estate directed to be sold. The mortgages bear date, respectively, July 10, 1872, April 1, 1873, and December 1, 1876, and provide, as do the bonds, that upon default, continuing for one month, in the payment of interest as stipulated, the principal sum, together with all arrearages of interest thereon, should, at the option of the Mortgage Company, become immediately due and collectible. Default having occurred and continued for one month in the payment of interest on each of the bonds, the Company, on the 2d of November, 1877, exercised that option, declared the principal and all arrearages of interest to be immediately payable and collectible, and within a few days after that date brought the present suit for foreclosure.

The circumstances under which the bonds, coupons and mortgages were executed are as follows:

On the 5th of July, 1872, Anson Sperry, guardian of Kingsbury, presented his petition, properly verified, to the County Court of Cook County, showing that the real property of the minor was subject to incumbrance by mortgages to the amount of about $78,500; that the debts secured by some of them were due, and the holders demanding payment; that the holders of other mortgage debts, soon to mature, were willing to accept payment and to assign or cancel their mortgages; that upon all of the mortgages considerable accumulations of interest were due and unpaid; that a portion of the real estate belonging to the minor consisted of lot six and a part of lot five, in block twenty-five of the original Town of Chicago, and that the buildings formerly thereon were destroyed by fire October 9, 1871; that the premises constituted a very large part of his estate in point of productive value, were centrally located in Chicago, and, before the destruction of the buildings thereon, yielded large rents; that in the judgment of all persons interested in the estate and in its proper management, the buildings should be restored, and the property made productive; that no money had come to the guardian's hands with which to liquidate the existing mortgage debts or the accumulated interest thereon; that the rents from the estate being insufficient for that purpose, it was necessary that provision be made to prevent the foreclosure of the mortgages; that there was no money of the estate to be ap-

plied in restoring the buildings; that the cost of constructing suitable buildings upon the premises would be about $100,000; and that for the purpose of funding, consolidating and paying off the mortgage debts and constructing proper buildings, it would be necessary to borrow about $200,000.

The prayer of the guardian was that he be authorized to negotiate, for the purposes stated, a loan of not exceeding $200,000, and to pay usual and reasonable commissions and brokerage therefor, upon such terms and for such time as shall be approved by the court and allowed by law, the mortgage to rest upon certain premises, belonging to the minor, the metes and bounds of which are given in the petition of the guardian. The authority asked for was given, and a loan in gold for $175,000 was negotiated with the appellant. The bonds given therefor were made payable, in gold, May 1, 1882, with interest (evidenced by coupons signed by the guardian) in like coin at the rate of nine per cent, payable semi-annually, until the principal was paid, and the mortgage to secure the payment of principal and interest was submitted to and approved by the county court. The order of approval was made August 6, 1872.

Subsequently, on the 4th of September, 1872, the guardian filed in the county court an inventory of the real and personal estate of the minor, which recited all the mortgages upon his property, including those executed before he inherited it, and the above mortgage for $175,000. This inventory was examined, approved and ordered to be recorded. A subsequent inventory filed by him December 26, 1872, showed a balance of receipts in his hands of $496.98, and a cash balance of $30,026.71 unexpended from the loan that had been authorized by the court. In that report he said: "That upon consultation with all parties interested and with persons of sound discretion, and without interest, it is thought best to construct on the north one hundred feet of lot six, fronting on the alley north of Randolph Street, and being the north end of Randolph Street lot, a public hall. There are no halls of the character intended to be built north of 22d street and east of the south branch of the Chicago River, and the large number of conventions, meetings, concerts, readings and other assemblages of a like character requires proper accommodations. The ground proposed to be used is useless for almost any other purpose, but is a source of large expense. The ground is eighty feet wide by one hundred feet deep, and a hall with seating room for fifteen to eighteen hundred people can be built at a cost of about $50,000, from which an annual income of $10,000, at least, can be realized. An entrance can be made through the Clark Street building, and the basement thereunder will rent for the purposes of an eating house at a fair rent. All the property belonging to said estate is liable to the dower right of Mrs. Jane C. Kingsbury, of one third of the net income thereof, and to the dower right of Mrs. Eva Lawrence, of two ninths of said net income." This report was examined, approved and recorded.

On the 3d of March, 1873, the guardian presented another petition to the county court, showing that he had used $68,643.80 out of the above loan in paying off old mortgages on the minor's estate, leaving a balance of $126,002.58, which he estimated would all or nearly all be required in the construction of buildings then being erected on the Randolph Street front of lot six in block thirty-five, and the building on that part of lot five, in the same block, owned by the minor. His petition also showed that the rear part of lot six had upon it, before the fire of 1871, a public hall or theater; and that upon careful consideration, and after consultation with judicious, competent persons, it was best for the estate to erect a public hall upon the rear of that lot, having its front on Clark Street, and to be used for concerts, lectures, readings, etc. It further appeared that, in addition to the old mortgages [31
previously described, there were two other incumbrances, that were either in whole or in part charges upon the estate of the infant, and which amounted to $15,000 and interest; and that the money in his hands, of the former loan, would be needed for the buildings on lot six, and more was needed to erect the building on the rear of that lot and to pay off said incumbrances. His petition showed "that the entire estate of the said Henry W. Kingsbury consists of real estate, nearly all situate in the City of Chicago, and the only revenue and income of said estate to meet the various charges and incumbrances upon it, and its expenses and taxation, must be derived from the rental of said real estate; that no revenue can, in his judgment and that of judicious persons with whom he has consulted, be derived from the said rear portion of said lot six (6) unless the same be improved; that the said premises have heretofore, as thus improved, been largely productive and profitable until the said improvements were destroyed by fire, and it is believed that, if judiciously built upon, as proposed, they would be again equally productive and profitable, if not more so." He therefore asked authority to negotiate an additional loan of $75,000 in gold coin or the equivalent thereof in paper currency of the United States, paying usual and reasonable commissions and brokerage therefor, upon such terms and for such time as the court would approve and the law allowed, and to secure the same by mortgage upon certain described premises.

The prayer of that petition was also granted, and an order was made authorizing a further loan of $75,000 in gold coin, or its equivalent in paper currency, upon the terms stated in the petition. Under this order the mortgage of April 1, 1873, was executed to secure the payment of $70,000 in gold coin borrowed by the guardian from the Mortgage Company, and for which amount the guardian gave his bond maturing April 1, 1883, payable with interest (evidenced by coupons signed by him as guardian) at the rate of nine per cent per annum, payable half-yearly in like coin, until the principal sum was fully paid. This mortgage does not seem to have been formally

[319] presented to the court for examination, but the fact of its execution was brought to its attention in the guardian's reports from time to time of the condition of the estate, and was recognized.

On the 12th of October, 1876, the guardian—who, at that time, was Herman G. Powers—presented to the county court a petition showing a large indebtedness against the minor's estate, arising in part from the erection of buildings upon the lots before referred to, and including $51,987.04 in gold, which he stated was due the United States Mortgage Company for unpaid interest up to August 15, 1876. For the purpose of discharging said indebtedness, he asked authority to make an additional loan in gold of a sum not exceeding $95,000, or its equivalent in paper currency of the United States, paying interest thereon at the rate of nine per cent per annum in gold. The authority asked was granted, and the amount above named having been negotiated with the appellant, he executed a mortgage, December 1, 1876, to secure the payment of that sum in gold coin on the 1st of December, 1883, with interest (evidenced by coupons signed by him as guardian), payable half-yearly in like coin, at the rate of nine per cent per annum until the principal sum was paid, the guardian giving his bond for the principal sum, and coupons for the interest. The mortgage, bonds and coupons, having been submitted to the court, were examined and approved.

Upon the basis of the master's report the aggregate amount due on the 15th day of December, 1885, was $343,399.96. This amount was reduced by the final decree to the sum of $221,727.64, making a difference against the Company, at that date, of $121,672.32.

The following extract from the final decree shows how this result was reached:

"And the court finds that there was due the complainant, October fifteenth, 1884, of principal and interest on the loans made by said Anson Sperry as guardian, calculating interest at nine per cent per annum from the time to which the interest on said loans had been paid or funded and secured by the mortgage executed by the said Powers, the following sums, to wit:

[320] "Principal of first loan..... $175,000 00
"Interest at nine per cent from November first, 1876, to October fifteenth, 1884..... 125,343 75
"Principal of second loan..... 70,000 00
"Interest at nine per cent from April first, 1877, to October fifteenth, 1884..... 47,512 50

"Making a total of..... $417,856 25

"And the court finds and the master's report shows payments to the complainant, made October fifteenth, 1884, and previously, to the amount of..... $302,568 17

"And that said Powers improperly paid to said complainant the sum of $370.57 as interest on coupons secured by said 1st and 2d mortgages, which sum should be charged to complainant..... 370 57

"Total payments..... $302,938 74

"Leaving a balance due October fifteenth, 1884, on said first two loans of..... $114,917 51

"The interest upon which at nine per cent to December fifteenth, 1885, is..... 12,066 33

"Leaving a balance due on the first two loans at that date..... $126,983 84

"And the court finds that the principal of said third mortgage made by Heman G. Powers should be reduced by deducting the amount of interest on coupons included therein, or $7,219.27, leaving..... $87,780 73

"And that the complainant should be allowed as interest thereon to December fifteenth, 1885, the sum of..... 6,963 07

"Making a total of principal and interest due on said mortgage of..... $94,743 80

"Which, added to the sum due on said first two mortgages, makes a total of..... $221,727 64 due the complainant on all three of said mortgages December fifteenth, 1885."

The calculation of interest was made to December 15, 1885, because on that day the court below filed an opinion sustaining the defendant's exceptions to the master's report so far as it allowed, (1) interest on coupons after their maturity; (2) interest on coupons of the first and second loans included in the third mortgage; and (3) interest on the third loan at the rate of nine per cent.

The assignment of errors questions the correctness of the ruling on the exceptions, but makes no distinct point as to interest at the contract rate having been calculated to December 15, 1885, rather than to the date of the entry of the final decree passed on the 23d of March, 1886.

Messrs. Wirt Dexter and **John J. Herrick**, for appellant:

If the county court had jurisdiction of the person and subject matter, the validity of the orders authorizing the mortgages cannot be questioned in this suit.

Grignon v. *Astor*, 43 U. S. 2 How. 319 (11: 283); *Florentine* v. *Barton*, 69 U. S. 2 Wall. 210 (17: 783); *McNitt* v. *Turner*, 83 U. S. 16 Wall. 352 (21: 341); *Davis* v. *Gaines*, 104 U. S. 391 (26: 759); *Young* v. *Lorain*, 11 Ill. 624; *Shoemate* v. *Lockridge*, 53 Ill. 503.

The county court had jurisdiction of the subject matter.

Sperry v. *Fanning*, 80 Ill. 371; *People* v. *Cole*, 84 Ill. 327; *Bostwick* v. *Skinner*, 80 Ill. 147; *Moffitt* v. *Moffitt*, 69 Ill. 641; *Bond* v. *Lockwood*, 33 Ill. 212; *Smith* v. *Sackett*, 10 Ill. 545; *Allman* v. *Taylor*, 101 Ill. 185; Chambers, Infants, 504, 505; *Dodge* v. *Cole*, 97 Ill. 338; McPherson, Infants, 295, 296; *Umbleby* v. *Kirk*,

Coop. Ch. 254; *Ex parte Grimstone*, Ambl. 706.

The rate of interest contracted for was not prohibited.

Blydenburgh, Usury, 17; *Western Transp. & Coal Co.* v. *Kilderhouse*, 87 N. Y. 430.

The rate of interest contracted for was not prohibited by appellant's charter.

House of Lords, 3 Bing. 193.

The rate of interest is determined by the law of the place of the contract.

2 Kent, Com. 460; Story, Confl. Laws, 396; *Pratt* v. *Adams*, 7 Paige, 616, 4 N. Y. Ch. L. ed. 300; *Balme* v. *Wombough*, 38 Barb. 353; *Wayne County Sav. Bank* v. *Low*, 81 N. Y. 566; *Sheldon* v. *Haxtun*, 91 N. Y. 124; *Scudder* v. *Union Nat. Bank*, 91 U. S. 412 (23: 248); *National Bank* v. *Matthews*, 98 U. S. 621 (25: 188); *National Bank* v. *Whitney*, 103 U. S. 99 (26: 443); *Bowen* v. *Lease*, 5 Hill, 221; *Philadelphia Loan Co.* v. *Towner*, 13 Conn. 248; *Bard* v. *Poole*, 12 N. Y. 495.

If it be conceded that the rate contracted for was prohibited by appellant's charter, the objection goes only to the capacity of the corporation, and cannot defeat the enforcement of the mortgages.

Ellsworth v. *St. Louis, A. & T. H. R. Co.* 98 N. Y. 553; Morawetz, Priv. Corp. § 100; Sedgwick, Stat. and Const. Law, 73; Boone, Corp. 101; *Jones* v. *Guaranty & I. Co.* 101 U. S. 622 (25: 1030).

A party contracting with a corporation cannot set up the defense of *ultra vires* to a contract fully performed on the part of the corporation.

Fishmongers Co. v. *Robinson*, 5 McN. & G. 131; *Farmers & M. Nat. Bank* v. *Dearing*, 91 U. S. 29 (23:196); *Ohio & M. R. Co.* v. *McCarthy*, 96 U. S. 258 (24: 693); *Gold Mining Co.* v. *National Bank*, 96 U. S. 640 (24: 648); *Union Nat. Bank* v. *Matthews*, 98 U. S. 621 (25: 188); *National Bank* v. *Whitney*, 103 U. S. 99 (26: 443); *Swope* v. *Leffingwell*, 105 U. S. 3 (26: 939); *Reynolds* v. *Crawfordsville Nat. Bank*, 112 U. S. 405 (28: 733); *Fortier* v. *New Orleans Nat. Bank*, 112 U. S. 439 (28: 764).

The question of interest is purely a question of local law; in Illinois and under the Illinois decisions the rate is the contract rate as long as the principal is unpaid.

Cromwell v. *Sac County*, 96 U. S. 51 (24: 681); *Ohio* v. *Frank*, 103 U. S. 697 (26: 531); *Etnyre* v. *McDaniel*, 28 Ill. 201.

A stipulation reserving to the creditor the right to have full payment of the money due on an existing contract, in case there should be a failure to pay a smaller sum on a specified day, does not constitute a penalty, and equity will not interfere to prevent its enforcement.

2 White & Tudor, Lead. Cas. in Eq. 2025; Pom. Eq. Jur. § 238; Bispham, Eq. (3d ed.) § 180; Bump, Comp. 46, 47, 54; *Sewell* v. *Musson*, 1 Vern. 210; *Thompson* v. *Hudson*, L. R. 4 H. L. 1; *Bonafaus* v. *Rybot*, 3 Burr. 1370; *Ford* v. *Chesterfield*, 19 Beav. 428; *Ex parte Bennett*, 2 Atk. 527; *Ex parte Vere*, 1 Rose, 280; *Ross* v. *Rose*, Ambl. 332; *Davis* v. *Thomas*, 1 Russ. & M. 506; *Mayo* v. *Judah*, 5 Munf. 503.

Even if the provision as to the reduction of interest is incorporated into the original mortgage, the higher rate of interest will not be regarded as a penalty, and the lower rate of interest can only be claimed by the mortgagor on strict compliance with the conditions.

Powell, Mortg. (6th ed.) 900; Coote, Mortg (4th ed.) 883; Fisher, Mortg. (2d ed.) 930; Adams, Eq. (7th ed.) 109; 1 Hillard, Mortg. (4th ed.) 88; *Nicholls* v. *Maynard*, 3 Atk. 520; *Herbert* v. *Salisbury & Y. R. Co.* L. R. 2 Eq. 224; *Reeves* v. *Stipp*, 91 Ill. 609.

The court below erred in holding that the interest coupons did not draw interest.

Heiman v. *Schroeder*, 74 Ill. 158; *Knickerbocker Ins. Co.* v. *Gould*, 80 Ill. 388; *Harper* v. *Ely*, 70 Ill. 581.

The question of interest is governed by the local law.

Cromwell v. *Sac County*, 96 U. S. 51 (24; 681); *Ohio* v. *Frank*, 103 U. S. 697 (26: 531); *Walker* v. *Hadduck*, 14 Ill. 399; *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 206 (17: 519); *Thompson* v. *Lee Co.* 70 U. S. 3 Wall. 327 (18: 177); *Aurora* v. *West*, 74 U. S. 7 Wall. 105 (19: 50); *Wilcox* v. *Howland*, 23 Pick. 167.

If a guardian or trustee converts money to his own use or employs it in his business, he will be charged with compound interest.

Rowan v. *Kirkpatrick*, 14 Ill. 11; *Bond* v. *Lockwood*, 33 Ill. 222; *Camp* v. *Bates*, 11 Conn. 487.

To constitute usury there must be an intention knowingly to contract for usurious interest.

Bank of United States v. *Waggener*, 34 U. S. 9 Pet. 378 (9: 163); *Lloyd* v. *Scott*, 29 U. S. 4 Pet. 205 (7: 833); *Thayer* v. *Wilmington Star Min. Co.* 105 Ill. 553.

A note given for the payment of interest on past-due interest is valid and can be enforced.

Kellogg v. *Hickok*, 1 Wend. 521; *Stewart* v. *Petree*, 55 N. Y. 621; *Camp* v. *Bates*, 11 Conn. 487; *Wilcox* v. *Howland*, 23 Pick. 167; *Mowry* v. *Bishop*, 5 Paige, 98, 3 N. Y. Ch. L. ed. 643; *Otis* v. *Lindsey*, 10 Me. 315; *Mosher* v. *Chapin*, 12 Wis. 453; *Haworth* v. *Huling*, 87 Ill. 23; *McGovern* v. *Union Mut. L. Ins. Co.* 109 Ill. 151; *Gilmore* v. *Bissell*, 124 Ill. 488; *Camp* v. *Bates*, 11 Conn. 487; *Meeker* v. *Hill*, 23 Conn. 574; *Oliver* v. *Decatur*, 4 Cranch, C. C. 461; *Bainbridge* v. *Wilcocks*, Baldw. 536; *Fobes* v. *Cantfield*, 3 Ohio, 17; *Turner* v. *Miller*, 6 Ark. 463.

Messrs. **John P. Wilson** and **Lyman Trumbull**, for appellees:

The circuit court did not err in refusing to allow interest on overdue interest.

Cromwell v. *Sac County*, 96 U. S. 51 (24: 681); *Ohio* v. *Frank*, 103 U. S. 697 (26: 531); *Leonard* v. *Villars*, 23 Ill. 377; *Barker* v. *International Bank*, 80 Ill. 96; *Thompson* v. *Hoagland*, 65 Ill. 310; *McFadden* v. *Fortier*, 20 Ill. 509; *Harper* v. *Ely*, 70 Ill. 581; *Hollingsworth* v. *Detroit*, 3 McLean, 472; *Dunlap* v. *Wiseman*, 2 Disney (Ohio) 398; *Humphreys* v. *Morton*, 100 Ill. 592; *Clark* v. *Iowa City*, 87 U. S. 20 Wall. 583 (22: 427); *Genoa* v. *Woodruff*, 92 U. S. 502 (23:586); *Amy* v. *Dubuque*, 98 U. S. 473 (25:228).

The weight of authority is against allowing interest on overdue interest in the absence of negotiable coupons.

Broughton v. *Mitchell*, 64 Ala. 210; *Wilson* v. *Davis*, 1 Mont. 188; *Doe* v. *Warren*, 7 Me. 48; *Union Bank* v. *Williams*, 3 Coldw. 579;

Stokely v. *Thompson*, 34 Pa. 210; *Mason* v. *Collender*, 2 Minn. 350; *Denver Brick & Mfg. Co.* v. *McAllister*, 6 Colo. 261; *Force* v. *Elizabeth*, 28 N. J. Eq. 403; *Le Grange* v. *Hamilton*, 4 T. R. 613, 2 H. Bl. 144.

An agreement made at the time of the original contract, to allow interest upon interest as it should become due, is not to be supported.

Stewart v. *Petree*, 55 N. Y. 621; *Ferry* v. *Ferry*, 2 Cush. 92.

In ascertaining the amount due on a note, made payable with interest annually, simple interest only is to be computed.

Hastings v. *Wiswall*, 8 Mass. 455; *Dean* v. *Williams*, 17 Mass. 417; *Von Hemert* v. *Porter*, 11 Met. 210; *Doe* v. *Warren*, 7 Me. 48; *Thayer* v. *Wilmington Star Min. Co.* 105 Ill. 540.

The third mortgage was usurious, and no interest should have been allowed thereon.

Harris v. *Bressler*, 119 Ill. 467; *Van Benschooten* v. *Lawson*, 6 Johns. Ch. 313, 2 N. Y. Ch. L. ed. 136; *Connecticut* v. *Jackson*, 1 Johns. Ch. 13, 1 N. Y. Ch. L. ed. 41; *Thornhill* v. *Evans*, 2 Atk. 330; *Peddicord* v. *Conard*, 85 Ill. 102; *Leonard* v. *Patton*, 106 Ill. 99; *Loveland* v. *Ritter*, 50 Ill. 54; *Farwell* v. *Meyer*, 35 Ill. 40; *Payne* v. *Newcomb*, 100 Ill. 611; *Ammondson* v. *Ryan*, 111 Ill. 506.

The indebtedness due appellant after Kingsbury attained lawful age drew interest only at six per cent.

Brewster v. *Wakefield*, 63 U. S. 22 How. 118 (16: 301); *Holden* v. *Freedmen's Sav. & Trust Co.* 100 U. S. 72 (25: 567); *Phinney* v. *Baldwin*, 16 Ill. 108; *Etmyre* v. *McDaniel*, 28 Ill. 201.

Appellant was prohibited by its charter from taking more than 7 per cent interest.

Farmers & M. Nat. Bank v. *Dearing*, 91 U. S. 29 (23: 196); *Burnhisel* v. *Firman*, 89 U. S. 22 Wall. 170 (22: 766); *Turner* v. *Calvert*, 12 Serg. & R. 46; *Ewing* v. *Toledo Sav. Bank*, 43 Ohio St. 31; *Larwell* v. *Hanover Sav. Fund Soc.* 40 Ohio St. 274.

325] *Mr. Justice* **Harlan** delivered the opinion of the court:

1. In the court below one of the contentions of the appellee Kingsbury—who reached his majority before the final decree, and became a defendant—was, that the guardian had no authority to borrow moneys for the purpose of erecting buildings to be rented, or to mortgage the minor's property to secure the payment of moneys borrowed for that or any other purpose; that no such authority could be conferred by the county court; and, consequently, that the mortgages were absolutely void. The circuit court did not concur in this view. It held the mortgages to be valid instruments to secure the payment of whatever amount was legally and justly due upon an accounting. The reduction of the amount reported arose from the disapproval of the mode in which the master computed interest on the several debts.

The contention that the mortgages were unauthorized by law is renewed in this court; and although the Mortgage Company alone has prosecuted an appeal, Kingsbury insists that even if the mode adopted by the circuit court for computing interest was erroneous, the decree cannot be reversed, if this court finds that the mortgages were void for want of authority in the guardian to execute them. As the present appeal necessarily brings before us the defense based upon the alleged invalidity of the mortgages—a defense that questions the right to a foreclosure for any amount—it is necessary to inquire at the outset whether, by the law of Illinois, the guardian had authority to mortgage the real estate of his ward to secure the payment of moneys borrowed to be used in improving the ward's property or to discharge existing mortgages upon it.

By the Constitution of Illinois, county courts are courts of record with original jurisdiction in the appointment of guardians and the settlement of their accounts, and with such other jurisdiction as may be given by general law. Art. 6, § 18. And by the Act of the General Assembly relating to guardians and wards, approved April 10, 1872 (Rev. Stat. Ill. 1874, chap. 64), it is provided that a guardian shall have, under the direction of the county court, "the custody, nurture and tuition of his ward, and the care and management of his estate;" although, under some circumstances, the custody of the person, as well as the education, of the minor would be committed to the father or mother. §§ 2, 4. By the same Statute it is provided that the guardian "shall manage the estate of his ward frugally and without waste, and apply the income and profit thereof, so far as the same may be necessary, to the comfort and suitable support and education of his ward," and "shall educate his ward." §§ 19, 20. It is made his duty "to put and keep his ward's money at interest, upon security to be approved by the court, or invest the same in United States bonds, or other United States interest-bearing securities;" all loans in amounts exceeding $100 to be upon real estate security, but no loan to be for a longer time than three years, nor beyond the minority of the ward. § 22. He "may lease the real estate of the ward upon such terms and for such length of time, not extending beyond the minority of the ward, as the county court shall approve." § 23. So, also, he "may, by leave of the county court, mortgage the real estate of the ward for a term of years not exceeding the minority of the ward, or in fee; but the time of the maturity of the indebtedness secured by such mortgage shall not be extended beyond the time of the minority of the ward." § 24. But "before any mortgage shall be made, the guardian shall petition the county court for an order authorizing such mortgage to be made, in which petition shall be set out the condition of the estate, and the facts and circumstances on which the petition is founded, and a description of the premises sought to be mortgaged." § 25. The Statute also declares "that foreclosures of mortgages authorized by this Act shall only be made by petition to the county court of the county where letters of guardianship were granted, or, in case of nonresident minors, in the county in which the premises, or some part thereof, are situated, in which proceeding the guardian and ward shall be made defendants; and any sale made by virtue of any or-

[326

326]

der or decree of foreclosure of such mortgage may, at any time before confirmation, be set aside by the court for inadequacy of price, or other good cause, and shall not be binding upon the guardian or ward until confirmed by the court;" and "that no decree of strict foreclosure shall be made upon any such mortgage, but redemption shall be allowed, as is provided by law, in cases of sales under executions upon common-law judgments." §§ 26, 27. Power is given to the county court to order "the sale of the real estate of the ward, for his support and education, when the court shall deem it necessary, or to invest the proceeds in other real estate, or for the purpose of otherwise investing the same," upon the verified petition of the guardian, filed at least ten days before the commencement of the term of court at which the application shall be made, and setting forth "the condition of the estate and the facts and circumstances on which the petition is founded." §§ 28, 29. Of the application to sell, notice must be given by publication to all persons concerned, and tried "as in other cases in chancery." § 31. Any order made or judgment rendered under the Act may be reviewed upon appeal to the circuit court, the appellant giving such bond and security as the court directs. § 43. The Statute contains many other sections, but those referred to are all that have any bearing, directly or indirectly, upon the questions raised in the present case.

It is clear, from the statement of the proceedings in the county court, that in each instance of borrowing, the guardian's petition for an order authorizing the loan and mortgage set out the condition of the estate, the facts and circumstances on which it was founded and a description of the premises sought to be mortgaged. And the maturity of the debt, incurred by borrowing, did not extend beyond the minority of the ward. §§ 24, 25. The petition, in form, met all the requirements of the Statute.

The question of the validity of the mortgages is within a very narrow compass, depending, as it does, upon statutory provisions so clearly expressed as to leave but little room for construction. The Statute commits to the guardian, under the direction of the county court, the care and management of the ward's estate, and makes it his duty to manage it frugally and without waste, applying the income and profit therefrom, so far as may be necessary, to the comfort and suitable support, as well as in the education, of the ward. §§ 4, 19. It is also made his duty to put and keep the ward's money at interest. Now, it is clear that the proper management of the ward's estate involves something more than his maintenance and education. It involves the payment of taxes, and may involve the payment of assessments, insurance premiums and mortgages as well as the repairing of buildings; and in order that the interests of the ward may be guarded and promoted, in every emergency arising in the management of his estate, the Statute empowers the guardian, with the leave of the county court, to lease, mortgage or sell his real property. While the Statute (§ 28) defines the objects for which his real property may be sold, it is silent as to the circumstances under which the guardian may lease or mortgage it. Nevertheless, the power to lease or mortgage is expressly given. For what purposes may the power to mortgage be exerted? One of the learned counsel for Kingsbury insists that the guardian cannot borrow money for any purpose or under any circumstances. If this view be sound, it would result that he could not [3
borrow money to pay taxes, or insurance premiums, or for necessary repairs upon buildings, or to discharge mortgages, even when that mode of raising money is absolutely required by the best interests of the estate. We cannot suppose that any such result was within the contemplation of the Legislature when it imposed upon the guardian the duty to care for and manage the ward's estate, under the direction of the county court, and empowered him, with the leave of that court, to mortgage real property for debts maturing on or before the ward's majority. If the guardian could not, with such leave, borrow money upon mortgage of real estate to discharge existing incumbrances, pay taxes, insurance premiums and assessments, or to make necessary repairs, in what mode could it be raised by him? If he could only sell, with the leave of the court, real property for the particular purposes named in the 28th section—namely, for the support and education of the ward, or to invest the proceeds in other real estate, or to invest them otherwise—in what way, when he was without sufficient income from the estate, could money be raised to discharge existing mortgages, pay taxes, insurance premiums, assessments, or to make repairs? The answer to this question suggests that the construction sought to be placed upon the Statute is too narrow. We are of opinion that the Legislature intended to commit the whole subject of mortgaging the real estate of the ward, primarily, to the guardian, subject to certain restrictions, some of which are expressed in the Statute, while others are necessarily implied from its provisions. The express restrictions are: first, that he obtain the leave of the county court, based upon petition setting out the condition of the estate, the facts and circumstances on which the petition is founded, and a description of the premises to be mortgaged; second, that the mortgage, if not in fee, must be for a term of years not extending beyond the minority of the ward; third, that the time of the maturity of the indebtedness secured by it should not extend beyond the minority of the ward. §§ 24, 25. The implied restriction, controlling the discretion and power both of the guardian and the county court, is, that the indebtedness secured by [3
the mortgage must arise out of, and have some necessary or appropriate connection with, the management of the ward's estate. We have seen that the express restrictions, imposed by the Statute, were all observed in the proceedings in the county court. It is equally clear that the debts created by the borrowing of money from the Mortgage Company arose out of and had connection

with the proper management of the ward's estate. When the buildings upon Kingsbury's lots were destroyed by fire in 1871, the question naturally occurred whether it was prudent or for the benefit of the ward that the lots be sold and the proceeds invested in other real estate or in securities, or whether the buildings destroyed should not be replaced, and other lots belonging to the ward improved. It was the duty of the guardian, as well as of the county court when informed of the situation, to consider those questions, because they were involved in the management of the estate. If the guardian had not taken such action as his best judgment indicated, he would have been neglectful of his duty. At any rate, these questions were, in the first instance, for him and for the county court; and their determination of them in the mode prescribed by the Statute was subject to be reviewed, upon appeal, in the circuit court.

This interpretation does not recognize, as belonging to the guardian and to the county court, any larger powers than they have by the express words of the Statute in respect to the disposition by sale of the real estate of the ward. Before the fire of 1871 it was competent for him, with the leave of the county court, to sell even the improved property of the ward in Chicago for the purpose of investing the proceeds in other real estate, improved or unimproved, or of otherwise investing them. For like purposes, and with the leave of that court, he could have sold the lots after the buildings were destroyed by fire. But no such sales should have been made if they could have been avoided, nor if, in the judgment of the guardian and of the county court, looking to the probable future of Chicago, it was best to replace the buildings destroyed and to improve lots not theretofore occupied by [31] buildings. It is asked, Why did not the guardian lease the property, and thus avoid the expense of rebuilding? As leases could not extend beyond the minority of the ward, it may be that the property could not have been advantageously leased for a short term of years, or a sufficient amount raised in that mode to meet the unpaid and constantly accruing taxes as well as the existing mortgages upon the property about to be foreclosed. Be this as it may, and independently of these considerations, it is sufficient to say that the question of lease, mortgage or sale was, under the Statute, for the determination of the guardian and the county court. The power to sell real estate for the purpose of investing the proceeds in other real estate, improved or unimproved, or of lending them upon real estate security, is not, looking at its nature or the consequences to result from its exercise, less important than the power to borrow money, secured by mortgage, to improve the ward's real property. If the former may be determined by the guardian and the county court, as the Statute expressly declares it may be, we do not feel at liberty to hold that the latter may not be also determined by them, especially as the power to mortgage is given without any restriction other than such as is necessarily implied.

It is also suggested by counsel for Kingsbury that if a guardian may, under any circumstances or for any purpose, borrow money and mortgage the real property of the ward to secure its payment, he can only do so when thereunto authorized by the circuit court of the proper county exercising the usual powers of a court of chancery. We cannot perceive anything in the Statute to sustain this interpretation. It may be that the circuit court of the proper county, in virtue of its general equity jurisdiction, and in a suit brought in behalf of the ward, by the guardian, could have authorized the latter to borrow money to improve the ward's real property, and give a mortgage to secure payment of the amount borrowed. It was held in *Smith* v. *Sackett*, 10 Ill. 534, 545, that "the jurisdiction of a court of chancery to order the sale of the whole, or a portion, of the estate of an infant, or to order it incumbered by mortgage whenever the interests of the infant demand it, [32 will not be denied, whether that interest be of a legal or equitable nature." And in *Allman* v. *Taylor*, 101 Ill. 185, 191, the jurisdiction of the circuit court sitting in equity, in a suit brought in the name of the infant by his guardian, to order the sale of the minor's unimproved lands in Illinois, that the proceeds might be applied in removing incumbrances on his improved land in Indiana, was sustained upon the principle announced in *Smith* v. *Sackett*. See also *Frith* v. *Cameron*, L. R. 12 Eq. 169. But it does not follow that the Statute of 1872 did not confer like jurisdiction upon the county court. That court, we have seen, is, by the State Constitution, a court of record and of original jurisdiction in the appointment of guardians and the settlement of their accounts. It has, also, by the Statute, general authority over the matters committed to it by the Statute of 1872.

It is further contended that if the county court could authorize the execution of mortgages to secure the payment of money borrowed, the mortgages in suit are not of that class, because the Act of 1872 provides that the mortgages executed under it shall be foreclosed only upon petition in the county court, and that no strict foreclosure shall be made, but that redemption shall be allowed as is now provided by law in cases of sales under execution upon common-law judgments (§§ 26, 27); whereas, the mortgages executed by Kingsbury's guardian authorized an absolute sale, and did not expressly recognize the right of redemption after sale. The declaration in the Statute, that foreclosures authorized by it shall only be made by petition to the county court granting the letters of guardianship, was not intended to exclude—indeed, it could not have excluded—the jurisdiction, in such cases, of the circuit court of the United States, if that court would otherwise have jurisdiction. *Davis* v. *James*, 10 Biss. 51. It had reference only to the courts of the State, and to the mode of foreclosing mortgages in the county court. Upon the other point, in respect to the right of redemption, it need only be said that it was not necessary to the validity of the mortgage that it should expressly reserve

the right of redemption. That right is given by the Statute, and is recognized by the Circuit Court of the United States, sitting in Illinois, as a rule of property, and was so recognized in the final decree in this case. The decree expressly provides, in conformity with the law of Illinois and the rules adopted in the court below, that the purchaser shall receive a deed only after the expiration of fifteen months from the date of the sale. *Connecticut Mut. Life Ins. Co.* v. *Cushman*, 108 U. S. 51 [27: 648].

Again, it is insisted that, if the county court had power under the Statute to authorize these mortgages, it could not authorize them without proof that such course was necessary for the preservation of the minor's estate, or, at the very least, that the estate would thereby be benefited. If such an objection as this can be urged in defense of a suit to foreclose the mortgages, or for the purpose of impeaching their validity, it is met by the fact that the record of this case fails to show that the county court made the orders authorizing the execution of the mortgages without full proof as to the necessity or propriety of making them. The Statute does not require that the petition to the county court for leave to mortgage shall be supported by any particular amount of proof, nor prevent the court from acting upon its personal knowledge of the facts. The orders, showing the leave of the county court to make the mortgages in suit, are entirely consistent with a thorough investigation of the facts by that court, in some appropriate form, before the orders were made. Those orders recite that the court, upon examining the guardian's petition, was sufficiently advised in the premises. Even without such recital, and in the absence of anything to the contrary, it must be assumed that the court, if required by law to hear formal proof of the allegations in the verified petition of the guardian, discharged its whole duty.

At the argument it was contended by the appellant that the question of the validity of the mortgages in suit was concluded, in its favor, by *Kingsbury* v. *Powers*, 131 Ill. 182, 192, where it held that the guardian was entitled to credit for the amounts paid to the United States Mortgage Company for interest. One of the contentions there was that the county court had no power to authorize a guardian to borrow money for the purpose of erecting new and costly buildings upon unimproved real estate, and that, therefore, the money so borrowed, upon which interest was paid, was borrowed without authority of law, and imposed no obligation whatever upon the estate of the ward. The court, referring to this contention, said: "That under certain circumstances the probate court [which had succeeded to the jurisdiction of the county court] exercising a chancery power, in that respect (*Bond* v. *Lockwood*, 33 Ill. 213), is empowered to authorize a guardian to borrow money under circumstances, as, for instance, for the prevention of irreparable injury to the estate, is clear. And our Statute expressly authorizes that court to empower the guardian to mortgage the real estate. See §§ 24, 25, etc. of chap. 64, Rev. Stat. 1874. The several steps pointed out by those sections were pursued in this instance, in obtaining the decree. There was therefore authority in that tribunal to adjudicate, and, at most, its orders were erroneous only, and not void. Until reversed on appeal, or set aside by some appropriate proceeding, they were binding, and it was therefore incumbent on the guardian to pay the interest accumulating upon the indebtedness." There is certainly some ground for the appellant's contention that this decision, in effect, sustains the power of the guardian, with the leave of the county court, to borrow money to improve his ward's real property and secure its payment by mortgage; for it would seem that the order of the county court would have been not simply erroneous, but void, if the Statute did not, under any circumstances, authorize the borrowing of money to erect new buildings upon the unimproved real property of the ward, and to pay off existing mortgage incumbrances. It is, however, proper to say that *Kingsbury* v. *Powers*, as well as *Kingsbury* v. *Sperry*, 119 Ill. 279, have been treated as not directly deciding the precise question before us, in respect to the validity of the mortgages in suit, and, in the absence of any direct determination by the Supreme Court of the State, we have given the Statute that construction which, in our judgment, is required by its provisions. We hold, in accordance with the views of the circuit court, that the mortgages, and therefore the bonds in suit, were [331
not invalid for want of authority in law for their execution by the guardian, acting under the direction of the county court.

We pass to the examination of questions relating to interest, and to the mode of computing it.

2. The appellant is a corporation of New York, created by special Act passed May 12, 1871. It is authorized by its charter "to lend money on bond and mortgage on real estate situated within the United States, or upon any hypothecation of such real estate, or upon hypothecation of bonds and mortgages on such real estate for any period of credit and repayable by annuity or otherwise." § 2. Its loans on mortgage or hypothecation "may be made to individuals, corporations, associations, States, cities, provinces and towns, or other municipal bodies authorized thereto." § 16. Its charter also provides that "no loan shall be made directly or indirectly to any director or officer of the company, nor shall any loan or advance of money be made at a rate of interest exceeding the legal rate." § 21. The highest rate of interest permitted by the general laws of New York to be contracted for, at the time the loans in question were made, was seven per cent. The same laws provided that no person or corporation should, directly or indirectly, take or receive interest at a greater rate. 2 Rev. Stat. N. Y. (Banks' 6th ed.) p. 1164, title 3, §§ 1, 2. By the statutes of Illinois in force when the bonds and mortgages in suit were given it was lawful for parties to stipulate for in-

terest at the rate of ten per cent per annum, or any less rate. 1 Gross' Stat. Ill. 371, § 10; 3 Gross' Stat. Ill. 244, § 4.

It is contended that the appellant, although having express authority by its charter to lend money on bond and mortgage of real estate, "situated within the United States," could not contract in Illinois for the highest rate of interest allowed by that State, but was limited to a rate of interest not exceeding that established by the State under whose laws it was created a corporation; and, therefore, it cannot, in the accounting, be allowed more than seven per cent interest upon the principal sum. We concur with [336] the court below in holding this position to be untenable. Reasonably construed, the appellant's charter authorized it to contract for such rate of interest as was lawful in the State where the contract of loan was made, and where the property mortgaged to secure the loan was situated. The General Statute of New York had for its object to regulate the rate of interest upon loans there made, and not the rate upon loans made elsewhere. That State did not assume to fix the maximum of compensation to be paid to the lender for the use of money in other States. What compensation is fair or just for the use of money borrowed cannot well be determined upon principles applicable alike to all parts of the country. The risk is much greater for the lender, and the amount the borrower can reasonably pay is larger, in some localities than in others. Laws regulating the rate of interest necessarily depend upon the condition of the people in the particular States or communities enacting them. Such laws express the policy of the respective States upon that subject. When New York created the Mortgage Company, with power to loan money upon real estate anywhere within the United States, and prohibited it from lending money at a rate of interest "exceeding the legal rate," it did not intend to withhold from it the power to contract in other States, for interest upon moneys loaned, upon terms less favorable than those States permitted in respect to loans there made by other corporations, and by individuals. The legal rate referred to in the appellant's charter is the rate established by the law of the place where the contract of loan is made. This view is supported by those decisions in New York which hold, in respect to loans made in other States, that the rate of interest allowed by the State where the contract of loan is made will be respected by the courts of New York, although such rate is in excess of that fixed by its own laws, and although, in some of the cases, one of the parties to the contract, the lender, was a resident of that State. *Sheldon* v. *Haxtun*, 91 N. Y. 124; *Wayne County Sav. Bank* v. *Low*, 81 N. Y. 566; *Pratt* v. *Adams*, 7 Paige, 615, 4 N. Y. Ch. L. ed. 300. See also *Tilden* v. *Blair*, 88 U. S. 21 Wall. 241 [22: 632], and *Scudder* v. *Union Nat. Bank*, 91 U. S. 406, 412 [23: 245, 248].

3. The next question to be considered is [337] whether the overdue coupons drew interest. The master allowed interest thereon, after maturity, at the statutory rate of six per cent per annum, but the circuit court held that interest upon interest was inadmissible.

By the statutes of Illinois in force when these loans were made—indeed, ever since 1845—it was provided that "creditors shall be allowed to receive [interest] at the rate of six per cent per annum for all moneys after they become due on any bond, bill, promissory note or other instrument of writing;" although under other statutory provisions parties might stipulate for, or agree upon, ten per cent or any less rate, "for money loaned or in any manner due and owing from any person or corporation to any other person or corporation in that State." Rev. Stat. Ill. 1845, p. 294; 1 Gross' Stat. 370, chap. 54; 3 Gross' Stat. 243; 1 Starr & C. 1356; Rev. Stat. 1874, p. 614.

The bond, given by the guardian on the first loan, dated July 10, 1872, provided for the payment of "the principal sum of $175,000, in gold coin of the United States, on the 1st day of May, 1882, with interest for the same, to be computed from the day of the date hereof, at the rate of nine per centum per annum, in like gold coin, which said interest shall be paid half-yearly, to wit, on the first day of each of the months of November and May from and after the date hereof, which will be in each and every year until the said principal sum shall be fully paid, which said interest payments, until the said principal sum shall become due, are specified in and further secured by twenty coupons given herewith. . . . But this bond is not intended to bind said Anson Sperry personally or his personal estate, but to bind him as such guardian and the estate of the said minor, Henry W. Kinsgbury, [of] which he is guardian as aforesaid." These provisions were also contained in the mortgage given to secure the payment of the bond. The coupons of this bond were also signed by the guardian, and were in the following form: "Due the United States Mortgage Company, $—, on the first day of —, 18—, in gold coin of the United States, payable at such place in the City of Chicago, in the State of Illinois, as the United States Mortgage Company, their successors, legal representatives or assigns, shall in writing from time to time appoint, and in default of such appointment, then at the agency of said Company in the said City of Chicago, being for the payment of an installment of interest due on that day on my bond to the said United States Mortgage Company of this date, conditioned for the payment in gold coin of the United States of $—, with semi-annual interest at nine per cent per annum on the whole sum from time to time remaining unpaid, in gold coin of the United States, said bond being made to secure a loan made to me in like gold coin." The bonds, mortgages and coupons executed for the other two loans contained similar provisions.

Each contract of loan was made and was to be performed in Illinois; and each bond provides that it is to be construed by the laws of Illinois.

Interest upon interest, as represented by

the coupons, must therefore be allowed or disallowed as may be required by the law of that State. In Illinois, the whole subject is regulated by statute, and interest cannot be recovered unless the statute authorizes it. *Sammis* v. *Clark*, 13 Ill. 544, 546; *Phinney* v. *Baldwin*, 16 Ill. 108; *Aldrich* v. *Dunham*, 16 Ill. 404; *Pekin* v. *Reynolds*, 31 Ill. 529, 532; *Illinois Cent. R. Co.* v. *Cobb*, 72 Ill. 148, 152; *Chicago* v. *Allcock*, 86 Ill. 384; *Ohio* v. *Frank*, 103 U. S. 697 [26: 531].

The precise question before us is, whether the interest provided for in the bonds and mortgages in suit, and further evidenced by coupons, drew interest after maturity, in virtue of the above Statute allowing interest at the rate of six per cent per annum "for all moneys after they become due on any bond, bill, promissory note or other instrument of writing." The scope and effect of this Statute have been considered by the Supreme Court of Illinois in numerous cases which have been the subject of extended discussion by counsel.

Walker v. *Hadduck*, 14 Ill. 399; *Heiman* v. *Schroeder*, 74 Ill. 158, and *Knickerbocker Ins. Co.* v. *Gould*, 80 Ill. 388, referred to by appellant, and the recent case of *Heissler* v. *Stose*, 131 Ill. 393, 397, hold, respectively, that installments of rent due on a written lease, installments due on a written contract for building and the amount due on a policy of insurance are moneys due on instruments of writing, and therefore, by the Statute, draw interest after maturity. These cases do not bear directly upon the question of interest upon interest; for the moneys due in them were principal sums. Interest upon such sums is in no sense interest upon interest. In *McFadden* v. *Fortier*, 20 Ill. 509, 516, a proceeding by *scire facias* to foreclose a mortgage given to secure promissory notes, each for a definite principal sum to be paid at a named date, "with six per cent interest," the court said that the rule for casting interest on notes, bonds, etc., upon which partial payments have been made, was to apply such payments to keep down the interest, "but the interest is never allowed to form a part of the principal so as to carry interest."

Leonard v. *Villars*, 23 Ill. 377, much relied on by the appellee, was a suit to foreclose a mortgage given to secure four promissory notes, which, upon their face, were made payable, respectively, in one, two, three and four years from date, with interest at the rate of ten per cent per annum, "the interest to be paid annually in advance." Only the first year's interest was paid in advance. In relation to the computation of interest, the court said: "To compute interest upon interest after its maturity has, by all courts, whether exercising equity or common-law jurisdiction, been held to be compound interest, and in violation of law. This question is one that has been frequently presented, and, it is believed, as uniformly held to be unauthorized. We are not aware of any well-considered case which has held that there is an implied legal or moral obligation to pay interest upon interest after its maturity. The court below erred in computing interest after it fell due." This case was referred to in *Barker* v. *International Bank*, 80 Ill. 96, which was a suit to foreclose a deed of trust given to secure the payment of a promissory note on a named day, "with interest at the rate of six per cent." The court said: "No payments having been made upon the note, the interest should have been computed from the date of the note until the rendition of the decree, and added to the principal, and a decree rendered for that amount. It was expressly decided by this [340] court, in *Leonard* v. *Villars*, 23 Ill. 377, that it was error to compute interest upon interest. The rule there announced must control here."

In *Dulaney* v. *Payne*, 101 Ill. 325, 331, which was an action of assumpsit for the principal amount due on a promissory note payable at a named date, "with ten per cent interest from date, interest payable semi-annually," a previous judgment obtained in a separate action for an installment of interest was pleaded in bar, but the court held the plea to be bad, upon the ground that the note contained two distinct contracts—one to pay the principal, and the other the interest—and that a separate action could be maintained after the maturity of interest to recover such interest only. The same principle had been announced in *Walker* v. *Kimball*, 22 Ill. 537, and was repeated in *Wehrly* v. *Morfoot*, 103 Ill. 183, 186, and in *McDole* v. *McDole*, 106 Ill. 452, 459. *Thayer* v. *Wilmington Star Min. Co.*, 105 Ill. 541, was a suit for the specific performance of a contract for the sale of real estate, in which there was a question as to the computation of interest on the amount of promissory notes maturing at named dates, each "with interest payable annually." The court said: "It is true that compound interest will not be allowed in the absence of an agreement to pay it; but after interest has accrued due, it may by agreement between the parties be turned into principal, and made to bear interest for delay of payment." See also *Haworth* v. *Huling*, 87 Ill. 23; *McGovern* v. *Union Mut. Life Ins. Co.* 109 Ill. 151, 156, and *Gilmore* v. *Bissell*, 124 Ill. 488.

In none of these cases were there separate coupons or warrants representing the stipulated interest. But *Harper* v. *Ely*, 70 Ill. 581 (*Harper* v. *Ely*, 56 Ill. 179), and *Humphreys* v. *Morton*, 100 Ill. 592, were of that class. *Harper* v. *Ely* involved a question as to interest evidenced by coupons of a bond secured by a trust deed. The court said: "The coupons provide for the payment of a definite sum of money at a specified time. They are in writing, and in effect are promissory notes, and we are aware of no reason why interest should not be computed upon [341] them after they became due. *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 206 [17: 519]; *Hollingsworth* v. *Detroit*, 3 McLean, 472; *Dunlap* v. *Wiseman*, 2 Disney (Ohio) 398." *Humphreys* v. *Morton* was a suit to foreclose mortgages given by a railroad company to secure bonds, with interest warrants attached, which it had issued. The warrants were in the following form: "$35. Peoria, Pekin and Jacksonville Railroad Company. Interest warrant for thirty-five dollars, payable at

the Importers' and Traders' Bank of the City of New York, on the first day of 18—, for six months' interest on bond No. —. L. Chapman, Jr., Secretary." The court said: "That interest was properly allowed and computed on this instrument is settled by *Harper* v. *Ely*, 70 Ill. 581, and the cases there referred to; and reference may also be made to *Clark* v. *Iowa City*, 87 U. S. 20 Wall. 583 [22: 427]; *Genoa* v. *Woodruff*, 92 U. S. 502 [23: 586], and *Amy* v. *Dubuque*, 98 U. S. 473 [25: 228], holding the same doctrine." So, in the late case of *Benneson* v. *Savage*, 130 Ill. 352, 367, it was said that "the executing of a coupon is the executing of an instrument, which, *ex vi termini*, bears interest after maturity—if no rate is expressed, six per cent; and, at the date of executing these coupons, any rate not exceeding ten per cent might be fixed by agreement of the parties,"—citing *Harper* v. *Ely* and *Humphreys* v. *Morton*.

The case of *Leonard* v. *Villars*, referred to with approval in *Barker* v. *International Bank*, undoubtedly proceeds upon the broad ground that the Statute does not allow interest upon interest, even where the instrument given for the payment of the principal sum at a named date is a promissory note, and provides on its face, but not also in separate coupons, for the payment of interest at stated periods intermediate the date of the note and the maturity of the principal sum. The question was much discussed at the bar as to whether the doctrine of that case was modified by later cases.

It is argued that, as a note or other written instrument providing on its face for the payment of the principal debt, with interest at named dates in advance of the maturity of the principal sum, contains two distinct contracts, one to pay the principal and the other [342] to pay the interest (*Dulaney* v. *Payne*, *Walker* v. *Kimball* and *Wehrly* v. *Morfoot*, above cited), such interest is as much money due on an instrument of writing as if it were evidenced by separate coupons. But that interpretation of the Statute is scarcely consistent with *Leonard* v. *Villars*, and we cannot assume that the Supreme Court of Illinois has intended by its later decisions to overrule the doctrine of that case. *Harper* v. *Ely*, *Humphreys* v. *Morton* and *Benneson* v. *Savage* decide nothing more than that separate coupons, when they are, in effect, negotiable promissory notes, and, therefore, instruments upon which the obligor may be held personally liable for the amount named in them, draw interest after maturity by virtue of the Statute, and are exceptions from the general rule announced in *Leonard* v. *Villars*. That such is the state of the local law is manifest from the case of *Drury* v. *Wolfe*, 25 N. E. Rep. 626, decided since this cause was submitted. It was there said by *Mr. Justice* Scholfield, speaking for the court: "The general rule recognized by this court is that parties cannot be bound by any contract made before interest is due for the payment of compound interest [citing, among other cases, *Leonard* v. *Villars*]; . . . but, after interest is due, it may, by agreement then made, be added to the principal, and made to thereafter bear interest. . . . There is, perhaps, an exception to the rule, as first above stated, in the case of interest coupons annexed to commercial paper. Such coupons bear interest. *Benneson* v. *Savage*, 130 Ill. 352, and cases there cited. But in such case interest is not compounded indefinitely. Interest is simply payable upon the amount of the face of the coupon; and that the coupon bears interest is solely because of the character given it by commercial usage. *Aurora* v. *West*, 74 U. S. 7 Wall. 105 [19: 50]; *Mercer Co.* v. *Hackett*, 68 U. S. 1 Wall. 83 [17: 548]; *Meyer* v. *Muscatine*, Id. 384 [564]. There is, therefore, no authority in this for holding that interest may be compounded indefinitely, or at all, in cases where the payment of interest is not secured by some negotiable instrument, independent of the instrument whereby the original indebtedness is presumed to be paid."

The present case is controlled by the general rule that interest upon interest will not [3 be allowed, and is not within the exception established by the recent cases in the Supreme Court of Illinois. The coupons signed by the guardian, although additional evidence of the interest agreed to be paid, are not independent obligations, nor strictly commercial securities, upon which he can be held liable; for, by the express contract between the parties, recited in the bonds and mortgages, he and his estate are exempt from all liability for the moneys borrowed. And as the ward was not personally liable for these moneys (Story on Bills, §§ 74, 75; *Forster* v. *Fuller*, 6 Mass. 58; 1 Daniel on Neg. Inst. § 271; 1 Parsons on Notes and Bills, 89, 90), the bonds as well as the coupons were, in effect, payable out of particular funds, and not absolutely and at all events as in the case of commercial paper.

It results that the circuit court properly disallowed interest upon interest.

4. It is said that the Company agreed, during the progress of the cause below, that interest be computed at nine per cent until the date of the appointment of LeMoyne as guardian of Kingsbury, and at only six and one-half per cent after that date; and that as the sum adjudged to the Company was the precise sum due, at the date of the decree, upon the above basis, the decree was for the right amount, and ought not to be reversed, even if the court below erred in holding that coupons do not draw interest after maturity, and that the third mortgage embraced items that ought not to have been included in it.

The facts out of which this contention arises are as follows:

On the 20th of September, 1877, John V. LeMoyne became Kingsbury's guardian in place of Powers, resigned, and, by an order entered May 15, 1878, was directed to pay into court, for investment in United States bonds, all sums secured by him as rents subsequently to November 26, 1877, and thereafter pay into court, on the first day of each month, all sums received by him, less such sums as might be paid, under the order of the court, for the support of the ward and

to meet other expenses. LeMoyne, December 2, 1878, filed an answer, impeaching the validity of the mortgages and denying the right of the Mortgage Company to do business in Illinois. On the 18th of January, 1882, there was filed in court a written stipulation, signed by the appellant's attorneys, which recited that a large net income was being collected annually from the ward's estate which could be applied to the reduction of whatever claim the Mortgage Company may have, and that it had agreed to a reduction of the rate of interest on the indebtedness claimed, under the arrangement and on the terms and conditions in that stipulation set forth. Those terms and conditions were as follows: "1. That if an order is made in said cause that the amount now deposited in this court to the credit of said estate shall be forthwith paid to said United States Mortgage Company, and that hereafter the income from said estate, after deducting all necessary expenses of said property, shall be paid monthly to said Mortgage Company, the said payments to be credited by said Mortgage Company on any amount which may be ultimately found due to said Company from said estate, then the said United States Mortgage Company agrees that from the date of the appointment of said John V. LeMoyne as guardian of said minor the rate of interest on the indebtedness claimed by said Company shall be reduced from nine per cent per annum to six and one-half per cent; said reduction being made, however, upon the express condition that the payments above provided for shall be made, and that the said minor shall, within six months after his majority, pay to said Mortgage Company the principal sums included in said mortgages, with interest thereon to be computed (to the date of said LeMoyne's appointment as guardian) at the rate and according to the terms of said mortgages, and thereafter at said reduced rate, and upon the further express condition that if said payments are not made as aforesaid, then said Company shall have the same right to proceed with the foreclosure of said mortgages, and to demand and collect the full amount secured by said mortgages, according to their terms, and without deduction from the rate of interest provided for in said mortgages, and shall have the same rights in all respects under said mortgages as if this stipulation had not been made. 2. An order shall be entered in said cause directing the payments to be made to said Mortgage Company according to the terms of this stipulation, and this stipulation shall take effect from the date of the entry of said order."

On the same day the court made an order, which, after reciting the pending motion of the complainant that the money deposited in court by LeMoyne, pursuant to the order of May 15, 1878, be paid to it, and also the terms of the above stipulation, directed "that all the money now in court in this cause, including proceeds of bonds, to be converted by the clerk, amounting to a total sum of sixty-one thousand nine hundred and sixty-nine dollars and twenty cents, be paid to said complainant, less the clerk's commissions of one per cent, said clerk taking its receipt therefor, and that hereafter said defendant LeMoyne pay to the said complainant monthly the money required by said order of May 15, 1878, to be paid into court, and that he take the receipt of the said complainant and file the same in lieu of the money with his monthly report herein, and that all such sums of money so to be paid to said complainant shall be paid on account of any indebtedness which may ultimately be found by this court to be due to said complainant in this suit, without determining any of the questions involved herein." The monthly payments provided for in the stipulation were made to the appellants up to September, 1884. On the 15th of October, 1884,—Kingsbury having become of full age in December, 1883,—there was paid to the Company, out of the proceeds of a certain portion of the mortgaged property, released by it from the mortgages in suit, the sum of $180,000. As evidence of that payment, a writing was filed in court, signed by Kingsbury, by LeMoyne, his attorney in fact, and by the Mortgage Company, which stated: "The United States Mortgage Company has received from Henry W. Kingsbury, by John V. Le Moyne, one hundred and eighty thousand dollars, to be applied on any indebtedness or claim which may be found due it from said Kingsbury in the above suit, and said payment is made by said Kingsbury and received by said Mortgage Company upon the agreement that it [346] shall not in any way operate or be considered a waiver of any claim that either of said parties have made or claimed or may have or claim in said suit or in regard to the subject matter thereof, it being expressly understood that neither this nor any other payment received by said Mortgage Company from said Henry W. Kingsbury shall [not] be construed in any way to be a waiver of the claim now made by said Mortgage Company, that it is entitled to demand the full amount of the principal and semi-annual interest thereon at nine per cent per annum, specified to be paid by the terms of the original bonds and mortgages, held by the said Mortgage Company."

On the 2d day of June, 1885, Kingsbury filed his separate answer, in which, among other things, he denied that the county court had ever authorized, or could legally authorize, the creation of the loans, or the giving of the mortgages, here in suit. Subsequently, June 13, 1885, he filed a petition in the cause, referring to the stipulation and order of January 18, 1882, the payment to the appellant, under that order, of $65,730.40, and the payment of the further sum of $60,598.97 up to September, 1884, and stating that the Mortgage Company had refused to come to any settlement with him unless he recognized the validity of the mortgages, and allowed interest on the principal debts at nine per cent, although he was willing, while denying the validity of the mortgages, that a decree be entered binding his property for the actual cash received by his guardians, subject to all payments made, with six per cent interest; that the net income of the estate was about $40,000, having nearly

doubled since this action was brought; that the then fair appraised value of the mortgaged property was fully $800,000; and that LeMoyne had collected and had in his hands $17,000 of income from the petitioner's property. The prayer of his petition was that an order be entered directing LeMoyne to pay over such moneys to him, "and that the orders of May 15, 1878, and January 18, 1882, may be discharged and declared to be of no effect as to the future income of said property, and all other relief." On the 28th of November, 1885, this application was 347] heard, and an order entered granting the prayer of the petition, discharging the receiver and directing him to forthwith deliver to Kingsbury the possession and control of all the real estate, buildings, personal property and choses in action, money, books and papers in his hands or under his control. The order was made upon certain conditions that do not affect the question now being considered.

The contention of the appellee Kinsgbury is, that under this state of facts the Mortgage Company cannot claim interest at a greater rate than six per cent after the date of the appointment of LeMoyne as guardian. It is argued that the court, by its order of January 18, 1882, accepted, for the benefit of the ward, the Company's offer to reduce the rate of interest, without assenting to the express conditions imposed by the stipulation; that if the Company did not approve the order, in the form in which it was entered, it should have declined to receive the moneys then in the registry of the court, which was directed to be paid to it; and that the receiving those moneys, as well as the monthly rents subsequently accruing, was a waiver of the express conditions set forth in the stipulation, and equivalent to an unconditional agreement by the Company to reduce the interest. We cannot assent to this view. The court below certainly did not intend, by the order of January 18, 1882, to ignore the conditions upon which the Company's offer to reduce the rate of interest was based. It intended, so far as it had the power, to put the ward in a position in which he could, upon arriving at age, avail himself of the proposed reduction of interest. And if Kingsbury had, within the time specified in both the stipulation and the order, paid into court the full amount of any balance due, allowing only six and a half per centum interest after the date of LeMoyne's appointment as guardian, the Company's stipulation to reduce the interest could, perhaps, have been enforced. But he chose not to perform the required condition, but to take his chances of a favorable decision of the cause upon the issues made by the pleadings. To that end he obtained the order setting aside that of January 18, 1882, as of no effect. So that, before the final decree was made, the 18] plan of settlement, indicated in the order of 1882, was repudiated by both parties, and by the court itself. The effect of the order of November 28, 1885, setting aside that of January 18, 1882, and giving Kingsbury full control of the mortgaged property, of the moneys then in court or thereafter to come from rents—even if that effect had not been produced by the failure of Kingsbury to meet the condition to be performed by him within six months after reaching his majority—was to remit him and the Company to whatever rights either had under the original contracts of loan prior to the stipulation and order of January 18, 1882. The construction placed upon the stipulation and order of January 18, 1882, is in harmony with the rule, supported by authority, that "where a certain sum of money is due, and the creditor enters into arrangements with his debtor to take a lesser sum, provided that sum is secured in a certain way and paid at a certain day, but if any of the stipulations of the arrangement are not performed as agreed upon, the creditor is to be entitled to recover the whole of the original debt, such remitter to his original rights does not constitute a penalty, and equity will not interfere to prevent its observance." White & Tudor's Leading Cases Eq., vol. 2, p. 2025; Pomeroy's Eq. § 438; *Thompson* v. *Hudson*, L. R. 4 H. L. 1; Coote on Mortgages (4th ed.) 883; Powell on Mortgages (6th ed.) 900; Adams on Equity, (7th ed.) 109; *Reeves* v. *Stipp*, 91 Ill. 609.

5. We come to consider the transaction of the third mortgage, the one for $95,000 in gold. In the settlement of that loan, which occurred December 19, 1876, the guardian received in money only $41,805.73. The balance of $53,194.27 was paid (1) in overdue coupons of the first and second loans, which were canceled and surrendered to the guardian; and (2) in the Company's claim of interest upon such overdue coupons, at the rate of nine per cent, after their maturity. The amount of this interest upon overdue coupons was $7,219.27, which was disallowed, and the loan treated as one in fact of $87,780.73 only. According to the views already expressed, the Company was not entitled, in the final computation, to interest upon overdue coupons, after their maturity, even at the statutory rate of six per cent per [36 annum. The application to the county court for leave to make the loan for $95,000 did not indicate the purpose of the guardian, in the settlement of that loan, to allow interest upon overdue coupons to be taken up by him. No such question was passed upon by that court, and if its assent would have authorized the guardian to pay such interest, no such assent was given. Certainly, the guardian could not, without leave of the court, make an allowance of interest upon past-due coupons that were not negotiable securities. The court below was therefore right in treating the loan as one only of $87,780.73.

It is contended that this loan was usurious (*Peddicord* v. *Connard*, 85 Ill. 102; *Leonard* v. *Patton*, 106 Ill. 99; *Ammondson* v. *Ryan*, 111 Ill. 506), and that the whole interest on it was, for that reason, forfeited under the Statute of Illinois, which allows parties to stipulate for any rate of interest for money loaned, not exceeding ten per cent per annum, but which also provides: "5. No person or corporation shall, directly or indirectly, accept or receive, in money, goods, discounts or thing in action, or in any other

way, any greater sum or greater value, for the loan, forbearance or discount of any money, goods or thing in action, than as above prescribed. 6. If any person or corporation in this State shall contract to receive a greater rate of interest or discount than 10 per cent upon any contract, verbal or written, such person or corporation shall forfeit the whole of said interest so contracted to be received, and shall be entitled only to recover the principal sum due to such person or corporation." The ground of this contention is, that nine per cent on $95,000 for the full term of the loan, seven years, $59,850, increased by the $7,219.27 included in the principal sum, in all, $67,069.27, would be in excess of ten per cent interest, for that term, on the amount really loaned by the Company. We do not concur in the view taken by the appellee. If the county court had authorized the guardian, in the settlement of the $95,000 loan, to allow interest upon interest, and make the interest, thus increased, a principal sum to draw interest, a different question would have been presented; for it is the settled doctrine of the Supreme Court of Illinois that an agreement made after interest is due to make it a principal sum does not render the transaction usurious. *Haworth* v. *Huling*, 87 Ill. 23; *Thayer* v. *Wilmington Star Min. Co.* 105 Ill. 553; *McGovern* v. *Union Mut. L. Ins. Co.* 109 Ill. 151; *Gilmore* v. *Bissell*, 124 Ill. 488; *Drury* v. *Wolfe*, 25 N. E. Rep. 626. In the case of *Gilmore* v. *Bissell*, above cited, the court said: "This was a bill to foreclose a mortgage. The only defense relied upon is usury. . . This note was secured by mortgage on the premises in controversy. On the 28th day of August, 1878, no interest having been paid on the note, Finley required the parties to pay the debt or renew the note. They concluded to renew. In computing the amount due, the agent of Finley charged on the interest due, from the time it became due to the date of renewal, interest at six per cent per annum. This was added to the interest due and the principal, which all amounted to the sum of $1,350, for which a new note and mortgage were given. The interest on the interest included in the mortgage amounted to $12.50, as is claimed by the defendants. The addition of this amount to the debt and the agreement to pay it, it is insisted, rendered the transaction usurious. We do not concur in this view. The mortgagors had agreed to pay the interest on the mortgage debt annually, and it was their duty to observe that agreement; but they had failed to pay, as the interest each year became due. When the time, however, came to renew the debt, the mortgagors had the right, if they saw proper, to redeem their agreement and pay interest on the interest; and their agreement to pay that interest was not illegal nor did it render the transaction usurious. What was done was but the performance of a contract made by the parties, which they had the right to do. If authority was needed to sustain the view of the circuit and appellate courts, *Haworth* v. *Huling*, 87 Ill. 23, is conclusive of the question made." But the county court did not authorize the guardian of Kingsbury to allow interest upon interest when making the settlement in respect to the third loan. It only authorized him to borrow $95,000 in gold, or its equivalent in currency. But, on the settlement of the loan, [35] he received only $87,780.73, and wrongfully permitted the Company to retain the $7,219.27 in payment of interest upon interest, because he, in good faith, believed that it was entitled to such interest. There was no contract, within the meaning of the Statute, that the Company should receive usurious interest, for no such contract was attempted to be authorized by the county court. In fact, the allowance by the guardian of interest upon interest was under a mistaken view of the obligation of the coupons in that regard. The remedy for the wrongful retention of the $7,219.27 out of the amount the Mortgage Company agreed to lend is to treat the loan as one for only $87,780.73, making the calculation of interest on the principal sum on that basis, and not to forfeit the interest on the sum actually received by the guardian from the Company.

6. It is contended that the Mortgage Company could not demand interest, after Kingsbury reached his majority, at a rate in excess of six per cent. The argument made in support of this proposition is that, as the guardian could not, under the Statute, have created a debt, secured by mortgage, that did not mature at or before the ward's majority, he had no authority to contract for the payment of interest after the ward reached full age, and that the rate, after his majority, must be controlled by the Statute, and not by express contract. We do not concur in this interpretation of the Statute. The guardian had authority, with leave of the court, to make these loans, and to stipulate for any rate of interest not exceeding ten per cent. He stipulated for interest at nine per cent, payable half-yearly in each year until the principal sum "shall be fully paid." Such a contract, in case of individuals, capable of acting for themselves, would bind the obligor to pay interest on the principal sum at that rate after its maturity. *Phinney* v. *Baldwin*, 16 Ill. 108; *Etnyre* v. *McDaniel*, 28 Ill. 201.

We perceive no reason why the guardian may not, under the Statute, make such a contract, subject, of course, to the condition that the maturity of the debt, created by him, on behalf of the estate, shall not extend beyond the ward's minority, and subject, therefore, to the right of the ward, im- [35] mediately upon attaining full age, to pay off the debt, or, by agreement with the lender, obtain an extension of the time of maturity, and a less rate of interest. The Statute does not mean that the ward may retain the benefit of the contract after he attains full age, and repudiate its provisions. Of course what is here said must be taken in connection with the Statute of Illinois providing that "judgment recovered before any court or magistrate shall draw interest at the rate of six per cent per annum from the date of the same until satisfied." Rev. Stat. Ill. 1874, chap. 74, § 3. Where the debt is merged in a judgment or decree, the contract ceases to exist, and the rate of interest is

thereafter controlled by the Statute. *Mason* v. *Eakle*, 1 Ill. 52; *Tindall* v. *Meeker*, 2 Ill. 137; *White* v. *Huffaker*, 27 Ill. 349; *Wayman* v. *Cochrane*, 35 Ill. 152; *Palmer* v. *Harris*, 100 Ill. 276, 280; *Phinney* v. *Baldwin* and *Etnyre* v. *McDaniel*, above cited; *Connecticut Mut. L. Ins. Co.* v. *Cushman*, 106 U. S. 51, 54 [27: 648].

It results that the decree below must be reversed as to that part which allowed only $6,963.07 as interest to December 15, 1885, on the third loan. It should have allowed interest on $87,780.73, the real amount of that loan, at the rate of nine per cent per annum to the date to which, as above, the calculation was made, and interest after that date at the statutory rate of six per cent. In that respect, and to that extent only, the decree must be modified.

The decree is reversed and the cause remanded for further proceedings consistent with this opinion.

380] WILLIAM D. WADSWORTH, as Administrator of the Estate of FRANK L. WADSWORTH, Deceased, *Plff. in Err.*,

v.

THEODORE ADAMS.

(See S. C. Reporter's ed. 380-387.)

Principal and agent—violation of duty by agent—loss of compensation—strict good faith required.

1. Where an agent is employed to sell promissory notes and is to receive an agreed compensation if he shall sell them at a discount of 8 per cent, and he receives a less offer for them, and is at the same time informed by the proposed purchaser that if that offer is not accepted he will buy them at 8 per cent discount, and the agent telegraphs to his principal the less offer but conceals from him the fact that, if that offer is not accepted, the purchaser will take them at 8 per cent, and the principal telegraphs to the agent a rejection of the less offer and thereupon sells the notes to another person, and the agent on receiving the latter telegram immediately sends another telegram to his principal that he has made the sale at a discount of 8 per cent, and receives from his principal an answer by telegram, "You are too late: Have disposed of the notes,"—such agent was guilty of a breach of duty in withholding from his principal information of the fact that the proposed purchaser was willing to buy the notes at 8 per cent if the principal would not accept the less offer, and he thereby lost the right to claim the stipulated compensation for his services or any other sum.

2. The law requires the strictest good faith upon the part of one occupying a relation of confidence to another.

[No. 152.]

Argued and Submitted Jan. 20, 21, 1891. Decided Feb. 2, 1891.

IN ERROR to the Circuit Court of the United States for the Northern District of Alabama, to review a judgment in favor of plaintiff for damages for the breach of an agreement to pay him a certain compensation for his services as agent employed to sell certain promissory notes. *Reversed.*

The facts are stated in the opinion.

Mr. **John T. Morgan,** for plaintiff in error:

The court gave no adequate instructions to the jury. On the contrary, the court usurped the functions of the jury and decided that Adams was the special agent of F. L. Wadsworth, and that he had committed no fraud upon him.

Tracy v. *Swartwout*, 35 U. S. 10 Pet. 80 (9: 354); *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 233 (24: 433); *Etting* v. *Bank of United States*, 24 U. S. 11 Wheat. 59 (6:419); *National Bank* v. *City Bank*, 103 U. S. 671 (26:418); *Stonecker* v. *Garrett*, 48 Pa. 419; *Mc Donnell* v. *Br. Bank*, 20 Ala. 317; *Bank of Montgomery* v. *Plannett*, 37 Ala. 227; *London Sav. Fund Soc.* v. *Hagerstown Sav. Bank*, 36 Pa. 501; *Butler* v. *Watkins*, 80 U. S. 13 Wall. 457 (20:629); *Shankland* v. *Washington*, 30 U. S. 5 Pet. 395 (8: 166); *Oliver* v. *Piatt*, 44 U. S. 3 How. 333 (11: 622).

This transaction violates the policy of the law.

Randall v. *Howard*, 67 U. S. 2 Black, 585 (17:269); *Wardell* v. *Union Pac. R. Co.* 103 U. S. 651 (26:509); *Jackson* v. *Ludeling*, 88 U. S. 21 Wall. 616 (22:492); *Wheeler* v. *Sage*, 68 U. S. 1 Wall. 518 (17:646); *Henderson* v. *Vincent*, 84 Ala. 99; *Pratt* v. *Patterson*, 112 Pa. 475, 3 Cent. Rep. 120; *Taylor* v. *Merchants F. Ins. Co.* 50 U. S. 9 How. 390 (13:187); *Utley* v. *Donaldson*, 94 U. S. 47 (24:56); *Dorsey* v. *Packwood*, 53 U. S. 12 How. 138 (13:926); *Marsh* v. *Fulton County*, 77 U. S. 10 Wall. 676 (19:1040); *Owings* v. *Hull*, 34 U. S. 9 Pet. 629 (9:254); *Butler* v. *Watkins*, 80 U. S. 13 Wall. 456 (20:629); *United States* v. *Peck*, 101 U. S. 64 (26:46).

Messrs. **A. H. Wintersteen,** *David D. Smith* and *Wayne Mac Veagh*, for defendant in error:

The suit and the judgment were personal against Wadsworth, and not against the trust estate, because it is well settled that if bound at all he was bound personally, and not as trustee.

Taylor v. *Davis*, 110 U. S. 330, 336, 337 (28: 163, 166); *Duvall* v. *Craig*, 15 U. S. 2 Wheat. 45 (4:180); *Jones* v. *Dawson*, 19 Ala. 672.

An agent is authorized to employ means suitable and usual to execute his mandate.

Whart. Ag. 126; *Williams* v. *Getty*, 31 Pa. 461.

An agent whose duty it is to bring the parties together may act for both parties without their knowledge or consent.

Rupp v. *Sampson*, 16 Gray, 398; *Collins* v. *Fowler*, 8 Mo. App. 588; *Orton* v. *Scofield*, 61 Wis. 382.

The principal was bound to the agent only

NOTE.—*As to power of consignee, factor or pledgee to sell goods*, see *note* to Brown v. M'Gran, 10:550.

When a broker to sell real estate is entitled to commission. See *note* to Mc Gavock v. Woodlief, 15:884.

As to factor's lien, see *note* to United States v. Villalonga, 23:64.

As to liability of agent to principal for disregard of orders, or for negligence; exceptions to rule that agent must obey instructions,—see *note* to Bell v. Cunningham, 7:606.

for the commission, and the latter was entitled to the commission.

Kilbourn v. *Sunderland*, 130 U. S. 505 (32: 1005); *Blanchard* v. *Jones*, 101 Ind. 542; *Kerfort* v. *Hyman*, 52 Ill. 512; *Merryman* v. *David*, 31 Ill. 404.

When the agent defrauds his principal, the principal can recover only the damages sustained.

Mc Millan v. *Arthur*, 98 N. Y. 167.

Mr. Justice **Harlan** delivered the opinion of the court:

By the judgment below the defendant in error recovered the sum of twelve thousand eight hundred dollars as damages for the alleged breach of an agreement made in March, 1883, at Birmingham, Alabama, between him and H. F. De Bardeleben, representing Frank L. Wadsworth, trustee, whereby the plaintiff was to receive ten thousand dollars if he negotiated the sale, at a discount of eight per cent per annum, of five promissory notes of one hundred thousand dollars each, payable in one, two, three, four and five years, executed to said trustee by the Pratt Coal and Coke Company, and secured by mortgage upon its property. The proceeds of the notes at that discount would have been three hundred and eighty thousand dollars.

The undisputed facts in the case are as follows: Adams went to the City of New York for the purpose of finding a purchaser of the notes. He there offered them to J. J. McComb at a discount of 8 per cent per annum. According to the plaintiff's testimony, McComb did not say whether he would take them or not, but put his clerk to making calculations in relation to them, and left his office to see if he could make arrangements to get the money in the event he bought the notes. On his return, McComb said he would give $350,000 for them, and requested plaintiff to telegraph that offer to De Bardeleben. Plaintiff told him that it was useless to send such a telegram, as De Bardeleben would not accept the offer. McComb insisting on his offer being sent, Adams telegraphed De Bardeleben from New York, under date of March 27, 1883: "I can sell the five notes with mortgage for three hundred and fifty thousand dollars cash, the right of trustee to sell and transfer being all right. Answer." It does not appear at what hour of the day this telegram was sent, but the plaintiff testified that just before he left McComb, at four o'clock in the afternoon of the 27th of March, 1883, he asked him what he should do if De Bardeleben refused the offer of $350,000. McComb replied that "if De Bardeleben refused the offer of $350,000 then he would take the notes at De Bardeleben's proposition—that is, at eight per cent per annum discount." Adams then went from New York to Philadelphia; and he testified that, after leaving McComb on the afternoon of the 27th of March, he did not see or have any communication with him in relation to the notes or their sale or purchase.

Under date of March 28th, 1883, De Bardeleben telegraphed to Adams at Philadelphia, where the latter resided: "Cannot accept offer." Adams, immediately, on the same day, replied by telegram from Philadelphia: "Have made the negotiation on the terms you gave me. Bring on your papers with Smith's opinion on the matters I mentioned to you. Let me know here when I shall meet you in New York." On the same day there was sent from New York, in the name of Adams, this telegram to De Bardeleben: "Please answer my telegram of yesterday." In reference to the latter telegram, which was received by De Bardeleben on the day of its date, the plaintiff was asked on cross-examination whether he did not send it. The bill of exceptions states: "After some hesitation he said possibly he might have done so, but had no recollection of going back to New York on the 28th. He was then asked by defendant if he had not given McComb authority to send said dispatch in his name; to which he said, 'Possibly I may have done so, but I have no recollection of it.' Upon further cross-examination, he said he had not sent said dispatch, nor had he any recollection that he authorized McComb to send it in his name." He further testified, on cross-examination, that he told McComb that De Bardeleben, for whose wife and children Wadsworth was trustee, "wanted money very badly, and that he wanted it as soon as possible; that he told McComb this while talking to him about the sale of said notes." Why Adams felt obliged to inform McComb of his principal's urgent need for money does not appear from the evidence.

De Bardeleben replied, on the 29th of March, to Adams' Philadelphia telegram of the 28th in these words: "You are too late. Have disposed of the notes." Adams telegraphed to De Bardeleben, under date of the 30th: "You are too late. You gave me explicit authority to sell at certain price, you to pay my commission. I wired you an offer I had below price you had named. You answered you could not accept offer, but said nothing about withdrawal of my authority to sell. I then sold to J. J. McComb, of Dobbs Ferry, New York, on terms authorized by you, and you should confirm that sale forthwith. Answer." Under date of March 31, De Bardeleben telegraphed to Adams: [38
"Your effort to beat me down in price has lost you the notes; will write." To this Adams replied by telegram, under date of April 2: "Assumptions of your dispatch wholly unfounded; no effort to beat you down; reported you the offer had. Your refusing the first offer led me to dispose of the notes at your offer, which I did and so reported to you." The plaintiff received from De Bardeleben, two or three days after it was written, the following letter, under date of March 31: "I telegraphed you this A. M.: 'Your effort to beat me down in price has lost you the notes; will write,'—which I now confirm. When you left me on the hotel piazza you said that if Gov. Smith pronounced the papers all right you would take one half and McComb the balance, you to telegraph me so soon as you got home. When I received your telegram offering me three hundred and fifty thousand dollars, I saw you were trying to make me take as little as you could, which was not in accordance with our understanding, so I at once took steps to sell to another party, which I have done. I am very sorry it

has turned out so, as I expected to have you in my big coal company that I am now forming, you to do the financiering and I to get the property in shape, by which each would have made quarter of a million dollars. I very much regret that it looks as though we will not be interested together."

It should be stated in this connection that when De Bardeleben received the telegram offering $350,000, and the telegram of March 28 from New York, requesting an answer to the New York telegram of the 27th, he was in conversation with Colonel Ensley, who offered $380,000 for the notes. The offer was immediately accepted. So that the notes were sold by De Bardeleben before he received the telegram from Adams that he had sold them on the terms originally named to him. Touching the first interview between Adams and McComb on the 27th in New York, the latter, a witness for the former, said: "That he was acquainted with the parties to this suit; that he had known the plaintiff, Theodore Adams, for thirty-five years; that he made a contract with Adams in New York City, on the 27th day of March, 1883, for the purchase, [34] through him, of five notes made by the Pratt Coal and Coke Company, payable to Frank L. Wadsworth, as trustee, in the sum of one hundred thousand dollars each; that by the terms of his said contract with Adams he (witness) was to take said notes at eight per cent per annum discount; that the proposition by Adams to sell witness said notes was made in his (witness') office, No. 35 Broadway, New York City, on the 27th of March, 1883; that he did not accept the proposition immediately, but set his book-keeper to work on a careful calculation as to what the result would be to him (witness) on the said notes, if he purchased them on the terms offered, and on the supposition that he (witness) should borrow the money at six per cent to carry the transaction; that while this calculation was being made he discussed the matter with Adams and suggested that he (Adams) should telegraph an offer of a lump sum of three hundred and fifty thousand dollars for the five notes of one hundred thousand dollars each, which Adams, after some hesitation, did; that afterwards and before parting witness told Adams that if this offer was declined he would take the notes on the terms offered, namely, eight per cent per annum discount, and that in either case he (witness) was the purchaser of the notes; that Adams told him he was authorized to make the sale; that all this transpired in his office, No. 35 Broadway, New York City, at one interview."

The court charged the jury, among other things, that "the plaintiff was a special agent, clothed with special power to sell the five notes at a price specified by De Bardeleben, and that if when the plaintiff, on March 27, 1883, first offered to sell said notes at said specified price to J. J. McComb, the said McComb did not express any acceptance of the offer, but told plaintiff to telegraph to said De Bardeleben a lump offer of three hundred and fifty thousand dollars, and also told plaintiff that if De Bardeleben declined that offer he (McComb) would take the notes at the price originally specified by De Barbeleben, amounting to three hundred and eighty thousand dollars; if afterwards, and in the same interview on said March 27, 1883, said McComb, in relation to said five notes, told plaintiff that if the said offer of three hundred and fifty thousand dollars was declined, he [35 (McComb) would take the notes on the terms first offered, viz., eight per cent discount, and that in either case he (McComb) was the purchaser of the notes,—all this amounted to a conditional offer only to take the notes at the specified price first offered, and did not impose upon the plaintiff the duty or obligation to communicate to his principal the fact that McComb was ready and willing to buy the notes at the said price at which they were first offered, amounting to three hundred and eighty thousand dollars; and the failure of plaintiff to communicate that fact in any manner to his principal was not a breach of his duty nor bad faith in itself, as he was only a special agent to sell at a fixed, specified price, and not an agent to get the best price he could obtain." To this charge, and to each proposition contained in it, the defendant duly excepted. Among the requests by defendant for instructions was one to the effect that if the jury believed all the evidence, their verdict should be in his favor. The court refused to so instruct the jury, and to its ruling in that respect the defendant excepted.

We cannot give our assent to the proposi- [36 tion that Adams, being a special agent only, was not guilty of a breach of duty in withholding from his principal information of the fact that McComb was willing to take the notes at a discount of eight per cent per annum, that is, for $380,000, provided he could not get them for $350,000. That fact came to his knowledge before he and McComb separated on the 27th of March, and good faith, upon his part, required that he should at once, with the utmost dispatch, have communicated it to his principal, and not have permitted him—pressed for money, as Adams knew him to be and as he took care to inform McComb he was—to consider the offer of $350,000, in the belief that that was the highest price his agent could obtain for the notes. The agreement to pay the latter ten thousand dollars, if he negotiated a sale of them at a discount of eight per cent per annum, was in consideration of his endeavoring to dispose of them upon those terms. It was a condition precedent to his right to such compensation that the services he undertook to render should be faithfully performed. If his principal had accepted the offer of $350,000, he would have lost $30,000 by reason of the concealment or the withholding by his agent of the fact that the party making the offer intended to accede to the principal's terms if he could not do better. In effect, Adams abandoned the position of agent for De Bardeleben to negotiate the notes for a specified sum, and practically co-operated with McComb in the latter's effort to get them at a sum less than De Bardeleben had authorized the agent to accept. He conducted himself as if he were more interested in McComb than in his principal. We have seen that when he learned, on the 28th, by telegram

from his principal, that McComb's offer of $350,000 was rejected, he immediately, on the same day, telegraphed from Philadelphia to De Bardeleben that he *had* negotiated the notes on the terms originally given him—that is, for $380,000. As he testifies that he did not, after parting from McComb in New York, in the afternoon of the 27th, see or have any communication with the latter in relation to the notes or their sale or purchase, it could not be true that he had, himself, on the 28th, or before being notified of the sale by De Bardeleben, negotiated a sale for $380,000, unless, as stated by McComb, it was understood between him and Adams, before they separated on the 27th, that McComb was to take the notes at $380,000 if his offer of $350,000 was not accepted by De Bardeleben. So that, for every substantial purpose, involving the interests of the principal, the agent did precisely what he would have done if he had expressly, and for compensation, stipulated with McComb that, pending the latter's efforts, through the agent, to induce the principal to part with the notes for $350,000, he would conceal from his principal the fact that, by remaining firm, he could get $380,000 from McComb.

We cannot agree that such conduct upon the part of Adams was consistent with the duty he owed to his principal in virtue of his agency for the sale of the notes. He abused the confidence reposed in him, and thereby lost the right to claim the stipulated compensation of ten thousand dollars or any other sum. *Sea* v. *Carpenter*, 16 Ohio, 412, 418; Story on Agency, § 331. He cannot complain of the sale to Ensley, for the reason, if there were no other, that his telegram of the 27th gave no intimation of his purpose to make further effort to negotiate the notes upon the terms originally given him. On the contrary, in view of all the circumstances, De Bardebelen might not unreasonably have supposed, from that telegram, that the offer of $350,000 was the highest that Adams could obtain, and that nothing better was to be expected from his efforts. Be that as it may, we are of opnion that Adams was not entitled to any compensation under the contract upon which he sues, and that the court should have so instructed the jury in accordance with the defendant's request. He is no more entitled to compensation than a broker will be entitled to commissions who, having undertaken to sell particular property for the best price that could be fairly obtained for it, becomes, without the knowledge of his principal, the agent of another to get it for him at the lowest possible price. The assumption of the latter position would be a fraud upon the vendor, who is entitled, in such cases, to the benefit of the diligence, zeal and disinterested exertions of the agent in the execution of his employment. The law requires the strictest good faith upon the part of one occupying a relation of confidence to another. *Kilbourn* v. *Sunderland*, 130 U. S. 505, 519 [32: 1005, 1010]; Story on Agency, §§ 81, 211; *Farnsworth* v. *Hemmer*, 1 Allen, 494; *Rice* v. *Wood*, 113 Mass. 133; *Scribner* v. *Collar*, 40 Mich. 375, 378; *Raisin* v. *Clark*, 41 Md. 158; *Lynch* v. *Fallon*, 11 R. I. 311.

The judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

R. H. BROWN ET AL., *Appts.*, [38
v.
CHARLES W. TROUSDALE ET AL.

(See S. C. Reporter's ed. 389-397.)

Jurisdiction as to amount—parties to suit to restrain tax to pay county bonds.

1. In an action by taxpayers in behalf of themselves and all other taxpayers of a county against certain county officers and holders of the county bonds, for an injunction to restrain the collection of a tax to pay interest on the bonds and for a decree declaring the bonds invalid and perpetually enjoining the collection of the principal or interest of the bonds, in which the main question at issue was the validity of the bonds, which were in amount far beyond $5,000, this court has jurisdiction; the rule applicable to plaintiffs each claiming under a separate and distinct right is not applicable.
2. In a suit to restrain the collection of taxes already levied to pay interest on county bonds and any other further levies by the county judge, in which a decree is asked adjudging the invalidity of the bonds, the sheriff, who was about to enforce the collection, and the county judge were necessary parties, as were the bondholders.
3. Where an action is brought in a state court to declare invalid a whole issue of county bonds and a large number of the bondholders reside in the State, two of whom are made defendants, the plaintiffs alleging ignorance as to who the other

---

NOTE.—*Municipal bonds as affected by change in the ruling of the highest court of a State, or by change in the Constitution.* See *note* to Mitchell v. Burlington, 18:350.

As to negotiability of railroad bonds, see *note* to White v. Vermont & M. R. Co. 16:221.

As to suits on coupons detached from bonds, see *note* to Kenosha v. Lamson, 19:725.

As to overdue coupons; rights of holders of; effect of, on bonds to which they are attached,—see *note* to Texas v. White, 19:839.

As to mandamus to compel city, town or county to levy tax to pay bonds or interest on bonds, see *note* to Davenport v. United States, 19:704.

As to recitals in negotiable bonds or securities, as evidence of the fact recited and as an estoppel, see *note* to Mercer County v. Hackett, 17:548.

As to municipal bonds; reference to statute in,—see *note* to Ogden v. Daviess County, 26:263.

As to removal of causes, under Act of 1875; citizenship,—see *note* to Meyer v. Delaware R. Const. Co. 25:593.

As to removal by one of two or more defendants; separable controversies,—see *note* to Sloane v. Anderson, 29:899.

As to removal of causes to United States courts for local prejudice, see *notes* to Gaines v. Fuentes, 23:524; Jefferson v. Driver, 29:897.

As to removal of causes from state to federal court, where United States Constitution, Act of Congress or treaty comes in question, see *note* to Little York Gold Wash. & W. Co. v. Keyes, 24:656.

As to civil rights; removal of causes, when denied,—see *note* to Civil Rights Cases, 27:835.

As to removal of actions against officers; Rev. Stat. sec. 643,—see *note* to Davis v. South Carolina, 27:574.

bondholders are, and asking that notice be given to the unknown bondholders, the action is against all the bondholders and is not susceptible of division to permit two bondholders, nonresidents of the State, who are allowed to be made parties defendant and to defend, to remove the cause to the United States circuit court, although the two resident bondholders who are made parties decline to resist the plaintiffs' claim and make answer that they have no defense.

[No. 158.]

Argued Jan. 22, 23, 1891. Decided Feb. 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the District of Kentucky dismissing a suit to enjoin the collection of a tax levied to pay interest on county bonds and the making of any further levy and for a decree declaring the bonds invalid and enjoining the holders from collecting the same; also from an order denying a motion to remand the case to the state court. *Reversed and cause remanded, with directions to remand it to the state court.*

[390] Statement by *Mr. Chief Justice* **Fuller:**

Upon the 27th of July, 1885, several hundred taxpayers of the County of Muhlenburgh, Kentucky, filed their bill of complaint in the circuit court of that county for themselves and others associated with them, numbering about twelve hundred, as well as "for and on behalf of all other taxpayers in the said County of Muhlenburgh, and for the benefit likewise of said county," against Tinsley, the sheriff, and Morton, the county judge, of the county; and Kittinger, Young, Weir, Whitaker, Newman and Mills, members of a funding board, and "any other member of the funding board; and Robert Glenn, holder of original bonds; George D. Park, holder of compromise bonds, and all holders of bonds issued to the Elizabethtown and Paducah Railroad Company;" alleging upon various grounds the invalidity of an issue of bonds in 1869, under an Act of February 24, 1868, to the amount of $400,000, in payment of an alleged subscription of that amount on behalf of the county to the capital stock of the railroad company, and also of certain new bonds issued in 1878 in compromise of the former bonds, under an Act of March 18, 1878, creating a board for the purpose of funding the prior indebtedness. The bill averred the levy of a tax to pay interest on bonds by the county judge, and that the sheriff was about to proceed in the collection thereof, and made the sheriff and county judge parties defendant; and prayed an injunction against the [391] sheriff from attempting to collect the particular tax, and against the county judge from making any order or further levy in the premises, and for a decree that the original bonds be declared invalid and all holders thereof be perpetually enjoined from collecting the principal of the bonds and the interest thereon, and that a like decree be made as to the bonds issued under the Funding Act.

The plaintiffs made the members of the funding board and two bondholders residing in the County of Muhlenburgh, one holding an original bond or bonds, and one holding a bond or bonds under the Funding Act, defendants; and alleged that they did not know the other holders of the bonds and therefore could not give their names, and asked for notice to be given to the unknown bondholders under both Acts, and for general relief.

The bill was sworn to on the 22d of July, 1885, and an order granting the injunction as prayed was made by the judge of the Muhlenburgh Circuit Court on the 23d, and entered of record, upon the filing of the bill. A summons and injunction issued and were served accordingly. Notice was given by counsel for defendants, dated August 5, and served August 8 and 10, that on the 12th of August the defendants would move for an order dissolving the injunction, and a motion to that effect was filed, as also a general demurrer to the petition. On that day an order was entered, setting down the motion to dissolve and the demurrer, for hearing, on the 14th of August, "by consent of counsel on both sides." On the 21st of August, the application and affidavit of James Alexander was presented, stating that "he is one of the defendants hereto, described generally as a holder of bonds issued to the Elizabethtown and Paducah Railroad Company;" and "that he holds and owns, and so held and owned at the time of the commencement of this action, nine bonds of the face value and denomination of one hundred dollars each, and one bond of five hundred dollars," to which bonds interest coupons since March 1, 1884, were attached, and he asked "to enter his appearance and make defense to this action." Whereupon an order was entered in these words: "This day came James Alexander and presented his petition to be made a party defendant to this action and to be [392] allowed to make defense to the same; which petition is ordered to be filed, and said James Alexander is made a party defendant to this action."

Simultaneously, Charles W. Trousdale made a similar application, as the holder of $7,000 of the compromise bonds of the County of Muhlenburgh, and a like order was entered thereon. On the same day, Trousdale and Alexander presented their petition for a removal of the cause to the United States Circuit Court for the District of Kentucky, stating: "That the matter and amount in dispute in the above-entitled suit and action exceeds, exclusive of costs, the sum or value of five hundred dollars ($500); that the controversy in this suit is between different citizens of different States; that your petitioners were at the commencement of this action and still are citizens of the State of Tennessee, and the plaintiffs, each and all of them, were then and still are citizens of the State of Kentucky. Your petitioners further state that in this suit and action above mentioned there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, that is to say, a controversy between these petitioners on the one side and the said plaintiffs on the other; that the defendants Alexander Tinsley, J. H. Morton, Martin Kittinger, Wm. Young, Samuel Weir, A. E. Newman and J. E. Mills, and each and every one of them, are ministerial officers of the said County of Muhlenburgh, and have no pecuniary interest in this

controversy; that the defendants Robert Glenn and George D. Park refuse to make defense to the petition, and are acting in concert with the plaintiffs therein, and petitioners are the only parties that have any real interest in the controversy adverse to plaintiffs;" and tendering bond and praying for the transfer of the suit. They also made a formal motion for the order of removal.

On the 22d of August the affidavit of Glenn and Park was filed, averring that "they were made parties defendant in said cause without their knowledge or consent; that no collusion existed between affiants and the plaintiffs in said cause before the filing of their petition, and no collusion exists now, and the affiants are holders and owners of the bonds of said county in good faith, and that the statement alleging affiants' collusion, in the petition for a removal of this cause to the United States circuit court, with the plaintiffs, is not true;" that their action was "based on their own judgment as to the justice of the same, and believing that the justice is with the plaintiffs they do not choose to resist the plaintiffs' claim;" and they also severally answered, saying that they had no defense to make and asking that the motion to dissolve the injunction and the demurrer be withdrawn, so far as they might be parties thereto.

Upon the same day the affidavit of C. L. Morehead was filed, stating that he was the agent of the funding board, and, from information he had obtained from his co-agent, he believed "that a majority of the new bonds of said county are owned and held by citizens of the State of Kentucky;" and also the affidavit of Louis Jones, "that he has opportunity for knowing the professed owners of the bonds of Muhlenburgh County, Ky., issued to the Elizabethtown and Paducah R. R. Co. This opportunity resulted from the fact that he was a member of the General Assembly of Kentucky, from which the bondholders aforesaid sought legislation on their behalf, and also from the fact that he was a justice of the peace of said Muhlenburgh County, and was proceeded against on behalf of said bondholders for the purpose of compelling a levy to satisfy interest on the said bonds. He states, from all the facts, expressions and disclosures in their affairs, he is satisfied that at that time about three fourths of the said bonds were held and owned by residents of the State of Kentucky, and it is his conviction now that the owners of the said bonds are, at least to the extent of two thirds, residents of Kentucky."

The Muhlenburgh Circuit Court entered an order removing the case to the United States circuit court, where a motion was subsequently made to remand and overruled, to which ruling and judgment plaintiffs by their counsel excepted. The injunction was thereupon dissolved by the circuit court "upon the face of the petition and exhibits filed therein." Trousdale and Alexander then filed their answers, and, issues being joined, the cause came on upon the pleadings and an agreed statement of facts and proofs, and a decree was entered dismissing the bill, and the case thereupon brought to this court.

Mr. **T. W. Brown,** for appellants:

The court could not arrange the parties according to their real interest in order to see where the real controversy was and between whom.

Meyer v. *Construction Co.* 100 U. S. 469 (25:598); *Railroad & Coal Co.* v. *Blatchford*, 78 U. S. 11 Wall. 174 (20:180); *Ayres* v. *Wiswall*, 112 U. S. 191, 192 (28:694).

Separate defenses do not make separate controversies, where all the defenses are connected with or grow out of the same cause of action.

Louisville & N. R. Co. v. *Ide*, 114 U. S. 52 (29:63); *Hyde* v. *Ruble*, 104 U. S. 407 (26:823); *Winchester* v. *Loud*, 108 U. S. 130 (27:677); *Pirie* v. *Tvedt*, 115 U. S. 41 (29:331).

Where there has been a fixed and long-continued policy or system acted on in a State, it is not to be presumed that the Legislature intended in an Act to depart from this policy, unless it is so expressly declared or the terms of the Act are necessarily inconsistent with the general policy or system.

Gelpcke v. *Dubuque*, 68 U. S. 1 Wall. 175, 220, 221 (17:520, 530, 531); *Elliott County* v. *Kitchen*, 14 Bush, 293.

The county judge can lay no charge upon the county, for any purpose, exceeding the sum to which he is restricted by law.

Harrison County Ct. v. *Smith*, 15 B. Mon. 166; *Pennington* v. *Woolfolk*, 79 Ky. 16; *Bowling Green & M. R. Co.* v. *Warren County Ct.* 10 Bush, 711; *Norton* v. *Shelby County*, 118 U. S. 425 (30:178); *Hill* v. *Memphis*, 134 U. S. 198 (33:887); *Bissell* v. *Spring Valley Twp.* 110 U. S. 162 (28:105); *Kelley* v. *Milan*, 127 U. S. 139 (32:77).

Mr. **D. M. Rodman,** for appellees:

Claims cannot be aggregated to give jurisdiction, although all are parties in the same record.

Farmers Loan & T. Co. v. *Waterman*, 106 U. S. 265 (27:115); *Adams* v. *Crittenden*, Id. 576 (99); *Tupper* v. *Wise*, 110 U. S. 398 (28:189).

Only those can appeal whose decrees exceed five thousand dollars.

Stewart v. *Dunham*, 115 U. S. 61 (29:329).

When several creditors unite in a suit in equity, each claiming a *pro rata* share of common property, each creditor's right to appeal depends upon his own claim.

Chatfield v. *Boyle*, 105 U. S. 231 (26:944); *Ballard Paving Co.* v. *Mulford*, 100 U. S. 147 (25:591); *Ex parte Baltimore & O. R. Co.* 106 U. S. 5 (27:78).

The county was not a party to the record in the lower court, and it cannot be made one here.

Payne v. *Niles*, 61 U. S. 20 How. 219 (15:295); *Bayard* v. *Lombard*, 50 U. S. 9 How. 530 (13:245); Phill. Prac. 71; *Davis* v. *Gray*, 83 U. S. 16 Wall. 220 (21:453); *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 797 (6:218).

Ministerial officers, such as a United States marshal, a sheriff, a county, state or township officer, are merely formal parties and do not affect the co-defendant's right to removal.

Harter Twp. v. *Kernochan*, 103 U. S. 562 (26:411); *Wade* v. *Wortsman*, 29 Fed. Rep. 754; *Browne* v. *Strode*, 9 U. S. 5 Cranch, 303 (3:108); *McNutt* v. *Bland*, 43 U. S. 2 How. 10 (11:159);

Wormley v. *Wormley*, 21 U. S. 8 Wheat. 422 (5:651); *Fisk* v. *Union Pac. R. Co.* 6 Blatchf. 362; *Sioux City & D. M. R. Co.* v. *Chicago, M. & St. P. R. Co.* 27 Fed. Rep. 770; Desty, Removal of Causes, 124, § 10 *m*, and Appendix, 253, and cases cited.

394] *Mr. Chief Justice* **Fuller** delivered the opinion of the court:

The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs each claiming under a separate and distinct right, in respect to a separate and distinct liability, and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard.

As the plaintiffs sought to restrain the collection of taxes already levied, and any further levies by the county judge, and also a decree adjudging the invalidity of the bonds, the sheriff, who was about to enforce the collection, and the county judge were necessary parties to the bill as framed, as were the bondholders, whose interests were directly affected. There is nothing to show that the latter were so numerous as to render it impossible to bring them all before the court, and we need not discuss the proper course to be
395] pursued in such a contingency. The plaintiffs made two of the bondholders residing in Kentucky, representing, the one the original, and the other the new, bonds, parties defendant, and averred that they did not know the names of the other holders of the bonds, and asked for notice to be given to the unknown bondholders. Before that notice had been directed by the court, or the names of other bondholders had been ascertained and steps taken to bring them in, the two nonresident bondholders voluntarily became parties to the proceedings, and thereupon the case was removed upon their application. And while the two Kentucky bondholders, on the day of the order of removal, withdrew the motion to dissolve and the demurrer, so far as they were parties thereto, and declared that they had no defense to make to the bill, because, as alleged in their affidavits, they believed that the justice of the cause was with the plaintiffs, and they therefore did not choose to resist in the premises, denying at the same time all collusion, yet this is not a controlling circumstance, in view of the frame of the bill.

Such being the attitude of the case we are of opinion that the motion to remand should have been granted. The removal was had under the Act of March 3, 1875 (18 Stat. 470), but cannot be sustained under the first clause of the second section of that Act, as the controversy was not between citizens of different States, unless the parties could be so arranged on the opposite sides of the matter in dispute as to bring about that result; nor, under the second clause of the section, unless there existed a separable controversy wholly between citizens of different States, and which could be fully determined between them.

In *Harter* v. *Kernochan*, 103 U. S. 562, 566 [26: 411, 412], this court said: "Disregarding, as we may do, the particular position, whether as complainants or defendants, assigned to the parties by the draughtsman of the bill, it is apparent that the sole matter in dispute is the liability of the township upon the bonds described in the bill; that upon one side of that dispute are all of the state, county and township officers and taxpayers, who are made parties, while upon the other is Kernochan, the owner of the bonds whose validity is questioned by this suit. He, alone, of all the parties, is, in a legal [3
sense, interested in the enforcement of liability upon the township. It is therefore a suit in which there is a single controversy, embracing the whole suit, between citizens of different States, one side of which is represented alone by Kernochan, a citizen of Massachusetts, and the other by citizens of Illinois." There the bonds were all owned and held by Kernochan, while here they are in large part held and owned by citizens of Kentucky. If this case admitted, then, of so arranging the parties as to put the county officers and taxpayers on one side of the controversy and the bondholders on the other, still the cause would not be susceptible of removal, under the first clause.

Was there, then, a separable controversy wholly between citizens of different States, and that a controversy which could be wholly determined between them? "The case," said *Mr. Chief Justice* Waite, in *Fraser* v. *Jennison*, 106 U. S. 191, 194 [27: 131], "must be one capable of separation into parts so that in one of the parts a controversy will be presented with citizens of one or more States on one side and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." Testing the right of removal by the case as made by the present bill, and as it stood at the time of removal, it was a case against all the bondholders, in respect to whom it was not denied that a large number were citizens of Kentucky, upon a cause of action not susceptible of division.

The plaintiffs were not prosecuting an action against individual bondholders for the cancellation of individual bonds. They were attacking the validity of the entire subscription and seeking a decree which would invalidate the entire issue. The petitioners were out of the jurisdiction, and if they had remained so would not have been concluded. The federal courts were open to them for the

pursuit of the remedies which the law afforded. When they voluntarily submitted themselves to the jurisdiction of the state court, they became so associated with the resident bondholders as to render it impossible for them to contend that the controversy which involved all was separable as to them, and] that they were thereby enabled to transfer the particular suit, as it affected all the defendants, to the circuit court.

The decree is reversed, and the cause remanded, with directions to remand it to the state court.

[BRUNO BEAUPRE ET AL., *Plffs. in Err.*,
v.
DANIEL R. NOYES ET AL.

(See S. C. Reporter's ed. 397-402.)

Jurisdiction of state judgments—federal question.

This court will not entertain jurisdiction of a state judgment, where, beside the federal question alleged to have been decided by the state court, it proceeded in part upon another and distinct ground not involving any federal question and sufficient in itself to maintain the judgment without reference to that question.

[No. 160.]

Argued and Submitted Jan. 23, 1891. Decided Feb. 2, 1891.

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment in favor of plaintiffs for wrongfully seizing property under attachments and the wrongful conversion of it by defendants to their own use. *Affirmed.*

Statement by *Mr. Justice* **Harlan:**

This action was brought in the District Court of Ramsey County, Minnesota, by the defendants in error, partners as Noyes Bros. & Cutler, against the plaintiffs in error, partners as Beaupre, Keogh & Co., each firm doing business in the City of St. Paul.

The complaint alleges that Charles Young, engaged in general mercantile business at Forsyth, in Custer County, Montana, being insolvent, and indebted to many persons,—among others, to the plaintiffs in the sum of $425.71, and to the defendants in the sum of $1,080.43,—executed, on the 27th of April, 1883, a deed of assignment for the benefit of his creditors, whereby, and for the purpose of making equal provision for all of them, he transferred to C. A. Winchester his property, real and personal, in trust for his creditors; that Winchester accepted the trust, qualified as assignee, took actual possession of the property assigned, proceeded in due form to execute the trust and has ever since been such assignee; that the deed was duly [398] recorded May 1, 1883, in the proper office; that the property so transferred was worth $6,000, and consisted, among other things, of a stock of general merchandise, books, book accounts, etc.; that of said assignment the plaintiffs were notified by Winchester as soon as he had taken possession of the property under the deed of assignment, and defendants assented thereto; that afterwards, on and between May 1, 1883, and January 2, 1884, Winchester, as such assignee, and not otherwise, with the consent of all the creditors, especially of the defendants, carried on business at Forsyth, purchasing large amounts of goods and merchandise as such assignee, and placing the same in the store building, previously occupied by Young at Forsyth, with the goods transferred by said deed of assignment; that Winchester continued until January 2, 1884, to sell both the original stock and the new goods so purchased, and applied the proceeds thereof, not required to meet the expenses of the assignment, to the payment as fast as possible of Young's creditors and of the debts incurred by the assignee; that the new goods were obtained solely to enable the assignee to dispose of all the property to the best advantage and were paid for out of the proceeds of the trust property as well as from the proceeds of the new goods purchased; that the defendants were paid as well on account of their claims against Young as for the goods purchased from them by the assignee, out of the proceeds of both the old and new stock; and that the defendants knew of all these matters and consented thereto.

It also alleges that, on the 2d of January, 1884, the defendants caused two actions to be commenced in the District Court for Custer County, Territory of Montana, one against Young and the other against Young and Winchester, the first to recover $683.71 (the balance claimed to be due them from Young on his original indebtedness to them), and the second to recover $931.44, as the balance due them from Young and Winchester for merchandise sold and delivered by the defendants between the date of the assignment and the commencement of those actions; that they caused attachments to be issued in such actions against the property of Young, and of Young and Winchester, respectively, [399 under which, by the direction of the defendants herein, the stock of merchandise, in the possession of Winchester as aforesaid, was seized and taken possession of by the officer serving the attachments; that said property was of the value of $6,000; that afterwards, January 15, 1884, Winchester, as such assignee, sold and conveyed to the plaintiffs herein the property so attached, which writing was duly recorded on the day of its date; and that the plaintiffs by such sale and conveyance became the owners of said property.

The complaint further alleged that the plaintiffs purchased the property for the sole purpose of preserving it from sacrifice by sale under the attachments, and that it might be applied to the purposes and objects of the trust, and for the benefit, share and share

---

NOTE.—*As to review, by United States Supreme Court, of territorial decisions; extent and matter of; distinction between an appeal and a writ of error,* —see *note* to Miners Bank of Dubuque v. Iowa, 13: 867.

What questions the United States Supreme Court will review on writ of error; bill of exceptions. See *note* to Parks v. Turner, 13:883.

The supreme court will not review the discretionary action of the court below. See *note* to Barrow v. Hill, 14:48.

alike, of all the creditors of Young and of Winchester, as assignee; that the officer having the attachments refused, upon the demand of the plaintiffs, and under the order of the defendants, to deliver the attached property to them; that a like demand was made upon the defendants, but they refused to surrender it, and have wrongfully converted all of it to their own use and benefit, to the damage of plaintiffs in the sum of $6,000; and that the total value of the merchandise sold by the defendants to Winchester, as assignee, was $2,675, on which he had paid $1,743.86.

The prayer of the plaintiff is for a judgment for $6,000, the value of the property, with interest, and $1,500 damages.

The answer alleges that while the defendants supposed from the representations made to them by Young and Winchester that an assignment had been made by Young to Winchester, in good faith, for the benefit of their creditors without preference, and while they had sold goods to Winchester in the belief that he ordered and procured them merely to facilitate his disposal of the goods acquired by him under the alleged assignment, they subsequently ascertained that no valid assignment had been made; that the goods, so pretended to be assigned, remained in the actual possession of Young, and never were delivered to Winchester; that the alleged assignment was a mere device to hinder Young's [400] creditors from collecting their debts by legal process; and that the whole arrangement was a trick, upon the part of Young, to continue in the control of the goods, through Winchester, who was only his clerk, and to so manage his business that he could pay out of the proceeds of the trust property and out of the new goods procured by him in the name of Winchester such creditors as he chose to pay, and to delay and defraud others, including the defendants.

The answer avers that the alleged deed of assignment was fraudulent and void under the Statutes of the Territory of Montana, in force in 1883, when the deed was made. Those Statutes provided: "§ 165. All deeds of gift, all conveyances and transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." "§ 169. Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be acccompanied by the immediate delivery, and be followed by an actual and continued change of possession, of the things sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignment or subsequent purchasers in good faith. § 170. The term 'creditors,' as used in the last section, shall be construed to include all persons who shall be creditors of the vendor or assignor at any time while such goods and chattels shall remain in his possession or under his control." "§ 172. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands or in goods in action, or of the rents or profits thereof, made with intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and any bond or other evidences of debt given, suits commenced, decrees or judgment suffered, with the like intent as against the person hindered, delayed or defrauded, shall be void." Laws Montana 1879, pp. 436, 437.

The answer averred that under these circumstances, and in conformity with these statutory provisions, the above actions were brought in Montana by the present defendants. In those actions Young and Winchester appeared, and such proceedings were had therein that judgment was rendered against Young in the action against him for $1,024.93, and against Winchester in the other action for $1,995.35. The attached property was sold under executions on those judgments for $676.90, which is alleged to have been their full value.

There was a verdict in the present action in favor of the plaintiffs. The case has been twice before the Supreme Court of Minnesota, first upon appeal from the order overruling a demurrer to the complaint (32 Minn. 496), where the complaint was adjudged to be sufficient in law, and then upon appeal from the final judgment. 36 Minn. 49.

Mr. **I. V. D. Heard** for plaintiffs in error.
Mr. **C. K. Davis** for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

The contention of plaintiffs in error is that, by the Statutes of the Territory of Montana, above quoted, the alleged assignment by Young to Winchester was conclusively fraudulent as to them, for the want of the immediate delivery, followed by an actual and continued change of possession, of the goods assigned; that their right to so treat the assignment, although such right was specially set up and claimed, was denied; and that, consequently, they were denied a right arising under an authority exercised under the United States. Whether the state court so interpreted the Territorial Statute as to deny such right to the plaintiffs in error, we need not inquire, for it proceeded, in part, upon another and distinct ground, not involving any federal question, and sufficient, in itself, to maintain the judgment, without reference to that question. That ground is, that there was evidence tending to show that the defendants acquiesced [401] in and assented to all that was done, and waived any irregularity in the mode in which the assignee conducted the business; and that the question whether the defendants so acquiesced and assented with knowledge of all the facts, and thereby waived their right to treat the assignment as fraudulent, was properly submitted to the jury. The state court evidently intended to hold that, even if the assignment was originally fraudulent, as against the creditors, by reason of Young remaining in the store as clerk for Winchester, and assisting the latter in carrying on the business, it was competent for the plain-

tiffs in error to waive the fraud and treat the assignment as valid for all the purposes specified in it. That view does not involve a federal question. Whether sound or not, we do not inquire. It is broad enough, in itself, to support the final judgment, without reference to the federal question, and for that reason *the judgment must be affirmed.*

The case of *Beaupre* v. *Noyes*, No. 159, is the same case, in respect to the issues and facts, as the above case. It is a writ of error to review the judgment of the Supreme Court of the State affirming the order of the court of original jurisdiction refusing a new trial in the above action. This writ was sued out upon the theory that the denial of a new trial might be regarded as a final judgment of the state court within the meaning of the Act of Congress. But, clearly, this court has no jurisdiction to review such an order. *The writ of error in case 159 must therefore be dismissed.*

---

[403] PRENTISS D. CHENEY, *Plff. in Err.*,
v.
THOMAS HUGHES ET AL.

(See S. C. Reporter's ed. 403.)

Transcript of record—motion for withdrawal of denied.

The court denies the motion of plaintiff in error to withdraw the transcript of the record from the files of this court.

[No. 741.]

Submitted Jan. 5, 1891. Decided Jan. 12, 1891.

IN ERROR to the Circuit Court of the United States for the District of Minnesota.

On motion for leave to withdraw the transcript of the record of the court below, a motion to dismiss at the cost of the plaintiff in error being also filed. *Denied.*

Mr. **William A. McKenney**, for plaintiff in error, for motion.

No counsel for defendants in error.

Fuller, *Ch. J.:*

The writ of error in this case was dismissed by plaintiff in error on the 5th of January, and at the same time a motion was made on his behalf for leave to withdraw the transcript of record heretofore filed herein. The transcript has become a part of the records of this court, which we cannot permit to be mutilated or destroyed. Its contents are accessible here and the original record remains in the circuit court. If information is desired, either source may be resorted to.

The motion is denied.

Ex parte:

[404] In the Matter of THOMAS HENRY COOPER, *Petitioner.*

(See S. C. Reporter's ed. 404-414.)

Prohibition—jurisdiction over Alaska courts.

The Supreme Court of the United States has jurisdiction, under Rev. Stat., § 688, to proceed, by way of prohibition, in respect to the District Court of the United States for the District of Alaska.

Argued Jan. 27, 28, 1891. Decided Feb. 2, 1891.

MOTION for leave to file a petition and suggestion for a writ of prohibition to prevent the District Court of the United States for the District of Alaska from entertaining jurisdiction of proceedings for the forfeiture of petitioner's schooner "W. P. Sayward." *Granted.*

The petition was presented and the motion made for leave to file the same by Mr. Joseph H. Choate, on January 12, 1891. The petition was as follows:

"To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

"Comes now, Thomas Henry Cooper, a British subject, and gives this Honorable Court to understand and be informed:

"That whereas, by the law of nations, the municipal laws of a country have no extraterritorial force and cannot operate on foreign vessels on the high seas, and it is legally impossible, under the public law, for a foreign vessel to commit a breach of municipal law beyond the limits of the territorial jurisdiction of the law-making State;

"And whereas, the seizure of a foreign vessel beyond the limits of the municipal territorial jurisdiction for breach of municipal regulations is not warranted by the law of nations, and such seizure cannot give jurisdiction to the courts of the offended country, least of all where the alleged act was committed by the foreign vessel at the place of seizure beyond the municipal territorial jurisdiction;

"And whereas, by the law of nations, a British vessel sailing on the high seas is not subject to any municipal law except that of Great Britain; and by the said law of nations a British ship so sailing on the high seas ought not to be arrested, seized, attached or detained [405] under color of any law of the United States;

"And whereas, by the laws of the United States, as well as by the law of nations, the district courts of the United States have not and ought not to entertain jurisdiction or hold plea of an alleged breach upon the high seas of the municipal laws of the United States by the captain and crew of a British vessel, and can acquire no jurisdiction by a seizure of such vessel on the high seas though she be afterwards brought by force within the territorial limits of the jurisdiction of said courts;

"And whereas, on the ninth day of July, 1887, there was between the governments and peoples of Great Britain and the United States profound peace and friendship, which relations of peace and friendship had happily subsisted for nearly three quarters of a century before said ninth day of July, 1887, and still endure to the great comfort and happiness of two kindred peoples;

"And whereas, on the said ninth day of July, 1887, the schooner 'W. P. Sayward,' a British vessel, duly registered and documented as such, and having her home port at Victoria in the Providence of British Columbia, Dominion of Canada, and commanded by one George R. Ferry, a British subject, as captain and master

thereof, was lawfully and peaceably sailing on the high seas, to wit: in latitude 54 degrees 43 minutes north, longitude 167 degrees 51 minutes west, fifty-nine miles from any land whatsoever, and then being fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands in Behring's Sea, as more fully appears by the chart in the record of the proceedings of the District Court of the United States in and for the Territory of Alaska hereinafter referred to

"And whereas, said schooner was at said time and place unlawfully and forcibly seized and arrested by an armed vessel of the United States revenue marine, to wit, the U. S. Rev. Cutter 'Rush,' cruising under instructions of the Secretary of the Treasury of the United States for the sole purpose of enforcing the
[406] municipal law of the United States, and the said British schooner was thereupon unlawfully, wrongfully and forcibly detained and seized, and was by force taken by the said 'Rush' to the Port of Sitka, in the Territory of Alaska, United States of America, and within the Territory of Alaska and the waters thereof and within the dominion of the United States in Behring's Sea;

"And whereas, the said British schooner being as aforesaid so unlawfully, wrongfully and forcibly seized on the high seas and without the limits of Alaska Territory or the waters thereof, and being so unlawfully, wrongfully and forcibly brought within the limits of Alaska Territory and the waters thereof; nevertheless a certain M. D. Ball, an attorney of the United States for the District of Alaska, not ignorant of the premises, but unmindful of the danger of disturbing the peace and harmony subsisting between the United States and Great Britain, did by process out of the District Court of the United States in and for the District of Alaska, attach and arrest the said schooner 'W. P. Sayward,' so as aforesaid wrongfully seized while lawfully sailing on the high seas under the protection of the law of nations, and so as aforesaid wrongfully and forcibly brought within the said Port of Sitka in the Territory of Alaska, and before the judge of the said district court, contrary to the said laws of nations and the laws of the United States, did unjustly draw in plea to answer a certain libel by him, the said M. D. Ball, against the said schooner, her tackle, apparel, boats, cargo and furniture exhibited and promoted, craftily and subtilely therein alleging and articulating that the said schooner 'W. P. Sayward,' her tackle, apparel, boats, cargo and furniture, were seized on the ninth day of July, 1887, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial District of Alaska, to wit, within the waters of that portion of Behring's Sea belonging to the United States and said district, and that all said property was then and there seized as forfeited to the United States for the following causes: That the said vessel and her captain, officers and crew were then and there found engaged in killing fur seal within the limits of Alaska Territory and in the said waters thereof in violation of section nineteen hundred and fifty-six
[407] of the Revised Statutes of the United States, and that on said ninth day of July, 1887, George R. Ferry and certain other persons whose names were to the said attorney unknown, who were then and there engaged on board said schooner 'W. P. Sayward,' as seamen and seal hunters, did, under the direction and by the authority of George R. Ferry, then and there master of said schooner, engage in killing and did kill in the Territory and District of Alaska and in the waters thereof, thirty fur seals in violation of section 1956 of the Revised Statutes of the United States in such cases made and provided; without this, however, and the said M. D. Ball not in any way alleging or articulating, that the said seizure was made, or the said killing of seal was done, within any river or bay of the United States, or within a marine league of the coast of any portion of the mainland, or any island belonging to the United States, or that the said vessel and her master and crew were subject to the laws of the United States sailing upon the high seas, or that any portion of the high seas beyond a marine league from the coasts of the mainland or adjacent islands was within the jurisdiction of the United States;

"And whereas, a demurrer by claimant filed on the fifteenth day of September, 1887, alleging the insufficiency of the libel, was overruled by the court on the said fifteenth day of September, 1887, and thereafter the claimant filed his answer specifically denying the allegations of the libel that the seizure aforesaid was made within the waters of Alaska Territory, or within the civil and judicial District of Alaska, or in any portion of Behring's Sea belonging to the United States, and specifically denying the allegations of the libel that the said vessel, her captain, officers and crew, were then and there found engaged in killing fur seal within the limits of Alaska Territory, or in the waters thereof, or that any of them did kill any fur seal therein:

"And whereas, at the trial of said cause, the libelant, through its witnesses, by it called in that behalf, to wit, the captain and officers of the 'Rush,' did make plain and clear to the court what was not clearly disclosed in the libel, that is to say, the place of the alleged
[4 offense, and the place of said seizure; and did support the averments of the claimant's answer, and by its evidence so offered in its behalf and not gainsaid in any way, did show that the place of the alleged killing of seal was without the limits of Alaska Territory or the waters thereof, and that the said seizure was not made, nor said killing of seal done, within the waters of Alaska Territory, or within the civil and judicial District of Alaska, or in any portion of Behring's Sea belonging to the United States, but that the place of the alleged offense, and the place of said seizure, was upon the high seas, to wit: in latitude 54° 43′ north, and longitude 167° 51′ west, fifty-nine miles distant from any land whatsoever, and fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, upon waters between Oonalaska and Prybyloff Islands in Behring's Sea, which said testimony for libelant, as to place of seizure and place of alleged offense, was supported by that of the claimant, so that the judge of the District Court of the United States for the District of Alaska was fully informed that the seizure had been made and

the said killing of seal done on the high seas without the limits of Alaska Territory or the waters thereof, and that said vessel was brought by force within the jurisdiction of said court, and that therefore, under the laws of nations and under the laws of the United States, he had, and could have, no jurisdiction of the alleged offense or of the vessel so as aforesaid unlawfully, wrongfully and tortiously seized without the jurisdiction of the United States and of the court, and so wrongfully and by force brought within the jurisdiction of the United States and of the court, yet nevertheless, being so fully advised, said judge of the District Court of Alaska aforesaid did, on the nineteenth day of September, 1887, in contempt of the authority of the United States, in violation of the laws of the United States and of the laws of nations, and to the great danger of the friendly relations happily subsisting between Great Britain and the United States, assert and attempt to exercise jurisdiction over the said vessel, the same being the vessel of a friendly nation at peace with the United States, knowing the same to have been unlawfully seized on the high seas without the jurisdiction
[9] of the United States, and knowing the place of the alleged offense against a statute of the United States to be alleged and proved to be the same place as the place of seizure, that is to say, the high seas without the limits of the Territory of Alaska or the waters thereof, and without the jurisdiction of the United States, —all this the said district judge well knowing, he did find as fact the killing of fur seal on the ninth day of July, 1887, by the captain and crew of the aforesaid British vessel, the 'W. P. Sayward,' at the said place of seizure as aforesaid, and did find as conclusion of law that such killing at such place on the high seas, to wit, at the said place of seizure in latitude 54° 43′ north and longitude 167° 51′ west, and fifty-nine miles from any lands whatsoever and fifty-nine miles northwest from Cape Cheerful, Oonalaska Island, was in violation of section 1956 of the Revised Statutes of the United States, and by reason thereof the libelant was entitled to a decree of forfeiture of the said British vessel, her tackle, apparel, boats, cargo and furniture;

"And whereas, after said assertion of jurisdiction to condemn and forfeit said vessel, and before decree or sentence, the claimant did move the court to arrest the decree of forfeiture, and among other grounds did distinctly set up that the court had no jurisdiction over the subject matter of the cause, as shown by libelant's own testimony as to place of offense and seizure, yet the said court did, nevertheless, in contempt of the authority of the United States and in violation of the laws of the United States and in violation of the laws of nations, and to the manifest danger of the peaceful relations of the two countries, assert and attempt to exercise jurisdiction in the premises, and on the nineteenth day of September, 1887, did make and enter a pretended decree of forfeiture to the United States of said vessel, her tackle, apparel, boats, cargo and furniture, and direct that unless an appeal be taken the usual writ of *venditioni exponas* be issued to the marshal commanding him to sell all said property and bring the proceeds into court to be distributed according to law, costs to be taxed and awarded against the claimants;

"And whereas, Thomas Henry Cooper, be- [4
ing admitted as the actual owner of the said schooner 'W. P. Sayward,' by order of the district court, to interpose as claimant, did, in order to prevent the execution of said decree, take an appeal to this Honorable Court on the 26th day of April, 1888, and docketed the same on the 30th day of October, 1888, under No. 1037;

"And whereas, all matters of fact hereinbefore recited and alleged, save and except those of which this Honorable Court takes judicial notice, appear by the record and proceedings of the District Court of the United States in and for the Territory of Alaska;

"And whereas, the said appeal has been dismissed by this Honorable Court on the application of the claimant, appellant, himself, not only because he is advised that there is no appeal given to this court from the District of Alaska by the laws of the United States, but because he is advised that the district court being wholly without jurisdiction its decree was and is a nullity, and this Honorable Court is fully authorized by section 688 of the Revised Statutes of the United States to prohibit any proceedings in the district court for the enforcement of the same;

"And whereas, the said Thomas Henry Cooper is advised that in consequence of the dismissal of his appeal, according to the practice of this Honorable Court, its mandate will issue in due course without further consideration by this court, which said mandate would, in ordinary course, not only permit, but command, the District Court of Alaska to proceed to execute its pretended decree of forfeiture, and it is therefore the duty of the said Thomas Henry Cooper, now, here, to give this Honorable Court to understand and be informed of all and singular the matters in this suggestion recited and alleged to the end that this court shall consider this application for prohibition before issuing its mandate, so that it may either frame a special mandate or take order that the ordinary mandate shall not reach the district court before the writ of prohibition hereinafter prayed, or a rule to show cause why said writ should not issue, shall be served upon said court,—

"Wherefore, the said Thomas Henry Cooper, [4
the aid of this Honorable Court most respectfully requesting, prays remedy by writ of prohibition to be issued out of this Honorable Court to the judge of the District Court of the United States in and for the Territory of Alaska to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid, any wise concerning further before him, and to prohibit him from in any manner enforcing the said decree or sentence, or from treating the said decree as a valid sentence, for any purpose, or from taking any steps whatsoever in the cause aforesaid as to said decree or any matter or thing remaining to be done in consequence of said decree, and prohibiting him, the said judge, from making or entering any order, judgment or decree in and about the certain stipulation exacted and required in the course of said proceedings, and generally from the further exercise of jurisdiction in said cause, or the enforce-

ing any order, judgment or decree made under color thereof.

"Joseph H. Choate, of Counsel.

"I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

"Joseph H. Choate.

"Subscribed and sworn to before me this 12th day of January, 1891.

"(Seal) Oscar Luckett, Notary Public."

At the same time that the above petition was presented Mr. Calderon Carlisle, on behalf of Sir John Thompson, K. C. M. G., Her Brittanic Majesty's Attorney-General of Canada, presented to the court a suggestion for a writ of prohibition which was in all respects identical with the above petition except as to the party presenting it and as to its suggestion, which was as follows:

"Wherefore, the said Sir John Thompson, K. C. M. G., Her Brittanic Majesty's Attorney-
2] General of Canada, the aid of this Honorable Court most respectfully requesting, for said Thomas Henry Cooper, submits to this Honorable Court that a writ of prohibition ought to be issued out of this Honorable Court to the judge of the District Court of the United States in and for the Territory of Alaska to be directed, to prohibit him from holding the plea aforesaid, the premises aforesaid, anywise concerning further before him, and to prohibit him from in any manner enforcing the decree or sentence, or from treating the said decree as a valid sentence, for any purpose, or from taking any steps whatsoever in the cause aforesaid as to said decree or any matter or thing remaining to be done in consequence of said decree, and prohibiting him, the said judge, from making or entering any order, judgment or decree in and about the certain stipulation exacted and required in the course of said proceedings, and generally from the further exercise of jurisdiction in said cause, or the enforcing any order, judgment or decree made under color thereof.

"And the said Sir John Thompson, K. C. M. G., Her Brittanic Majesty's Attorney-General of Canada, most respectfully informs this Honorable Court that the fact that this his suggestion is presented with the knowledge and approval of the imperial government of Great Britain will be brought to the attention of the court by counsel duly thereunto authorized by Her Brittanic Majesty's representative in the United States.

"Calderon Carlisle,

"Counsel for Sir John Thompson, K. C. M. G., Her Brittanic Majesty's Attorney-General of Canada.

"I have read the foregoing suggestion by me subscribed, and the facts therein stated are true to the best of my knowledge and belief.

"Calderon Carlisle.

"Subscribed and sworn to before me this 12th day of January, 1891.

"(Seal) Oscar Luckett, Notary Public."

Time was allowed the Attorney-General to prepare an argument in opposition to the motion, at the expiration of which the parties appeared and counsel were heard.

Messrs. **Joseph H. Choate, Calderon Carlisle** and **Charles Strauss,** in support of the motion:

"The supreme court shall have power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction."

Act of September 24, 1789, § 13 (1 U. S. Stat. at L. 80); U. S. Rev. Stat. § 688.

If the lowest of the courts of the United States could usurp jurisdiction over the vessels of a friendly foreign nation, by our Constitution the executive would be powerless in almost every such case to meet the just complaint of the foreign government. For such a case it was eminently proper that the highest tribunal of the United States should be expressly clothed with authority, by a process well known to the common law, to restrain the district courts from proceeding as courts of admiralty and maritime jurisdiction in cases where they had no jurisdiction or were exceeding their jurisdiction.

United States v. *Peters*, 3 U. S. 3 Dall. 121, (1:535); *Ex parte Pennsylvania*, 109 U. S. 174 (27:894).

The power of Congress to vest judicial power in courts created in territories is unlimited both as to the extent and the mode of its exercise.

American Ins. Co. v. *356 Bales of Cotton*, 26 U. S. 1 Pet. 542 (7:255). See *Clinton* v. *Englebrecht*, 80 U. S. 13 Wall. 441 (20:660).

The district and court created for Alaska in their organization and character are indistinguishable from the judicial districts and the district courts created by the original Judiciary Act of 1789.

Act of May 17, 1884, § 1 (23 Stat. at L. 24).

Messrs. **W. H. H. Miller,** *Atty-Gen.*, and **William H. Taft,** *Solicitor-Gen.*, for the United States, in opposition to the motion:

This court has no power to issue a writ of prohibition to the District Court of Alaska.

Section 688, Rev. Stat., when its origin and history are considered, cannot refer in the expression "district courts" to any courts of that name except such as are established by Congress under the third article of the Constitution as courts of the United States charged with the exercise of the judicial power therein conferred. The District Court of Alaska is not such a court.

Act of May 17, 1884, § 3 (23 Stat. at L. 24). See *American Ins. Co.* v. *356 Bales of Cotton*, 26 U. S. 1 Pet. 511 (7:242); *Clinton* v. *Englebrecht*. 80 U. S. 13 Wall. 434–447 (20:659–662); *The City of Panama*, 101 U. S. 453–460 (25:1061–1064); *McAllister* v. *United States*, 22 Ct. Cl. 318.

The jurisdiction of this court in prohibition is an appellate jurisdiction.

Marbury v. *Madison*, 5 U. S. 1 Cranch, 137 (2:60).

This court can exercise no appellate jurisdiction unless conferred upon it by Act of Congress.

United States v. *Boisdoré*, 49 U. S. 8 How. 121 (12:1012); *United States* v. *Cox*, 86 U. S. 11 Pet. 162 (9:671); *United States* v. *Nourse*, 31 U. S. 6 Pet. 470 (8:467); *Ex parte Dorr*, 44 U. S. 3 How. 104 (11:514).

The jurisdiction of this court in prohibition is specific and limited.

Ex parte Graham, 77 U. S. 10 Wall. 541,

542 (19:981, 982). See also Phillips, Manual of Practice, chap. XXXII. *Prohibition; Ex parte Gordon*, 66 U. S. 1 Black, 503, 506 (17:134, 135); *Ex parte Christy*, 44 U. S. 3 How. 292 (11:603); *Ex parte Warmouth*, 84 U. S. 17 Wall. 64 (21:543.)

Appellate jurisdiction of this character over the courts of Alaska is not expressly granted and there is no room for implication as to the appellate jurisdiction in this case, for the Act establishing the court of Alaska makes provision expressly for the revision of its judgments and decrees.

Act of May 17, 1884, § 7 (23 Stat. at L. 26). See *Farnsworth* v. *Montana*, 129 U. S. 104, 113 (32:616, 618); *Durousseau* v. *United States*, 10 U. S. 6 Cranch, 307 (2:232).

The question of jurisdiction cannot be raised on the record here.

First. The face of the proceedings shows jurisdiction, and in such a case, after sentence, prohibition will not issue.

Camden v. *Home*, 4 T. R. 397; *Full* v. *Hutchins*, Cowp. 422; *Paxton* v. *Knight*, 1 Burr. 315; *Buggin* v. *Bennet*, 4 Burr. 2035; High, Extr. Leg. Rem. § 774; *Ladbrooke* v. *Crickett*, 2 T. R. 649-653; *Ex parte Easton*, 95 U. S. 77 (24:376); *Ex parte Gordon*, 104 U. S. 515 (26:814); *Ex parte Christy*, 44 U. S. 3 How. 308, 317 (11:610); *Ex parte Watkins*, 28 U. S. 3 Pet. 193 (7:650); *Bobyshall* v. *Oppenheimer*, 4 Wash. C. C. 482.

Second. Evidence shows seal killing within 3-mile limit. Jurisdiction was therefore in the court wherever seizure was made.

(a). Objection to jurisdiction was waived by appearance.

See *Bobyshall* v. *Oppenheimer*, 4 Wash. C. C. 482; *Livingston* v. *Story*, 36 U. S. 11 Pet. 351 (9:746); *Sheppard* v. *Graves*, 55 U. S. 14 How. 505 (14:518); *The Sloop Abby*, 1 Mason, 360-363; *The Idaho*, 29 Fed. Rep. 187-192; *Marye* v. *Strouse*, 5 Fed. Rep. 483; *Hale* v. *Continental L. Ins. Co.* 12 Fed. Rep. 359, 360; *National Furnace Co.* v. *Moline Malleable Iron Works*, 18 Fed. Rep. 863, 864; *Mina* v. *The I. & V. Florio S. S. Co.* 23 Fed. Rep. 915.

(b). But even if the seizure was illegal and a violation of international law and this were properly pleaded, that cannot affect the jurisdiction of the court to punish or forfeit for a municipal offense of a vessel in the custody of of its marshal and within its jurisdiction.

Gelston v. *Hoyt*, 16 U. S. 3 Wheat. 311 (4:397); *Ker* v. *Illinois*, 119 U. S. 436 (30:421); *Ex parte Scott*, 9 Barn. & C. 446; *The Richmond*, 13 U. S. 9 Cranch, 102 (3:670); *The Merino*, 22 U. S. 9 Wheat. 402 (6:121).

(c). But even if it be admitted that this was a seizure of a British ship upon the high seas without the jurisdiction of the United States, the seizure, being for an offense committed within the jurisdiction of the United States and against her laws, was not illegal and could not oust the jurisdiction.

Rose v. *Himely*, 8 U. S. 4 Cranch, 241 (2:608); *Hudson* v. *Guestier*, 10 U. S. 6 Cranch, 281 (3:224); *The Marianna Flora*, 24 U. S. 11 Wheat. 42 (6:415).

The question of jurisdiction here raised is political, and this court is concluded by the action of the executive and Congress from deciding it otherwise than against petitioners.

Foster v. *Neilson*, 27 U. S. 2 Pet. 309 (7:434); *Garcia* v. *Lee*, 37 U. S. 12 Pet. 511 (9:1176); *Re Baiz*, 135 U. S. 403 (34:222); *Cherokee Nation* v. *Georgia*, 30 U. S. 5 Pet. 1, 29 (8:25, 35); *Williams* v. *Suffolk Ins. Co.* 3 Sumn. 275; *Jones* v. *United States*, 137 U. S. 2812, 216 (34:696, 697); *Williams* v. *Suffolk Ins. Co.* 38 U. S. 13 Pet. 415-420 (10:226-228); *State* v. *Wagner*, 61 Me. 178-184; *State* v. *Dunwell*, 3 R. I. 127; *The Johannes*, 1 Lush. 188, 3 L. T. N. S. 757-759; *The Marianna Flora*, 24 U. S. 11 Wheat. 1 (6:405); *The Scotland*, 105 U. S. 31 (26:1004).

Fuller, *Ch. J.:* [4

This is an application for leave to file a petition for a writ of prohibition to the District Court of the United States for the District of Alaska. The Attorney-General being present and expressing a desire to that effect, opportunity was afforded him to be heard in opposition to granting the leave to file, and this resulted in argument having a much wider range than was necessary to the disposition of the motion.

We are of opinion upon the preliminary question that this court has jurisdiction to proceed in respect to the District Court of the United States for the District of Alaska, by way of prohibition, under section 688 of the Revised Statutes, and leave will therefore be given to file the petition for such writ and the accompanying suggestion. A rule will be entered as in like cases, returnable on such day as will allow reasonable time for service and return, in relation to which we invite the views of counsel.

(Counsel having conferred, the second Monday of April was made the return day.) [53

LAWRENCE MANUFACTURING COMPANY, *Appt.*,
v.
TENNESSEE MANUFACTURING COMPANY.

(See S. C. Reporter's ed. 537-552.)

Trade-mark—quality of goods—origin or ownership—grade or style—letters "LL" not a trade-mark—fraudulent use of label.

1. The office of a trade-mark is to point out distinctively the origin or ownership of the article

NOTE.—*Trade-mark, right to; what may be; infringement; assignment; when protected; misrepresentation in; use of name; remedy in equity; injunction.*

Registration does not create a trade-mark, and is only prima facie evidence that the person procuring it has a valid trade-mark. United States v. Braun, 39 Fed. Rep. 775.

The exclusive use of words designed to deceive the public, when claimed as a trade-mark, will not be protected by a court of equity. Alden v. Gross, 25 Mo. App. 123; Koehler v. Sanders, 48 Hun, 48, 21 Abb. N. C. 95.

One has no right to appropriate as a trade-mark a sign, or a symbol, or a name, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose. Corbin v. Gould, 133 U. S. 308 (33: 611); Stokes v. Allen, 56 Hun, 526.

No property can be acquired in any word, mark

to which it is affixed; or, in other words, to give notice who was the producer.

2. An exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired.

3. If the primary object of the mark be to indicate origin or ownership, the mere fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection and make it the common property of the trade.

4. If the device or symbol was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the articles to denote class, grade, style or quality, it cannot be upheld as technically a trade-mark.

5. The letters "LL" placed upon sheetings, which only indicate grade, class or quality, and not origin, ownership or manufacture, cannot be upheld as a trade-mark.

6. Where defendant has been guilty of fraud on the public and on the plaintiff by using an important part of plaintiff's label in such a way and under such circumstances as to amount to a false representation and thereby intentionally and fraudulently selling its goods as those of the plaintiff, without plaintiff's consent or acquiescence, such conduct will in a proper case constitute ground for relief.

[No. 101.]

Argued Dec. 3, 1890. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Middle District of Tennessee, dismissing a suit in equity for damages for the use of a trade-mark and an injunction and an account of profits. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

This was a bill of complaint filed by the Lawrence Manufacturing Company, a corporation of Massachusetts, against the Tennessee Manufacturing Company, a corporation of Tennessee, in the Circuit Court of the United States for the Middle District of Tennessee, alleging that plaintiff had been, and was, engaged in the manufacture and sale of sheetings; that in said trade several standards or classes of goods were generally recognized, the first of which included sheetings of such weight that two and eighty-five one-hundredths yards thereof would weigh a pound; the second, sheetings of such weight that three yards would weigh a pound; and the third, sheetings of such weight that four yards would weigh a pound; that prior to the year 1870 the plaintiff "adopted and thereupon became duly vested with the exclusive [5 right to use a label or trade-mark for all goods of its manufacture coming within said third class, to distinguish sheetings of its manufacture from sheetings of the same general class manufactured by others, the substantive, distinctive and chief feature of which label was, and is, an arbitrary sign or symbol, consisting of the capital letters 'LL' prominently and separately appearing upon such label or stamp; that said trade-mark, with certain environments, which have been changed from time to time, has been so used by complainant since said date of adoption, and, to wit, for more than fifteen years, and has been imprinted upon each and

---

or device which denotes merely the nature, kind or quality of an article. Laughman v. Piper, 5 L. R. A. 599, 128 Pa. 1; Smith v. Walker, 57 Mich. 456; Alden v. Gross, 25 Mo. App. 123; Trask Fish Co. v. Wooster, 28 Mo. App. 408.

Words descriptive of, and having relation to, a trade or business, cannot be seized and appropriated as a trade-mark. Koehler v. Sanders, 48 Hun, 48, 21 Abb. N. C. 95.

Everyone is at liberty to affix to the product of his own manufacture any symbol or device not previously appropriated, which will distinguish it from articles of the same general nature manufactured or sold by others. Laughman v. Piper, 5 L. R. A. 599, 128 Pa. 1.

When a man manufactures his goods at a particular place, he may use the name of that place in combination with other words as a trade-mark to distinguish the origin or ownership of his goods; and no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place. Gato v. El Modelo Cigar Mfg. Co. 6 L. R. A. 823, 25 Fla. 886.

A manufacturer or trader can acquire an exclusive right to the use of a peculiar location of words and the general form of a label, although the words themselves could not make a valid trade-mark. Kinney Tobacco Co. v. Maller, 53 Hun, 340.

Although the words "Warren Hose Supporter" would not alone constitute a valid trade-mark, they may do so in connection with a cut representing a supporter engaged with a stocking. Frost v. Rindskopf, 42 Fed. Rep. 408.

Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a peculiar label, symbol or trade-mark; and no other person has a right to adopt his label or trade-mark, or one so like his as to lead the public to suppose that the article to which it is affixed is the manufacturer's. Gato v. El Modelo Cigar Mfg. Co. 6 L. R. A. 823, 25 Fla. 886.

An inventor of a system of manufacturing garments, unless he has been engaged in trade, acquires no proprietary right in a trade-mark and can transfer none. Jaeger's Sanitary W. S. Co. v. Le Boutillier, 47 Hun, 521.

A label cannot be treated as a trade-mark where it does not indicate by what person the articles upon which it is used were made. Weener v. Brayton (Mass.) 8 L. R. A. 640.

The use of a rose-colored capsule upon bottles of wine cannot be claimed as a trademark; nor can another be prevented from using them, where there is no attempt to deceive by labels or otherwise. Mumm v. Kirk, 40 Fed. Rep. 589.

Rose and vanilla having been for many years well-known flavoring extracts, a person registering these words as a trade-mark for a food product cannot prevent other persons from flavoring food products with rose or vanilla or both, and describing them as so flavored. Clotworthy v. Schepp, 43 Fed. Rep. 62.

The words "Microbe Killer," being English words in common use, cannot be appropriated in their original meaning as a trade-mark. Alff v. Radam, 9 L. R. A. 145, 77 Tex. 530.

There can be no exclusive right to the use of the word "Singer" as a trade-mark for sewing-machines manufactured upon the principles covered by the Singer patents, which have expired, or to the mode of construction, external shape, appearance and ornamentation of such machines manufactured while the patents were in force. Singer Mfg. Co. v. June Mfg. Co. 41 Fed. Rep. 208.

A trade-mark cannot arise out of illustrations in a published book or story, but such illustrations must be protected by copyright. Munro v. Smith, 55 Hun, 419.

every piece or bolt of such sheetings of said third general class made and sold by complainant during said period;" that said trade-mark was so adopted by plaintiff for the purpose of distinguishing sheetings of its manufacture of the third general class from similar goods manufactured by others; that in connection with the trade-mark, or substantive element of said label, under and in connection with which the trade reputation of plaintiff had been established, plaintiff had used the words "Lawrence Mills," and the word "Sheetings," in different juxtapositions, and also at times a picture or representation of a bull's head, and at other times a picture or representation of a "bull rampant," and in connection therewith and underneath the same, and in a separate position, has always used said capital letters "LL" as and for the purpose aforesaid; that plaintiff had earned and acquired a trade reputation of great value as manufacturers of sheetings under its trade-mark, with the result that sheetings of the third general class of plaintiff's manufacture had come to be universally known as "LL sheetings," "and sheetings so known, named and called for, import the excellent raw material, the method and care of manufacture, and the general guaranty of excellence and lasting quality for which your orator has a long, valuable and thoroughly established reputation as to all goods of its manufacture;" that since plaintiff became vested with the exclusive right to the use of the trade-mark, namely, from the first of January, 1884, to the present time, the defendant had been manufacturing and selling large quantities of sheetings of said third general class, upon which, and for the purpose of taking advantage of plaintiff's trade label, trade-mark and trade reputation, defendant had placed a stamp or label in imitation of the stamp or label of plaintiff, and so in imitation thereof as to tend to deceive the public, and had upon its said stamp or label on its sheetings printed or stamped the capital letters "LL," prominently and separately from the other parts of its label; that the acts and doings of the defendant tended to deceive the public and to constitute a fraud upon them as well as upon the plaintiff; and that the appropriation and wrongful use of the letters "LL" was for the purpose and with the tendency and effect of appropriating a part, at least, of the good-will and trade reputation of the plaintiff; wherefore plaintiff prays for an injunction and for an account of all gains and profits realized by defendant, and for damages.

The answer admitted that in the trade of sheetings there were several recognized classes based upon the difference in weight of the goods per yard, and among them four classes running two and $\frac{85}{100}$, three, four and five yards to the pound; and that the products of different manufacturers, though coinciding in the standard of weight, differed in texture and durability. Defendant denied that either prior to 1870, or at any other time, plaintiff adopted and thereupon became duly vested with the exclusive right to use a label or trade-mark upon all goods of its manufacture coming within the third class, having as its substantive, distinctive and chief feature a symbol consisting of the capital letters "LL" prominently and

---

A man cannot acquire the right of a trade-mark in the use of his own name to the exclusion of the right of another person by the same name, and whose place of business is in the same place. Gato v. El Modelo Cigar Mfg. Co. 6 L. R. A. 823, 25 Fla. 886.

The right which every person has to use his own name in the prosecution of his business can be limited or controlled only when such name has become the trade-mark or business sign of another, and is being used to deceive the public or defraud the person who made it valuable. Caswell v. Hazard, 121 N. Y. 484, affirming 50 Hun, 230.

The right to a trade-mark is a property right, for the violation of which damages may be recovered in an action at law, and the continued violation be enjoined in equity. United States v. Steffens, 100 U. S. 82 (25: 550).

The object of the trade-mark is to indicate, either by its own meaning or by association, the origin or ownership of the article to which it is applied. Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51 (25: 998).

Directions, advertisements, notices, etc., constitute no part of a trade-mark. Candee v. Deere, 54 Ill. 462.

At common law the exclusive right to the ordinary trade-mark grows out of its use, and not from its mere adoption. United States v. Steffens, 100 U. S. 82 (25: 550).

The right to its use may be lawfully transferred with the business to which it is affixed. Kidd v. Johnson, 100 U. S. 617 (25: 769); Manhattan Medicine Co. v. Wood, 108 U. S. 218 (27: 706).

A trade-mark which contains a misrepresentation to the public will not be protected. Hoxie v. Chaney, 3 New Eng. Rep. 714, 143 Mass. 592; Palmer v. Harris, 60 Pa. 156; Hobbs v. Francais, 19 How. Pr. 567; Wolfe v. Burke, 7 Lans. 151; Connell v. Reed, 128 Mass. 477; Manhattan Medicine Co. v. Wood, 108 U. S. 218 (27: 706); Parlett v. Guggenheimer, 8 Cent. Rep. 796, 67 Md. 542.

Where parties claim rights acquired by advertising their wares under representations that are false, equity will not protect. Laird v. Wilder, 9 Bush, 131; Helmbold v. Helmbold Mfg. Co. 53 How. Pr. 453; Seabury v. Grosvenor, 53 How. Pr. 192; Palmer v. Harris, 60 Pa. 156; Ellis v. Zeilin, 42 Ga. 91; Tallcot v. Moore, 6 Hun, 106; Blackwell v. Wright, 73 N. C. 310; Green v. Shepherd, 38 Scot. Jur. 523; Foot v. Lea, 13 Ir. Eq. 484.

A trade-mark cannot be had in the form or color of a package or box (Ball v. Seigel, 3 West. Rep. 42, 116 Ill. 137; Enoch Morgan's Sons Co. v. Troxell, 89 N. Y. 292; Moorman v. Hoge, 2 Sawy. 78; Harrington v. Libby, 14 Blatchf. 128); nor in the form, finish or appearance of goods. Browne, Tradem. § 605.

A figure or a letter cannot, but a combination of either may be, appropriated as a trade-mark,—as 3214. American S. L. B. Co. v. Anthony, 2 New Eng. Rep. 630, 15 R. I. 338; Lawrence Mfg. Co. v. Lowell Hosiery Mills, 129 Mass. 325; Gillott v. Esterbrook, 48 N. Y. 374.

The words "A. N. Hoxie's Mineral Soap," and "A. N. Hoxie's Pumice Soap," taken together, constitute a trade-mark, and may be assigned. Hoxie v. Chaney, 4 New Eng. Rep. 709, 143 Mass. 592; Kidd v. Johnson, 100 U. S. 617 (25: 769).

Words merely designating the kind of business, as "patent roofing," cannot be appropriated (Fay v. Fay (N. J.) 4 Cent. Rep. 241); nor words which merely describe a quality, as "health preserving" (Ball v. Seigel, 3 West. Rep. 41, 116 Ill. 137; Gilman v. Hunnewell, 122 Mass. 139; Royal Baking Powder Co. v. Sherrell, 93 N. Y. 331; Larrabee v. Lewis, 67 Ga. 561; Upton, Tradem. 114; Browne, Tradem. §§ 164, 657, 658); nor words merely describing and designating the place where a business is carried on, as "Tower Palace" (Armstrong v. Kleinhans,

separately appearing on such label or stamp; and denied that at the time alleged or before or since plaintiff adopted or had used such symbol for the purpose of distinguishing sheetings of its manufacture from similar goods manufactured by others. Defendant admitted that plaintiff had used the letters "LL" upon sheetings of the third class, and had also impressed upon the goods "Lawrence Mills" and the word "Sheetings," and at times the representation of a bull rampant, but charged that the words "Lawrence Mills" were used to designate that the goods were made by plaintiff and to distinguish its manufacture from sheetings of the third class made by others, and that the representation of the bull and the words "Lawrence Mills" constituted plaintiff's trade-mark, if it had any, and that the letters "LL" were used solely to denote the class or grade of sheetings upon which they were impressed. Defendant denied that sheetings of the third class of plaintiff's manufacture were universally known as "LL sheetings," but asserted that it was generally understood in the trade and by consumers that the capital letters "LL" are placed on sheetings weighing one fourth of a pound to the yard to designate those of that class, and that they are thus used in common by all manufacturers of sheetings of this weight; that plaintiff's sheetings thus stamped are known in the trade as "Lawrence LL sheetings," and defendant's are known as "Cumberland LL sheetings," and that the same class of goods of other well-known makers in the United States are marked LL and recognized and distinguished according to their respective trade-marks denoting origin, as "Aurora LL," "Buckeye LL," "Beaver Dam LL," and many others; that plaintiff manufactures, besides the Lawrence LL sheetings, sheetings of the same weight and class, but of a different quality, and brands them "Shawmut," with the addition of the capital letters "LL," so that purchasers buying LL sheetings, made by plaintiff, are forced to designate the quality desired by ordering "Lawrence LL" or "Shawmut LL," as the case may be. Defendant admitted that since April, 1885, it had stamped upon its cotton

[540]

82 Ky. 303); nor geographical names, as "Lackawanna coal" (Delaware & H. Canal Co. v. Clark, 80 U. S. 13 Wall. 311 (20:581); "East Indian") Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397); nor words, letters or symbols merely indicating quality of the goods. Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51 (25: 993).

Where marks indicating style or quality also indicate origin, they may be subjects of trade-mark and their use be protected. American S. L. B. Co. v. Anthony, 2 New Eng. Rep. 630, 15 R. I. 338; Shaw Stocking Co. v. Mack, 21 Blatchf. 1.

Any mark or symbol, however unmeaning, may be the subject of a trade-mark and entitled to protection. Braham v. Bustard, 1 Hem. & M. 447; Perry v. Truefitt, 6 Beav. 66.

The fair and honest use of one's own name in the ordinary course of business cannot be restrained. Rogers v. Rogers, 1 New Eng. Rep. 411, 53 Conn. 121; Clark v. Clark, 25 Barb. 78; Devlin v. Devlin, 69 N. Y. 214; Landreth v. Landreth, 22 Fed. Rep. 41; Shaver v. Shaver, 54 Iowa, 213; Stonebraker v. Stonebraker, 33 Md. 268; Williams v. Brooks, 50 Conn. 278; Meriden Britannia Co. v. Parker, 39 Conn. 450; Croft v. Day, 7 Beav. 84; Holloway v. Holloway, 13 Beav. 213; Sykes v. Sykes, 3 Barn. & C. 541; Metzler v. Wood, L. R. 8 Ch. Div. 608; Fullwood v. Fullwood, L. R. 9 Ch. Div. 176.

A person cannot make a trade-mark of his own name so as to prevent others of the same name from using it in their own business. Meneely v. Meneely, 62 N. Y. 427; Meriden Britannia Co. v. Parker, 39 Conn. 450; Faber v. Faber, 49 Barb. 357; Glendon Iron Co. v. Uhler, 75 Pa. 467; James v. James, L. R. 13 Eq. 421; Burgess v. Burgess, 3 De G. M. & G. 896, 17 Jur. 292, 22 L. J. N. S. Ch. 675.

The use of a trade-name to designate a business so similar to that of another as to raise a strong probability of misleading and deceiving the public will be restrained. Sanders v. Jacob, 2 West. Rep. 408, 20 Mo. App. 96; McCartney v. Garnhart, 45 Mo. 593.

No trader can adopt a trade-mark so resembling that of another trader that ordinary purchasers, buying with ordinary caution, are likely to be misled. McLean v. Fleming, 96 U. S. 245 (24: 828); Partridge v. Menck, 2 Barb. Ch. 101, 5 N. Y. Ch. L. ed. 572, and *note;* Curtis v. Bryan, 36 How. Pr. 33, 2 Daly, 312; McCann v. Anthony, 3 West. Rep. 436, 21 Mo. App. 83; Filley v. Fassett, 44 Mo. 168; Sanders v. Jacob, 2 West. Rep. 409, 20 Mo. App. 96.

The use of the words "golden chain" is not of itself an infringement upon the trade-mark "golden crown." Parlett v. Guggenheimer, 8 Cent. Rep. 796, 67 Md. 542.

The court of chancery has the power to interfere by injunction to prevent the pirating of trade-marks. Partridge v. Menck, 2 Barb. Ch. 101, 5 N. Y. Ch. L. ed. 572; Taylor v. Carpenter, 11 Paige, 292, 5 N. Y. Ch. L. ed. 140, and *note;* Lee v. Haley, L. R. 5 Ch. App. 155; Wotherspoon v. Currie, L. R. 5 H. L. 508, 42 L. J. N. S. Ch. 130, 27 L. T. N. S. 393.

Where ordinary attention will enable purchasers to discriminate, the court will not interfere. Ball v. Seigel, 3 West. Rep. 41, 116 Ill. 137; Read v. Richardson, 45 L. T. N. S. 54; Beard v. Tanner, 13 L. T. N. S. 746; Leidersdorf v. Flint, 50 Wis. 401; Eggers v. Hink, 63 Cal. 445.

The right must be clearly established by the evidence. Ball v. Seigel, 3 West. Rep. 43, 116 Ill. 137; McLean v. Fleming, 96 U. S. 245 (24. 828).

The unauthorized use of the trade-mark of another person is not only an invasion of his exclusive right, but it is a fraud upon the public, and equity will restrain such use. Taylor v. Carpenter, 11 Paige, 292, 5 N. Y. Ch. L. ed. 140, 2 Sandf. Ch. 603, 7 N. Y. Ch. L. ed. 770; Hennessy v. Wheeler, 69 N. Y. 271; Walton v. Crowley, 3 Blatchf. 440; Congress & E. Spring Co. v. High Rock Congress Spring Co. 45 N. Y. 291; Cook v. Starweather, 13 Abb. Pr. N. S. 401; Singer Mfg. Co. v. Kimball, 10 Scot. L. R. 173, 45 Scot. Jur. 201; Manhattan Medicine Co. v. Wood, 108 U. S. 218 (27: 706); Taylor v. Carpenter, 11 Paige, 292, 5 N. Y. Ch. L. ed. 140, 42 Am. Dec. 114.

The fraudulent imitation of the name of a publication which has been used for many years will be restrained and the owner will be protected by injunction. Matsell v. Flanagan, 2 Abb. Pr. N. S. 432; Robertson v. Berry, 50 Md. 591.

In the following cases the remedy was refused: Bell v. Locke, 8 Paige, 75, 4 N. Y. Ch. L. ed. 359; Stephens v. De Conto, 7 Rob. 343; Tallcot v. Moore, 6 Hun, 106; American Grocer Pub. Asso. v. The Grocer Pub. Co. 51 How. Pr. 402.

The court is not bound to interfere where ordinary attention will enable purchasers to discriminate between trade-marks used by different persons. Popham v. Cole, 66 N. Y. 69, 23 Am. Rep. 32; Partridge v. Menck, 2 Sandf. Ch. 622, 7 N. Y. Ch. L. ed. 729, 2 Barb. Ch. 101, 5 N. Y. Ch. L. ed. 572; Stokes v. Landgraff, 17 Barb. 608.

As to when an injunction will be granted, restraining the unauthorized use of trade-marks, see *note* to McLean v. Fleming, 24: 828.

goods weighing one fourth of a pound to the yard the words "Cumberland" and "Sheetings" in horizontal lines, with the figures "4-4" beneath them, and with the capital letters "LL" below the figures "4-4;" that the word "Cumberland," from the river near which its works are located, was used to designate its manufacture and as a trade-mark; the word "Sheetings," to signify the general character of the goods; that the letters "LL" were used to denote the class to which the sheetings belonged, and the figures "4-4" to indicate that the goods were one yard wide; but denied that, for the purpose of taking advantage of plaintiff's trade, it had placed on the said goods a stamp or label in imitation of plaintiff's stamp or label, with intent to and with the effect of deceiving the public; and denied that its stamp or label bore any resemblance to that of the plaintiff or that even the most casual observer would take the one for the other; and denied that it had sold with the stamp or label designated goods of less weight than it claims the said letters indicate, with the qualification that there may exist slight variations above or below the standard, mathematical exactness not being uniformly attainable by any manufacturer, and such variations existing in plaintiff's goods. Defendant averred that plaintiff could not lawfully set up any claim to the exclusive use of the capital letters "LL" as a trade-mark, for they did not indicate any ownership of the goods upon which they are impressed, and did not have the characteristics for making them a lawful trade-mark, and standing alone conveyed no meaning, while the words "Lawrence Mills," used on plaintiff's labels, indicated the origin of said goods and plainly advertised that they were made by plaintiff. Defendant further stated, that before plaintiff used the letters "LL," they were stamped and used by the Atlantic Mills, in the United States, on a grade of sheetings manufactured by them, and said letters had never been by the trade and general public accepted as a trade-mark of plaintiff or as forming an element of the same, but their accepted signification was that they represented a class of goods and not origin or ownership.

Replication having been filed, the cause came on for hearing April 28, 1887, before *Judge* Jackson, upon the pleadings and voluminous depositions taken by the respective parties, and resulted in a decree dismissing the bill. The opinion of the circuit court will be found in 31 Fed. Rep. 776.

In a painstaking review of the evidence, the circuit court stated the facts to be, that prior to 1867, plaintiff branded its four-yard sheetings with a picture of a bull in a rampant position in connection with the words "Lawrence Mills," and the single capital letter "L;" that in 1867, plaintiff added another capital letter "L," at which time plaintiff was a well-known manufacturing company and had manufactured and sold large quantities of four-yard goods; that in 1883, plaintiff substituted for the bull rampant, the bull's head; that since 1867, plaintiff had put upon the market, continuously, a sheeting of the same weight as its third-class goods of first quality, but inferior and of less value than the former, which it branded "Shawmut LL sheetings," and that it made two other kinds of brown sheetings graded according to weight, one of which it stamped "XX," and the other "XXX," to denote distinction in grade; that plaintiff had for many years advertised its sheetings in a well-known dry goods advertising periodical, heading its advertisement with the picture of a bull's head, the words "Lawrence Mills" and the letters "XX," "XXX" and "LL;" that plaintiff made flannels and denims on which it used the picture of a bull's head and the words "Lawrence Mills" as on the four-yard sheetings, but not the letters "LL;" that letters of the alphabet have for many years been employed by manufacturers to designate grades and qualities of goods, and almost the entire alphabet is so used, and it is understood generally, in the cotton-goods trade, that letters are thus used to designate grade, class or quality; that it was also generally understood in the trade that "LL," as stamped on plaintiff's sheetings, meant four-yard goods, and that the words "Lawrence Mills," in connection with the bull's head, were used to indicate the maker; that these goods were always invoiced by plaintiff as "Lawrence" or "Lawrence Mills" LL, and were thus generally known in the trade, except that in some instances persons who have been more familiar with them, or have handled them exclusively, called them simply "LLs," thereby meaning the sheetings made by the Lawrence Company, but usually said sheetings were described as "Lawrence LL" or "Lawrence Mills LL," just as other sheetings stamped with "LL" were generally known in the trade and spoken of as "Beaver Dam LL," "Badger State LL," "Aurora LL," "Cumberland LL," etc.; that the signification of the letters "LL" stamped upon cotton sheeting, as indicative of grade, class and quality, was generally understood in the trade when defendant commenced the use of said letters in 1885; that the Atlantic Mills of Lawrence, Massachusetts, stamped the letters "LL" upon brown sheetings of its manufacture in the years 1860, 1862, 1864 and 1865, and from 1872 down to the present time; that there were cessations in the manufacture of said goods by the Atlantic Mills from time to time, between 1860 and 1865, and between 1865 and 1872 none were thus stamped; that the weight of the Atlantic goods made in 1860 and stamped with the letters "LL" was 4.19 yards to the pound; that in 1862 the goods so stamped weighed 4.36 yards to the pound, and in 1863, 1864 and 1865 their weight was 4.56 yards to the pound; that in 1872, when the Atlantic Mills had again commenced placing the "LL" on its sheetings, they weighed, and ever since have weighed, five yards to the pound; that the Atlantic Mills, in 1860, made a grade of brown sheetings that weighed 3.89 yards to the pound, and which it stamped with the single "L;" that the Atlantic Mills employed said letters to distinguish between different grades of goods, and has continued to use letters for that purpose; that it is fairly deducible from the evidence that the Atlantic "LL" cotton sheetings were in the market in 1867; that the Atlantic goods were and are of the same general character and class as those upon which plaintiff stamps "LL," and they are so nearly alike to the "Lawrence LL" that ordinary buyers and even experts cannot by looking at [543

them distinguish them from each other; that they are both used for the same general purpose and compete with each other; that looking only at the letters "LL," purchasers would as readily mistake "Shawmut LL" for "Lawrence LL" sheetings as they would "Cumberland LL" sheetings; that John V. Farwell & Co. have for several years been using a private brand for sheetings known in the trade as "Albany LL," and in 1884, and with full knowledge of this fact, plaintiffs stamped for Farwell & Co. four-yard sheetings with the label "Albany LL," the stamp being furnished by Farwell & Co., and returned to them with the goods, which were sold in the market as John V. Farwell & Co's "Albany LL sheetings;" that plaintiff had all the while known of the Atlantic Mills using the "LL" on its goods, and for more than six years before the commencement of this suit had been aware of
[544] the fact that numerous other manufacturers had been stamping said letters on their four-yard cotton sheetings, and that it never objected until about the time of the bringing of this suit and one of a like character against the Aurora Cotton Mills at Chicago; that it did not appear that the brand of defendant had ever been mistaken for that of the plaintiff; that it was not shown that plaintiff, when it commenced using the letters "LL" on its third-class goods, adopted them for the purpose of making them its trade-mark or any substantial or material part thereof, nor that the single L, used prior to 1867, constituted in whole or in part its trade-mark; that the Atlantic Mills were using the single L on one grade or class of goods merely to indicate quality, from 1862 up to 1868; that under the proof it was clear that the purpose and design of the change from L to LL was not to indicate origin or ownership or to distinguish the sheetings on which said letters were stamped from similar goods manufactured by others, but that its primary object was to denote its class, quality or grade, and to represent it to the public as being different goods in class and quality from those primarily sold by plaintiff under the single L stamp.

The circuit court quoted from the evidence of plaintiff's agent that the "LL" was adopted "because it was a time when cotton goods were depreciating. We had made considerable sales of the single L; but a party who had bought a large lot was underselling us at a price lower than we could afford to meet, and I suggested that in order to keep them out of this competition the mills should change the fold of the single L from a narrow to a wide fold, and put on a double L."

The court held that the letters were not only originally used by plaintiff to indicate the grade of the sheetings on which they were stamped, but to convey the impression that they were different goods from those it had previously sold, and that they could not constitute a valid trade-mark, such as would give plaintiff the exclusive right to use them on third-class sheetings, weighing one quarter of a pound to the yard; that it might well be doubted whether
[545] letters by themselves or in combination could be employed to represent both the grade and quality of goods and their origin, thus performing at the same time the double office of a trade-mark and a description or classification of the article to which they were affixed, and be sustained as affording an exclusive right to the use of the device as a trade-mark, which would come into collision with the right of the public to use the letters in their other meaning; but that question was left undetermined, since the court concluded that the letters only indicated grade, class or quality, and not origin, ownership or manufacture. The court also held that the Atlantic Company so used the letters, before their adoption by plaintiff, as to preclude the latter from acquiring a valid trade-mark therein; and that the putting upon the market of an inferior quality of cotton sheeting, weighing four yards to the pound and branded "Shawmut LL," equally warranted the use of the letters by the defendant, and prevented plaintiff from claiming injury to its trade by such use. The court found further that the plaintiff was not entitled to relief on the ground that its label, or distinctive part thereof, was being simulated by defendant so as to impose its goods upon the public as those of the plaintiff, since defendant had been guilty of no fraudulent intent, and had in no way either deceived the public or defrauded the plaintiff.

Messrs. **J. H. Raymond** and **W. B. Hornblower,** for appellant:

At common law the exclusive right to a trade-mark grows out of the use of it, and not its mere adoption.

United States v. *Steffens*, 100 U. S. 82 (25: 550).

Property in a trade-mark has very little analogy to that which exists in copyrights or in patents for inventions.

Delaware & H. Canal Co. v. *Clark*, 80 U. S. 13 Wall. 322 (20: 583).

"LL" legally and properly indicates both origin, ownership and manufacture, and grade, quality and class.

American S. L. B. Co. v. *Anthony*, 2 New Eng. Rep. 630, 15 R. I. 338; *Amoskeag Mfg. Co.* v. *Trainer*, 101 U. S. 51 (25: 993); *Shaw Stocking Co.* v. *Mack*, 12 Fed. Rep. 707; *Burton* v. *Stratton*, 12 Fed. Rep. 701; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 222 (27: 707); *Menendez* v. *Holt*, 128 U. S. 514 (32: 526); *Godillot* v. *Harris*, 81 N. Y. 263; *Ransome* v. *Graham*, 51 L. J. N. S. Ch. 897; *Gillott* v. *Esterbrook*, 47 Barb. 455, 48 N. Y. 374; *Coats* v. *Holbrook*, 2 Sandf. Ch. 586, 7 N. Y. Ch. L. ed. 713; *Boardman* v. *Meriden Britannia Co.* 35 Conn. 402; *Lawrence Mfg. Co.* v. *Lowell Hosiery Mills*, 129 Mass. 328; *Godillot* v. *Harris*, 81 N. Y. 263; *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandf. 599, 607; *McLean* v. *Fleming*, 96 U. S. 245 (24: 828).

Messrs. **A. J. Hopkins** and **J. M. Dickinson,** for appellee:

To entitle a person to the exclusive use of a mark or device as a trade-mark, it must appear that its purpose is to identify the maker with the articles.

Amoskeag Mfg. Co. v. *Spear*, 2 Sandf. 599, Cox, Trade-mark Cas. 87; *Amoskeag Mfg. Co.* v. *Trainer*, 101 U. S. 51 (25: 993); *Goodyear's I. R. Glove Mfg. Co.* v. *Goodyear Rubber Co.* 128 U. S. 699 (32: 535); *Delaware & H. Canal Co.* v. *Clark*, 80 U. S. 13 Wall. 311 (20: 581); *Candee* v. *Deere*, 54 Ill. 439; *Avery* v. *Meikle*, 81 Ky. 97; *Stokes* v. *Landgraff*, 17 Barb. 608, Cox,

Trade-mark Cas. 137; *Falkinburg* v. *Lucy*, 35 Cal. 52, Cox, Trade-mark Cas. 448; *Burton* v. *Stratton*, 12 Fed. Rep. 696; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *McLean* v. *Fleming*, 96 U. S. 245 (24: 828); *Marshall* v. *Pinkham*, 52 Wis. 572, 38 Am. Rep. 756.

The claimant must have been the first one to use the mark on same or like articles.

Stachelberg v. *Ponce*, 128 U. S. 690 (32: 571); *Delaware & H. Canal Co.* v. *Clark*, 80 U. S. 13 Wall. 311 (20: 581); *American S. L. B. Co.* v. *Anthony*, 15 R. I. 338; *Avery* v. *Meikle*, 81 Ky. 97; *Derringer* v. *Plate*, 29 Cal. 292, Cox, Trade-mark Cas. 327.

Where imitation or infringement is charged, such imitation, to be restrained, must amount to a false representation, expressed or implied.

High, Inj. §§ 1085, 1086, 1089; *Merrimack Mfg. Co.* v. *Garner*, 4 E. D. Smith, 387, Cox, Trade-mark Cas. 161; *Partridge* v. *Menck*, 2 Sandf. Ch. 622, 7 N. Y. Ch. L. ed. 729, Cox, Trade-mark Cas. 72-81; *Colladay* v. *Baird*, 4 Phila. 139, Cox, Trade-mark Cas. 257-261; *Boardman* v. *Meriden Britannia Co.* 35 Conn. 402, Cox, Trade-mark Cas. 503; *Popham* v. *Cole*, 66 N. Y. 69, 23 Am. Rep. 22; *Enoch Morgan's Sons Co.* v. *Troxell*, 89 N. Y. 292, 42 Am. Rep. 296.

The owner of a valid trade-mark who acquiesces in its use by others who had no intention to defraud, cannot have an account of gains and profits.

Browne, Trade-marks, 503; *Beard* v. *Turner*, 13 L. T. N. S. 747, Cox, Trade-mark Cas. 717; *Taylor* v. *Carpenter*, 2 Woodb. & M. 1, Cox, Trade-mark Cas. 41; *Harrison* v. *Taylor*, 11 Jur. N. S. 408, Cox, Trade-mark Cas. 675; *Amoskeag Mfg. Co.* v. *Garner*, 5 Barb. 151.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

After a careful examination of the evidence in this record, we are satisfied that the conclusions of the circuit court upon the facts are substantially correct. While there may be a conflict in some particulars, we regard the defendant's contention upon all points material to the disposition of the case as clearly sustained by the weight of the evidence, which we do not feel called upon to recapitulate.

In *Delaware & H. Canal Co.* v. *Clark*, 80 U. S. 13 Wall. 311, 322 [20: 581, 583], it was said by *Mr. Justice* Strong, speaking for the court, that "the office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark or device well known, but not previously applied to the same article. But though it is not necessary that the word adopted as a trade-name should be a new creation, never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of a wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities. Hence the trade-mark must either by itself, or by association, point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade-name [547] which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection. As was said in the well-considered case of *Amoskeag Mfg. Co.* v. *Spear*, 2 Sandf. 599, the owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ, for the same purpose.'"

We quote thus at length, because the decision is a leading one, which has been repeatedly referred to and approved as presenting the philosophy of the law applicable to trade-marks in a clear and satisfactory manner, as should also, indeed, be said of *Judge* Duer's noted opinion in the case therein cited. *Amoskeag Mfg. Co.* v. *Trainer*, 101 U. S. 51 [25: 993]; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218 [27: 706]; *Goodyear's I. R. Glove Mfg. Co.* v. *Goodyear Rubber Co.* 128 U. S. 598 [32: 535]; *Corbin* v. *Gould*, 133 U. S. 308 [33:611].

Nothing is better settled than that an exclusive right to the use of words, letters or symbols, to indicate merely the quality of the goods to which they are affixed, cannot be acquired. And while if the primary object of the mark be to indicate origin or ownership, the mere

fact that the article has obtained such a wide sale that it has also become indicative of quality, is not of itself sufficient to debar the owner from protection, and make it the common [548] property of the trade (*Burton* v. *Stratton*, 12 Fed. Rep. 696), yet if the device or symbol was not adopted for the purpose of indicating origin, manufacture or ownership, but was placed upon the article to denote class, grade, style or quality, it cannot be upheld as technically a trade-mark.

Amoskeag Mfg. Co. v. *Trainer*, *supra*, which involved the use of the letters "A. C. A." in connection with a general device constituting a trade-mark, is very much in point, and the discussion by *Mr. Justice* Field, who delivered the opinion of the court, leaves little, if anything, to be added here. In that case, as in this, there was some evidence tending to show that it was understood that the letters were used to indicate origin as well as quality, but it was considered to be entirely overborne by the disclosure of the name of the manufacturer in full and the history of the adoption of the letters to designate quality only, as narrated by complainant.

We held in *Menendez* v. *Holt*, 128 U. S. 514, 520 [32: 526, 527], that the words "La Favorita" were so used as to indicate the origin of a special selection and classification of certain flour, requiring skill, judgment and expert knowledge, and which gave value and reputation to the flour. The name was purely arbitrary—a fancy name and in a foreign language—and did not in itself indicate quality. The legality of the trade-mark as such (and it had been duly registered under the Act of Congress) was conceded by the answer, though it was contended in the argument that it was not valid because indicative only of quality, but we were of opinion that the primary object of its adoption was to symbolize the exercise of the judgment, skill and particular knowledge of the firm which adopted and used it, and that the phrase covered the wish to buy and the power to sell from that origin.

Since we are satisfied from the evidence that plaintiff failed to establish the existence of a trade-mark in the letters "LL," or that they constituted a material element in its trade-mark, relief cannot be accorded upon the ground of an infringement by defendant of an exclusive right in the plaintiff to use the letters as against all the world. The jurisdiction to restrain the use of a trade-mark rests upon [549] the ground of the plaintiff's property in it, and of the defendant's unlawful use thereof. *Boston Diatite Co.* v. *Florence Mfg. Co.* 114 Mass. 69. If the absolute right belonged to plaintiff, then if an infringement were clearly shown, the fraudulent intent would be inferred, and if allowed to be rebutted in exemption of damages, the further violation of the right of property would nevertheless be restrained. *McLean* v. *Fleming*, 96 U. S. 245 [24: 828]; *Menendez* v. *Holt*, 128 U. S. 514 [32: 526].

It seems, however, to be contended that plaintiff was entitled at least to an injunction, upon the principles applicable to cases analogous to trade-marks, that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly an unfair and fraudulent competition against the business of the plaintiff—conduct with the intent, on the part of the defendant, to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief.

In *Putnam Nail Co.* v. *Bennett*, 43 Fed. Rep. 800, where the bill alleged that the defendants had imitated plaintiff's method of bronzing horse-shoe nails, which plaintiff used as a trade-mark, with the intention of deceiving the public into buying their goods instead of plaintiff's, and the question came up on demurrer, *Mr. Justice* Bradley, after stating certain averments of the bill, said, orally: "There is here a substantial fact stated, that the public and customers have been, by the alleged conduct of the defendants, deceived and misled into buying the defendants' nails for the complainant's. That averment is amplified in paragraph four of the bill. Now a trade-mark, clearly such, is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud, and to palm off his goods as another's. Whether this is in itself a good trade-mark or not, it is a style of goods adopted by the complainant which the defendants have imitated for the purpose of deceiving, and have deceived the public thereby, and induced them to buy their goods as the goods of the complainant. This is fraud. We think the case should not be decided on this demurrer, but that the demurrer should be overruled, and the defendants have the usual time to answer. The allegation that the complainant's peculiar style of goods is a trade-mark may be regarded as a matter of inducement to the charge of fraud. The latter is the substantial charge which we think the defendants should be required to answer." And see *New York & R. Cement Co.* v. *Coplay Cement Co.* 44 Fed. Rep. 277.

In *Wotherspoon* v. *Currie*, L. R. 5 H. L. 508, the plaintiffs had manufactured starch at Glenfield, which had become known as "Glenfield starch." They removed from Glenfield, but continued to call their starch by the same name. The defendant, though his place of business was at Paisley, commenced manufacturing starch at Glenfield, and selling the same in Scotland with the words "Glenfield starch" printed on the sale labels. This was interdicted by the court of sessions, but he continued to sell in England under a label of which "Glenfield" in larger or darker letters than any other on the packets was the pronounced feature, and the House of Lords held that he was putting the word "Glenfield" on his labels fraudulently and with the intention of making out that his starch was the starch of the plaintiff, who had by user acquired the right to the name of Glenfield starch, and enjoined him from so doing.

In *Thompson* v. *Montgomery*, L. R. 41 Ch. Div. 35, 50, the plaintiffs and their predecessors had for a hundred years carried on a brewery at Stone, and their ale had become known as "Stone ale." They had registered several trade-marks, which contained the words "Stone ale" in combination with some device or name of their firm, and in 1888 they registered as an additional trade-mark the words "Stone ale" alone. The defendant built a brewery at Stone,

over which he placed the words "Montgomery's Stone Brewery," with a device containing the words "Stone ale," and a monogram somewhat resembling the plaintiffs' trade-mark. It was held that the plaintiffs could not register "Stone ale" as a trade-mark under the Act of Parliament in that behalf, but that they had acquired by user the right to the use of the words "Stone ale;" and that the conduct of the defendant being, in the opinion of the court, calculated to deceive the public into supposing that his ales were brewed by plaintiffs, they were entitled to an injunction. *Lord Justice* Lindley remarked that, although the plaintiffs had no exclusive right to the use of the words "Stone ale" alone as against the world, or any right to prevent the defendant selling his goods as having been made at Stone, yet, "as against a particular defendant who is fraudulently using, or going to fraudulently use, the words with the express purpose of passing off his goods as the goods of the plaintiffs, it appears to me that the plaintiffs may have rights which they may not have against other traders. In regard to that proposition, it appears to me that the Glenfield starch case has an extremely important bearing upon this case. The evidence in this case convinces me that any ale which may be sold by this particular defendant as 'Stone ale' will be intended by him to be passed off as the plaintiffs' ale. I am satisfied that he does not use the words 'Stone ale' for any honest purpose whatever, but according to the evidence with a distinctly fraudulent purpose. Is there any reason, then, why the court should not deal with him accordingly, and prevent him from carrying out such intention by restraining him from using the words which he will only use for that purpose? In my opinion the Glenfield starch case warrants us in going that length as against this particular defendant."

But the deceitful representation or perfidious dealing must be made out or be clearly inferable from the circumstances. If, in this case, the letters LL formed an important part of plaintiff's label, and the defendant had used them in such a way and under such circumstances as to amount to a false representation, which enabled it to sell and it did sell its goods as those of the plaintiff, and this without the plaintiff's consent or acquiescence, then plaintiff might obtain relief within the principles of the cases just cited. But there is no such state of facts here. The brands are entirely dissimilar in appearance, and the letters have for years been understood generally as signifying grade or quality, and been so used by different manufacturers, and there is no proof justifying the inference of fraudulent intent, or of deception practiced on the plaintiff or on the public.

The decree is therefore affirmed.

Mr. Justice **Blatchford** did not sit in this case or take any part in its decision; nor did *Mr. Justice* **Brown**, who was not a member of the court when the case was argued.

LAWRENCE MANUFACTURING COMPANY, *Appt.*, [552
v.
JANESVILLE COTTON MILLS.

(See S. C. Reporter's ed. 552-562.)

Suit to enforce former decree—consent decree not res adjudicata—*court will not enforce consent decree when wrong.*

1. Where a party comes into a court of equity to obtain its aid in executing a former decree of the court, the court may open up such decree in order to inquire whether circumstances justified the relief granted by it; in such case it devolves upon such party to show that the decree was a right decree.
2. Where a party returns to a court of chancery to have the benefit of its former decree and the prior decree was the consequence of the consent of the parties, and not of the judgment of the court, the court may decline to treat it as *res adjudicata.*
3. Where a consent decree was entered restraining a manufacturing company from using a label or trade-mark of the plaintiff, and a suit is afterwards brought to restrain the successor of the company from using said trade-mark and to enforce the decree against it on the ground that the agreement on which the decree was entered in terms bound the successor, the court may refuse to be constrained by or to enforce the previous consent decree where that decree was erroneous and contrary to the right of the case.

[No. 102.]

Argued Dec. 3, 4, 1890. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Western District of Wisconsin, dismissing a suit in equity to enforce a former decree entered by consent. *Affirmed.*

Statement by *Mr. Chief Justice* **Fuller:**

The Lawrence Manufacturing Company filed its bill against the Janesville Cotton Mills on the first day of June, 1886, in the United States Circuit Court for the Western District of Wisconsin, claiming that the letters "LL" upon sheetings of the third class, running four yards to the pound, belonged to it as a trade-mark, and averring that defendant had been recently organized, and was in law and in fact the successor of the Janesville Cotton Manufacturing Company, having succeeded to and having acquired all the assets and property and good-will of the latter, and that the defendant was owned and officered (with one exception) by the same persons as the Cotton Manufacturing Company, and that the defendant had advertised itself to the public as the successor in all re-

NOTE.—*Where an injunction will be granted restraining the unauthorized use of trade-marks.* See *note* to McLean v. Fleming, 24:828.

As to trade-mark; right to; what may be; infringement; assignment; when protected; misrepresentation in; use of name; remedy in equity; injunction, —see *note* to Lawrence Mfg. Co. v. Tennessee Mfg. Co. *ante*, p. 907.

553] spects of the Cotton Manufacturing Company. That early in 1886, appellant exhibited in the same court a bill of complaint containing the allegations set forth in this bill in respect to the use of the letters "LL," against the Cotton Manufacturing Company, and that thereafterward the appellant and the Cotton Manufacturing Company entered into a stipulation in the case, bearing date March 30, 1886: "That the said Lawrence Manufacturing Company hereby consents that the suit commenced in the Circuit Court of the United States for the Western District of Wisconsin against said Janesville Cotton Manufacturing Company be dismissed without costs to said Janesville Cotton Manufacturing Company, and also hereby waives all claim to damages against the said Janesville Cotton Manufacturing Company; and the said Janesville Cotton Manufacturing Company hereby agrees not to use the label or trade-mark 'LL' on any goods of its manufacture after the first day of July, A. D. 1886; and it is further stipulated that a consent decree discontinuing said suit without the right of appeal shall be entered in accordance with the terms thereof."

The bill further alleged that with the stipulation there was submitted to the Cotton Manufacturing Company a release proposed to be executed by appellant to said company, and also an agreement proposed to be executed and delivered by the company to appellant, which agreement bound the Cotton Manufacturing Company and its successors in said corporation and in said business and its assigns, not to use the label or trade-mark "LL" on any goods of its manufacture after the first day of July, 1886; and that the stipulation, release and agreement were adopted by the board of directors of the Cotton Manufacturing Company on the third of April, 1886, and appellant was so notified by defendant, and, pursuant to the action of the board of directors and the agreement, stipulation and contract, a consent decree was entered in that cause in the words and figures following, to wit:

"This cause coming on to be heard, Messrs. Raymond & Rainey appearing for the complainant, and Mr. George G. Sutherland appearing for the defendant, and confessing the said bill of complaint and consenting to this
554] final finding and decree, the court doth order, adjudge and decree as follows, the same being in accordance with the stipulation of the parties heretofore herein filed, to wit:

"*First.* That the total cost heretofore and now incurred herein shall be paid by the complainant.

"*Second.* That a perpetual injunction issuing out of and under the seal of this court against the said defendant, the Janesville Cotton Manufacturing Company, commanding it and each and every of its officers, agents, servants and employés that from and after the first day of July, A. D. 1886, they and each of them shall desist and refrain from, directly or indirectly, using said letters 'LL' upon any sheetings of their manufacture, as in said bill of complaint is mentioned."

To which was attached the following, signed by counsel for the respective parties:

"We hereby assent to the foregoing form of decree, the same being in accordance with the terms of a stipulation of the parties hereto, heretofore filed herein."

That, notwithstanding the premises, the defendant, being the successor in law and in business of the Cotton Manufacturing Company, issued the circular letter attached, a part of which, under the heading of "Dissolution and Reorganization" is as follows:

"The corporation known as the Janesville Cotton Manufacturing Company has been dissolved by mutual consent of the stockholders, and all of its property, consisting of two thoroughly equipped cotton mills, together with its franchises and good-will, has been sold and transferred to the Janesville Cotton Mills, a new corporation organized for the purpose of continuing the manufacture and sale of the justly celebrated 'Badger State sheetings.'

"The new corporation purpose to make the three grades of sheeting known to the trade as Badger State, R, R R and L L, under a distinct trade-mark and stamp of their own, consisting of a diagonal bar across the letters R & L, with or without the word 'double,' to wit: Badger State, R, Dou R ble, Dou L ble."

That appellant demanded at once that de- [5
fendant should withdraw the circular letter and cease preparations to use the capital letter "L" with the word "double" written across it, and should not use the same; but defendant declined to comply with the demand, and threatened and proposed to use the capital letter "L" with the word "double" written across it as its stamp upon sheetings of the third general class, on and after July 1, 1886. Plaintiff averred that such a use would be a fraud upon the public and a fraud upon itself, and a violation of the stipulation of the contract and of the consent decree, and of the injunction ordered in the prior suit, and would cause irreparable injury. Plaintiff therefore prayed for answer, for a temporary injunction and for general relief. Affidavits were filed with the bill and a restraining order entered, and a day assigned for a hearing of the motion for a preliminary injunction.

The defendant answered, denying that plaintiff had the exclusive right to use the letters "LL," and admitting that it was organized in April, 1886, but denying that it was the successor of the Cotton Manufacturing Company in any other sense than that it purchased the property of that company, and some of its stockholders and officers were the same as those of the Cotton Manufacturing Company. The answer admitted that in the month of February, 1886, the plaintiff exhibited the bill of complaint set forth in the bill in this case, and that the Cotton Manufacturing Company did not defend against that bill, but entered into the stipulation set forth in this bill, and that the decree therein set forth was entered; but defendant averred that that decree was not in accordance with the stipulation, which provided that the suit should be discontinued without the right of appeal; and defendant denied, upon information and belief, that the Cotton Manufacturing Company executed or agreed to execute the agreement mentioned and referred to in the bill of complaint. The answer further

alleged that the Cotton Manufacturing Company at the time of the stipulation and agreement was about to go into liquidation and wind up its affairs, and would have no further occasion to use the letters "LL" after July 1, 1886; [556] that it had since disposed of all its property, rights and privileges to defendant, and abandoned the business of manufacturing cotton sheetings; had wound up its affairs and been dissolved; and that defendant was a wholly distinct and separate corporation from the Cotton Manufacturing Company; was not a party to the prior suit, and was not bound by the stipulation or decree, or by any other stipulation, agreement or obligation entered into or assumed by the Cotton Manufacturing Company. Upon hearing upon the pleadings and proofs, a decree was entered dismissing plaintiff's bill of complaint with costs, and thereupon the cause was brought to this court by appeal.

The evidence established that on the 30th of March, 1886, the stipulation above given was made out and signed by the Lawrence Manufacturing Company, and, with duplicates, handed to the attorney for the Cotton Manufacturing Company, together with copies of an agreement to be executed under the authority of the board of directors of the Cotton Manufacturing Company by the president and secretary, and under the seal of the company, and a letter of plaintiff's solicitor reciting these facts, and stating that he had no doubt that the Lawrence Company would authorize the settlement, and, if so, would be glad to have the agreement duly executed and returned, and that if the Cotton Manufacturing Company desired it, a formal release from the Lawrence Company, duly executed, of all claims for damages, etc., would be obtained, although "the agreement of the Janesville Company made in consideration of that release, and the whole matter being of record in court, would not necessitate such a formal release from the Lawrence Company." The agreement to be executed by the Cotton Manufacturing Company was as follows:

"For and in consideration of the discontinuance by the Lawrence Manufacturing Company, of Lowell, Massachusetts, of a suit now pending in the United States Circuit Court for the Western District of Wisconsin against the Janesville Cotton Manufacturing Company, and in consideration of a release of all claims for damages for the infringement of the trademark of said Lawrence Manufacturing Com- [557] pany for brown sheetings by the use of the letters 'LL,' all in accordance with the stipulation in the case now made and executed, the said Janesville Cotton Manufacturing Company does hereby, for itself, its successors, both in said corporation and in said business, and for its assigns, covenant and agree to and with the said Lawrence Manufacturing Company, its successors and assigns as aforesaid, not to use the label or trade mark 'LL' on any goods of its manufacture after the first day of July, A. D. 1886."

On the third of April, 1886, the following proceedings were had by the Cotton Manufacturing Company, as shown by its records:

"Matters pertaining to the suit brought against our company by the Lawrence Manufacturing Company for infringement of their right in the use of the stamp LL on our sheetings were explained by Mr. Sutherland, and, on motion of Mr. Eldred, Mr. Sutherland was authorized and instructed, as our attorney, to sign the stipulations agreed upon by the attorneys of the Lawrence Manufacturing Company and Mr. Sutherland in behalf of the Janesville Cotton Manufacturing Company.

"On motion, Mr. Sutherland was instructed to notify the attorneys of the Lawrence Manufacturing Company that the president and secretary of the Janesville Cotton Manufacturing Company will execute, under the authority of its board of directors, the agreement to discontinue the use of said LL stamp whenever the Lawrence Manufacturing Company shall sign a formal release, duly executed, of all claims for damages, etc., against the Janesville Cotton Manufacturing Company for the use of said LL stamp."

Whereupon and on the same date the attorney of the Cotton Manufacturing Company wrote from Janesville to plaintiff's solicitor at Chicago, as follows:

"I was unable to get a meeting of the directors of the Janesville Cotton M'f'g Co. until this afternoon.

"They have just authorized me to sign the stipulations as drawn, and they further authorized the president and secretary to sign the agreement drawn by you, on receiving the release mentioned in your letter from the Lawrence M'f'g Co.

"I have sent the original stipulation to the [558] clerk of the court at Madison, and inclose you a duplicate."

The release by plaintiff was executed, delivered to and accepted by the Cotton Manufacturing Company, and the consent decree was entered May 11, 1886.

It also appeared that the Cotton Manufacturing Company was at the time of the suit against it in embarrassed circumstances, and on the 10th of March, 1886, a resolution to dissolve the corporation, sell its property and wind up its affairs was adopted by the board of directors, which recited that it was contemplated by the stockholders of the company that some of them should immediately proceed to organize another corporation for the same purposes of manufacturing and selling cotton cloth, with a capital stock of $150,000, to be paid in cash or indebtedness of the company by the subscribers, and that each of the present stockholders of the Cotton Manufacturing Company should have the privilege of subscribing for the capital stock of the new company *pro rata*, share and share alike, in proportion to the amount of the stock of the Cotton Manufacturing Company owned by them, respectively, and upon the 11th of March this resolution was ratified at a meeting of the stockholders, and an agreement was made as to subscribing for shares in the new company, provided the project should be carried out by the sale of the property of the Cotton Manufacturing Company and the conveyance of the same to the new corporation.

On the 21st of April, 1886, the defendant, the Janesville Cotton Mills, was organized un-

der the laws of Wisconsin by articles of association filed with the secretary of state, and to it the Cotton Manufacturing Company conveyed its property in consideration of one dollar, "and for the further consideration that the said party of the second part assumes and agrees to pay all the indebtedness of said party of the first part due or to become due upon its promissory notes or other written contracts, which are not secured by a lien upon its property." The articles of association of the new company were signed by officers and stockholders of the old one, and were dated March 12, 1886, and provided that the new company
559] was, upon acquiring title to the property of the Cotton Manufacturing Company, "to assume and pay all indebtedness of said Janesville Cotton Manufacturing Company due or to become due upon its promissory notes or other written contracts which are not secured by lien upon its property, but is not to assume any indebtedness or liability secured by lien upon such property or evidenced otherwise than as above stated." The officers and stockholders of the old company were in the main the officers and stockholders of the new one.

The new company went on with the same business, and continued to use the books of the old company and substantially the same brands, except that "LL" was changed to "L," with the word "double" across it. There was no evidence that the agreement not to use the "LL" mark on sheetings was ever signed by the president and secretary, and the seal affixed, of the Cotton Manufacturing Company, although they were authorized to execute it as soon as the formal release should be signed, which was done. The failure to obtain the formally executed agreement was explained by one of the plaintiff's attorneys, who testified that as the stipulation was filed and decree entered, and he believed the matter fully settled in good faith and the parties sufficiently and fully protected, he neglected to ask for the formal evidence of the agreement executed under the seal of the Cotton Manufacturing Company, until he was informed of the dissolution thereof by the circular letter of the defendant.

Upon the question of trade-mark, evidence from other cases seems to have been stipulated into this, and it was agreed by counsel that the printed record in the case mentioned below might be used if the court would permit.

Messrs. **W. B. Hornblower** and **J. H. Raymond** for appellant.

Mr. **I. C. Sloan** for appellee.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

We have already held in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, *ante*, 997, that plain-
560] tiff is not entitled to the exclusive right to use the letters "LL" as a trade-mark on sheetings running four yards to the pound, and that no case was made there for relief on the ground of actual fraud; and that decision is controlling here so far as those questions can be considered as involved. But it is insisted that the appellee, by virtue of a contract with and decree against the Janesville Cotton Manufacturing Company, is estopped from the use of the letters "LL," or any imitation thereof, and that a decree accordingly should go against it. The bill is not framed upon the theory, nor do we understand counsel so to contend, that plaintiff is entitled to relief upon the agreement alone, but that it is to be taken with the decree which was entered perpetually enjoining the Cotton Manufacturing Company from the use of the letters "LL" after July 1, 1886. Defendant denied, and it was not shown, that the written agreement was ever executed by the president and secretary of the Cotton Manufacturing Company, although this was authorized to be done as soon as the release from damages was furnished, as it afterwards was, but only as part of a settlement of the pending suit, under which that suit was to be dismissed without costs to the company.

This proposed agreement provided that in consideration of the discontinuance of the plaintiff's suit, then pending, and of a release of all claims for damages, in accordance with the stipulation in the cause then made, the Cotton Manufacturing Company covenanted and agreed "for itself, its successors, both in said corporation and in said business, and for its assigns," "not to use the label or trade-mark 'LL' on any goods of its manufacture after the first day of July, A. D. 1886." By the consent decree subsequently entered, the case was not discontinued, but, on the contrary, a perpetual injunction was decreed against the Cotton Manufacturing Company, its officers, agents, servants and employés, restraining them and each of them, after July 1, 1886, from directly or indirectly using the letters "LL" upon any sheetings of their manufacture as mentioned in the bill of complaint. It was, however, provided that the total costs of the suit should be paid by the plaintiff; and no [56
damages were awarded. This decree, then, was in accordance with the stipulation in respect of damages and costs, but not as to the discontinuance, in place of which an affirmative decree in plaintiff's favor was substituted. And this change, made with the written assent of counsel for the respective parties, as the record shows, dispensed with the occasion for a covenant on the Cotton Manufacturing Company not to use the letters "LL" on goods of its manufacture after July 1, 1886, for such was the restraint decreed. But the decree did not in terms enjoin the successors of the Cotton Manufacturing Company, as a corporation and in business, and its assigns, according to the letter of the proposed agreement.

This, in plaintiff's view, left that decree incomplete, and therefore it seeks in substance to have it pieced out and then enforced under the prayer for general relief. There is no prayer in the bill that the preliminary injunction be made perpetual, but that would result, if plaintiff succeeded, by a decree under the general prayer, in subjecting this defendant to the operation of the prior decree. But where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill. Hence, even if it be assumed upon the evidence that the decree against the old corporation bound the new one, yet this being in effect, in one of the two aspects, and, perhaps, the sole aspect,

in which it is framed, a bill to carry the former consent decree into execution, the circuit court was not obliged to do so if it believed that decree erroneous; and that it was erroneous we have already decided. Inasmuch as plaintiff came into a court of equity to have the benefit of the former decree, the court was at liberty to inquire whether circumstances justified the relief. Mitf. Ch. Pl. 96. Indeed, it would seem to have devolved upon it to show that the decree was a right decree. Such is the language of *Lord* Redesdale in *Hamilton* v. *Houghton*, 2 Bligh, P. C. 169, 193, and of *Lord Chancellor* Sugden in *O'Connell* v. *Macnamara*, 3 Drew & W. 411, 412. The same principle was announced as early as 1700 by the lord keeper in *Johnson* v. *Northey*, Finch, Prec. in Ch. 134. See also *Lawrence* v. *Berney*, 2 Ch. Rep. *127; Adams, Eq. *416; 2 Dan. Ch. Pr. (4th ed.) 1586. This rule was much considered and applied in *Wadhams* v. *Gay*, 73 Ill. 415, and approved by this court in *Gay* v. *Parpart*, 106 U. S. 679 [27: 256]. The prior decree was the consequence of the consent and not of the judgment of the court, and, this being so, the court had the right to decline to treat it as *res adjudicata*. *Wadhams* v. *Gay*, *Gay* v. *Parpart*, *supra*; *Jenkins* v. *Robertson*, L. R. 1 H. L. (Sc.) 117; *Brownsville Tax. Dist.* v. *Louque*, 129 U. S. 493, 505 [32: 780, 784]; *Texas & P. R. Co.* v. *Southern P. Co.* 137 U. S. 48, 56 [34, 614, 617]; *Edgerton* v. *Muse*, 2 Hill, Eq. 51; *Lamb* v. *Gatlin*, 2 Dev. & B. Eq. 37; *Bean* v. *Smith*, 2 Mason, 252.

As, therefore, if the old company had defended the suit against it, it would have prevailed, the decree of the circuit court, being correct upon the merits, is also correct in that the court refused to be constrained by the previous erroneous consent decree, to decree contrary to the right of the cause.

Affirmed.

Mr. Justice **Blatchford** did not sit in this case or take any part in its decision; nor did *Mr. Justice* **Brown**, who was not a member of the court when the case was argued.

TALCOTT H. RUSSELL, Receiver of the AMERICAN NATIONAL LIFE AND TRUST COMPANY OF NEW HAVEN, CONN., *Plff. in Err.*,

v.

AUGUSTUS T. POST.

(See S. C. Reporter's ed. 425-431.)

Action for fraud, when case should be submitted to jury—evidence tending to show fraud.

1. In an action to recover for fraud of defendant by which assets of a trust company were abstracted and lost, evidence which tends to show that defendant knew that a scheme existed by which the funds of the company were to be withdrawn wrongfully from its control, and that he lent his aid, for large consideration, to the accomplishing of such fraudulent transaction, is sufficient to require the submission of the case to the jury, although the exact nature and full details of the scheme were not communicated to him.
2. Where a loan of securities is not an ordinary business transaction, and the compensation paid for the loan is so excessive as to be suspicious, and the purpose of the borrower is the accomplishment of a criminal act; and where there are surrounding circumstances, trivial, it may be, separately considered, and the testimony in respect thereto contradictory, but the tendency of which is to charge the lender with knowledge of the wrongful purpose of the borrower, although there may be no direct and positive evidence of guilty knowledge,—a jury may be justified in holding that the loan was made with intent to consummate the wrong, and that the lender is responsible for the result of the wrong contemplated and accomplished, and which, knowingly, he assisted in accomplishing.
3. Where there are presented by the testimony matters of fact vital to the controversy, upon which the plaintiff has the right to the opinion of the jury, it is error for the court to withdraw the case from the jury and direct a verdict for defendant.

[No. 126.]

Argued Jan. 5, 1891. Decided March 2, 1891.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for defendant by direction of the court in an action for fraud. *Reversed.*

Statement by *Mr. Justice* **Brewer:**

The plaintiff here, plaintiff below, is the receiver of the American National Life and Trust Company of New Haven. This action, originally commenced in the Supreme Court of the City and County of New York, and thence removed to the Circuit Court for the Southern District of New York, is one to recover damages resulting from certain alleged fraudulent acts by the defendant, Post, who alone answered, in conjunction with other parties, by which a large quantity of valuable assets were abstracted from the possession of the American National Life and Trust Company and wholly lost to it.

The company was an insurance company, organized under the laws of the State of Connecticut. Proceedings were duly instituted for winding up its affairs and annulling its charter, and under these proceedings the plaintiff was appointed receiver, and authorized to maintain this action. This appointment was made on November 8, 1878. Some time before his appointment a large bulk of the assets of the corporation was transferred to the National Capital Insurance Company of Washington, D. C., and wholly lost to the Connecticut corporation, as well as to the parties having policies in such company. [426]

Messrs. **Simeon E. Baldwin** and **Talcott H. Russell**, for plaintiff in error:

Where a case fairly depends upon the effect or weight of testimony, it should never be withdrawn from the jury unless the testimony be of such a conclusive character as to compel

NOTE.—*As to questions of law and fact, for court or jury, in civil and criminal cases*, see *note* to King v. Delaware Ins. Co. 3:155.

When a verdict may be directed by the court. See *note* to Grand Chute v. Winegar, 21:174.

the court, in the exercise of a sound judicial discretion, to set aside a verdict rendered in opposition to it.

Rea v. *Missouri*, 84 U. S. 17 Wall. 532 (21: 707); *Phœnix Ins. Co.* v. *Doster*, 106 U. S. 30 (27:65); *Pasley* v. *Freeman*, 2 Smith, Lead. Cas. (9th Am. ed.) 1300; *Swift* v. *Winterbotham*, L. R. 8 Q. B. 244.

In order to enable a person injured by a false representation to sue for damages, it is not necessary that the representation should be made to the plaintiff directly; it is sufficient if the representation is made to a third person to be communicated to the plaintiff, or to be communicated to a class of persons of whom the plaintiff is one, or even if it is made to the public generally, with a view to its being acted on, and the plaintiff, as one of the public, acts on it and suffers damage thereby.

Gerhard v. *Bates*, 2 El. & Bl. 475; *Bedford* v. *Bagshaw*, 4 Hurl. & N. 538; *Scott* v. *Dixson*, 29 L. J. N. S. Exch. 62; *National Exchange Co.* v. *Drew*, 2 Macq. H. L. Cas. 103; *Foster* v. *Charles*, 7 Bing. 105; *Polhill* v. *Walter*, 3 Barn. & Ad. 114; *Pontifex* v. *Bignold*, 3 Mann. & Gr. 63; *Iasigi* v. *Brown*, 53 U. S. 17 How. 185 (15: 208); *Eaton C. & B. Co.* v. *Avery*, 83 N. Y. 31.

Neither is it necessary that there should be an intent to defraud any particular person.

Morgan v. *Skiddy*, 62 N. Y. 319; *Newbery* v. *Garland*, 31 Barb. 122; *Williams* v. *Wood*, 14 Wend. 126; *Thomas* v. *Winchester*, 6 N. Y. 397; *Wellington* v. *Downer Kerosene Oil Co.* 104 Mass. 64, 67; *Norton* v. *Sewall*, 106 Mass. 144; *Endsley* v. *Johns*, 9 West. Rep. 747, 120 Ill. 469; *Genesee County Sav. Bank* v. *Michigan Barge Co.* 52 Mich. 164.

He who by his carelessness or undue confidence has enabled another to obtain the money of an innocent person shall answer the loss.

Chapman v. *Rose*, 56 N. Y. 137; *Putnam* v. *Sullivan*, 4 Mass. 54; *Leas* v. *Walls*, 101 Pa. 57; *Scotland County Nat. Bank* v. *O'Connel*, 23 Mo. App. 165; *Young* v. *Grote*, 4 Bing. 253; *National Sav. Bank* v. *Ward*, 100 U. S. 195 (25:621); *Bruff* v. *Mali*, 36 N. Y. 200, 205; *Bartholomew* v. *Bentley*, 15 Ohio, 659; *Clark* v. *Edgar*, 84 Mo. 106; *First Nat. Bank* v. *Lanier*, 78 U. S. 11 Wall. 369, 378 (20:172, 175); *Matthews* v. *Massachusetts Nat. Bank*, 1 Holmes, 396; *Lobdell* v. *Baker*, 3 Met. 469, 471.

Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury.

Chandler v. *Von Roeder*, 65 U. S. 24 How. 227 (16:634); *Ewing* v. *Burnet*, 36 U. S. 11 Pet. 41, 50 (9:624, 628); *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657 (21:745); *Louisville & N. R. Co.* v. *Woodson*, 134 U. S. 614, 621 (33:1032, 1034).

Messrs. **William G. Choate** and **L. Laflin Kellogg**, for defendant in error:

Without proof of Post's knowledge of and participation in the fraudulent scheme of Walker and Noyes, he cannot be held liable for any damage resulting therefrom, merely because his bonds were used as a means of deception by Walker and Noyes.

The burden of proof on a charge of fraud is on the party alleging it.

Kerr, Fraud and Mistake, 384; Whart. Ev. § 1248; Best, Ev. 302, 349; Lawson, Presumptions, 93; Bigelow, Fraud, § 142; *Baird* v. *New York*, 96 N. Y. 592, 593.

It is not enough that the party holding the burden has produced some evidence of the fact to be established. There must be such amount of evidence as would justify the court or jury in finding the necessary fact proved.

Toomey v. *London, B. & S. C. R. Co.* 3 C. B. N. S. 149; *Wheelton* v. *Hardisty*, 8 El. & Bl. 275; *Schuylkill & D. Imp. & R. Co.* v. *Munson*, 81 U. S. 14 Wall. 442, 448 (20:867, 872); *Schuchardt* v. *Allen*, 68 U. S. 1 Wall. 359, 369 (17:642, 646); *Pleasants* v. *Fant*, 89 U. S. 22 Wall. 120 (22:782) *Herbert* v. *Butler*, 97 U. S. 320 (24:958); *Anderson County Comrs.* v. *Beal*, 113 U. S. 240 (28:970).

Fraud is an essential element in the action.

Russell v. *Clark*, 11 U. S. 7 Cranch, 69 (3: 271); *Lord* v. *Goddard*, 54 U. S. 13 How. 211 (14:116).

If the charge is, as in this case, connivance in the fraud of another, knowledge of that fraud must be proved.

The mere use of defendant's bonds without fraudulent intent on his part is immaterial.

Morgan v. *Skiddy*, 62 N. Y. 319; *Wakeman* v. *Dalley*, 51 N. Y. 27; *Cullen* v. *Thomson*, 4 Macq. H. L. Cas. 441.

There must be at least some connection between the wrongful act and the alleged damage, as cause and effect.

Lamb v. *Stone*, 11 Pick. 526.

Mr. Justice **Brewer** delivered the opinion of the court:

The contention of plaintiff is that this transfer and loss of assets of the Connecticut corporation was brought about by a conspiracy, and through the fraudulent acts, of defendant, Post, with others. The case was tried before a jury; and at the close of the testimony the judge, ruling that the plaintiff had made out no case, and proved nothing which justified any submission of matters of fact to the jury, directed a verdict for the defendant. The record, therefore, transmitted here by proper proceedings in error, presents the question, not whether the plaintiff was entitled to recover all the damages he claimed, not what was the measure of damages, if he was entitled to recover, not even whether upon the facts the jury was bound to return a verdict in his favor, but whether there was sufficient testimony to require a submission of the question to the determination of a jury. We are of the opinion that there was such sufficient evidence, and that therefore the judgment must be reversed, and the case remanded for a new trial.

We premise what we have to say with the remark that we express no opinion as to the extent of the recovery which should be had, if any, or the measure of damages, nor do we wish to be understood as asserting that the verdict ought to have been in favor of the plaintiff. We simply hold, for reasons hereafter stated, that there were presented by the testimony matters of fact vital to the controversy, upon which the plaintiff had a right to the opinion of the jury, and which it was error for the court to withdraw from its judgment. It is necessary for the just disposition of this case that a fuller statement of the dis-

puted and undisputed facts should be made. In the fall of 1875, Benjamin Noyes, of New Haven, and Henry D. Walker, of Boston, were officers of the Connecticut company, which was then in failing circumstances, though possessed of assets amounting to several hundred thousand dollars. Personal liability was supposed to attach to these gentlemen, but whether this was so or not, in fact, is immaterial. The condition of the company was known to defendant, Post; at least, he was fully advised of suspicion and charges, because, on an inquiry instituted by the insurance commissioner of the State of Connecticut, he had been called as a witness as to the value of certain securities held by it. On or about December 5, 1875, Noyes and Walker, with others, bought the franchises of the National Capital Insurance Company of Washington, D. C., a company without property or business, and paid four thousand dollars for the purchase. Conspiring to secure themselves from liability, and to wreck for their own benefit the Connecticut company, a scheme was devised for the reinsurance of the risks of the Connecticut company with the National Insurance Company. A reinsurance was possible only on satisfactory representations to the Connecticut company of the possession by the Washington company of abundant assets. Such satisfactory evidence was furnished to the directors of the Connecticut company, the reinsurance was accomplished and a large amount of the assets of the Connecticut company was transferred to the Washington company. The outcome of this was that the Connecticut company lost its assets and, somehow or other, the same assets transferred to the Washington company disappeared. At least, for the purposes of this case, these facts must be considered as proved in view of the allegations in the complaint, and the time at which the court interposed in the trial and directed a verdict for defendant. The contention of plaintiff is, that such transfer of assets was brought about by fraudulent representations made to the Connecticut company by the Washington company, and that the representations were accomplished through the agency of the defendant Post, and under such circumstances that knowledge of a fraudulent intention is imputable to him. Walker and Noyes were officers of the Connecticut company; Walker became treasurer of the Washington company. It was necessary to satisfy the Connecticut company that the Washington company should be possessed of large properties. It in fact had nothing. The possession of properties by the Washington company must therefore be evidenced to the Connecticut company, before reinsurance was possible. With other transactions having the same objects in view, Walker arranged with defendant Post that he should put fifty thousand dollars in bonds into his, Walker's, possession as treasurer of the new company. Thereupon, fifty thousand four hundred dollars of negotiable securities were placed in the Continental National Bank by Post, and a receipt given to Walker, by the assistant cashier of that bank, in these words: "Received of Henry D. Walker, the following securities as special deposit, without risk in case of robbery." Following these words was a list of the securities, and the receipt was signed "W. J. Harris, Ass't Cashier." When this and other like deposits had been accomplished, the Connecticut company was advised that the Washington company was possessed of one hundred and fifty thousand dollars of property, and sought a reinsurance of the risks of the Connecticut company. One of the directors of the Connecticut company, Joseph A. Smith, was appointed a committee to ascertain the character and value of the assets of the Washington company. In obedience to that duty, he went to New York and was shown by Walker, the treasurer of the Washington company, the securities thus deposited in his name in the Continental Bank, as well as others similarly deposited, and reported to the Connecticut company that the treasurer of the Washington company had in his possession, as assets of the latter company, more than one hundred and fifty thousand dollars of municipal and other securities. Thereupon, the reinsurance was effected, and the assets of the Connecticut company, in the main, were transferred to the Washington company.

It is undisputed that the Washington company had no assets and that this show of assets was made by reason of the transfer of apparent title by the defendant, Post, and others to Walker, the treasurer of the Washington company. It is in evidence that Post received [429 from one thousand to fifteen hundred dollars, the exact amount not being clearly shown, for this temporary transfer of apparent title. The transfer, as arranged between Walker and Post, was only for fifteen days, so that for perhaps fifteen hundred dollars Post permitted Walker to appear as the owner of fifty thousand dollars of municipal securities for half a month. According to Post's own testimony, he arranged with the Continental Bank, which was the bank with which he did business, that these securities were not to be passed from its possession, and that all that Walker could do was to show them as deposited in his name. The face value of the securities was fifty thousand four hundred dollars—their real value was perhaps not over thirty thousand dollars. No transfer of their actual possession was provided for; no right given to remove them from the bank; Post considered himself all the while the owner and in possession, having given simply permission to make a show of title, a permission to close at the end of fifteen days. Surely such a transaction is outside the ordinary lines of business. It must have carried notice to Post of some scheme, and of a design to accomplish something which ordinary business transactions would not justify.

Outside of these matters, in respect to which there is no dispute, are others in which the testimony is contradictory. A. G. Fay, who was attorney of the Washington company, testifies that he called with Walker twice on Post, and in one of those interviews Post asked him "if he was going to be connected with the company;" and he replied, "that he didn't know anything about it;" that "there was not any company as yet."

The testimony of the president of the Continental Bank and Post is conflicting as to what was said with respect to the deposit of the bonds. The president also testified that after the commencement of this suit Post said to him, "the less we remember about that, it is an old thing we had better let it go—it is one of those old things that it is best to be forgotten, or something like that." There are also other circumstances, perhaps in themselves of a trifling nature, and yet are such as a jury would be apt to consider, and [430] justly, too, to indicate knowledge on the part of defendant. The main point is that which we have referred to, a scheme on the part of Walker and others to transfer from the Connecticut company to the Washington company, the latter company being wholly without property, the assets of the former; that to accomplish such a transfer a show of assets in the Washington company was essential; that such show of assets was accomplished through the means of Post, and through a transaction which, to say the least, was not an ordinary business transaction—a transaction which secured enormous pecuniary gain to Post for a temporary and well-guarded placing of the apparent title of securities in the name of Walker. We do not question the proposition that a man may loan money or bonds and not be responsible for the improper use of the money or securities by the parties to whom the loan is made; and we do not mean to say that Post is necessarily responsible for any improper use made by Walker of the securities, the title to which he apparently parted with; but we do hold that, where the loan is not an ordinary business transaction; where the compensation paid for the loan is excessive, so excessive as to be suspicious; where the purpose on the part of the borrower is the accomplishment of an act not merely *malum prohibitum* but *malum in se*, an act criminal by statute and criminal in itself; and where there are surrounding circumstances, trivial, it may be, separately considered, and the testimony in respect thereto contradictory, but the tendency of which is to charge the lender with knowledge of the wrongful purpose of the borrower, although there may be no direct and positive evidence of guilty knowledge,—a jury may be justified in holding that the loan was made with intent to consummate the wrong, and that the lender must share in the responsibility for the result of the wrong contemplated and accomplished, and which, knowingly, he assisted in accomplishing.

We think, therefore, there was error in withdrawing the case from the jury; and that there was testimony justly demanding its consideration, as to whether the defendant, Post, was not knowingly aiding a fraudulent transaction. Even if he did not know the full [431] nature and terms of the conspiracy, but only knew in a general way that a scheme existed by which the funds of the Connecticut company were to be withdrawn wrongfully from its control, and lent his aid, for large consideration, to the accomplishing of such fraudulent transaction, we do not think he can avoid his liability by proof that the exact nature and full details of the scheme were not communicated to him.

The judgment will be reversed and the case remanded for a new trial.

Mr. Justice **Bradley** dissents.

STATE OF MISSOURI, *ex rel.* JOHN H. CAREY, *Plff. in Errr.*, *v.* JOSEPH ANDRIANO.

(See S. C. Reporter's ed. 496-501).

Review of state judgments—contest for sheriff's office.

1. This court cannot review a state judgment, unless the federal question involved therein was personal to plaintiff in error.
2. In a proceeding in a Missouri court to try the respective titles of the relator and the respondent to the office of sheriff, where respondent relied upon an election to that office, and the relator claimed that he was in possession of the office, performing its duties, and that respondent's election was void under the Constitution of Missouri, because respondent was not a citizen of the United States, and respondent replied, admitting his foreign birth and that he had not been naturalized, but claimed that, under sec. 4 of the Act of Congress of April 14, 1802, he became a citizen by the naturalization of his father, this was a right or privilege claimed by respondent under a statute of the United States; and the state court having decided in favor of such right or privilege set up by the respondent and against the relator's claim, this court cannot review the state decision upon writ of error brought by relator.

[No. 127.]

Submitted Jan. 5, 1891. Decided March 2, 1891.

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of that court reversing a judgment of the Circuit Court of Buchanan County which ousted respondent from the office of sheriff of that county. *Dismissed.*

Statement by *Mr. Justice* **Brown:**

The controversy in this case arose from the conflicting claims of the relator and the respondent to the office of sheriff of Buchanan County, Missouri. The proceeding was originally instituted by an information in the nature of a *quo warranto*, filed by the prosecuting attorney, in the Circuit Court of Buchanan County, to test the right of respondent, Andriano, to assume the duties of sheriff. The information was filed upon the relation of John H. Carey, who had been

---

NOTE.—*Jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution.* See *notes* to Martin v. Hunter, 4:97; Matthews v. Zane, 2:654; Williams v. Norris, 6:571.

Jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws. See *notes* to Hart v. Lamphire, 7:679; Commercial Bank of Cincinnati v. Buckingham, 12:169.

holding the office and discharging its duties for the two preceding years, and who, under the state law, had a right to hold it until his successor should be duly elected, commissioned and qualified. It alleged, in substance, that while the relator was in office, having the right thereto, the respondent, without any legal warrant, ground or right whatever, entered into, and assumed to discharge part of the duties of, such office; and further averred that he was to that extent an unlawful usurper of the rights belonging to relator, as sheriff of such county. Waiving the issue of a writ, respondent appeared, and by his answer, which by agreement was treated as a return, set up that he had received at the general election in November, 1886, the majority of the votes cast thereat for the office of sheriff of said county, and thereupon the governor of the State had issued to him his commission, and he had given bond and duly qualified as such sheriff. He further alleged that at the time of such election he was, and ever since had been, a citizen of the United States, a resident of the said county, and duly qualified, under the Constitution and laws of the State, to hold the office. To this answer or return there was filed a reply, denying that respondent was, or ever had been, such citizen.

The case was tried upon the following stipulation of facts:

It was admitted by the parties, that Joseph Andriano, the respondent, was born in Heidelberg, Baden, now in the German Empire, in October, 1841; that he came to the United States with his father and mother in 1849, and the family settled in Buchanan County, Missouri, where respondent has ever since resided, and where his father and mother, who were, from a long time before respondent's birth, during their joint lives, husband and wife, resided up to the time of their deaths respectively; that his father and mother both lived until long after the year 1855; that respondent and his father and mother were born citizens of Baden, and so continued up to the time they came to the United States; and that Albert Andriano, the respondent's said father, was, by proper proceeding in the Circuit Court of the State of Missouri, within and for Buchanan County, duly naturalized under and pursuant to the laws of the United States, and thereby became a citizen of the United States on the 4th day of October, A. D. 1854.

It was also admitted that all the statements contained in the information were true, and that respondent was guilty of the acts therein set forth, provided he (respondent) was not a citizen of the United States at the time of the general election, in November, 1886; but that if he were such citizen, then, while said acts were admitted to have been performed by respondent, they were not unlawfully but rightfully performed by him. It was also admitted that the respondent himself never took any steps or did anything toward becoming naturalized as a citizen of the United States.

Upon the issue thus formed by the pleadings and stipulation, the circuit court found the respondent guilty as charged in the information and rendered a judgment ousting him from the office, so far as he had been exercising, or assuming to exercise, the duties thereof. From this judgment respondent appealed to the Supreme Court of the State, wherein the case was heard and the judgment reversed, and respondent restored to all things which he had lost by reason of the said judgment. To reverse this decision [49 of the supreme court relator sued out this writ of error.

Messrs. **B. R. Vineyard** and **Alexander Porter Morse** for plaintiff in error.

No counsel for defendant in error.

Mr. Justice **Brown** delivered the opinion of the court:

We are confronted upon the threshold of this case with the inquiry whether there is a federal question involved; if not, the only disposition we can make of it is to dismiss it for want of jurisdiction. The object of the proceeding is to try the respective titles of the relator and the respondent to the office of sheriff of Buchanan County, Missouri. Respondent relies upon the fact that he received a majority of votes cast at a popular election for the office. Relator claims to have been in possession of the office since December 1, 1884, performing all the duties imposed upon him by law, and, as to respondent's election, insists that the same is void under the Constitution of Missouri, which declares (art. 8, sec. 12) that "no person shall be elected or appointed to any office in this State, civil or military, who is not a citizen of the United States, and who shall not have resided in this State one year next preceding his election or appointment." He claims, further, that under the laws of Missouri (Rev. Stat. sec. 3350) he is entitled to hold the office until a successor is duly elected, commissioned and qualified. In support of his claim that respondent is not a citizen he relies upon the fact that he was born in Germany and is therefore, prima facie, an alien. To this respondent replies, admitting his foreign birth, and also that he had never been naturalized under the laws of the United States, but claiming that under section 4 of the Act of Congress of April 14, 1802 (2 Stat. 153), he became and was a citizen by the naturalization of his father. This Act, which is reproduced in Rev. Stat., sec. 2172, provided "that the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law upon that subject, by the [49 government of the United States, may have become citizens of any one of the said States, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens," etc. Here is clearly a right or privilege claimed by respondent under a statute of the United

States within the meaning of Rev. Stat., sec. 709, and had the judgment of the Supreme Court of Missouri been adverse to his claim, there could be no doubt of his right to a writ of error from this court to review its ruling. It is insisted, however, that the relator has no right to a review of the ruling in favor of respondent, as he claimed no right or privilege personal to himself or to his own status as a citizen, from such Statute. The question thus presented is, whether the right or privilege must necessarily be personal to the plaintiff in error, or whether he is not entitled to a review where such right or privilege is asserted by his opponent, and the decision is in favor of such opponent and adverse to himself. While there is some force in the argument that the right of review in cases involving the construction of a federal statute should be mutual, the Act limits such right to cases where the state court has decided *against* the title, right, privilege or immunity set up or claimed under the Statute. Now, the only claim made under the Federal Statute in this case is by the respondent. The difficulty with the position of the relator is that he asserts no right under the Statute, but, to establish the alleged alienage of the respondent, relies solely upon the fact that the latter was born abroad. To this, respondent replies, admitting his foreign birth, but claiming that the Statute makes him a citizen, and the state court has adopted his view.

The object of the present Judiciary Act was not to give a right of review wherever the validity of an Act of Congress was drawn in question, but to prevent the courts of the several States from impairing or frittering away the authority of the federal government, by giving a construction to its statutes adverse to such authority. Of course, if the construction given by the state court to the Act under which the right is claimed be favorable to such right, no such reason exists for a review by this court. As stated by *Chief Justice* Taney in *Commonwealth Bank* v. *Griffith*, 39 U. S. 14 Pet. 56, 58 [10: 352, 353], "the power given to the supreme court by this Act of Congress was intended to protect the general government in the free and uninterrupted exercise of the powers conferred on it by the Constitution, and to prevent any serious impediment from being thrown in its way while acting within the sphere of its legitimate authority. The right was therefore given to this court to re-examine the judgments of the state courts, where the relative powers of the general and state government had been in controversy, and the decision had been in favor of the latter."

[500]

The question is by no means a novel one in this court. The case of *Fulton* v. *M'Affee*, 41 U. S. 16 Pet. 149 [10: 918], was an action of ejectment, in which the lessor of the plaintiff made title under a certificate issued to him as assignee of Jefferson College, the trustees of which college were authorized by an Act of Congress to relinquish certain lands which had been reserved for their use. Defendant offered testimony to show that the certificate was fraudulently obtained, that its authority had been denied by the commissioner of the land office, and consequently that it did not confer on the lessor of the plaintiff a valid legal title upon which he could recover in ejectment. These questions were decided by the state court in favor of the right claimed by the plaintiff, and the defendant took a writ of error from this court. It was held that, as the decision of the state court was in favor of the right claimed, this court had no jurisdiction.

The case of *Linton* v. *Stanton*, 53 U. S. 12 How. 423 [13: 1050], was an action upon certain promissory notes, to which the defendant pleaded a discharge under the Bankruptcy Law. Objections were taken to the validity of the discharge, but they were overruled by the court and judgment entered for the defendant. It was held the plaintiff had no right to a review in this court. "Undoubtedly," says *Chief Justice* Taney, "the defendant, in pleading his discharge under the Bankrupt Law, claimed a right or exemption under a law of Congress. But in order to give jurisdiction, something more is necessary; the judgment of the state court must be against the right claimed." Like rulings were made in *Gordon* v. *Caldcleugh*, 7 U. S. 3 Cranch, 268 [2: 436]; *Strader* v. *Baldwin*, 50 U. S. 9 How. 261 [13: 130]; *Burke* v. *Gaines*, 60 U. S. 19 How. 388 [15: 655]; *Hale* v. *Gaines*, 63 U. S. 22 How. 144 [16: 264]; *Reddall* v. *Bryan*, 65 U. S. 24 How. 420 [16: 740], and *Ryan* v. *Thomas*, 71 U. S. 4 Wall. 603 [18: 460].

None of the cases cited by the relator involve the question here presented, *and the writ of error must be dismissed for the want of jurisdiction.*

CENTRAL TRUST COMPANY OF NEW YORK ET AL., *Appts.*, [4
v.
SYLVESTER H. KNEELAND.

(See S. C. Reporter's ed. 414-424.)

Railroad mortgage on after-acquired property —effect of.

1. Where a company is incorporated to construct a railroad between two cities named as its termini, a mortgage given by it which, as expressed, is upon its line of railroad constructed or to be constructed, between the named termini, together with all the stations, depot-grounds, engine-houses, machine-shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, creates a lien upon its terminal facilities in those cities, and is not limited to so much of the road as is found between the city limits of those places, which lien is superior to a subsequent mortgage specifically executed thereon.
2. A mortgage executed by a railroad company upon its present and after-acquired property covers not only property then owned by the railroad company, but becomes a lien upon all

NOTE.—*As to lien of mortgage on after-acquired property*, see *note* to Pennock v. Coe, 16:426.

As to power of corporations to mortgage, see note to Memphis & L. R. R. Co. v. Railroad Comrs. 23: 837.

property subsequently acquired by it, which comes within the description in the mortgage, to which the railroad company acquires either the legal or equitable title.

[No. 137.]

Argued Jan. 7, 1891. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Ohio in favor of defendant in an action to quiet the title to property sold under a mortgage. *Affirmed.*

[1] Statement by *Mr. Justice* **Brewer:**

On the 17th of January, 1880, the Toledo, Delphos and Burlington Railroad Company, a corporation organized by the consolidation of several constituent companies, executed a mortgage to the Central Trust Company of New York, by which it conveyed the following property: "All and singular the line of railroad of the said party of the first part, as the same now is or may hereafter be constructed, between Toledo, Lucas County, Ohio, through the Counties of Lucas, Wood, Henry, Putnam, Allen and Van Wert, in the State of Ohio, and the Counties of Adams, Wells, Huntington, Wabash, Miami, Grant and Howard, in the State of Indiana (and not including the branch line from Delphos, Allen County, Ohio; thence *via* Spencerville, Mendon and Mercer, and through the Counties of Allen, Van Wert and Mercer, to Shanesville, Mercer County, Ohio), being about one hundred and eighty miles in length, together with all and singular the rights of way, road-bed, made or to be made, its track, laid or to be laid, between the terminal points aforesaid, together with all the stations, depot-grounds, rails, fences, bridges, sidings, engine-houses, machine-shops, buildings, erections, in any way now or hereafter appertaining unto said described line of railroad, together with all the engines, cars, machinery, supplies, tools and fixtures now and at any time hereafter held, owned or acquired by the said party of the first part, for use in connection with its line of railroad aforesaid, and all its depot-grounds, yards, sidings, turnouts, sheds, machine-shops, leasehold rights and other terminal facilities now or hereafter owned by the said party of the first part, together with all and singular the powers and franchises thereto belonging, and the tolls, income and revenue to be levied and derived therefrom;" and also provided: "The said party of the first part expressly covenants and agrees that it will, on demand, from time to time hereafter execute, acknowledge and deliver unto said party of the second part any and all such further and other conveyances and assignments as may be necessary and proper to fully convey to and vest in the party of the second part or the trustee for the time being all such future acquired depots, grounds, estates, equipments and property as it may hereafter from time to time purchase for use in and upon its said line of railroad and intended to be hereby conveyed."

On June 21, 1880, the same railroad company executed to the same trustee another mortgage, known as the "terminal trust mortgage." The property thereby conveyed is thus described: "All and singular the line of railroad of the said party of the first part as the same now is or may hereafter be constructed, between the southeasterly end of Washington Street, in the City of Toledo, Lucas County, Ohio; thence northwesterly along Washington Street to the aforesaid canal lands in said city; thence southwesterly along said abandoned canal lands to Swan Creek in said city; thence over said Swan Creek and the Miami and Erie Canal and over and along Mill Street and Canal Avenue, in said city, to the westerly limit thereof; and thence to the point where said railroad crosses the westerly limit of said City of Toledo; together with all and singular the franchises, rights of way, station-grounds, shop-grounds, side-track grounds and grounds of any and every kind, for whatever purpose bought, between the points aforesaid, viz., the southeasterly end of Washington Street, in the City of Toledo, State of Ohio, and the westerly limits of said city, and together with the road-bed made or to be made, and tracks and side-tracks laid and to be laid thereon, together with all stations, work-houses, engine-houses, shops, turn-tables, water-tanks, buildings, erections of every description, and all facilities of any and every description appertaining to said road-bed, station-grounds, shop-grounds and lands of every kind and for every purpose lying between the points aforesaid owned or acquired by the said party of the first part, for the use in connection with the part of its line of railroad aforesaid, and all its said depot-grounds, yards, sidings, turn-outs, sheds, machine-shops, leasehold rights and other terminal facilities now and hereinafter owned by the said party [41] of the first part in connection with the said part of its railroad, together with all and singular the powers and franchises thereto belonging, and the tolls, income and revenue to be levied or derived therefrom."

On foreclosure proceedings, duly had, of the first mortgage, appellee became, in the interest of the bondholders, the purchaser. After confirmation of sale and passage of title, and during the pendency of a suit to foreclose the second mortgage referred to, this proceeding was commenced by the trustee in the latter mortgage and certain holders of bonds secured thereby, against Kneeland, the purchaser. The bill was practically one to quiet the title of those security holders to the terminals in Toledo. To this bill Kneeland filed an answer and cross-bill. In the latter he set up his title under the first mortgage and the sale, and prayed to have his title quieted to these terminals. Upon proofs and hearing, the circuit court rendered a decree in favor of Kneeland, quieting his title to all except a small strip of the right of way, thereby adjudging priority of lien to the first mortgage. This decree the appellants have brought to this court for review.

Mr. **W. W. Mac Farland** for appellants.

Messrs. **Robert G. Ingersoll** and **Clarence Brown** for appellee.

Mr. Justice **Brewer** delivered the opinion [41] of the court:

The first mortgage had the "after-acquired

property" clause in it. It is settled that such a clause is valid, and that thereby the mortgage covers not only property then owned by the railroad company, but becomes a lien upon all property subsequently acquired by it which comes within the description in the mortgage. *Pennock* v. *Coe*, 64 U. S. 23 How. 117 [16: 436]; *Dunham* v. *Cincinnati, P. & C. R. Co.* 68 U. S. 1 Wall. 254 [17: 584]; *Galveston, H. & H. R. Co.* v. *Cowdrey*, 78 U. S. 11 Wall. 459 [20: 199]; *Thompson* v. *White Water Valley R. Co.* 132 U. S. 68 [33: 256]. And this is true, not only as to property to which it acquires the legal title, but also as to that to which it acquires only a full equitable title. *Toledo, D. & B. R. Co.* v. *Hamilton*, 134 U. S. 296 [33: 905].

Where a company is incorporated to construct a railroad between two cities named as its termini, a mortgage given by it which, as expressed, is upon its line of railroad constructed or to be constructed between the named termini, together with all the stations, depot-grounds, engine-houses, machine-shops, buildings, erections in any way now or hereafter appertaining unto said described line of railroad, creates a lien upon its terminal facilities in those cities, and is not limited to so much of the road as is found between the city limits of those places. The stations, depot-grounds, etc., in the terminal cities appertain to the railroad as fully as similar structures in places intermediate those termini. In the absence of restrictive words, such is the natural import, and therefore must be adjudged the intent and scope, of a mortgage containing that description. This first mortgage contains not only the general terms referred to, but after them, and as if it were to avoid any possible doubt, adds: "And all its depot-grounds, yards, sidings, turn-outs, sheds, machine-shops, leasehold rights and other terminal facilities now or hereafter owned by the said party of the first part." It would be difficult to make language more full, accurate and descriptive. *Willink* v. *Morris Canal & Bkg. Co.* 4 N. J. Eq. 377; *Morris & E. R. Co.* v. *Central R. Co.* 31 N. J. L. 205; *Mohawk Bridge Co.* v. [420] *Utica & S. R. Co.* 6 Paige, 554, 3 N. Y. Ch. L. ed. 1099; *Com.* v. *Erie & N. E. R. Co.* 27 Pa. 339. There can be no doubt that by this mortgage a lien was created on the terminal facilities in the City of Toledo, and as this mortgage was executed some months before the terminal trust mortgage, apparently it created a prior lien. And if there were no other facts to be considered, the disposition of this case would be easy.

That the parties receiving bonds under this mortgage would understand that they were to have a first lien on all terminal facilities in Toledo then owned or thereafter acquired, is clear. That the railroad company also understood that it owned and was giving a prior lien upon such terminals is evident from the fact that in the year 1879 it executed a mortgage for one million two hundred and four thousand dollars and negotiated six hundred and thirty thousand dollars of the bonds secured thereby, which bonds and mortgages were taken up and satisfied out of the proceeds of the mortgage of January 17, 1880, and in the prospectus, issued for the purpose of inviting investors to purchase those bonds, was this statement:

"*Terminal Advantages.*

"The Toledo, Delphos and Burlington Railroad has the right of way through and down the very center of the City of Toledo. It enters the city near the Miami and Erie Canal, and substantially follows the canal to Washington Street; thence down Washington Street to Swan Creek and to lake navigation, within three squares of the post-office. This franchise is very valuable and of very great importance to the business of the road, and adds greatly to the pecuniary value of the property of the corporation. No other road entering the city approaches so near to its center; none whose freight and passenger business is transacted so near to the business of the city. This franchise is considered valuable to the road not only from the fact that it affords unusual business facilities, but because it becomes independent of other corporations and renders its business secure without submitting to a heavy tax on its traffic."

Not only this, but when the mortgage of January 17, 1880, was in contemplation, and [4
on December 12, 1879, when its execution was ordered, the resolution of the directors declared: "That for the purpose of borrowing money for the use of the company to enable it to carry out the purposes for which it is organized and was consolidated, . . . and build, complete, equip, pay for right of way and depot-grounds and operate its railroad, it is expedient to prepare, issue and negotiate a series of first-mortgage bonds, amounting in the aggregate to $1,250,000," and "that in order to secure the payment of said issue of first-mortgage bonds and the interest thereon, . . . the president shall also forthwith cause to be prepared a mortgage or deed of trust conveying . . . all this company's present and future-to-be-acquired line of railroad, appurtenances and equipment and income thereof, between said City of Toledo in the State of Ohio and the Town of Kokomo in the State of Indiana."

No one can misunderstand these declarations. They expressed to every purchaser of a bond secured by this first mortgage a purpose to vest in him a prior lien on all the property of the railroad company, including its terminal facilities—a lien superior to every incumbrance thereon. They unite, therefore, with the clear language of the mortgage, the expressed intent of the mortgagor. To thwart this purpose, so obvious and expressed, there should be a clear disclosure of higher equity, and to the suggestions of that we pass.

The second, the terminal trust, mortgage, was executed on June 21, 1880. On September 4, 1880, more than two months thereafter, the Toledo and Grand Rapids Railroad Company executed its mortgage to the Central Trust Company, to secure, not its own indebtedness, but the bonds secured by the terminal trust mortgage above referred to. This mortgage, in terms, conveyed the grant-

or's right of way within the City of Toledo, property which is, in fact, a part of the right of way and terminal facilities of the Toledo, Delphos and Burlington Railroad Company. On November 29, 1880, George W. Ballou and wife executed a mortgage to the same Trust Company, conveying certain properties similarly situated and also as security for those terminal trust bonds. On [22] April 12, 1881, the Toledo and Grand Rapids Railroad Company conveyed to the Toledo, Delphos and Burlington Railroad Company all its properties. The consideration of such transfer was $265,477.86 cash, an amount supposed to be sufficient, and provided to pay all the indebtedness of the Toledo and Grand Rapids Railroad Company. So far as the property standing in the name of Ballou is concerned, he was the financial agent of the mortgagor, the Toledo, Delphos and Burlington Railroad Company; and while he took the title to some properties in his own name, the purchase was with moneys of the mortgagor. Hence, while he held the legal title, the full equitable title was in the railroad company, and that property became, therefore, in equity, subject to the lien of the first mortgage. Further, the mortgage from Ballou to the Central Trust Company, of date November 29, 1880, was really a tripartite agreement between Ballou, the Toledo, Delphos and Burlington Railroad Company and the Central Trust Company, and recited that the mortgage to the Trust Company was in consideration of forty thousand of these terminal trust bonds received by Ballou. So, not only was this purchase by Ballou made with the funds of the Toledo, Delphos and Burlington Railroad Company, but he received also forty thousand dollars of the terminal trust bonds. Further than that, as we read the record—and there are seventy to eighty deeds and relinquishments of right of way contained in it—apparently the title to the bulk of the right of way passed directly to the Toledo, Delphos and Burlington Railroad Company, and not to Ballou nor to the Toledo and Grand Rapids Railroad Company, so that we have these facts before us: *First*, the title to the larger portion of the terminal facilities passed directly to the mortgagor, the Toledo, Delphos and Burlington Railroad Company. *Second*, all that part whose title was taken in the name of Ballou was paid for by the funds of the Toledo, Delphos and Burlington Railroad Company, and therefore it had the full equitable title, and he had only the naked legal title in trust for its benefit. *Third*, the incumbrance which he placed upon it in the tripartite agreement was not security for an independent lien, but simply additional [23] security for the terminal trust bonds issued by the Toledo, Delphos and Burlington Railroad Company. *Fourth*, the mortgage given by the Toledo and Grand Rapids Railroad Company, which was generally of its right of way and terminal facilities, was not to secure an independent debt, but the already issued terminal trust bonds of the Toledo, Delphos and Burlington Railroad Company. *Fifth*, all the indebtedness of the Toledo and Grand Rapids Railroad Company was assumed and paid by the Toledo, Delphos and Burlington Railroad Company, as a consideration of the appropriation by the latter of all the franchises and property of the former. Whatever, therefore, may be said as to the scheme and plan of the parties who in the spring of 1880 were in control of the Toledo, Delphos and Burlington Railroad Company, the fact remains undisputed that its mortgage of January 17, 1880, covered, in terms, all subsequently acquired terminal facilities in the City of Toledo; that purchasers of bonds secured thereby were invited to invest, on the strength of representations by the company that it covered the terminal facilities; that the title to the larger portion of these terminal facilities passed directly and unincumbered by anyone to the Toledo, Delphos and Burlington Railroad Company; that as to those portions whose title passed to Ballou and the Toledo and Grand Rapids Railroad Company, the purchase price was paid by the Toledo, Delphos and Burlington Railroad Company; and that the mortgages which they respectively executed to the Central Trust Company were not given to secure independent debts, but simply as collateral to the terminal trust bonds.

We do not question the proposition invoked by counsel for appellant, that a mortgage with an "after-acquired property" clause creates a lien upon property subsequently acquired only when it is acquired, and in the condition in which it is acquired, and subject to all existing liens; nor the other proposition, that the ownership by one corporation of the stock of another will not of itself prevent the creation of a new and independent lien upon the property of the latter, as adjudged in the case of *Williamson v. New Jersey S. R. Co.*, 28 N. J. Eq. 278, 29 N. J. Eq. 316. Yet we think those propositinos are not decisive of the case here [4 presented. The mortgagor in the two mortgages of January and June, 1880, held the legal title to a large portion of the terminal facilities, and was the equitable owner of substantially the rest. Its first mortgage, its expressed purpose, was a lien upon those terminal facilities. No lien was ever placed by the holders of the legal title on that portion of the right of way and terminal facilities which did not stand in the name of the Toledo, Delphos and Burlington Railroad Company, to secure any new and independent obligation. These collateral and subsequent mortgages were in terms only to strengthen the security already given by the terminal trust mortgage. If they had never been executed, can there be a doubt that on a foreclosure the trustee in either the mortgage of January 17, 1880, or the terminal trust mortgage, could have subjected to its lien all property in fact a part of the right of way and terminal facilities, whether the title of the company thereto was either legal or equitable? They therefore only put into writing that which was already and in equity the obligations resting on the property. So, whatever may have been the secret thought and scheme of the parties controlling the management of these railroad companies, we are of opinion that the various

properties included in the right of way and terminal facilities became in fact subjected to the lien of the two mortgages of January and June, 1880, executed by the Toledo, Delphos and Burlington Railroad Company. At least, that is true of all properties whose title passed to the Toledo, Delphos and Burlington Railroad Company. Certain properties whose title did not thus pass were by the decree exempted from the operation of this lien.

We think there was no error in the ruling of the Circuit Court, and its *decree is affirmed.*

525] WILLIAM CRESSEY ET AL., *Appts.*,
v.
HERMANN MEYER ET AL.

(See S. C. Reporter's ed. 525-528).

Laches and limitations in equity—suit against State—defense of laches.

1. An action by a creditor of a State, not against his debtor, but against its debtors, to secure an appropriation of their debts to it to the satisfaction of its obligations to him, is in the nature of a personal action by one individual against another; and as against such a suit, laches and limitations are in a court of equity sufficient defenses. Such a suit, brought thirty-six years after the settlement between the State and its debtors, and nineteen years after the time fixed by that settlement for the last payment by them, cannot be sustained.
2. Although a State may enforce all obligations due to it, no matter what period of time may have intervened, yet that right is personal to the sovereign, and does not pass to any of its creditors; and its intervention and appearance in a suit brought by a creditor, as against its debtors, does not give to such creditor its sovereign exemption from liability to the Statute of Limitations and the defense of laches.
3. In a suit by a creditor of a State to subject debts due to it to the payment of his claim, brought nineteen years after the payment of such debts was due from them to it, the fact that much litigation had intervened during those years, and that bankruptcy proceedings were pending, to which plaintiff was not a party, is no answer to the defense of staleness of the claim.

[No. 145.]

Argued Jan. 12, 1891. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Louisiana, dismissing a suit seeking to charge defendants for sums due from them to the State and to apply the same upon a debt due from the State to plaintiff. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

The Consolidated Association of the Planters of Louisiana was a banking corporation establishment by an Act of the Legislature of that State of date March 16, 1827, as amended by an Act dated February 19. 1828. The capital, as fixed by the first of those Acts, was two millions of dollars, which was to be raised by means of a loan obtained by the directors of the corporation. The Act also provided, in section 2, for stock to the extent of five thousand shares of five hundred dollars each, or a total of two millions and a half of dollars. As security for their subscriptions to this stock, which could be taken only by planters and was transferable only to them, the subscribers were to give real estate mortgages, and, to obtain the capital as named, for the business of the institution, the corporation was to issue bonds payable, respectively, in five, ten and fifteen years. The thought and purpose were that the subscribers should not advance any money, but that the consolidation of their credit in one institution would enable it to secure an abundance of capital, and that the profits of that capital, used in the banking business, would be sufficient not only for the expenses of the corporation, but also to discharge the liabilities assumed by the stockholders by their mortgages to the institution. The amendment of the Act of the succeeding year increased the authority to borrow, from two millions to two and a half of millions dollars, and the stock, from two and a half to three millions of dollars. It also provided that the State should issue its bonds to the [51
institution to the amount of two millions and a half of dollars; that it should take all the securities of the stock, with accompanying mortgages, and also receive a bonus of one million of dollars in stock. This scheme was carried out; the bonds of the State were issued; the stock was subscribed, and the corporation, possessed of capital, went into the banking business. The subscribers to the capital stock paid nothing, but simply gave their secured notes to the corporation. The State issued to the institution its own bonds for two and a half millions of dollars. In other words, the State furnished the capital and secured itself by individual obligations. The first series of state bonds were paid as they became due, but by authority of the Act of March 31, 1835, for the remainder new bonds were issued, payable in 1848. The banking scheme was a failure. The bank continued in business until 1842, when, on November 17, its charter was declared forfeited for insolvency, at a suit of the State. In anticipation of this decree of forfeiture, the Legislature of 1842 passed four Acts: one, entitled "An Act to Revive the Charters of Several Banks Located in the City of New Orleans, and for Other Purposes," approved February 5; another, to amend this Act, approved March 7; another, approved March 11, relieving from the rule requiring the reinscription of mortgages at the date of ten years from registry the mortgages given by the stockholders to this bank; and fourth, of March 14, entitled "An Act to Provide for the Liquidation of Banks." This last Act provided forfeiture proceedings in the name of the State, and for the appointment by the

---

NOTE.—*That neither time nor Statute of Limitations runs against the State,* see *note* to Gibson v. Chouteau, 20:534.

As to effect of state decisions and laws, in regard to Statute of Limitations, upon United States courts, see *note* to Elmendorf v. Taylor, 6:289.

As to effect of disability occurring after Statute of Limitations begins to run, see *note* to Harris v. McGovern, 25:317.

governor of a board of managers to wind up its affairs. On April 5, 1843, another Act was passed, declaring that the assets of this bank should remain in the possession and under the exclusive management of the State until the final payment of all bonds issued to it by the State. On April 6, 1847, an Act was passed authorizing the managers of the bank to extend by indorsements the bonds in favor of the bank issued by the State to six, nine, twelve, fifteen and eighteen years, with a privilege to each stockholder to discharge his obligation to the bank and cancel his subscription by surrendering bonds of the State proportionate to the amounts due from him by his subscription. It was further provided that the managers should require such annual or periodical payment by the stockholders as would finally pay the bonds due the State; and that the amount might be distributed through the succeeding seventeen years. This legislation, so far as any action on the part of the bank was necessary to give it force, was accepted. On examination, it was found that the deficiency of assets would be about $500,000; and that a contribution of one hundred and two dollars per share, payable in seventeen equal annual installments, would be sufficient to pay off these bonds, and such an assessment was duly ordered.

This suit was commenced by the filing of a bill in the circuit court of the United States on December 12, 1883, by William Cressey, an alien, against the bank and its board of managers and directors; and afterwards, by an amended bill, filed January 24, 1884, against a large number of stockholders, setting forth the plaintiff's ownership of certain bonds issued by the State under the Act of 1847, portions of which had been paid, and seeking to charge these stockholders for the unpaid portion of the amounts due from them under the settlement of 1847, above referred to. Subsequently, the State of Louisiana intervened, and was admitted as a party *pro interesse suo*. On proofs and hearing, the defenses of the stockholders were sustained, and the bill as to them dismissed.

Messrs. Walter H. Rogers, **George A. King** and **Charles W. Hornor** for appellants.

Messrs. **J. D. Rouse** and *Wm. Grant* for appellees.

Mr. Justice **Brewer** delivered the opinion of the court:

One proposition alone requires notice. This was an action by a creditor of the State, not against his debtor, but against its debtors, to secure an appropriation of their debts to it to the satisfaction of its obligations to him. It is a proceeding of a garnishee nature. The appearance of the State, voluntarily, its application to be made a party *pro interesse suo*, may avoid all questions as to the right of the plaintiff to maintain this suit. Conceding that such a suit is proper, it still remains in the nature of a personal action by one individual against another. As against such a suit, laches and limitations are in a court of equity sufficient defenses. The settlement, which was practically between the State and its debtors, was made in 1847. Thirty-six years thereafter this bill is filed. If the time for full payment given by the settlement of 1847 is subtracted, this suit was commenced nineteen years after the time fixed by that settlement for the last payment had passed. Limitation and laches forbid that this suit should be sustained. It may be that, as against the sovereign, no Statutes of Limitation run; and it may be that, in the courts of Louisiana, the State may enforce all obligations due to it, no matter what period of time may have intervened since they were assumed; but that right is personal to the sovereign; it does not pass to any of its creditors; and its intervention and appearance in a suit brought by a creditor, as against its debtors, does not give to such creditor its sovereign exemption from liability to the Statute of Limitation and the defense of laches. Whatever, therefore, might be true if the State of Louisiana were suing in its own courts, this suit must be treated in the federal courts as one by an individual against individuals; and, brought nineteen years after by the terms of settlement between the State and its creditors the last payment was due from them to it, must be adjudged a stale claim. The decisions of the Supreme Court of Louisiana are in accord with this conclusion. *Louisiana Planters Asso.* v. *Lord*, 35 La. Ann. 438. That case was the counterpart of this, and the final conclusion of that court was against the right to maintain the action and on the ground of the staleness of the claim. The fact that much litigation had intervened during these years, that bankruptcy proceedings were pending, avails nothing to this plaintiff, who was no party thereto.

The decree is affirmed.

CASE MANUFACTURING COMPANY, [43
Plff. in Errr.,
v.
PETER H. SOXMAN ET AL.

(See S. C. Reporter's ed. 431-439.)

Evidence that notes were received as payment—finding by court—acts of financial manager bind company.

1. Where the plaintiff alleges that his acceptance of the notes of a limited liability company was through a mistake, parol evidence that defend-

NOTE.—*As to admissions or declarations of principal and agent, when evidence,*—see *note* to Leeds v. Marine Ins. Co. of Alexandria, 4: 266.

As to effect of admissions of partner, after dissolution, on his copartners,—see *note* to Thompson v. Bowman, 18: 736.

As to declarations of vendor of chattels; admissibility against vendee,—see *note* to Jones v. Simpson, 29:742.

As to parol evidence as to bill or note; admissible for what purposes,—see *note* to Bank of United States v. Dunn, 8: 316.

As to parol evidence of previous negotiations, when admissible to affect a written contract,—see *note* to Union Mut. L. Ins. Co. v. Mowry, 24: 674.

ants proposed to organize a corporation with limited liability and that its obligations were to be given for the purchase out of which the debt arose, is admissible to show that the subsequent acceptance of such notes was within the meaning of the contract.

2. Where the trial is by the court without a jury, and there is evidence which properly sustains a finding of the court, this court will accept the finding as conclusive, and will inquire no further into the testimony than it would in the case of a verdict by a jury.

3. Where one is financial manager of a company, his acts bind the company, and it cannot repudiate its liability therefor, by showing that he in fact had no authority.

[No. 150.]

Argued Jan. 16, 19, 1891. Decided March 2, 1891.

IN ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review a judgment for defendants in an action to recover the value of machinery. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

The Case Manufacturing Company, plaintiff in error, is a corporation located at the City of Columbus, State of Ohio, and engaged in the manufacture and sale of flour-milling machinery. On the 8th of December, 1883, an order was sent to its home office, received and approved on the 11th of December, which order, omitting immaterial matters, was, with the acceptance, as follows:

[432] "(Form No. 2.)

"This form to be used where machines are ordered for changing over a mill, but where the millwright work is not done by the Case Manufacturing Co. Fill up three of these blanks; one for the purchaser, one for the Case Manufacturing Co. and one for the salesman. Fill up blanks carefully. This contract to be binding only when signed by the Case Manufacturing Company, at its home office at Columbus, Ohio.

"Latrobe, Dec. 8th, 1883.

"The Case Manufacturing Co., Columbus, O.:

"Please ship the undersigned, as near the first day of Feb., 1883, as possible, the following machinery at and for the price of eight thousand dollars. . . . We agree to receive and pay freight on the same and place them in our mill according to your directions; to supply the necessary power and appliances and other machinery required to obtain the best results, using proper diligence in placing and starting the same. After starting them we are to have thirty days' running time in which to test them, when, if found up to your guarantee, we will settle for the same by paying 2,000 dollars cash, 2,000 dollars by note due 12 months after accepting of the machinery, and 4,000 dollars by note due 18 months, at 6 per cent interest.

"You to guarantee that, with necessary power and proper management, the machines shall have capacity for from 100 to 110 barrels of flour in twenty-four hours; that they shall perform the work they are intended to do as well as any machines now in use for the same purpose, and the results to be equal to those obtained from any of the roller or other modern systems of milling now in use in this country using the same grades of wheat and an equivalent line of machinery. We agree to be responsible for any damage or loss by fire or otherwise to said machines after they reach us, and agree to make no claims for damages on account of delays incident to starting up said mill.

"The title to said machines shall remain in and not pass from you until the same are paid for, and until all the notes given therefor are [433] fully paid; and in default of payment as above agreed, you or your agent may take possession of and remove said machines without legal process.

"Latrobe Milling Co.
"P. H. Soxman, Pres.
"H. C. Best, Sec'y.
"D. J. Soxman, Treas.

"P. O. address, Latrobe, County of Westmoreland, State of Pennsylvania.

"Shipping address, Latrobe, County of Westmoreland, State of Pennsylvania.

"We accept the above order upon the conditions named, and hereby make the guaranty above set forth this 11th day of December, 1883, at Columbus, Ohio.

"Case Manufacturing Co.,
"By O. Watson, P't.

"All settlements must be made with and all notes given and moneys paid direct to the Case Manufacturing Co."

On the 20th of October, 1884, the machinery having all been furnished and the mill started, a settlement was made by the purchasers with the same agent of plaintiff, Davis, who had negotiated the sale in the first instance. Having already paid one thousand dollars, a check was given for one thousand more, which was paid; and two notes, one for two thousand dollars, due in one year, and one for four thousand, due in eighteen months. These notes were not signed with the name of the Latrobe Milling Company, but were signed "P. H. Soxman, Pres't; H. C. Best, Sec'y,"—with the seal bearing the name "Latrobe Milling Company, Limited," impressed upon it. The agent brought these notes and money back to Columbus, and turned them over to Mr. Shough, then acting manager (Mr. Watson the president, being ill). The contract was made when Mr. Watson was both president and the active manager of the affairs of the Company. On receiving these notes Mr. Shough, dissatisfied with their form, wrote this letter:

"Columbus, Ohio, October 29, 1884. [434]

"Latrobe Milling Company, Latrobe, Pa.

"Dear Sir: Mr. Davis has handed us your settlement, which is all satisfactory, with the exception that the notes are not properly signed. They are only signed by the president and secretary. They should be signed 'The Latrobe Milling Company, Limited,' by P. H. Soxman, president, and H. C. Best, secretary, and your seal attached. If you are willing to put them in proper shape we will send you the notes with new ones filled out for you to sign and return; otherwise your settlement is very satisfactory, and we are glad to place you among our long list of friends. We are obliged to you for your good letter, as well as your settlement, and we shall endeavor to use it

when it will do us all good. According to the the laws of your State a corporation is only liable to the extent of the property they hold, there being no individual responsibility outside of the property, and, believing that you are willing to do what is just and right, we will ask you to assign your insurance policies to us. The notes run for a long time, and there being no other security on them we ask you to do this for us. Should your mill burn, as it is liable to do, then it would be optional with you whether you pay us or not. You will recognize that this is business, and, while we have all the confidence in you and have very flattering reports about you, at the same time you will understand that it is the business way of doing, and we have no doubt but what you will be willing to grant our request.

"Awaiting your early reply and, with best wishes, we are, etc., yours truly,

"The Case Manufacturing Co.,
"By Shough."

Subsequently, the milling company sent the following letter:

"Latrobe, Pa., December 2, 1884.
"Case Manufacturing Company.

"Dear Sir: Inclosed find notes corrected as requested; also, the insurance policy for $6,000, which you will return to me; will please pardon, as secretary has been on the road and is not at home yet, and I thought it my duty, after getting his signature, to send to you. The mill is running right along, only we have a hard time to compete with Mr. Chambers, across the way, as he has reduced the price to nothing, viz., $4.25 per barrel of flour, but the race belongs to the one who has the most sand to stand up to it.

"Yours respectfully,

"Latrobe Milling Co.,
"D. J. S."

To which letter the plaintiff returned this reply:

"Columbus, Ohio, December 4, 1884.
"Latrobe Milling Company, Latrobe, Pa.

"Dear Sirs: We are in receipt of the notes, which are all 'O. K.;' also the insurance policies, which we will have the transfer made on and returned to you to be signed, and have your agent there indorse the transfer. At the price Chambers is selling flour there surely is a loss in it, and we hope it won't take him long to see his folly and restore the price, so that you can both make some money.

"Yours truly,

"The Case Manufacturing Co.
"By Shough.

"P. S.—Accept thanks for fixing our matters up in proper shape."

At the time the original order was signed no corporation defendant existed. The parties were contemplating the formation of a corporation or association, and on May 5, 1884, they did form, under authority of the general laws of the State of Pennsylvania, an association known under the name "Latrobe Milling Company, Limited," by which the liability of the parties interested in the new association was limited to the amount of the capital stock, and the notes given in the settlement were the notes of this limited-liability company. Mr. Watson, the president of the plaintiff corporation, died in the winter of 1884-85. Thereafter, John F. Oglevee became its secretary and treasurer and general manager of its affairs. The first note not being paid when due, in the fall of 1885, Oglevee visited Latrobe to look after its payment. Subsequently, examining the records [436
in the county-seat of Westmoreland County, in which Latrobe lies, he found judgments against the milling company and mortgages upon its property. Shortly after this discovery he returned to Columbus, and thereupon the plaintiff Company returned the two notes which it had received, alleging that they did not conform to the contract, and demanded payment of the first note, two thousand dollars and interest, and, in lieu of the second, a new note executed by the Latrobe Milling Company, and not by the limited-liability company. The defendants refused to comply with this demand, and returned the notes to the plaintiff. Thereafter this suit was brought. To this suit the defendants pleaded that it was understood at the time of the original contract that they were to organize a corporation with limited liability, and that its notes were to be the notes to be given for deferred payments. Secondly, that after the organization, and after the delivery of the machinery, the plaintiff, with knowledge of the facts, acceepted the notes in full payment and satisfaction of the debt. When the case came on for trial, a jury was waived. Findings of fact were made, and a judgment entered thereon in favor of defendants, to review which these proceedings in error have been brought to this court.

Messrs. **Chas. E. Burr, Jas. S. Moorehead** and *James Watson*, for plaintiff in error:

Parol evidence of a contemporaneous verbal understanding is inadmissible to vary or contradict a written contract.

Howard v. *Thomas*, 12 Ohio St. 201; *Martin* v. *Berens*, 67 Pa. 463; *Anspach* v. *Bast*, 52 Pa. 356; *Barnhart* v. *Riddle*, 29 Pa. 96; *Hacker* v. *National Oil Ref. Co.* 78 Pa. 93; *Bast* v. *First Nat. Bank of Ashland*, 101 U. S. 93 (25: 794); *Union Mut. L. Ins. Co.* v. *Mowry*, 96 U. S. 544 (24: 674); *Dwight* v. *Pomeroy*, 17 Mass. 328.

Equitable remedies are not administered in the federal courts of law.

Jones v. *McMasters*, 61 U. S. 20 How. 9 (15: 805); *Bennett* v. *Butterworth*, 52 U. S. 11 How. 669 (13: 859).

Parol evidence will not be received to alter, add to, diminish, vary or contradict a written agreement.

Commissioners v. *McCalmont*, 3 Penr. & W. 122; Taylor, Ev. § 1132; 1 Greenl. Ev. § 275.

The verbal contract which the evidence was offered to prove was so far out of the ordinary transactions of sale that the defendants were chargeable with the knowledge that Davis had no power to make it.

Story, Agency (8th ed.) § 60, and *note 6*.

The conversations were therefore inadmissible to charge the company, and should have been excluded.

Walsh v. *Hartford F. Ins. Co.* 73 N. Y. 5; *Clark* v. *Metropolitan Bank*, 3 Duer, 241, 248; *Barnard* v. *Wheeler*, 24 Me. 412; *Deecee* v. *Manhattan Ins. Co.* 35 N. J. L. 366; *Stasner* v.

Tysen, 8 Hill, 279; *New York L. Ins. Co.* v. *Fletcher*, 117 U. S. 519 (29: 934).

If the debtor gives his own note for a debt, it will not be an absolute payment unless it is taken as such by the agreement of the parties.

Randolph, Com. Paper, §§ 1509, 1534, 1546; Story, Prom. Notes, § 104, *note 1*, and cases cited; *The Kimball*, 70 U. S. 3 Wall. 45 (18: 53); *Downey* v. *Hicks*, 55 U. S. 14 How. 240 (14: 404); *Elby* v. *Hoopes*, 1 Pennypacker, 175; *McIntyre* v. *Kennedy*, 29 Pa. 448; *League* v. *Warsing*, 85 Pa. 244; *Merrick* v. *Boury*, 4 Ohio St. 60; *Dixon* v. *Holdroyd*, 7 El. & Bl. 903.

The intention to make a note a satisfaction of the original note or debt must not be left to mere inference, but must be clearly proved.

Messrs. W. H. Young, J. A. Marchand and **Paul H. Gaither** for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The first question is as to the admission of the testimony of H. C. Best, a witness for and one of the defendants, as to conversations between them and the plaintiff's agent, Davis, at the time the original contract was signed. The scope of this testimony was substantially that they proposed to organize a corporation, with limited liability; that the purchase was to be made in the interest of such corporation, and that its obligations were to be given for the deferred payments. The contention is that this [37] testimony varied the original contract, and was therefore inadmissible.

The first and obvious reply is that it makes against the contention of plaintiff that its acceptance of the notes of the limited-liability company was through a misunderstanding. Whatever obligations may have been assumed by the original contract, the fact that the plaintiff knew that the contemplation of the purchasing parties was a limited-liability company, and that on the delivery of the machinery it accepted the notes of such company, is evidence strong, if not convincing, that its acceptance of such notes was not through a mistake, but from a recognition of the understanding between the parties at the time of the original contract. How can the plaintiff, knowing that the expressed understanding of the purchasers at the time of the original contract was the creation of a limited-liability company, and the giving of its notes in satisfaction of the deferred payments, now be permitted to say that the written contract spoke of no such limited-liability company, and that it took the notes of such a company through misunderstanding and mistake? Whatever other significance and value such testimony may have, it is certainly significant and competent upon the question whether the acceptance of the notes of this limited-liability company was intentional or through mistake.

Further than that, the original contract upon its face suggested corporate rather than personal liability. The signatures were "Latrobe Milling Company. P. H. Soxman, Pres't. H. C. Best, Sec'y. D. J. Soxman, Treas." While if there were no corporation such signatures might impose personal liability, yet the purport and notice of such signatures was corporate and not individual liability. When to that is added the knowledge of the plaintiff as to the character of the proposed corporation, and its acceptance of the notes of the corporation in fact organized, can it be doubted that the plaintiff knew the significance of these signatures, or that it was knowingly dealing with a contemplated corporation, and knowingly accepted the notes of such corporation as a fulfillment of all the contract obligations assumed by this instrument? The idea that the plaintiff supposed it was dealing with individuals, and [43] contemplated personal liability, is also negatived by the letter of October 29, 1884, which shows that it understood that it was dealing with a corporation, and that, by the laws of Pennsylvania, corporate liability extended not beyond the assets of the corporation and cast no burden upon the individual stockholders. The parol testimony thus admitted was not to contradict the language of the written contract, but to explain any doubt as to its meaning, and to fortify the claim of the defendants that the subsequent acceptance of the notes of the limited-liability company was no departure from the thought of the original contract, but a well-understood and intentional recognition of its real meaning. We see no error in the admission of this testimony.

The second and third assignments of error may be considered together. They present the proposition that the court erred in finding that the notes of the limited-liability company of October 20, 1884, were accepted as payment and satisfaction of the original liability under the contract. Here we face the proposition that we are not triers of fact. And if there were evidence upon which such a finding might properly rest, we should accept the finding as conclusive and inquire no further into the testimony than we should into its sufficiency to sustain the verdict of a jury. Surely the facts that we have already referred to, the correspondence between the parties, are some, if not satisfactory and conclusive, evidence that these notes were accepted as closing out the original contract. The conduct of the plaintiff tends to support this view. It took the check of the limited-liability company for one thousand dollars and received from it certain notes; and then, stating that it was aware that no liability attached beyond the amount of the property of the corporation, it requested and received a change of notes into the supposed proper form of obligations of the limited-liability company, and also insurance policies on the property, and then, using one of these notes by way of discount, treated the matter as closed for more than a year. Supposing this first note discounted by the plaintiff had been paid by the milling company, could the plaintiff then be heard to say that these notes were not received in payment? While in fact it was not paid, [43] yet the plaintiff treated it as its property and negotiated it. Can it now be heard to say that such note was simply evidence of the amount due, when it received and used it as its property? It is unnecessary to affirm that these matters show conclusively that the obligations assumed by the original contract were satisfied and discharged by the settlement and notes of October, 1884. It is enough to affirm that there is in these matters testimony from which such a conclusion might be drawn; and there-

fore the findings of the trial court in this respect cannot by this court be ignored.

The fourth allegation of error is that notwithstanding the acts of Mr. Shough may have apparently been such as to bind the Company plaintiff, he had in fact no authority to bind the Company by such acts. It is sufficient to say, in respect to this matter, that his own testimony, corroborated by that of other members of the Company, is that during the dates of these transactions he was acting as its financial manager, and therefore it cannot now repudiate its liability for his actions.

These are the only errors alleged, and in them we see nothing to justify us in disturbing the rulings of the trial court. *The judgment is therefore affirmed.*

LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILROAD COMPANY, *Appt.*, *v.* BLUFORD WILSON.

(See S. C. Reporter's ed. 501-509.)

Appealable decree—counsel fees, when payable by receiver—right of priority—party, when liable—equality in security—services of counsel, when lienholders not liable for—liability for expenses.

1. A decree, upon an intervening petition in a foreclosure suit against a railroad company, adjudging that the sum of $7,650 is a lien on the proceeds of the sale of the mortgaged premises, and that the corporation organized by the parties who purchased at said sale pay that sum to the intervenor for services as counsel, may be appealed from by said new corporation.
2. The term "wages of employés," in an order requiring a receiver of a railroad company to pay wages of employés, does not include the services of counsel employed for special purposes.
3. Where the receiver has not paid a claim which it is alleged comes within an order requiring him to pay it, and the question is presented to the court as to the liability of the property for the claim, the court is not foreclosed by the order, but may determine the extent of liability of the property to such claim, and what its rights of priority are.
4. A party who takes the benefit of services performed by counsel, by which moneys were secured and paid to a receiver, ought to pay for such services; and equity may properly decree payment therefor.
5. They who are compelled to set third parties into an equality with themselves in the matter of a security ought not to be compelled to pay counsel who brought about such equality.
6. Services rendered at the instance of a railroad company to preserve control of that portion of its road not covered by the first lien cannot be considered as services to the holders of bonds secured by that lien.
7. Security holders are not liable, either in law or in equity, for the expenses incurred by their debtor in carrying into effect a scheme which the latter believes will enable it to pay its interest to them, but which, in fact, does not accomplish such result.

[No. 153.]

Argued Jan. 21, 1891. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Southern District of Illinois, that the sum of $7,650, allowed the intervenor, Bluford Wilson, is a lien upon the proceeds of sale of the mortgaged premises superior to the deeds of trust, and that the Louisville, Evansville and St. Louis Railroad Company shall pay said sum to him with interest and costs. *Reversed, and case remanded with instructions to allow the intervenor $300, costs in this court to be divided.*

Statement by *Mr. Justice* **Brewer:**

On the 30th day of December, 1884, Isaac T. Burr filed in the Circuit Court of the United States for the Southern District of [502 Illinois his bill of complaint against the Louisville, Evansville and St. Louis Railway Company; the Mercantile Trust Company of New York, trustee; Noble C. Butler, trustee, and Robert A. Watts, trustee. The bill set forth the fact that the complainant was a judgment creditor of the railway company, and the others, trustees in deeds of trust given by the company. Subsequently, a cross-bill was filed by two of the trustees. The original bill prayed the appointment of a receiver, and on the 3d day of January, 1885, George F. Evans was appointed receiver and took possession of the railway property. In the order of appointment was this provision: "It is further ordered, adjudged and decreed that the said receiver, out of the income that shall come into his hands from the operation of the said railway or otherwise, do proceed to pay all just claims and accounts for labor, material, supplies, salaries of officers and wages of employés that may have been earned or furnished within six months prior to January 1, 1885, and all taxes." The outcome of the litigation was the sale of the road under a decree of foreclosure of the deeds of trust. This decree was entered April 23, 1886. A similar decree of sale was entered in the Circuit Court of the United States for the District of Indiana, in which court, also, foreclosure proceedings were had, the road extending through both districts. On the 9th of June, 1886, the property was sold in obedience to these decrees. On the 22d of July, 1886, this sale was confirmed. On the 8th of October, 1886, an order was entered in the Circuit Court in the Indiana District, directing the receiver to surrender the possession of the property sold, to the Louisville, Evansville and St. Louis Railroad Company, a corporation organized by the parties interested in the purchase, and to which the purchasers had conveyed all their rights under their purchase. This order was not entered in the Illinois circuit court at

---

NOTE.—*As to powers and duties of receivers*, see *note* to Davis v. Gray, 21: 447.

As to lien of an attorney for compensation, see *note* to Texas v. White, 19: 992.

As to right of mortgagor to income and products of mortgaged premises, see *note* to Gilman v. Illinois & M. Teleg. Co. 23: 405.

As to priority between mortgage and mechanics' lien, see *note* to Brooks v. Burlington & S.W. R. Co. 25: 1057.

that time; but, nevertheless, on the 11th of October, 1886, the receiver surrendered the entire property to the new corporation. In the order directing this surrender were provisions for the payment by the new corporation of all claims which might be adjudged superior in equity to the deeds of trust fore-
[503] closed, with the right to retake possession of the property if payment was not made, and with the further right to the new corporation to appeal from any adjudication of such claims. Appellee intervened in the Illinois circuit court, and on the 10th day of August, 1887, an order was entered adjudging that he be allowed $7,650. This order also provided: "And the court does further order, adjudge and decree that the receiver, George F. Evans, forthwith pay the same to the said petitioner, together with the costs of the proceedings, out of any money in his hands arising from the operation of the said railway as such receiver, and, if that is insufficient, then that the same be paid, prior to the bonded debt, out of the proceeds of the sale of the mortgaged premises." On the 29th of August, 1887, the order entered in the Indiana circuit court on October 8, 1886, was, by the direction of the circuit judge, entered in the Illinois circuit court as of the date of October 8, 1886, and on the same day an order was entered reciting the appearance of the receiver; that he showed to the court that he had surrendered possession on the 11th of October, 1886; and, in addition, providing, "In consideration thereof, and of the decree herein entered on August 10, 1887, it is ordered, adjudged and decreed that the sum of seven thousand six hundred and fifty dollars, allowed the intervenor, Bluford Wilson, together with the costs incurred on his intervention, is a lien and charge upon the earnings of the said property while in the hands of the receiver, and upon the proceeds of sale of the mortgaged premises, prior and superior to the deeds of trust of June 1, 1881, and March 1, 1882, and it is thereupon adjudged, ordered and decreed that the Louisville, Evansville and St. Louis Railroad Company shall, within twenty days from this date, pay to the said intervenor or into court for him the said sum of seven thousand six hundred and fifty dollars ($7,650), with interest from this day, and the costs of the said intervenor upon this intervention." The order also gave an appeal to the new corporation, and granted a supersedeas on the filing of a bond in the penalty of ten thousand dollars. This bond was filed, and the appeal perfected. The appeal was taken from the order of August 29.

Messrs. **Alex. P. Humphrey,** *J. E. Iglehart, Edwin Taylor* and *Geo. M. Davis,* for appellant:

The amount allowed the intervenor is not a lien either upon the earnings of the property in the hands of the receiver or upon the proceeds of the sale.

The claim of the intervenor is not of that class to which a court of equity will allow precedence over mortgage bondholders.

St. Louis, A. & T. H. R. Co. v. *Cleveland, C. C. & I. R. Co.* 125 U. S. 658 (31: 832); *Fosdick* v. *Schall,* 99 U. S. 235 (25: 339); *Fosdick* v. *Southwestern Car Co.* Id. 256 (344); *Huidekoper* v. *Hinckley Locomotive Works,* Id. 258 (344); *Miltenberger* v. *Logansport R. R. Co.* 106 U. S. 311 (27: 127); *Union Trust Co.* v. *Souther,* 107 U. S. 591 (27: 488); *Union Trust Co.* v. *Walker,* Id. 506 (344); *Burnham* v. *Bowen,* 111 U. S. 776 (28: 596); *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434 (29: 963); *Penn* v. *Calhoun,* 121 U. S. 251 (30:915); *Porter* v. *Pittsburg B. S. Co.* 120 U. S. 649 (30: 830); *Toledo, D. & B. R. Co.* v. *Hamilton,* 134 U. S. 296 (33: 905); *Union Trust Co.* v. *Morrison,* 125 U. S. 592 (31:827); *Kneeland* v. *American L. & T. Co.* 136 U. S. 91 (34: 379).

Messrs. **Bluford Wilson** and *W. S. Opdyke,* for appellee:

The Company defaulted in its interest and the bondholders funded their coupons repeatedly, and did not enter or foreclose until long after the rights of the appellee accrued.

Hale v. *Frost,* 99 U. S. 389 (25: 419); *Union Trust Co.* v. *Souther,* 107 U. S. 594 (27: 489); *Burnham* v. *Bowen,* 111 U. S. 779 (28: 597); *Fosdick* v. *Schall,* 99 U. S. 252 (25: 342).

Until possession of the mortgaged premises is actually taken, or until the institution of a receivership at the instance and for the benefit of the mortgagees, they are not entitled to the earnings, even although the mortgages in express terms cover income.

Galveston, H. & H. R. Co. v. *Cowdrey,* 78 U. S. 11 Wall. 483 (20: 207); *American Bridge Co.* v. *Heidelbach,* 94 U. S. 798 (24: 144); *Dow* v. *Memphis & L. R. R. Co.* 124 U. S. 652 (31:565); *Sage* v. *Memphis & L. R. R. Co.* 125 U. S. 361, 377 (31: 694, 698).

The assignees of labor and supply claims have the right to be subrogated to all the rights of original holders.

Union Trust Co. v. *Walker,* 107 U. S. 596 (27: 490); *Ketchum* v. *Duncan,* 96 U. S. 659 (24: 868); *Wood* v. *Guarantee Trust & S. D. Co.* 128 U. S. 416 (32: 472).

The mere reservation of the right to appeal where none otherwise exists cannot create such right.

Farmers L. & T. Co. v. *Waterman,* 106 U. S. 265 (27: 115).

The appellant, not having appealed from the order of August 10, 1887, should not now be heard by way of appeal from orders necessarily made to carry into effect the unimpeached decree of the court adjudicating the appellee's rights.

Central Trust Co. v. *Grant Locomotive Works,* 135 U. S. 207 (34: 97).

Mr. Justice **Brewer** delivered the opinion [504
of the court:

We think the appeal was properly taken. At the time the order of August 10 was entered, the receiver was not in possession; he had surrendered the property more than nine months prior thereto. When he surrendered the property, he closed up his receivership. A decree against him was not personal, but official. It was not the contemplation of the court that any personal liability should be cast upon him. He not only had no railroad funds or property in his possession, out of which to pay this allowance, but he had no right to retake that which he had surren-

dered. The reservation made in the order entered in the Indiana court, of the right of the court to retake possession of the property surrendered, conferred no rights on the receiver; it was simply a reservation to the court, which might, under that reservation, by the old or a new receiver, at any time retake possession when its allowances within the scope of the order of surrender were not paid. So, the order of August 10 was a mistake. It neither bound the appellant nor the property which it had received. It was not a purchaser of the railroad property, and did not become, until August 29, a party to the record in the Illinois court. It is true that, on August 29, the circuit judge, directing the entry in the Illinois court of the order made nearly a year before in the Indiana court, directed that it should be entered as of August 8, 1886, the date of its entry in the Indiana circuit court; but such *nunc pro tunc* entry, while proper for the protection of the receiver, could not antedate the subjection of the new corporation to the orders and decrees of the Illinois circuit court. It could justly say that it was not a party to the proceedings in that court until the entry of August 29, 1887. There was no misunderstanding, no misrepresentation, no deceit, in these matters. Immediately on the entry of this order of August 29, a transcript of the order from the Indiana circuit court, a new decree in favor of the intervenor was entered, a decree for the first time binding the appellant. This was not an order in execution, merely, of the former decree, such as those noticed in the case of *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207 [34: 97], but it was the first order against and binding the appellant. We are therefore compelled to notice the merits of this allowance.

The allowance to the appellant was for three matters. He does not sue for services as general counsel of the mortgagor company, or for salary as an officer of that company. With respect to the provision in the order of appointment, he claims to come under the descriptive words therein used, "wages of employés." If that fails him, then he appeals to the general equity powers of the court to compensate him as one whose services were beneficial to the security holders. On the meaning of the words "wages of employés," he cites the case of *Gurney* v. *Atlantic & G. W. R. Co.*, 58 N. Y. 358, in which an order directing the receiver of a railway company, thereby appointed, to pay debts "owing to the laborers and employés" for labor and services, was held broad enough to include a debt due to Hon. Jeremiah S. Black, for professional services as counsel. Without criticising that decision, or noticing the special circumstances which seemed in the judgment of that court to justify the inclusion of professional services within the descriptive words of the appointment, we are of the opinion that the term "wages of employés," as used in the order now under consideration, does not include the services of counsel employed for special purposes. *Vane* v. *Newcombe*, 132 U. S. 220, 237 [33: 310, 314].

The terms "officers" and "employés" both, alike, refer to those in regular and continual service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employé. They imply continuity of service, and exclude those employed for a special and single transaction. An attorney of an individual, retained for a single suit, is not his employé. It is true, he has engaged to render services; but his engagement is rather that of a contractor than that [5
of an employé. The services of appellee, therefore, did not come within the order appointing the receiver. We would not be understood as asserting, even by implication, that the terms of an order of appointment of a receiver vest in all claimants an absolute right as against the security holders. Such terms may be, and doubtless are, a protection to the receiver; and what he does and pays within those terms may be, thereafter, beyond the challenge of any party interested in the property. But when he has not acted, and the question is presented to the court as to the liability of the property for any claim, the court is not foreclosed by the order of appointment, but may consider and determine equitably the extent of liability of the property to such claim, and what its rights of priority may be. Hence, as the receiver did not pay this claim, the parties in interest may rightfully challenge its priority, even if it were within the very letter of the order of appointment of the receiver.

What were the services for which the appellee made his claim; and were they so beneficial to the security holders that a court of equity might justly give them priority? And the question, it will be borne in mind, is not, whether out of the earnings of the road such claims are payable, but whether, where there are no surplus earnings, they may be paid out of the corpus of the property in preference to secured liens.

The first matter is this: Prior to the appointment of a receiver the railway company leased to the Illinois Midland Railway Company certain engines. When the latter road passed into the hands of a receiver intervenor was employed to get the engines back and rental for their use. In this service he secured an allowance against its receiver for $1,500, upon which $1,340.18 was paid, and paid after the receiver in this case was in possession. The only testimony as to the value of such service fixed it at $300. Part of such service was rendered more than six months prior to the appointment of a receiver in this case, but, apparently, the important part within such time. This recovery inured to the benefit of the security holders, as placing so much more money in the hands of the receiver for the purpose of discharging obligations against the company payable before [5
the bonds. We think it may fairly be held that the party who takes the benefit of such a service ought to pay for it; and that equity may properly decree payment therefor. As justly remarked by *Lord* Kenyon in *Read* v. *Dupper*, 6 T. R. 361, "The principle has long been settled that a party should not run away with the fruits of a cause without

satisfying the legal demands of his attorney, by whose industry and expense these fruits were obtained." In *Renick* v. *Ludington*, 16 W. Va. 392, it is said: "The lien (even in cases of *quantum meruit*) is in the nature of an equitable lien (3 Cooper's Tenn. Ch. 23), and is based on the natural equity that the plaintiff ought not to be allowed to appropriate the whole of a judgment in his favor without paying thereout for the services of his attorney in obtaining such judgment." See also *Mahone* v. *Southern Teleg. Co.* 33 Fed. Rep. 702, and *Re Paschal*, 77 U. S. 10 Wall. 483 [19: 992]. We think, therefore, there was no impropriety in allowing intervenor three hundred dollars for these services.

The second item of intervenor's claim is this: The Railroad Company was not paying operating expenses and interest; it was running behind. Certain parties interested in and officers of the road advanced moneys to continue its operation and prevent foreclosure proceedings. After advancing a considerable sum, they became anxious to secure their advances, and upon the intervenor's advice they took assignments of pay-rolls, so as to bring them within the scope of the rulings of this court, as to preferential payment of employés, and on foreclosure these claims, thus evidenced and secured, were recognized and given equality of right with the security holders in the reorganization scheme. One of the witnesses as to the value of these services testified that they were worth five thousand dollars, adding, "Of course, I mean that such fees should be paid by the parties benefited." That states the true equities of the case. The parties who, acting under the intervenor's advice, took such steps as to secure their advances, and thereby obtained equality of interest with the lienholders, should pay him. They who are compelled to let third parties into an equality with
508] themselves in the matter of security ought not to be compelled to pay counsel who brought about such equality. As happily said by counsel for appellant: "This is taking the funds belonging to a prior mortgagee to pay counsel to devise a scheme by which the subsequent lender of money is preferred before him."

The remaining matter is this: The Louisville, Evansville and St. Louis Railway Company was a corporation made up by the consolidation of the Louisville, New Albany and St. Louis Railroad Company and the Evansville, Rockport and Eastern Railway Company. At the time of the consolidation there was on the first-named property a deed of trust of three millions of dollars, and on the latter one of nine hundred thousand dollars. After consolidation a new deed of trust for one million of dollars was executed on the entire property. Fearing that the trustee in the deed of trust on the Evansville, Rockport and Eastern Railway Company might take possession of that division, intervenor was employed to prevent such action, and he commenced suits to enjoin the trustee therefrom. He also successfully negotiated with the bondholders, and thus preserved the unity of operation and control until the commencement of the proceedings in this suit, whereby the entire property was taken possession of and operated by a single receiver, and subsequently sold and passed into the new corporation. At the sale both divisions were sold. The Evansville division being sold subject to the deed of trust of nine hundred thousand dollars, brought only twenty thousand dollars, to be applied on the second lien—the one given by the consolidated company.

The services thus rendered were at the instance of the Railroad Company; and it is not perceived how services rendered at its instance, to preserve control of that portion of its road not covered by the first lien, can be considered as services to the holders of bonds secured by that lien. The primary object of such services was the benefit of the Railroad Company. It was to enable it to retain the control and receive the earnings of as large an extent of the road as possible. As such services did not secure any additional interest to the lienholders—in fact, they advanced the moneys due for interest on the Evansville first mortgage—it seems inequi- [5
table that they should be held responsible and be compelled to pay the party employed by the Railroad Company. It cannot be that security holders are liable, either in law or in equity, for the expenses incurred by their debtor in carrying into effect a scheme which the latter believes will enable it to pay its interest to them, but which, in fact, does not accomplish such result. It was the debtor's act; and if it failed of accomplishing hoped-for results, the party employed must look to his employer alone for compensation, and cannot charge the bondholders therefor, on the theory that it was believed that it might inure to their ultimate benefit. In this matter, also, the allowance to the intervenor as against the security holders, represented by the appellant, was unwarranted.

The decree, therefore, will be reversed, and the case remanded with instructions to allow the intervenor three hundred dollars. Costs in this court will be divided.

JOSEPH T. WILLIAMS, *Appt.*, [5
v.
UNITED STATES.

(See S. C. Reporter's ed. 514-524.)

Parties in equity—inadvertence and mistake—equity jurisdiction—suit by United States to cancel contract for public lands.

1. Where there are outstanding two titles to the same land held by different parties adversely to the real owner, the latter may bring a suit against either to devest him of his title without joining the other; a court of equity has jurisdiction to devest either one of the adverse holders of his title in a separate action.

NOTE.—*In what cases equity will relieve from mistake or ignorance of material fact.* See *note* to M'Ferran v. Taylor, 2:436.

As to whether equity will relieve against a mistake of law, see *notes* to Hunt v. Rousmanier, 7:27; Same v. Same, 5: 589.

When awards will be set aside by a court of equity.

2. Inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to devest a title acquired thereby.

3. Where public land was improperly certified to the State of Nevada under the Act of June 16, 1880, so that in equity the State had no title, and its contract with the appellant to sell the land to him transferred nothing to him, the United States may maintain a suit for the cancellation of such contract and it may be decreed therein that the title of appellant in the land be devested and that he surrender for cancellation his contract.

4. The power given by the Act of June 16, 1880, to the Secretary of the Interior to approve of the selection made by the state authorities of public lands under that Act authorizes him in his discretion to refuse to approve of such selection, and to hold the title in the general government, where there are prior equities to be protected.

[No. 157.]

Argued Jan. 21, 22, 1891. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the District of Nevada devesting appellant's title in public land and directing the cancellation of his agreement with the State. *Affirmed.*

Statement by *Mr. Justice* **Brewer:**

On June 16, 1880, Congress passed an Act, of which the following are the first two sections:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there be, and are hereby, granted to the State of Nevada two million acres of land in said State in lieu of the sixteenth and thirty-sixth sections of land heretofore granted to the State of Nevada by the United States: *Provided,* That the title of the State and its grantees to such sixteenth and thirty-sixth sections as may have been sold or disposed of by said State prior to the passage of this Act shall not be changed or vitiated in consequence of or by virtue of this Act.

"Sec. 2. The lands herein granted shall be selected by the state authorities of said State from any unappropriated, non-mineral public land in said State, in quantities not less than the smallest legal subdivision; and when selected in conformity with the terms of this Act, the same shall be duly certified to said State by the commissioner of the General Land Office, and approved by the Secretary of the Interior." 21 Stat. 287.

On May 3, 1883, the lands in controversy were certified to the State of Nevada under this Act. This certification was based on an application by the State, formally executed July 29, 1882. On May 20, 1882, the appellant applied to the proper state officers to purchase these lands. On February 2, 1884, in pursuance of this application, a contract was entered into between the State and the appellant for the sale to him of the lands in controversy, he, at the time, paying one fifth of the purchase-money, and contracting to pay the balance in subsequent annual installments. On December 18, 1884, this bill was filed by the United States in the Circuit Court for the District of Nevada against the appellant alone. Generally speaking, the scope of the allegations in the bill is that the lands were improperly certified to the State; that in equity it had no title, and its contract with appellant transferred nothing to him; and the prayer was for the cancellation of the contract between the appellant and the State of Nevada, and an adjudication that the appellant had no title or interest in such lands. On November 26, 1886, a decree was entered (30 Fed. Rep. 309) by which the title of appellant in the lands was devested, and he directed to surrender up to the State of Nevada, for cancellation, all contracts or agreements he had with that State for these lands. From such decree appellant has appealed to this court.

Messrs. J. H. Hickcox, Jr., and **J. K. Redington,** for appellant:

The certification and approval of the lands to the State passed the legal title as fully and effectually as the same could be effected by a patent.

Frasher v. *O'Connor,* 115 U. S. 116 (29:316).

To vacate this title, even if good ground therefor in law existed, it was necessary for the United States to assume the position of party plaintiff in a proceeding in equity.

United States v. *Hughes,* 52 U. S. 11 How. 552 (13: 809); *Moore* v. *Robbins,* 96 U. S. 530 (24: 848); *United States* v. *Minor,* 114 U. S. 233 (29:110); *Mullan* v. *United States,* 118 U. S. 271 (30: 170).

The United States assumed all the burden and obligations of a private party in such a position, and was obliged to call in all necessary parties.

United States v. *Flint,* 4 Sawy. 42; *United States* v. *White,* 17 Fed. Rep. 561; *United States* v. *Colgate,* 21 Fed. Rep. 318; *United States* v. *Union Nat. Bank,* 10 Ben. 408; *United States* v. *Tetlow,* 2 Low. 159; *Fink* v. *O'Neil,* 106 U. S. 272 (27:196); *United States* v. *North Carolina,* 136 U. S. 211 (34:336).

It is not enough that fraud and imposition have been practiced upon the Department; it must appear that by the law properly administered the title should have been awarded to the claimant.

Lee v. *Johnson,* 116 U. S. 48 (29: 570); *Sparks* v. *Pierce,* 115 U. S. 408 (20: 428); *Bohall* v. *Dilla,* 114 U. S. 47 (29: 61).

and when not. See *note* to Burchell v. Marsh, 15: 96.

As to cancellation of a deed or a contract, in equity, for fraud, concealment or misrepresentation, see *note* to Neblett v. Macfarland, 23: 471.

As to deed avoided in equity, by fraud, insanity, drunkenness, duress, undue influence, fraud on marriage; from ward to guardian; from heir to executor; cestui que trust to trustee; imbecility,—see *note* to Harding v. Handy, 6: 429.

As to equity jurisdiction after trial at law, see *note* to Smith v. M'Iver; 6: 152.

As to jurisdiction of equity to restrain trespasses and wrongs, see *note* to Northern Indiana R. Co. v. Michigan Cent. R. Co. 14: 674.

As to necessary parties in equity, see *note* to Marshall v. Beverley, 5: 97.

That patents for land may be set aside for fraud, see *note* to Miller v. Kerr, 5: 361.

At the date of the State's election Matthiessen and Ward had nothing but a mere naked possession, which does not run against the government or any purchaser under it.

Sparks v. *Pierce*, 115 U. S. 408 (20: 428); *Jourdan* v. *Barrett*, 45 U. S. 4 How. 169 (11: 924); *Burgess* v. *Gray*, 57 U. S. 16 How. 48 (14: 839); *Frisbie* v. *Whitney*, 76 U. S. 9 Wall. 187 (19: 668); *Gibson* v. *Chouteau*, 80 U. S. 13 Wall. 92 (20:534); *Oaksmith* v. *Johnston*, 92 U. S. 343 (23: 682); *Morrow* v. *Whitney*, 95 U. S. 551 (24: 456).

Mr. **A. X. Parker**, *Assistant Atty-Gen.*, for appellee:

In seeking to acquire the land under the state location, Williams attacks the preferential rights of the original settler and his successors.

Lamb v. *Davenport*, 85 U. S. 18 Wall. 307 (21: 759); *Atherton* v. *Fowler*, 96 U. S. 513, 518, 519 (24: 732, 734); *Nickals* v. *Winn*, 17 Nev. 188; *Rector* v. *Gibbon*, 111 U. S. 276, 284, 287 (28: 424, 430, 431).

The United States has the right to initiate and maintain a suit of the nature of the one at bar.

United States v. *San Jacinto Tin Co.* 125 U. S. 279 (31: 749); *United States* v. *Beebe*, 127 U. S. 338 (32: 121); *Re Neagle*, 135 U. S. 66–71 (34: 72–74); *United States* v. *American Bell Teleph. Co.* 128 U. S. 315 (32: 450); *Moore* v. *Robbins*, 96 U. S. 530 (24: 848); *Moffat* v. *United States*, 112 U. S. 24 (28: 623); *United States* v. *Iron Silver Min. Co.* 128 U. S. 673, 676 (32: 571, 573).

Mr. Justice **Brewer** delivered the opinion of the court:

The first contention of appellant is, that this action could not be maintained because the State of Nevada was not made party, it holding the legal title;

Second, that the circuit court erred in finding that there was fraud or wrong, by which the title was passed to the State of Nevada; and,

[16] *Third*, that even if there were fraud or wrong in this matter, the outcome of the proceedings was the necessary one, and therefore the bill should not have been sustained.

With respect to the first contention: It cannot be doubted that the certification operated to transfer the legal title to the State (*Frasher* v. *O'Connor*, 115 U. S. 102 [29: 311]); nor that the contract between the State and appellant passed to him the equitable title, the legal title being retained by the State, simply as security for the unpaid part of the purchase money. The proposition, therefore, is that, where there are outstanding two interests or titles, held by different parties, the real owner cannot proceed against either without joining the other; that only one action can be maintained to devest these parties of their separate titles; and that to that action both adverse holders must be parties. The proposition is not sound. A court of equity has jurisdiction to devest either one of the adverse holders of his title, in a separate action. Doubtless the court has power, when a separate action is instituted against one, to require that the other party be brought into the suit, if it appears necessary to prevent wrong and injury to either party, and to thus fully determine the title in one action; but such right does not oust the court of jurisdiction of the separate action against either. It has jurisdiction of separate actions against each of the adverse holders, and there is no legal compulsion, as a matter of jurisdictional necessity, to the joinder of both parties as defendants in one action. There are special reasons why this rule should be recognized in this case. It may be that the circuit court would not have jurisdiction of an action against the State; that an action against a State, on behalf of the United States, can be maintainable only in this court; and that when brought in this court no other party than the State can be made defendant. We do not decide that these things are so, but suggest the difficulty which must have presented itself to the counsel for the government, and which justifies a separate suit against the holder of the equitable title. The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been [5 used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer,—it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government. The jurisdiction of the circuit court over this bill was properly sustained.

The second contention is, that the court erred in finding that there was fraud or wrong by which the title was taken away from the general government. The allegations of the bill are of fraud and wrong, but they also show inadvertence and mistake in the certification of the State; and it cannot be doubted that inadvertence and mistake are, equally with fraud and wrong, grounds for judicial interference to devest a title acquired thereby. This is equally true in transactions between individuals, and in those between the government and its patentee. If, through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey? So of any other inadvertence and mistake, vital in its nature, by which a title is conveyed when it ought not to have been conveyed. The facts and proceedings attending this transfer of title are fully disclosed in the bill. They point to fraud and wrong, and equally to inadvertence and mistake; and if the latter be shown, the bill is sustainable, although the former charge against the defendant may not have been fully established.

For satisfactory answer to this inquiry, a fuller statement of facts is necessary: On May 19, 1879, defendant made in the proper land office of the United States a desert-land entry for two hundred and forty acres, including therein the lands in controversy. 19 Stat. 377. On July 26, 1879, he conveyed to the New Philadelphia Silver Mining Company, for the sum of five thousand dollars, eighty acres thereof, described as the east ½ of southeast ¼, section 33, township 8, range 50 east, Nye County, Nevada. The conveyance was with this warranty: "And the party of the first part agrees to and with the party of the second part that he has full right and power to sell and convey the said premises and water rights, and that they are now free from all incumbrances, sales or mortgages." Within the succeeding year the grantee erected a ten-stamp quartz mill on the premises, at the expense of about fifty-eight thousand dollars. Becoming embarrassed, this eighty acres, with improvements, passed by sheriff's and receiver's deeds to Matthiessen and Ward, the title thus passing finally by the 16th of December, 1881. The consideration of five thousand dollars, named in the original deed, was paid to Williams. On May 20, 1882, he executed papers for the relinquishment to the government of his desert-land entry, and at the same time made application to the State for the purchase of these lands as agricultural lands. At his instance, the State, on July 29, 1882, applied to the government for a certification of these lands. On August 12, 1882, by letter from the Land Department, cancellation of the desert-land entry was made on the books of the local land office, and subsequently, as stated, in May, 1883, the lands were certified to the State, and thereafter the application of Williams for purchase from the State was accepted, and the contract entered into.

Further, it appears that on June 20, 1881, the receiver of the Philadelphia company wrote to the commissioner of the land office, giving notice of the company's interest in these lands, and asking instructions as to steps necessary to protect its title. This information was followed, on February 10, 1882, by interview and communication to the Department from the counsel of Matthiessen and Ward. On April 14, 1882, the commissioner answered the inquiry of the receiver, informing him that desert-land claims were not assignable. On May 23 he advised Ward that there was no evidence in his office showing a relinquishment by Williams of the desert-land entry. In August, 1882, the land register of Nevada, replying to an inquiry of Matthiessen and Ward, said: "Mr. Williams informed me that he would try and procure the cancellation of his desert-land entry; we have received no notice as yet of the cancellation of said entry." As weeks before Williams had filed relinquishment papers in that office, and the matter of cancellation, having been referred to Washington, was waiting response, this communication was obviously deceptive, and suggests conspiracy between the register and Williams. So obvious is this, that on September 11, 1882, the commissioner of the General Land Office wrote to the register for an explanation. In that letter, after referring to his information to the agent of Matthiessen and Ward, as above quoted, he adds: "Upon a cursory examination of the matter it would seem that the information, if furnished by you as aforesaid, was not in accordance with the facts in the case and misleading in result, and therefore calculated to create suspicion in the public mind as to the honest administration of your office in matters coming before you for official action. Large and valuable interests were affected by the relinquishment of Williams, and the company should have been notified when it was filed in your office, or, at all events, when it applied to you through its agent for information. Please explain the matter at once." On September 6, 1882, an application was made on behalf of Matthiessen and Ward for reinstatement of the desert-land entry, and a protest against embracing in the State's selection the eighty acres, heretofore referred to, conveyed by Williams to the Philadelphia company. This application for reinstatement of the desert-land entry was denied by the land commissioner on February 21, 1883. The application by the State for this land was at the instance of the appellant, and the application was included in a list known as "List Number 24." On January 8, 1883, Matthiessen and Ward made, in due form, an application for the five acres upon which the buildings were situated, as a mill-site. The application was denied by the land [520 office in Nevada on the ground that the land was embraced in the selection theretofore made by the State of Nevada. Appeal was made to the land office at Washington, and the appeal papers were received there January 18, 1883. On January 23, Curtis & Burdett, attorneys for Matthiessen and Ward, appeared in the land office at Washington and asked to be advised of any action. Immediately thereafter the officers in the Land Department noted, in pencil, within brackets, on list 24, against the land in controversy, these words, "mill-site." The effect of this annotation was to suspend action in respect to these lands until the adverse claim had been investigated and removed. Thereupon the controversy as to the right to select these lands proceeded in the Department. While this controversy was pending in the Department and undetermined, list 24 was presented for approval, and the annotation of the words "mill-site" having been by some person erased, and there appearing on the face of the list no controversy as to any of the lands, the certificate was made in May, as heretofore stated. The controversy proceeded in regular order until December, 1883, without any suspicion on the part of the commissioner of the land office that any certification of title had been made to any of these lands or that the controversy was not still open for adjudication. In December, 1883, on discovery of this mistake by the land commissioner, he telegraphed to the governor of Nevada to return the approved list, which application was declined, by telegram, on the advice of the attorney-general of the State. On the 14th of Decem-

ber, 1883, the Secretary of the Interior telegraphed to the governor of Nevada, as follows:

"[Received at Carson, Dec. 14, 4.03 p. m.
"Dated Washington, D. C. — 14, 1883.]

"To Governor of Nevada, Carson City, Nev.:

"Has land mentioned in dispatch of commissioner, of 11th instant, been sold and deeded, or either? If so, to whom? Unless the list can be returned and corrected I desire to have proceedings commenced immediately to set aside the certification.

"H. M. Teller, Secretary."

[521] On the same day the appellant telegraphed as follows:

"[Received at Carson, December 14, 4.46 p. m.
"Dated Washington, December 14, 1883.]

"To Governor Jewett W. Adams or W. M. Garrard:

"Have deed for my state land claim executed immediately. Give Harry Day money if he has not got it; will remit from Hot Creek. Don't delay. Answer.

"Jos. T. Williams."

On the 15th of December the Secretary of Interior telegraphed to the state register as follows:

"Tract inadvertently certified while adverse claim was pending and undecided. Much embarrassment will result to Department if list be not returned as requested."

On the same day he received this answer:

"Carson, Nev., December 15, 1883.

"To H. M. Teller, Washington, D. C.:

"The land referred to is applied for and contracted to J. T. Williams, but no patent is yet issued. J. W. Adams, Governor."

These facts make it clear that when list 24 was presented to the Department, and it had received notice of an adverse claim as to these lands, the ordinary annotation was made on the list opposite to these lands, to indicate an adverse claim, and that pending the adjudication of the merits of that claim no certification would have been made; that by somebody's act (and the record does not disclose the party), this customary departmental entry of notice was rubbed out; and that thereafter the list, passing through the hands of the various officers of the Department, with every mark of approval from the various subordinate officers, and not challenged as to this controversy, was inadvertently, unintentionally and through mistake certified to the State of Nevada. Can there be any doubt that this land was certified through [522] inadvertence and mistake; and that the Land Department did not intend to certify it to the State, or approve the selection made by the State, until after the determination of the pending controversy? Who made the erasure cannot be, from the testimony, determined. The defendant and his attorney in Washington City each testify that he did not make it or know of its being made; yet who would make such an erasure, save one interested in having the fact of the contest removed from notice? The suggestion made by counsel for appellant, that Matthiessen and Ward caused this to be done in order to lay the foundation for this bill, when in fact their controversy in the Department had not been adjudicated as to the right of the State to make this selection, is so puerile as to intensify the suggestion against the appellant. That Williams had some information from within the Department is evident from the fact that on the very day the Secretary telegraphed to the governor of Nevada he telegraphed insisting upon immediate execution of the deed from the State—a telegram received at the capital of the State forty-three minutes after that of the Secretary. We do not impugn the truthfulness of the appellant or his counsel, in the testimony given by each, "that he neither made or knew of the making of this obliteration:" yet we cannot but be impressed with the conviction that there was someone in the Department employed to look after appellant's interests in this controversy, and who, without special direction or authority, assumed to do that which he thought, and which would apparently, promote his employer's interests, to wit, the erasure from this list of any notice of contest or adverse claim. Of course, if fraud was done by one employed by appellant, he, though ignorant, must bear the consequences of that fraud. We do not doubt what the verdict of a jury would be, as to a charge of fraud, under these circumstances; but we do not care to place our decision upon this ground. We rest it upon the incontrovertible fact that through inadvertence and mistake this land was certified to the State.

This brings us to the final contention: That if there had been no erasure, that if the contest had been had, the lands must inevitably have been certified to the State of Nevada, because they were, within the de- [523] scription of the Act, "unappropriated, nonmineral, public land," selected by the State; that the desert-land entry by Williams, in 1879, gave to him no right which he could sell or transfer; that, therefore, the deed from him to the Philadelphia company passed nothing as against the government; that, having failed to reclaim the land within the time prescribed, his right in the land ceased, and his cancellation of his desert-land entry was a mere matter of form to clear the face of the record; that at the time of the selection and application by the State there was no legal adverse claim; that, therefore, the State had a right to select it; that having made such selection, it was the duty of the Department to certify the land, and thus transmit the legal title; and that the g vernment pays no attention to private disputes between parties who have transactions in respect to public lands before it parts with its title, and before any right is vested in either of the disputing parties.

In the main, we do not doubt these propositions of law; but there are certain equita-

ble considerations which the Department is authorized to recognize, and when recognized no court will ever disturb its action. Consider the facts in this light: Williams had made a desert-land entry; his proposition by that entry was to reclaim this land by irrigation; he conveyed by deed a portion of it to the Philadelphia company, warranting that he had perfect title and right to convey, and receiving five thousand dollars for this conveyance. On the faith of it the company expends fifty-eight thousand dollars in improvements. The time for reclamation passes, and he has failed in his implied duty to the government. With a view to secure to himself a title which he has once conveyed with warranty, he schemes to surrender his desert-land entry for cancellation, and induce the State to select and obtain title to the lands as agricultural, non-mineral lands, and then buy the title thus obtained by the State. When the Department is advised of these facts, it declines to certify the title to the State. If all questions of jurisdiction and procedure were removed, would any court issue a mandamus to compel the officers of the Land Department to certify those lands to the State? Would not the equity developed by these facts forbid the court to issue such an order? The certification after selection by the State is to be approved by the Secretary of the Interior. This is no mere formal act. It gives to him no mere arbitrary discretion, but it does give power to prevent such a monstrous injustice as was sought to be accomplished by these proceedings. It gives the power to the Secretary to deny this application of the State, and refuse to approve its selection, and hold the title in the general government until, within the limits of existing law or by special Act of Congress, a party who, misinformed and misunderstanding its rights, has placed such large improvements on the property, shall be enabled to obtain title from the government.

We would not be misunderstood in respect to this matter. We do not mean to imply that any arbitrary discretion is vested in the Secretary; but we hold that the Statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force. It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

The decision of the Circuit Court is right, and must be affirmed.

Mr. Justice **Gray** was not present at the argument of this case, and took no part in its decision.

DORA A. BUNT ET AL., *Plffs. in Err.*, [483
v.
SIERRA BUTTE GOLD MINING COMPANY, LIMITED.

(See S. C. Reporter's ed. 483-485.)

Master and servant—when servant takes the risk—evidence.

1. Where several miners were in a tunnel in defendant's mines and the superintendent, discovering that the roof of the tunnel had been shattered by blasting, told the men to prop it up and to put a post by the side of one which had been there for another purpose, but, on one of the men suggesting that this should be taken out and another put in its place, left it optional with them to do so or not, and told them to be careful and not let the roof fall down on them, and deceased and the other miners decided that it would be safe to take out the post, and did so, intending to go outside to get other timber, and, after the removal of the post, deceased sat down under the shattered roof and part of the rock fell on him and killed him,—*held*, that he took the risks of the work in which he was employed, and that his own negligence was the direct cause of his death, and that in an action by his widow and daughter, to recover damages for his death, the court rightly directed a verdict for defendant.
2. Where the only witnesses of the accident, whom the plaintiff was therefore compelled to call, were in defendant's employ and might be prejudiced in its favor, the question how far they were so biased is of no weight, and does not require submission to the jury; theirs being the only testimony on the point, disbelief of their testimony cannot supply a want of proof.

[No. 168.]

Argued and Submitted January 28, 1891. Decided March 2, 1891.

IN ERROR to the Circuit Court of the United States for the Northern District of California to review a judgment entered upon an order of the court directing a verdict for the defendant in an action brought by the widow and daughter to recover damages under sec. 377 of the California Civil Code for the death, by defendant's negligence, of one of its workmen. *Affirmed.*

The facts are stated in the opinion.

Messrs. **S. F. Leib** and *J. C. Black*, for plaintiffs in error:

Ordinarily, where there is any testimony tending to show negligence, it is a question for the jury.

Quimby v. *Vermont Cent. R. Co.* 23 Vt. 387; *Pfau* v. *Reynolds*, 53 Ill. 212; *Paterson* v. *Wallace*, 1 Macq. H. L. Cas. 748, 28 Eng. L. & Eq. 48; *Barney* v. *Schmeider*, 76 U. S. 9 Wall. 248 (19:648); *Hickman* v. *Jones*, Id. 197 (551).

It became an imperative duty of the master

NOTE.—*As to who are co-employés or co-servants within the rule that a master is not responsible for injuries to a servant occasioned by the negligence of a co-servant*, see *note* to Hough v. Texas & P. R. Co. 25: 612.

As to negligence; responsibility of master to servant for carefulness and competency of co-servants,—see *note* to Wabash R. Co. v. McDaniels, 27:605.

to see to it that the temporary support was supplied before the post was taken out.

Wheeler v. *Wason Mfg. Co.* 135 Mass. 294; *Copley* v. *New Haven & N. Co.* 136 Mass. 6; *Flike* v. *Boston & A. R. Co.* 53 N. Y. 549; *Corcoran* v. *Holbrook*, 59 N. Y. 517-520; *Fuller* v. *Jewett*, 80 N. Y. 50, 52, 53; *Ford* v. *Fitchburg R. Co.* 110 Mass. 241; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642 (29: 755).

It was a duty of the court to submit the whole case with proper instructions to the jury.

Kane v. *Northern Cent. R. Co.* 128 U. S. 91-96 (32: 339-342); *Jones* v. *East Tennessee, V. & G. R. Co.* Id. 443-446 (478-480); *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554 (34: 235); *Hough* v. *Texas & P. R. Co.* 100 U. S. 213 (25: 612); *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642 (29: 755); *Daley* v. *American Print. Co.* 150 Mass. 77; *Myers* v. *Hudson Iron Co.* 150 Mass. 125.

Messrs. Thomas B. Bishop and **William W. Morrow** for defendant in error.

[484] *Mr. Justice* **Gray** delivered the opinion of the court:

This was an action brought against a corporation of Great Britain by the widow and daughter of William J. Bunt, citizens of California, to recover damages, under § 377 of the California Civil Code, for his death by the defendant's negligence while a workman in its mine. The answer alleged, among other things, that his death was caused by his own negligence, and not by any negligence on the part of the defendant.

At the trial, the only witnesses called by the plaintiffs (except in proof of their relationship to the deceased, and of his death) were the superintendent of the mine and a fellow workman of the deceased, whose testimony tended to prove the following facts: While Bunt and three others, all four experienced miners, were in a tunnel in the rock of the defendant's mine, thirty-five hundred feet from its mouth, the superintendent came in, and discovered, by looking at the roof of the tunnel, and by sounding it with a pick, that it had been shattered by blasting further in; and told the men to prop it up with timbers from that point to the end. There was already a post of timber at that point, which had been put there only to hold the "spiling" or pieces of wood extending along the sides of the tunnel to keep back the "gouge or selvage of the vein clay and slimy stuff." The superintendent told the men that they had better put a post by the side of this one; but, on one of the men suggesting that this should be taken out and another put in its place, left it optional with them to do so or not, saying, "If you think proper you can take out that post, but be careful of the roof, don't let it fall down on you, and be careful of the spiling." Bunt and the other workmen decided that it would be safe to take out the post, and did so, intending to go outside to get other [485] timber. After the removal of the post, Bunt sat down to rest under the shattered roof, and part of the rock fell upon and mortally injured him.

At the close of the plaintiffs' evidence, the defendant moved the court to direct a verdict for the defendant, because the evidence would not warrant a verdict for the plaintiffs. The circuit court granted the motion; and the plaintiffs excepted to the direction, and sued out this writ of error.

The reasons stated in the opinion of the court below, reported in 11 Sawyer, 178, are conclusive. Bunt participated in taking out the post, with full knowledge of the danger, and, after the post had been removed, and before another had been put in its place, sat down under the shattered roof. Recklessness could hardly go farther. The evidence would warrant no other conclusion than that he took the risks of the work in which he was employed, and that his negligence in the course of that work was the direct cause of his death. The court therefore rightly directed a verdict for the defendant. *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478 [27: 1008]; *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615 [29: 224]; *Gunther* v. *Liverpool & L. & G. Ins. Co.* 134 U. S. 110 [33: 857].

The suggestion that, because the only witnesses of the accident, and whom the plaintiffs were therefore compelled to call, were in the defendant's employ and might be prejudiced in its favor, the question how far they were so biased should have been submitted to the jury, is of no weight. Theirs being the only testimony on the point, disbelief of their testimony could not supply a want of proof.

Judgment affirmed.

JOHN W. HANNER ET AL., *Appts.*, [48
v.
LEWMAN G. MOULTON ET AL.

(See S. C. Reporter's ed. 486-495.)

Will of lands—suit to set aside sale—limitations—possession of land.

1. Where a testator in Tennessee devised by his will lands in Texas, his right to lands in that State existing only in a land certificate issued by the Republic of Texas which had been conveyed to him, and an administrator in Texas of his estate, by order of the Texas probate court, sold the certificate, which sale was confirmed, and the purchaser located the certificate on land, and patents therefor were issued by the State, such purchaser is the holder of the legal title to the certificate and to the land, and he and those who derived their title from him are the owners of such legal title, although the sale was fraudulent.

NOTE.—*That title of lands by devise is governed by laws of the State*, see *note* to Clark v. Graham, 5: 391.

Foreign wills must be proved here, to have effect here; when and how evidence; ancillary, probate of. See *notes* to Darby v. Mayer, 6: 367; Armstrong v. Lear, 6: 589.

Domicil of testator governs validity of will and distribution; foreign will, necessary to be proved where assets are. See *note* to Smith v. Union Bank of Georgetown, 8: 212.

As to interpretation of wills; intention of testator to govern,—see *note* to Pray v. Belt, 7: 309.

As to conditions precedent and subsequent; who may perform, and their effect; implication; unperformed,—see *notes* to Taylor v. Mason, 6: 101; United States v. Clarke, 9: 89.

The interest which the devisees under the will had after the sale of the certificate was not an interest legal or equitable in the land, but only the right to disaffirm the sale and institute a suit to set it aside, and thus acquire the certificate or the land located under it; such a suit must be brought within the period of the Statute of Limitation of the State.

2. Where an interval of nearly thirteen years, being more than the state period of limitation, has elapsed between the sale of a land certificate and the bringing a suit to set the sale aside, and the value of the land located thereunder has largely increased, and parties interested and witnesses have died, and no person now interested in the land is implicated in the fraud alleged as the ground of relief, the plaintiffs are guilty of laches, and cannot have relief in a court of equity.

3. One's assuming possession of a tract of land does not excuse him from prosecuting a suit within the prescribed period of limitation, against a person holding an adverse title thereto.

[No. 171.]

Argued and Submitted Jan. 28, 29, 1891. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Texas dismissing a suit to set aside a sale of a land certificate as fraudulent and to declare deeds of land null and void. *Affirmed.*

The facts are stated in the opinion.

Mr. **James D. Park,** for appellants:

The decree is erroneous in holding, in effect, that the subject of the devise, being, not land, as the testator expressly states he believes it to be, but a government grant of, or an inchoate right to, land, evidenced by a head-right certificate, unlocated, was merely a piece of personalty, and could not pass under a devise of land. The devise was therefore inoperative, and void for uncertainty.

Finlay v. *King*, 28 U. S. 3 Pet. 376 (7: 712); *Chapman* v. *Brown*, 3 Burr. 1634; *Hiscocks* v. *Hiscocks*, 5 Mees. & W. 363; *Wilkins* v. *Allen*, 59 U. S. 18 How. 393 (15: 399); *Den* v. *McMurtie*, 15 N. J. L. 276; *Clarke* v. *Boorman*, 85 U. S. 18 Wall. 502 (21: 906).

A sale of the land would include a sale of the certificate, and the title to the certificate would remain good and follow it to whatever land it might be subsequently applied.

Hines v. *Thorn*, 57 Tex. 102; *Trimble* v. *Smithers*, 1 Tex. 804; *Robertson* v. *Du Bose*, 76 Tex. 8; *Hearne* v. *Gillett*, 62 Tex. 23; *Rutherford* v. *Greene*, 15 U. S. 2 Wheat. 196 (4: 218); *Fremont* v. *United States*, 58 U. S. 17 How. 542 (15: 241); *United States* v. *Larkin*, 59 U. S. 18 How. 557 (15: 485); *Rodriguez* v. *United States*, 68 U. S. 1 Wall. 588 (17: 691); *Hornsby* v. *United States*, 77 U. S. 10 Wall. 244 (19: 905); *Schulenberg* v. *Harriman*, 88 U. S. 21 Wall. 60 (22: 554); *Shepley* v. *Cowan*, 91 U. S. 333 (23: 425); *Hall* v. *Russell*, 101 U. S. 509 (25: 831); *Bissell* v. *Henshaw*, 1 Sawy. 573; *Catlin* v. *Hoffman*, 2 Sawy. 490.

Land certificates and warrants have in Texas been sometimes treated as having the incidents of real estate (*Hermann* v. *Reynolds*, 52 Tex. 395; *Ripley* v. *Withee*, 27 Tex. 18; *Smith* v. *Sublett*, 28 Tex. 163), and sometimes as having those of personal property.

Stone v. *Brown*, 54 Tex. 334; *Kimmell* v. *Wheeler*, 22 Tex. 85; *Duncan* v. *Veal*, 49 Tex. 611.

No adverse holding of the certificate, however long the time, gives title to the certificate by limitation, or the right evidenced by it, as against the true owner.

Barker v. *Swenson*, 66 Tex. 407; *Harvey* v. *Cummings*, 68 Tex. 606; *Ross* v. *Early*, 39 Tex. 390; *Dunlap* v. *Gibbs*, 4 Yerg. 94; 2 Bl. Com. 17; 1 Thomas' Coke, 219; 3 Kent, Com. 322.

Mr. **Sawnie Robertson,** for appellees:

The certificate was a mere chattel.

Randon v. *Barton*, 4 Tex. 289; *Johnson* v. *Newman*, 43 Tex. 640; *Barker* v. *Swenson*, 66 Tex. 407.

A sale by the administrator passes a title superior to the title of the heir, devisee or legatee.

Grignon v. *Astor*, 43 U. S. 2 How. 338 (11: 290); *Florentine* v. *Barton*, 69 U. S. 2 Wall. 216 (17: 785); *Rutherford* v. *Stamper*, 60 Tex. 448.

The appellants' suit is stale, and they are barred of their right of recovery by their laches.

Pearson v. *Burditt*, 26 Tex. 172; *Fisher* v. *Wood*, 65 Tex. 199; 2 Perry, Trusts, § 602; *Johnson* v. *Newman*, 43 Tex. 628.

The legal title passing by patent passes by inurement to the owner of the certificate by virtue of which the patent issued.

Bissell v. *Penrose*, 49 U. S. 8 How. 330 (12: 1100); *Landes* v. *Brant*, 51 U. S. 10 How. 348 (13: 449); *Stoddard* v. *Chambers*, 43 U. S. 2 How. 284 (11: 269); *French* v. *Spencer*, 62 U. S. 21 How. 228 (16: 97); *Gould* v. *West*, 32 Tex. 338; *Burkett* v. *Scarborough*, 59 Tex. 498; *Satterwhite* v. *Rosser*, 61 Tex. 175; *Lindsay* v. *Jaffray*, 55 Tex. 626.

The owners were innocent purchasers for value and without notice of appellants' equity.

2 Pom. Eq. Jur. § 740; *Leneve* v. *Leneve*, 2 White & T. Lead. Cas. in Eq. 146, 155.

Mr. Justice **Blatchford** delivered the opinion of the court:

This is a bill in equity, filed January 27, 1882, in the Circuit Court of the United States for the Northern District of Texas, by John W. Hanner, Jr., James D. Park and John S. Park, Jr., against Lewman G. Moulton, M. C. Moulton, C. R. Beaty, Clement R. Johns, J. C. Kerby, Flavius Everett, W. Von Rosenburg and the corporation of C. R. Johns & Company, to establish the title of the plaintiffs to three several tracts of land in the State of Texas, one of 586 acres in Ellis County, one of 640 acres in Falls County and one of 250 acres in Clay County. The bill prayed that the deeds under which the defendants claimed title to such land might be declared null and void. The plaintiffs asserted title to it as devisees under the will of Thomas Park, who died in the State of Tennessee, where he resided, on September 4, 1866, leaving a last will and testament, executed March 20, 1866, one clause of which was as follows: "I will to John W. Hanner, Junior, James Park and John Park, Junior, my tract of land, containing near fifteen hundred acres first-rate land, lying, I believe, in Ellis County, Texas. My papers are in the hands of J. A. N. Murray and William [487] H. Gill, of Clarksville, Texas, who must account for all papers of mine found in the hands of William A. Park's widow at his death. All other lands I may own, and not disposed of by will, may be given to Dr. Jas. P. Hanner."

The testator did not own at any time any land in Ellis County, Texas, and the defendants insisted that he did not own any other land in Texas to which the devise referred or could refer; but at the time of his death he owned what was called a head-right certificate for one third of a league, or 1,476 acres, of land, issued by the Republic of Texas May 8, 1838, to William H. Ewing, Ewing having conveyed to the testator, by deed dated April 9, 1846, all his right, title and interest to the land which had been or might be located and surveyed by virtue of such head-right certificate, the deed warranting to the grantee the peaceable possession of the land against all claims to be made under the grantor. By a codicil to his will, executed August 25, 1866, the testator appointed James P. Hanner his executor. The will was admitted to probate in the probate court in Tennessee, and letters testamentary thereon were issued to James P. Hanner.

Subsequently, and on July 8, 1867, at the instance of the Tennessee executor, Clement R. Johns, one of the defendants in this suit, applied to the county judge of Travis County, in the State of Texas, sitting as a probate court, praying that letters of administration might be issued to him on the estate of James Park, with the will annexed, and produced a certified copy of the will, with satisfactory evidence of the probate thereof in Tennessee; and it was admitted to probate in Texas, and letters of administration with the will annexed were granted to Johns, at the July Term, 1867. At the same term, he presented to the Probate Court of Travis County an inventory of the estate, which did not include the 1,476 acres, but stated that there were other lands in the State claimed by the heirs, which would be reported by him as soon as a knowledge of the same could be obtained by him sufficient to identify them. On January 1, 1869, Johns filed in the probate court a supplemental inventory, which stated that, since filing the original inventory, [488] he had found a land certificate belonging to the estate, for one third of a league, or 1,476 acres, granted to W. H. Ewing and transferred by the latter to James Park, and which was appraised January 1, 1869, by appraisers appointed by the court, at the value of $200; and that that was all the additional property to which title had been discovered. He further stated that, the certificate being lost, he had obtained a duplicate of it, and asked for an order to sell it, to pay the expenses of administration and the expenses of looking up the estate, which then amounted to over $100. The court thereupon made an order that he proceed to sell the land certificate, for cash, on the first Tuesday in February, 1869, after giving due notice. On the 26th of February, 1869, on the representation of the administrator to the court that by accidental omission the sale had not taken place, it made an order that he sell the certificate for cash on the first Tuesday in April, 1869, on giving due notice; and that he return on account of sale to the court. On the 3d of June, 1869, he reported to the court that on the first Tuesday in April, 1869, he had sold the certificate, as the property of the estate, to J. C. Kerby, the highest and best bidder, for 7½ cents per acre, making, for the 1,476 acres, $110.70, which he stated he believed to be a fair price, under the circumstances connected with the title; and he recommended a confirmation of the sale. Thereupon, on the same day, the court made an order approving and confirming the sale, and directing the administrator to devest title out of the former owner and to vest it in the purchaser, after his compliance with the terms of sale.

In October, 1871, Johns, as administrator, presented to the County Court of Travis County his account of debits and credits, showing, among other things, the receipt of the $110.70 for the "sale of one-third-league cert. doubtful title," and a balance on hand, belonging to the estate, of $11.88 in United States currency, and representing "that all the property of the said estate of James Park, except the land certificate, which was found by the administrator, has been disposed of by the last will of the deceased," and asking to be discharged. No action appears to have been had by the court in regard to this account or to a discharge. Kerby, the purchaser, afterwards located the certificate on the three tracts of land above mentioned. [4

On August 28, 1882, an amended and supplemental bill was filed by the plaintiffs, adding as defendants James P. Hanner, the Tennessee executor, Robert Smith, Thomas D. Johns, W. B. Blalock and A. J. P. Johnson. The gravamen of the two bills was, that the proceedings of Clement R. Johns, the Texas administrator, in the Probate Court of Travis County, by which he obtained the order for the sale of the certificate, and the sale itself, were fraudulent; that Kerby, the purchaser, had knowledge of and participated in the fraud; and that the other defendants, who were in possession of the three tracts of land, claiming title to them under Kerby, bought with notice of the fraud.

Answers to the bill were put in by James P. Hanner, Kerby, Clement R. Johns, Von Rosenberg, Everett, Beaty, the two Moultons, Smith, Blalock and Johnson. M. C. Moulton having died, the suit was revived against his devisees, legatees and executor. Thomas D. Johns and the executor and devisees of M. C. Moulton subsequently answered the bill. It was set up in the answer of Beaty, that the claim of the plaintiffs was barred by the Laws of Limitation of Texas before the commencement of the suit, and that the demand was stale; and in the answer of M. C. Moulton, that the claim of the plaintiffs, if any they ever had, was stale, on account of their laches and gross and inexcusable neglect to make known or assert their claim; and in the answers of Smith and Johnson, that the suit was barred by the Statutes of Limitation of Texas; and in the answer of Clement R. Johns, that the claim of the plaintiffs was stale and barred by reason of laches; and in the answer of Kerby, that the plaintiffs' demand was stale and barred by the Law of Limitations.

Replications having been filed to the various answers, proofs were taken, and the cause was heard before *Mr. Justice* Woods and *Judge* McCormick, District Judge, and on the 10th of February, 1885, a decree was entered dismissing the bill. The opinion of *Mr. Justice* Woods is reported in 23 Fed. Rep. 5. He dis-

posed of the case on the following ground, as stated in his opinion: "Upon the trial of the case, the plaintiffs, conceding that the testator at his death owned no land in Ellis County, or elsewhere in Texas, to which said devise referred, to prevent the devise from being inoperative, and to prove their title to the lands in question, offered evidence tending to show that the testator, when he executed his will, and at the time of his death, believed that the Ewing head-right certificate had been located in Ellis County, making him the owner of the lands covered thereby; that it was the purpose of the testator, shown by his declarations to and conversations with the witnesses, to devise to the plaintiffs the Ewing certificate, if it should turn out that it had not been located; and that he was advised by the lawyer who drew his will that the devise above quoted would be effectual to carry out such purpose. The contention of the plaintiffs was, that if this evidence was admitted, it would show them to be the owners of the Ewing head-right certificate under the devise in the will of James Park, and establish their title to the lands located by Kerby under that certificate. It is evident that the title of the plaintiffs to the relief prayed by their bill depends upon the admissibility of this evidence. The defendants object to the testimony. I am of opinion that the objection is well taken, and that the evidence should be excluded." He further said: "I think this is a case for the enforcement of the rule which excludes parol evidence to alter or add to the terms of a will. I am therefore of opinion that the evidence offered should be excluded. Without its aid, the plaintiffs show no ground for the relief prayed in their bill. It must therefore be dismissed, at their costs; and it is so ordered."

We do not find it necessary to consider the case in the view in which the circuit court considered it: for we are of opinion that the claim of the plaintiffs must fail on the ground of laches.

Patents were issued by the State of Texas for the three tracts of land in question in the name of James Park, assignee of William H. Ewing, "his heirs or assigns forever," as follows: February 17, 1870, for the 586 acres in Ellis County; March 5, 1870, for the 640 acres in Falls County; and June 24, 1873, for the 250 acres in Clay County; and such patents were duly recorded in the respective counties. It was a custom in the land office of Texas not to issue patents to assignees who derived their title through a judicial sale, and therefore all these patents were issued in the name of James Park.

In 1876, the plaintiffs put a tenant in possession of a large part of the 586 acres in Ellis County, and L. G. Moulton, who claimed title to the land, brought an action of trespass to try title against the tenant, in the District Court of Ellis County, on March 27, 1879; which suit was removed into the Circuit Court of the United States for the Northern District of Texas. The plaintiffs in the present suit were made parties defendant to that suit, and part of the prayer of the bill in the present suit is to enjoin such action at law of L. G. Moulton.

Kerby was the holder of the legal title to the certificate and the legal title to the land; and he and the defendants who derived their title from him became the owners of such legal title. This was so, even if the sale was fraudulent. If the certificate was by the will bequeathed to the plaintiffs, and even if the sale was fraudulent, the interest which the plaintiffs had, after the sale of the certificate, was not an interest of any kind, legal or equitable, in it or in the land, but only the right promptly to disaffirm the sale and institute a proceeding, in a reasonable time, to have it set aside, and thus re-acquire the certificate or the land located under it. Perry on Trusts, § 602*w*; 2 Pomeroy's Equity, §§ 818, 917; 2 Story's Eq. Jur. § 1520; *Pearson* v. *Burditt*, 26 Tex. 157.

The sale in question was confirmed by a proper decree of the Probate Court of Travis County. Limitation of the right of review was two years after the date of the decree. Rev. Stat. of Texas, art. 1389, enacted in 1846.

Further, a bill to review a decree in equity was authorized by the Act of February 5, 1841 (1 Paschal's Dig. p. 764, art. 4616), if brought not more than two years after the decree should have been made final. This applies to proceedings in the probate court. *Kleinecke* v. *Woodward*, 42 Tex. 311; *Murchison* v. *White*, 54 Tex. 78, 86.

Since 1841 (1 Paschal's Dig. p. 758, art. 4604) [49:
the limitation of a suit in Texas to recover personal property, or damages for its conversion, has been two years; and by 1 Paschal's Digest, p. 766, art. 4622, three years bars a suit for land if the defendant has color of title. All of these defendants had color of title, within the meaning of that Statute. By 1 Paschal's Digest, p. 767, art. 4623, a suit for land, if the defendant claims under a registered deed, is barred in five years. By the Revised Statutes of Texas, art. 3209, p. 465, a suit for the specific performance of a contract to convey real estate is barred in ten years, ten years being the longest period of limitation under the statutes of Texas.

In the present case, there is no question of minority or of any other disability. It is alleged, however, that the cause of action was concealed; but the order of sale, the report of sale and the order confirming the sale were of record in the Probate Court of Travis County. The plaintiffs knew, or had the means of knowing, of the granting of administration in Texas, and in what court the proceeding was pending. The administrator reported that Kerby was the purchaser. The connection of Kerby with C. R. Johns & Company was no secret. The records of the land office of the State showed, as early as March 23, 1870, that a certificate for the unlocated balance, which was afterwards located in Clay County, had been delivered to C. R. Johns & Company. On the information disclosed by those records, the plaintiffs in 1876 assumed to own the 586 acres of land in Ellis County, and sold part of it and leased the rest. This was done under a power of attorney executed by the three plaintiffs, on February 15, 1876, to Cyrus T. Hogan, a real-estate agent of Ellis County, Texas, constituting him their agent to sell the 586 acres in that county, and to sign their names to transfers and releases necessary to confer the title to the land; and they executed a further power of attorney to Hogan, on September 25, 1876, au-

thorizing him to sell and convey all their interest in the W. H. Ewing one-third league survey or certificate, wherever it might be located in the State of Texas, as having been willed to them by James Park, and to perform all legal
493] acts in the management of the certificate, or the land located by virtue of it, and to sign their names to conveyances of any nature or kind.

It is stated in the original bill that neither the plaintiffs nor the Tennessee executor ever heard of the settlement of October, 1871, by Johns, as administrator, in the probate court, in October, 1871, until about the year 1877 or the latter part of 1876, when the knowledge first came to them through information from their agent in Ellis County, Texas. That agent was Hogan. James D. Park, one of the plaintiffs, in his testimony, produces a letter from Hogan, dated September 20, 1876, to Doctor John S. Park, and states that he first learned through that letter that the firm of C. R. Johns & Company were claiming the land in Ellis County, and also the remainder of the land called for by the certificate, some of which was in Falls County. Doctor John S. Park was a witness in the case, and was a nephew of the testator, an uncle of the plaintiff John W. Hanner, Jr., and the father of the other two plaintiffs. In that letter, Hogan informed Doctor Park that C. R. Johns administered on the estate of James Park in 1869, and sold the W. H. Ewing certificate to J. C. Kerby; and that, on an examination of the record, he, Hogan, found a transfer from Johns, as administrator, to Kerby. On the 26th of September, 1876, Hogan wrote another letter to Dr. John S. Park, which is produced, stating that a lawyer, whom Hogan had consulted on the subject of the sale of the Ewing certificate by Johns, as administrator, said that it would not "stick at all," but advised action at once.

If the plaintiffs, in 1876, on the information disclosed by the records, assumed to own, to sell a part of, and to lease another part of, the 586 acres of land in Ellis County, thus acting on the view that the sale did not deprive them of their interest in the land, the same information was sufficient to demand and to justify a suit. The explanation of the delay may be connected with the fact that the certificate, when it was sold, was valued at $200, while, when the bill in the present case was filed, the three tracts of land were worth, as is testified, from $8,600 to $10,600.

[494] Moreover, the evidence shows that in January, 1871, James D. Park, one of the plaintiffs, was in Austin, Texas, saw Clement R. Johns, went to the land office and looked at the record books, and found in one of them an entry that the balance of the Ewing claim, not patented, had been delivered to C. R. Johns & Company on the 23d of March, 1870; that he afterwards had an interview with Clement R. Johns on the subject and told him what he had seen at the land office, and asked him if he knew what had ever become of the Ewing certificate; and that he learned from Johns that a duplicate of it, for one third of a league, had been sold at public auction in Austin, in 1868, by Johns, as administrator of James Park, to pay expenses, etc., of administration. James D. Park states in his testimony that the transaction ought to have been investigated then and there, and gives, as an excuse for not doing so, that Johns treated the matter very lightly, and as of little or no consequence, and also stated that he did not recollect who was the purchaser of the certificate. He also testifies that, on returning to Tennessee, he mentioned to the Tennessee executor and to others of the family what had occurred at Austin, and requested the executor to write to Mr. Green, a lawyer at Austin, to look into the sale of the Ewing certificate, and see if it could not be got back in some way or replaced by Johns; that the executor got letters from Mr. Green, promising to look into the matter, but nothing further or definite was done or reported to the executor, "the parties probably being too much engaged in other matters to give it proper attention;" that through Hogan he learned, in 1876 or 1875, that a portion of the Ewing certificate had been located in Ellis County; and that a patent was on record there to James Park and his heirs for 586 acres of the Ewing certificate; and that his father then wrote to Hogan to take possession of the land for the plaintiffs, and instructed Hogan to investigate the sources of the supposed title of C. R. Johns & Company to the lands, and report the results, after which Dr. John S. Park received from Hogan the letters of September 20 and September 26, 1876, followed soon afterwards by a paper sent by Hogan to the witness, which was a copy obtained from the public [4
records of Ellis County, and which is produced, showing that it was a copy of the conveyance made by Johns, as administrator, to Kerby, of the certificate, and which recited that he had sold the certificate on the 6th of April, 1869, to Kerby, for $110.70, and that the sale had been confirmed by the court at the May Term, 1869.

Even in 1876, when the plaintiffs knew all that they knew when they filed the bill in 1882, and had no title, but only the right to go into a court of equity, they brought no suit but contented themselves with assuming that they owned the 586 acres in Ellis County. Their assuming possession of that tract of land did not excuse them from prosecuting a suit. *Walet* v. *Haskins*, 68 Tex. 418; *Bullock* v. *Smith*, 72 Tex. 545, 549.

An interval of nearly thirteen years elapsed between the sale of the certificate and the filing of the bill in this suit. The value of the property has largely increased. Parties interested and witnesses have died, and the memory of those who survive has decayed. Not a person who is now interested in any of the land is implicated in the fraud charged in the bill. Under the facts above stated, the plaintiffs have been guilty of such laches that they cannot have any relief in a court of equity. *Speidel* v. *Henrici*, 120 U. S. 377, 387 [30: 718, 719], and cases there cited; *Richards* v. *Mackall*, 124 U. S. 183, 187, 188 [31: 396, 399].

Nor are the decisions of the courts of Texas inconsistent with the sustaining of this defense of laches. In *Fisher* v. *Wood*, 65 Tex. 199, it was held that a party would be relieved from the charge of laches, where facts were shown calculated to lull inquiry, and the fraud was not discovered until about three months before the suit was brought. In *Rowe* v. *Horton*, 65 Tex. 89, as against a claim to relief in equity

against a deed where more than ten years had elapsed between the date of its execution and the bringing of the suit, it was held that the plaintiff might, by reasonable diligence, have sooner discovered the mistake which was the alleged ground of relief, although it was not in fact discovered by her until within a few months before the suit was brought; and the same doctrine was applied in *Parish* v. *Alston*, 65 Tex. 194.

Decree affirmed.

HIRAM BARNEY, Late Collector of the PORT OF NEW YORK, *Plff. in Err.*,

v.

E. A. OELRICHS ET AL.

(See S. C. Reporter's ed. 529-536.)

New York Statute of Limitations—residence out of State.

1. The residence out of the State which suspended the running of the New York Statute of Limitations, section 100 of the Code of Procedure of 1849, was a fixed abode entered upon with the intention to remain permanently, at least for a time, for business or other purposes.
2. The words "to reside out of the State," in sec. 100 of the New York Code of 1849, meant the taking up of an actual abode or dwelling place elsewhere, and not a mere temporary sojourn for transient purposes.

[No. 177.]

Argued Jan. 30, 1891. Decided March 2, 1891.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of plaintiffs in an action to recover back duties illegally exacted from them on merchandise imported and fees illegally charged for services rendered in the custom-house. *Reversed.*

The facts are stated in the opinion.

Mr. **Wm. A. Maury**, *Assistant Atty-Gen.*, for plaintiff in error.

Messrs. S. F. Phillips and **F. D. McKenney** for defendants in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was an action brought against Hiram Barney to recover back money alleged to have been illegally exacted by him when Collector of the Port of New York, as duty on certain charges and commissions, and as fees for services rendered in the custom-house in connection with merchandise imported, and was commenced in the Superior Court of New York City by service of summons, dated March 27, 1868, on the defendant, April 16, 1868, and subsequently removed into the Circuit Court of the United States for the Southern District of New York.

The declaration consisted of the common counts, and, in addition to the general issue, defendant pleaded that the supposed several causes of action did not any of them accrue at any time within six years next before the commencement of the suit; to which the plaintiffs replied that, after the several causes of action had accrued, "defendant departed from and resided out of this State for several successive periods, amounting in the aggregate to twelve months, and this suit was brought within six years and twelve months after the said several causes of action, and each and every one thereof, accrued to these plaintiffs;" and defendant rejoined that, "before the commencement of this suit, he, the said defendant, did not depart from and reside out of this State for several successive periods, amounting in the aggregate to twelve months, in manner and form," etc., concluding to the country. [530

As this and many other similar causes involved, as respected duties alleged to have been illegally exacted upon charges and commissions, the examination of long accounts, of numerous invoices, entries and other documents and papers, and the taking of the testimony of various witnesses touching the same, the several causes were sent by the court, without objection, to a referee, who took evidence and reported thereon, and whose report in this case was considered upon exceptions, and the conclusions reached by him made the basis of instructions to the jury upon the trial, which took place January 18, 1886. As to the fees, the jury were instructed to find for the plaintiffs in the amount of $289.12, being $113.60 principal, and $175.52 interest; and as to the duties overpaid, in the amount of $1,076.74, being $406.85 principal, and $669.89 interest; and a verdict was returned accordingly, making, with some further interest and costs, a total of $1,586.14, for which sum judgment was rendered.

The case having been brought to this court, counsel for plaintiff in error asks for a reversal upon the ground that the circuit court erred in its ruling upon the Statute of Limitations,

---

NOTE.—*As to what statute governs; effect of new statutes;* lex fori, *and not* lex loci, *governs,*—see *note* to Townsend v. Jemison, 13: 194.

As to contracts limiting the time within which action must be brought; waiver of; estoppel as to—see *note* to Southern Exp. Co. v. Caldwell, 22: 556.

As to when Statute of Limitations, or change in Statute, impairs obligation of contracts, see *note* to Koshkonong v. Burton, 26: 886.

That neither time nor Statute of Limitations runs against the State, see *note* to Gibson v. Chouteau, 20: 534.

As to effect of state decisions and laws, in regard to Statute of Limitations, upon United States courts, see *note* to Elmendorf v. Taylor, 6: 289.

As to limitation of time in equity cases, see *notes* to Pratt v. Carroll, 3: 627; Thomas v. Brockenbrough, 6: 287.

As to equity of redemption barred by time, see *note* to Thomas v. Brockenbrough, 6: 287.

As to length of time no bar to a trust, see *notes* to Prevost v. Gratz, 5: 311; Thomas v. Brockenbrough, 6: 287.

As to Statute of Limitations in cases of fraud in equity, see *note* to Stearns v. Page, 12: 928.

As to effect of disability occurring after Statute of Limitations begins to run, see *note* to Harris v. McGovern, 25: 317.

What promise, acknowledgment or payment takes case out of Statute. See *note* to Wetzeli v. Bussard, 6: 481.

As to suspension of Statute of Limitations during war, see *note* to Hanger v. Abbott, 18: 939.

and as the argument was addressed to that point alone, our consideration of the record will take no wider scope.

The causes of action declared on accrued prior to the Act of June 30, 1864 (13 Stat. 214), prescribing the time within which actions against collectors might be brought, and while the Act of February 26, 1845 (5 Stat. 727), was in force, which preserved to parties paying duties under protest the right to maintain actions at law to test the validity of such duties. Whatever limitation existed was to be found in the state law, and in this instance, in sections 91 and 100 of the Code of Procedure of April 11, 1849, chap. 438, of the State of New York. By section 91 the limitation of six [531] years was applied to "an action upon a contract, obligation or liability, express or implied, excepting those mentioned in section 90,"—exceptions not material here. Section 100 was as follows: "If, when the cause of action shall accrue against any person, he shall be out of the State, such action may be commenced within the terms herein respectively limited after the return of such person into this State; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action."

Included in the amount claimed for overpaid duties, and in the verdict and judgment, were certain items for payments made more than six years prior to the commencement of this suit. To sustain the contention that these items were not barred, plaintiffs put in evidence a letter of the defendant stating that during the seven years from April, 1861, to April, 1868, his absences from the City of New York were all temporary, and, though frequent, were for short periods, varying from one day to perhaps forty or fifty days; that there were probably only two or three as long as forty days, and not more than one as long as fifty days; that they consisted mainly of brief visits to Washington during the first four years, and visits to Iowa and Wisconsin and the South during the following years; and that he estimated that they averaged two months a year. Some evidence of failure in attempting to serve process was also adduced. Mr. Barney testified on his own behalf that he had resided in the State of New York nearly fifty, and in the city nearly forty, years, including from 1861 to 1870 inclusive, during which time he did not reside at any other place than Kingsbridge, now in the city, and never voted elsewhere than in the city except from 1842 to 1852, when he lived in Brooklyn; that he had always had an office in the City of New York; that his absences from the State were never with the intention of remaining away, except for the temporary purposes of pleasure or business; and that there was one absence in Iowa and Wisconsin on business which he thought was over fifty but less than ninety days.

[532] The court held as matter of law that all the absences referred to should be accumulated and not taken as a part of the period of limitation, which being done, the statutory bar was not made out. The question is whether, under section 100, defendant was properly held to have departed from and resided out of the State of New York during these absences. If in the administration of his office he were called to Washington for twenty-four or forty-eight hours, or if he visited some seaside or mountain resort not in New York for a few days' recreation, or if business demanded his attention temporarily in other States, did defendant reside out of the State of New York within the intent and meaning of the Statute? We do not think he did, and that the words "to reside out of the State" meant the taking up of an actual abode or dwelling place elsewhere, and not a mere temporary sojourn for transient purposes.

The inquiry is as to the meaning of the words as used. If "residence" were always synonymous with "domicil," or even with "inhabitancy," there would seem to be no room for contention; but if the language here was intended to express something less than domicil or inhabitancy, then the proper definition must be arrived at in view of that intention and the subject matter to which the words were applied, and we are of opinion that "to reside out of the State" comprehended something more than alighting at a place in travel or in pursuit of temporary objects, and such we understand to be the result of decision by the courts of New York.

In *Penfield* v. *Chesapeake, O. & S. W. R. Co.*, 134 U. S. 351 [33: 940], we had occasion to consider when a person might be properly held to be a resident of the State of New York and entitled to bring an action which would have otherwise been barred by the laws of the defendant's residence, and this involved an examination of the decisions in that State in the construction of the words "resident" and "residence," as contained in its statutes. The cases of *Re Thompson*, 1 Wend. 43; *Frost* v. *Brisbin*, 19 Wend. 11; *Haggart* v. *Morgan*, 5 N. Y. 422, and *Weitkamp* v. *Loehr*, 21 Jones & S. 79, were cited and quoted from as showing that within the meaning of the Statutes regulating attachments against the property of debtors, and arrest on civil process for debts, it was actual residence of the defendant and not his domicil that determined the rights of the parties; while *Burroughs* v. *Bloomer*, 5 Denio, 532; *Ford* v. *Babcock*, 2 Sandf. 518; *Cole* v. *Jessup*, 10 N. Y. 96; *Satterthwaite* v. *Abercrombie*, 23 Blatchf. 308, and *Engel* v. *Fischer*, 102 N. Y. 400, 3 Cent. Rep. 303, were referred to as sustaining the conclusion that a like construction had been given to the words in that clause of the Statute of Limitations which provided that if, after the cause of action shall have accrued, the defendant shall "depart from and reside out of this State, the time of his absence" shall not be included in the period of limitation. And because it did not appear in the case that the plaintiff had taken up an actual residence in the State of New York, it was held that he could not avail himself of the statutes of that State in order to recover.

In *Re Wrigley*, 4 Wend. 602, 8 Wend. 134, it was decided that a person whose legal domicil was England, but who had done business in New York for some years, then returned to England, and again to New York, remaining for a time, with the intention of settling in Canada, was not an inhabitant or resident

within the meaning of the New York Insolvent Act of 1813; and in the court of errors *Chancellor* Walworth remarked: "Inhabitancy and residence do not mean precisely the same thing as domicil, when the latter term is applied to succession to personal estate, but they mean a fixed and permanent abode or dwelling place for the time being, as contradistinguished from a mere temporary locality of existence."

Mr. Justice Nelson, then chief justice of New York, delivering the opinion of the court in *Frost* v. *Brisbin*, 19 Wend. 11, said that the word "inhabitant" implies a more fixed and permanent abode than the word "resident," and "frequently imports many privileges and duties which a mere resident cannot claim or be subject to;" and that "the transient visit of a person for a time at a place does not make him a resident while there; that something more is necessary to entitle him to that character. There must be a settled, fixed abode, an intention to remain permanently at least for [534] a time, for business or other purposes, to constitute a residence within the legal meaning of that term." The settled rule that a person may be a resident in one State and have his domicil in another was recognized, and the decision has been often cited with approval by the courts of New York as well as of many other States.

In *Bartlett* v. *New York*, 5 Sandf. 44, the plaintiff sought an injunction against the collection of certain taxes on personal property for which he had been assessed in the City of New York, on the allegation that he resided in Westchester County, which was refused, on the ground that, while plaintiff's home was in Westchester County, his residence for a portion of the year was in the City of New York. *Frost* v. *Brisbin* was relied on and the definition of "residence" in Webster's Dictionary adopted, namely, "the dwelling in a place for some continuance of time." So in *Douglas* v. *New York*, 2 Duer, 110, Douglas was held to be a resident of the City of New York and liable to be taxed as such, although his domicil was in Flushing. These cases were favorably commented on in *Bell* v. *Pierce*, 51 N. Y. 12, in support of a similar conclusion.

As to the Statute of Limitations, it will have been observed that there were two exceptions to its operation: (1) Where the debtor was absent from the State when the cause of action accrued; (2) Where the debtor, after the cause of action had accrued, departed from and resided out of the State. Under the first exception, absence was sufficient to avert the bar, because the Statute did not commence to run until the return of the debtor into the State, and such return, it was decided, must be open and notorious, so that a creditor might with reasonable diligence find his debtor and serve him with process. *Engel* v. *Fischer*, 102 N. Y. 400, 3 Cent. Rep. 803. But to bring a case within the second exception something more than absence was essential to be shown. In *Wheeler* v. *Webster*, 1 E. D. Smith, 1, *Judge* Ingraham, speaking for the New York Court of Common Pleas (then composed of Ingraham, Daly and Woodruff, *JJ.*), said that "it was necessary to prove that the debtor departed from the State, and also that he resided out of the State. The evidence did not tend to show this. For aught that is in proof before us, the [535] absence may have been merely temporary; excursions for pleasure or business, with a return to this State as the residence of the debtor. . . . The plaintiff should have proven that the defendant was a resident of some other place than the State of New York, or should have shown a residence for some time elsewhere." In *Harden* v. *Palmer*, 2 E. D. Smith, 172, it appeared in an action for goods sold, to which the Statute was pleaded, that the defendant had been absent in Europe after the sale, at one time for eight months and at another for two months, which absences, if deducted in the computation of time, brought the commencement of the suit within six years; but there was no evidence that the debtor had any domicil in the State, and the common pleas (composed of the same judges) held that the absences were properly deducted by the trial court. The opinion of *Judge* Daly inclined to the view that absence, whether permanent or temporary, might be equivalent to residing out of the State; but *Judge* Woodruff, in a separate opinion, put the decision on the ground that there was no evidence that the defendant had any domicil in the State, and "if not, he, of course, resided out of the State when he went to Europe," and therefore the periods of absence were properly excluded. In *Burroughs* v. *Bloomer*, 5 Denio, 532, 535, the court say: "The expressions, 'and reside out of the State' and 'the time of his absence,' have the same meaning; they are correlative expressions. So that while the defendant in this case resided out of, he was absent from, the State." But this was said in respect of the contention that a person who had resided in New York, and had moved to and was actually residing in New Jersey, had resumed his residence in New York because he visited and transacted business there. Although the cause of action accrued before the defendant removed to New Jersey, the distinction between the return into the State referred to in the first clause of the section, and departures and returns under the second clause, is carefully pointed out. Under the former, when standing alone, the time commenced running on the first return and continued to run without reduction; and hence the latter was introduced by way of [536] amendment, in order that removal and residence abroad after the Statute commenced to run might suspend its operation during the continuance of an absence or absences so occasioned. But mere presence was not tantamount to residence under the Statute, nor mere absence equivalent to residence elsewhere. And the occasional absences of a resident of the State continuing to reside therein were not to be deducted in computing the statutory term. *Ford* v. *Babcock*, 2 Sandf. 518, 529.

Apparently, because this was obviously so, the Legislature of New York, by an Act passed April 25, 1867 (Laws N.Y. 1867, p. 1921), amended section 100 by adding after the words "and reside out of this State" the following, "or remain continuously absent therefrom for the space of one year or more." Absence for the time specified was thus provided to be deducted from the time limited for the commencement

of actions, so that, whether the defendant resided out of the State or not, such absence would suspend the running of the Statute.

We hold that the residence out of the State which operated to suspend the running of the Statute under section 100 as originally framed was a fixed abode entered upon with the intention to remain permanently, at least for a time, for business or other purposes, and as there was no evidence tending to establish such a state of fact here, the judgment must be reversed. The same conclusion has been reached in effect by many of the state courts, and reference to decisions in Massachusetts, Maine, Vermont and New Hampshire will be found in the well-considered opinion of the Supreme Court of Illinois in *Pells* v. *Snell*, 130 Ill. 379, where the terms of the Statute were nearly identical with those of that of New York, and the court approved the definition of "residence" as given in *Re Wrigley*, 8 Wend. 134; *Frost* v. *Brisbin*, 19 Wend. 11, and *Boardman* v. *House*, 18 Wend. 512.

The judgment is reversed and the cause remanded, with instructions to proceed in conformity with this opinion.

---

[562] ROBERT SCHELL ET AL., *Plffs. in Errr.*,
v.
VICTOR FAUCHÉ ET AL., Survivors.

(See S. C. Reporter's ed. 562-573.)

Protest against illegal duties—form of—sufficiency of—omission of date—record of—prospective protest—usage—abandoning protest.

1. The production of a protest, required to be made in order to maintain an action for duties paid under protest, from its proper repository or custody, is sufficient evidence that it has been served according to law.
2. A protest, which consisted of two forms of protest, pasted together and signed at the end of the second piece of paper, is a sufficient protest against the two exactions named in both, to wit, excessive duty on goods, and on commissions.
3. A protest which indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles is not insufficient because of the brevity with which the objection is stated.
4. The omission of the date in a protest is immaterial, where the protest is in proper form and is attached to the invoice of merchandise mentioned therein and is duly signed.
5. That a protest has not been copied in the record kept for that purpose, the object of copying being to supply secondary evidence if the original is lost, is no objection to it as evidence in favor of the importer.
6. A prospective protest, intended to apply to all future similar importations made by the same importer, is valid.
7. Where a practice has grown up of receiving prospective protests, notwithstanding a treasury regulation requiring protests to be special, the practice ought not to be disturbed, if a failure to follow it would entail serious consequences on importers.
8. That a specific protest is filed after a general prospective protest does not necessarily show an intention to abandon all claim under the prospective clause; if it is any evidence of such intent, it may properly be submitted to a jury, but a peremptory instruction in favor of defendant cannot be required.

[No. 690.]

Argued Jan. 28, 1891. Decided March 2, 1891.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment for plaintiffs for duties illegally exacted upon importations of goods. *Affirmed.*

Statement by *Mr. Justice* **Brown:** [56

This was a consolidation of six actions originally begun between September 1, 1857, and March 1, 1860, in the state courts of New York, and removed to the circuit court of the United States. The actions were brought against the collector of customs for the Port of New York to recover back duties alleged to have been illegally exacted upon certain importations of mousseline de laines made by the copartnership of which the defendants in error are the survivors. The consolidated suit was tried in October, 1887, and a verdict found for the plaintiffs under the direction of the court for $50,563.44. Judgment having been entered against the executors of Augustus Schell, deceased, late collector of the port, a writ of error was sued out from this court. The real question at issue was whether mousseline de laines were, under the Act of March 3, 1857 (11 Stat. 192), subject to a duty of 19 or 24 per cent. That question, however, was excluded from this case under a stipulation "by and between the respective parties to this action that mousseline de laines, composed of worsted, or worsted with a satin stripe, were, under the Tariff Acts of 1857, subject to a duty of 19 per cent, as claimed by the plaintiffs." As the duty exacted and paid was 24 per cent, judgment was rendered for the difference, and the [564 only questions argued by counsel in this court arose upon the admissibility of testimony, and the form, sufficiency and service of protests accompanying the several entries of merchandise, which are set forth and considered in the opinion of the court.

Mr. **A. X. Parker,** *Assistant Atty-Gen.*, for plaintiffs in error.

Messrs. **S. F. Phillips** and *F. D. McKenney* for defendants in error.

Mr. Justice **Brown** delivered the opinion of the court:

Apparently in consequence of the decision of this court in *Cary* v. *Curtis*, 44 U. S. 3 How. 236 [11: 576], to the effect that under the Act of March 3, 1839, an action for money had and received would not lie against a collector of customs for duties paid under protest, Congress, on February 26, 1845, enacted (5 Stat. 727) that nothing contained in the Act of 1839 should be construed to take away or impair the right of any person, who may have paid duties under protest, to maintain an action at law against a collector to ascertain the legality

NOTE.—*As to action to recover back duties paid under protest; protest, how made, and its effect,*—see *note* to Greely v. Thompson, 12: 397.

of such payment; "nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof." The questions presented by the record in this case turn upon the proper construction of this proviso, and upon the proper practice to be pursued in making and serving such protest.

1. Defendants objected to the receipt of Exhibit 5 and twenty-six other exhibits standing in like position, with the protests attached thereto. These exhibits were all entries of merchandise imported by plaintiffs in various ships, to which were appended the usual consignee's oath, and a specific protest duly signed by plaintiffs' firm was also attached to each one by a wafer. Objection was made to the admission of such documents upon the ground [565] that it did not appear that such protests had been served upon the collector as required by the Act of 1845; and second, that if so served, it did not appear that they had been served at or before the payment of the duty sought to be recovered, as required by the same Act.

The Act of 1845 requires, first, that the protest shall be in writing; second, that it shall be signed by the claimant; third, that it shall be made at or before the payment of the duties; and fourth, that it shall set forth distinctly and specifically the grounds of objection to the payment of such duties. But so far as respects the manner, or the person upon whom protest shall be served, the Statute is silent, and we can only infer that from the nature of the proceedings it must be served upon the collector or his subordinate officer, or the person who receives the entry or the payment of the duties. In this silence of the Statute, and in the absence of any treasury regulation upon the subject, it would probably be competent for the collector to receive such protest personally, or delegate his authority to one of his deputies. It is not at all singular that, after the lapse of more than thirty years, it should be impossible to prove upon whom the service was made; but we are informed by the testimony of a custom of passing protests in with the entry, which seems to have prevailed for some time prior to the date of these transactions, and to have continued until the treasury regulations of 1857 were adopted. Now, as these protests were produced under subpœna at the trial from the proper repository, where they appeared to have been lying for a long time, it is not unreasonable to infer that the usual course was pursued and the protests served according to the custom of the office. With regard to the conduct of a public office the presumption is that everything is done properly and according to the ordinary course of business, or, as expressed in the maxim, *omnia præsumuntur rite esse acta.* 1 Greenleaf, Ev. sec. 38. The same presumption would justify us in inferring that the protest was made and served at its date, which, in the case of Exhibit 5, was January 30, 1858, and before the payment of duties, which appears upon the face of the entries to have been made February 1, or two days after the protest was signed.

2. Objection was also made to Exhibits 6, [566] 11 and 13, upon the grounds we have already held to be insufficient, and upon the further ground that the protest consisted of two forms of protest, one printed on white, like Exhibit No. 5, but unsigned, and the other on blue, paper, the latter being pasted to the former and signed by the plaintiffs' firm. The two papers thus pasted together and signed, as aforesaid, were attached to the entry by a wafer, and, read together, made a protest against two exactions, viz.: first, an excessive duty upon the mousseline de laines; and second, the exaction of a duty upon two and one-half or three per cent commissions, when, as claimed, such goods were liable only to duty upon two per cent commission. This consolidated protest was dated "New York, Feb. 10th," and addressed, immediately following the date, to "Augustus Schell, Esq., Collector of Customs," and signed at the bottom by Lachaise, Fauché & Co., the importers. Had it not been for the repetition of the word "Sir" at the beginning of each section of the protest, and the further fact that the protest was on two pieces of paper, there would be nothing to indicate that the plaintiffs did not intend in one communication to protest against the two exactions, viz.: the excessive duty on the mousseline de laines, and the duty on the commissions. While the protest is signed only at the end of the second piece of paper, no one would be misled into supposing that the signature, and the final clause applying the protest to all future similar imports, were not intended to apply as well to the protest against the duty assessed upon the mousseline de laines, as upon the commissions. And it is evident from the protest books of the custom-house in New York that the entire paper was understood by the official who recorded it as a single protest against two illegal exactions. Authorities are plentiful to the effect that papers attached together even by a pin are to be treated as a unit constituting one entire contract or memorandum. Thus, in *Tallman* v. *Franklin*, 14 N. Y. 584, it was held that, where an auctioneer *pinned* a letter to him from the owner of certain real estate to be sold, which stated the terms of sale, on a page of his sales' book, and then made the residue of the entries requisite to constitute a memorandum of [567] the contract of sale on the same page of the book, and subscribed his name to it, the letter was to be taken as a part of the memorandum subscribed by the auctioneer, and was sufficient to take it out of the Statute of Frauds. To the same effect are *Hutcheon* v. *Johnson*, 33 Barb. 395, where certain papers which had been *pasted* together were construed as a single memorandum; *Ginder* v. *Farnum*, 10 Pa. 98, where the sheets of a will were fastened together by a *string;* and *Martin* v. *Hamlin*, 4 Strobh. L. 188. If, however, the papers are not connected together in fact, they are not considered as connected in law, unless, at least, the paper signed refers in some way to the other, which may then be construed as forming a part of it. *Hinde* v. *Whitehouse*, 7 East, 558; *Kenworthy* v. *Schofield*, 2 Barn. & C. 945.

The proper test is, whether a person reading these papers would be deceived or misled as to the actual intention of the writer. We think there can be but one answer to this, and we hold the objection was not well taken.

3. The objections to the admission of Exhibits 1 and 2 are also untenable. These protests were in the following form: "New York, July 25 (27), 1857. Augustus Schell, Esq., Collector of the Port of New York. Sir: We hereby protest against the payment of a duty of 24 per cent, charged by you on worsted stuffed goods, claiming that under existing laws said goods are only liable to a duty of 19 per cent as a manufacture of worsted. We pay the amount exacted to obtain possession of the goods, claiming to have the difference refunded. Lachaise, Fauché & Co." Objection was made to these protests upon the ground that neither of them distinctly and specifically set forth the ground or grounds of objection to the payment of the duties exacted on any of the importations mentioned therein, as required by the Act of 1845. In *Converse* v. *Burgess*, 59 U. S. 18 How. 413, 416 [15: 455, 456], the protest was objected to upon the ground that it stated only "that the goods were not fairly and faithfully examined by the appraisers," and the proof offered was, that the appraisers did not examine any of the original packages, and only saw samples which had been taken several weeks before, and which would not afford a true criterion by which to judge of the importation. *Mr. Justice* Campbell observed: "This Statute was designed for practical use by men engaged in active commercial pursuits, and was intended to superinduce a prompt and amicable settlement of differences between the government and the importer. The officers of the government on the one part, and the importer or his agent on the other, are brought into communication and intercourse by the act of entry of the import, and opportunities for explanation easily occur for every difference that may arise. We are not, therefore, disposed to exact any nice precision, nor to apply any strict rule of construction upon the notices required under this Statute. It is sufficient if the importer indicates distinctly and definitely the source of his complaint, and his design to make it the foundation for a claim against the government." The protest was held to be sufficient. So, in *Arthur* v. *Morgan*, 112 U. S. 495 [28: 825], it was held that a protest against paying a certain duty upon a carriage, which stated that the carriage was "personal effects," and had been used over a year, and that, under the Revised Statutes, "personal effects in actual use" are free from duty, was sufficient, upon which the amount paid for duty could be recovered back on the ground that the carriage was free from duty as "household effects" under the same Statute. It was said by *Mr. Justice* Blatchford: "The protest is not required to be made with technical precision, but is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector, so as to secure to the government the practical advantage which the Statute was designed to secure." In the case under consideration, the importer claimed, in substance, in his protest, that the duty of 24 per cent was excessive, and that the goods were liable only to a duty of 19 per cent "as a manufacture of worsted." His insistence upon classifying them as a manufacture of worsted indicated clearly that the objection made was substantially to their classification as "de laines." We think the collector upon reading this protest could have no doubt in his mind that the intention of the importer was to object to the failure to classify the goods as a manufacture of worsted. Some allowance must be made for the magnitude of business done at a large port, and the hurry and confusion necessarily incident to its transaction, as well as for the proneness of commercial men to look at the substance of things, rather than at the form in which their ideas are expressed. A protest which indicates to an intelligent man the ground of the importer's objection to the duty levied upon the articles should not be discarded because of the brevity with which the objection is stated.

4. Exhibits 14 and 41 contain protests which are without date, and objection was made to them upon that ground. But as it appeared that these protests were in proper form, the same form as No. 5, and were attached to the invoice of merchandise mentioned therein, and duly signed by the plaintiffs' firm, we regard the omission of the date as quite immaterial.

5. Objection was also made to the admission of twenty-two protests upon the ground that there was no evidence that these had been copied in the record kept for that purpose. Treasury Regulation No. 387 provided that "whenever duties are paid under protest, collectors of customs will have the protest carefully and accurately copied at length in a record to be kept for that purpose, properly compared, verified and certified as a correct copy by the officer or officers making such comparison, the number and date of entry, name of importer, vessel and description of merchandise in regard to which the protest is made, to be duly stated on the record for the purpose of identification. This precaution is deemed necessary as well for the protection of the importer as the United States in the event of the loss of the original protest by accident or otherwise." The object of this regulation is thus stated to be in terms to supply secondary evidence in case of the loss of the original protest. If the original be produced, the record is of no value, and, in any event, the failure of the collector to conform to the treasury regulation ought not to prejudice the rights of the importer. The latter would be powerless to require such record to be made, and the omission to make it in a particular case should not be imputed to him. We have already held that the production of the protest from its proper custody was sufficient evidence that it had been served according to law.

6. The only remaining question to be considered is that of prospective protests, and this is really the main question in the case. In twenty-seven entries there are no protests to be found, nor is there any record nor any reference in the protest books of the custom-house indicating that any protest was served in the cases of such entries. These, however, are claimed by the plaintiffs to be covered by the

concluding clause of the double protest number 6, which is in the following words: "You are hereby notified that we desire and intend this protest to apply to all future similar importations made by us." The same clause is found in the protest accompanying entries number 11 and 13, but in none others. Exhibit Number 14 is a specific protest attached to the entry. As no claim was made that any specific protest, however served, had any prospective effect, it follows that the claim for a repayment of duties on the twenty-four exhibits after number 13 is based upon the prospective clauses appearing in the charges and commission form of the pasted papers of Exhibits Number 6, 11 and 13, or is based on such clause or clauses of one or more of these three exhibits. We attach no significance to the fact that the prospective clause of the protest is found at the end of the double protest, following the protest against the duty upon the commission, and is not found attached to that portion of the protest against the duty upon the mousseline de laines. As we have already held that the two protests constitute one paper, it necessarily follows that the concluding clause regarding the prospective protests should be applied to the entire paper, and to the protest against the duty upon the goods, as well as upon the commissions.

The objection to the admission of these papers raised distinctly the question as to the validity of prospective protests. It is admitted that the doctrine held by the court below upon the trial of this suit, that the prospective protests set forth in the clauses attached to the special protests are sufficient as to all similar importations made by the same importer, is now, and has been for a long time, the settled law of that court, and the general practice prevailing in the Port of New York. Such practice is claimed to be authorized by the case of *Marriott* v. *Brune*, 50 U. S. 9 How. 619 [13: 282], decided in 1850. This was also an action for duties illegally exacted, in which the question was made as to the validity of a certain protest, which was somewhat vague in its terms, but was construed by the court as applying prospectively to all importations of "sugar and molasses." After this prospective protest, the plaintiffs made a special protest in each of six several importations, but there were thirteen other importations made after the general protest, respecting which they relied upon the efficacy of the general protest. The court held that as the subsequent entries "all depended on a like principle,—as from the circulars of the department some doubt existed whether the excess of duties would not voluntarily be refunded, as the amounts in each importation were small, and both parties thus became fully aware that the excess in all such cases was intended to be put in controversy, and reclaimed,—we are inclined to think this written protest may fairly be regarded as applying to all subsequent cases of a like character, belonging to the same parties." This case was in affirmance of the opinion in *Brune* v. *Marriott*, Taney, 132, in which *Chief Justice* Taney said that "a particular protest in each case is not required by the law. The object of the protest is merely to give notice to the officer of the government that the importer means to claim the reduction, and to make known to the collector the grounds upon which he makes the claim. In these receipts this protest is sufficiently explicit, and covers all the cargoes upon which the duties had not been finally assessed and adjusted by the collector." It was said of this case in *Davies* v. *Miller*, 130 U. S. 284, 287 [32:932,933], that "though criticised in *Warren* v. *Peaslee*, 2 Curt. 231, it was generally regarded and acted on as laying down a general rule establishing the validity of prospective protests,"—citing *Steegman* v. *Maxwell*, 3 Blatchf. 365; *Hutton* v. *Schell*, 6 Blatchf. 48, and *Strange* v. *Redfield*, there cited; *Wetter* v. [572
Schell, 11 Blatchf. 193, and *Chouteau* v. *Redfield*, there cited. But as this case has been generally accepted as settling the law for this court, and the practice has grown up throughout the country of paying duties under such protests,—a practice to which eminent judges have lent their sanction,—we think it too late for us to be called upon to overrule it. It is an acknowledged principle of law that, if rights have been acquired under a judicial interpretation of a statute which has been acquiesced in by the public, such rights ought not to be impaired or disturbed by a different construction, and if, notwithstanding Treasury Regulation Number 384, requiring protests to be special in each case, a practice has grown up in the different ports of entry of receiving prospective protests, the annulment of such practice might entail serious consequences upon importers who had acted upon the faith of its validity. As early as 1803, it was held by this court, in *Stuart* v. *Laird*, 5 U. S. 1 Cranch, 299 [2:115], that a practical construction of the Constitution that the justices of the supreme court had a right to sit as circuit judges, although not appointed as such, was not open to objection. "It is sufficient to observe," says the court, "that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling. *McKeen* v. *DeLancy*, 9 U. S. 5 Cranch, 22 [3:25]; *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 206 [6:603]; *United States* v. *Alexander*, 79 U. S. 12 Wall. 177 [20:381]; *Peabody* v. *Starks*, 83 U. S. 16 Wall. 240 [21:311]; *Hahn* v. *United States*, 107 U. S. 402 [27:527]; *Rogers* v. *Goodwin*, 2 Mass. 475; Endlich on Stats. sec. 357. Nor do we think the fact that in some cases specific protests were filed after the general prospective protest necessarily shows an intention to abandon any future claim under the prospective [573
clause. If it were any evidence at all of such intent, it might properly be submitted to a jury, but defendants had no right to a peremptory instruction in their favor.

This disposes of all the material questions involved, and it results that *the judgment of the court below must be affirmed.*

[464] PATTIE A. CLAY, *Appt.*,
v.
DAVID I. FIELD ET AL.

LUCY C. FREEMAN, *Appt.*,
v.
PATTIE A. CLAY ET AL.

DAVID I. FIELD, *Appt.*,
v.
PATTIE A. CLAY.

(See S. C. Reporter's ed. 464-483.)

Duty and liability of surviving partner—property in slaves—jurisdiction as to amount.

1. On the dissolution of a firm by the death of one of the two partners, it is the survivor's duty to settle up the partnership affairs and pay to the representatives of the deceased partner the amount due to them; and if he continues the business of the firm on the partnership property he is liable for losses and for half the profits, or for deceased's share in the capital and interest, after deducting his indebtedness to the firm, at the option of deceased's representatives.
2. Where the personal property of a firm consisted almost wholly of slaves, which in a short time after the death of one of the partners were made free through the effect of a public war, the surviving partner ought not to be compelled to account for their value, but only for the value of their use as long as they were slaves, he having an excuse for not selling them until it became too late to sell them at all.
3. If several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, they cannot be aggregated together for the purpose of giving this court jurisdiction on appeal.
4. A latent ambiguity in a writing may be removed by evidence.

[Nos. 895, 1085, 1091.]
Submitted Oct. 27, 1890. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Mississippi decreeing settlement of partnership accounts and payment of the amount due the estate of the deceased partner, and other relief. *Appeal of Lucy C. Freeman dismissed; decree in favor of David I. Field reversed.*

The facts are stated in the opinion.

Mr. **W. L. Nugent** for Pattie A. Clay.

Mr. **Edward Mayes** for Lucy C. Freeman.

Messrs. **J. E. McKeighan** and **Frank Johnston** for David I. Field.

[465] *Mr. Justice* **Bradley** delivered the opinion of the court:

This case was before us in October Term, 1885, upon a decree dismissing the bill on demurrer. See *Clay* v. *Freeman*, 118 U. S. 97 [30: 104]. We reversed that decree, and remanded the cause with instructions to enter a decree in conformity with the opinion of this court, which was done. After various subsequent proceedings in the court below, a decree was finally made on the 15th of August, 1889, from which both complainants and defendants have appealed. Before adverting to the subsequent proceedings, it will be necessary briefly to review the case as stated in the bill, and as it appeared before us on the former appeal.

In 1855, Christopher I. Field and his brother, David I. Field, purchased a plantation in Bolivar County, Mississippi, called the Content place, for the purpose of working the same in raising cotton and other crops as partners, the arrangement being that David should occupy and manage the plantation and all the affairs of the partnership, and that each should share equally in the profits and losses. In the course of the business, Christopher I. Field, who had a plantation adjoining the Content place, and was a man of large means, made sundry advances to the firm to pay for land purchased and other things required in carrying on the business, for which his brother David executed, on behalf of the firm, several notes or acknowledgments of indebtedness; one dated 23d of December, 1856, payable 1st of January, 1858, for the sum of $7,385.31, with six per cent interest from maturity; another dated 20th of March, 1857, for the sum of $5,666⅔, to be paid with interest at six per cent from date; a third dated 5th of June, 1858, for the sum of $1,100; and a fourth dated 30th of June, 1859, for the sum of $1,389.29,—in all, $15,541.27.

David I. Field died on the 11th of September, 1859, leaving his widow, Lucy C. [4
Field (who afterwards married one C. L. Freeman), and an infant son, David I. Field, Jr., who are the defendants in this suit. At the time of David I. Field's death his widow was in Kentucky, and did not return to Mississippi.

Of course, the care of the plantation and partnership property devolved upon Christopher I. Field, as surviving partner; but soon after the death of David letters of administration upon his estate were taken out by another brother, Ezekiel H. Field, who went into possession of the plantation and continued to carry it on in the place and stead of his deceased brother, for the benefit of the partnership, during the year 1860 and part of the year 1861. He left in the summer of the latter year, when the disturbances occasioned by the Civil War rendered it hazardous, if not impracticable, to cultivate the plantation or to secure any crops. It is charged in the bill that the year 1859 was an

NOTE.—*As to liability of partners on bills and notes; power of partner, as agent, to bind the firm as party to negotiable instruments, and otherwise,* —see *note* to LeRoy v. Johnson, 7:391.

As to how far partners are liable for each other's acts, see *note* to Nelson v. Hill, 12:81.

When partner liable on contracts in firm name after dissolution; what notice of dissolution is necessary to avoid liability. See *note* to Lovejoy v. Spafford, 23:851.

As to effect of admissions of partner, after dissolution, on his copartners, see *note* to Thompson v. Bowman, 18:786.

As to rights and powers of surviving partners, see *note* to Moore v. Huntington, 21:642.

unprofitable year, in consequence of the overflow of the river, and that during the year 1860 the crop raised was appropriated to keeping up the plantation, ditching and making other improvements, and that the crop of the year 1861 was destroyed by the soldiers of the Confederate States under military orders. It is also alleged that no part of the crops ever came into the hands of Christopher I. Field, but all the proceeds that were realized were applied to the payment of current expenses and debts of the partnership, other than the debt due to Christopher I. Field, which, it is alleged, has never been paid. During the war Christopher I. Field, to prevent the capture of the slaves by the fleets of the United States descending the river, removed them to the State of Texas, and kept them there until the surrender, but realized nothing from their labor in Texas beyond sufficient to pay for their maintenance and support. After the surrender he had them brought back from Texas at considerable expense, for the purpose of cultivating the plantation again, but most of them, claiming their freedom, abandoned it, and he was obliged to rent the plantation for what he could get, and did rent it for a time to different persons, but never received therefrom any results beyond the expenses incidental thereto. Ezekiel H. Field, after quitting the plantation in 1861, performed no further acts in the administration of the estate, and resigned his position in May, 1866, and some time in that year Christopher I. Field was appointed his successor. Christopher died on the 18th of July, 1867, leaving as his only heir-at-law the appellant, Pattie A. Field, now Pattie A. Clay by intermarriage with Brutus J. Clay the younger. After the death of Christopher I. Field, and in October, 1867, Brutus J. Clay, the elder, was appointed administrator both of his (Christopher's) estate and of the estate of David I. Field, the plantation being at that time under rent to Martin and Childress. During 1868 it was rented by Brutus J. Clay, the administrator, to one Holloway; and in 1869 to the said Holloway and another person by the name of Clay, but very little rent was collected which was not required to make repairs consequent upon breaks in the levees, etc. In March, 1868, Brutus J. Clay filed his accounts as administrator of Christopher I. Field, in the Probate Court of Bolivar County, Mississippi, and also commenced proceedings to have the interest of David I. Field in the Content plantation sold for the purpose of paying his half of the promissory notes given by the firm of D. I. Field & Company to Christopher I. Field, before mentioned. These proceedings are stated in the former report of the case, before referred to. The probate court made a decree declaring the estate of D. I. Field insolvent, and authorizing the administrator to sell the lands described in the petition; and accordingly a sale of D. I. Field's half interest in the plantation was made at auction on the 20th of December, 1869, and it was struck off to the appellant, Pattie A. Field, by her attorney or some other person acting in her behalf (she then being a minor, and ignorant of the matter), for the sum of $6,000, and she received a deed therefor, and a receipt for that amount was given as a credit on the said notes. Pattie A. Field then went into possession of the property, and remained in possession until the bringing of the present suit, except as to such part as was set off to the widow, Lucy C. Freeman, for her dower, in November, 1879. [The said sale, however, has been held void because of the abolishment of the probate court by the Constitution adopted on December 1, 1869.] The [468 bill states that the result of the working of the plantation whilst in possession of the plaintiffs from 1870 to the time of the filing of the bill was without profit, and that the complainant, Pattie A. Clay, incurred a loss of $2,500 or $3,000 by keeping possession of the property and making repairs rendered necessary by the dilapidations arising from the war, the overflowing of the river and other causes for which she was not responsible. The bill sets forth in detail a large amount of expenditures incurred by the complainant for taxes and other expenses, and for necessary repairs made by her.

In April, 1873, Lucy C. Field, the widow, filed a petition in the Chancery Court of Bolivar County for her dower in one undivided half of the Content plantation; and in 1875 a decree for allotment of her dower was made, and was affirmed by the Supreme Court of Mississippi in 1876 so far as the affirmation of her right of dower was concerned. In 1879 she further applied to the said chancery court to have her said dower set off to her in severalty, and a decree for that purpose was made and carried into execution, and she has ever since had possession of the portion set off to her. In September, 1880, the said Lucy commenced a suit, in the same court, against the appellant, Pattie A. Clay, and her husband, to recover the rental value of her dower whilst in possession of the said Pattie. This suit was removed into the Circuit Court of the United States for the Northern District of Mississippi, before the commencement of the present suit, and evidence was taken therein and sundry proceedings were had, and it stood ready for trial when the bill in the present case was filed. In November, 1880, David I. Field, the son and heir of David I. Field, deceased, having attained his majority, brought an action of ejectment in the United States circuit court aforesaid against the said Pattie A. Clay and her husband for the undivided half of the Content plantation, also demanding $20,000 for the use and occupation of the premises from and including the year 1870. Pattie A. Clay and her husband filed a plea in said suit, and the action was pending when the present suit was brought. The bill in the present case was filed for the purpose of enjoining the prose- [469 cution of the said two last-mentioned suits, and for the settlement of the partnership accounts of D. I. Field & Company, and payment out of the partnership property remaining (consisting only of said plantation) of the amount due to the estate of Christopher I. Field, upon the four notes before mentioned. The complainants offered in the bill to account for all rents and profits received

by them, claiming credit for all expenditures, taxes and repairs made on account of the property, and prayed that the assets of the partnership might be marshalled and sold for such balance as might be found due to the said Pattie as representative of her father's estate.

This bill was demurred to by the defendants, and the court below sustained the demurrer as to so much of the bill as prayed for a settlement of the partnership accounts, but overruled it so far as it related to an account of the rents and profits due either to Lucy C. Freeman, in respect to her dower, or to David I. Field in respect to his undivided half of the plantation, thus in effect turning it into a suit against the complainants instead of a suit by them. Thereupon evidence was taken on the part of Lucy C. Freeman in support of her claim for rents and profits upon her dower. David I. Field, in March, 1884, filed an answer, stating that he had recovered a judgment in his ejectment suit for one undivided half of the plantation, and praying an account of rents and profits for that half, to be taken in the present suit.

At this stage of the proceedings the complainants objected to having the suit proceed for the purpose of merely taking an account of rents and profits against them, and thereupon, on the 6th of March, 1884, the court made the following decree, to wit:

"Pattie A. Clay *et al.* } 288.
v.
"Lucy C. Freeman *et al.* }

"Be it remembered that this day came on to be heard the above-entitled cause; and, the parties appearing in open court, by consent the account herein filed by the master
470] is withdrawn, and the decree of reference hereinbefore rendered is set aside; and counsel for complainants declining to avail himself of the offer of the court to retain the bill for the purpose of stating an account, it is ordered, adjudged and decreed that said bill be, and the same is hereby, dismissed, and that complainants pay the cost, for which let execution issue; and thereupon complainants prayed an appeal to the Supreme Court of the United States, which is granted upon their entering into bond in the penalty of one thousand dollars, with two securities, conditioned according to law."

The complainants then appealed to this court, and the decree of the circuit court was reversed, as appears by the report of the case before referred to. 118 U. S. 97 [30: 104].

In conformity with the mandate of this court, a decree was made by the court below in June, 1886, ordering, amongst other things, as follows, to wit:

"1. That the demurrers of defendants to complainants' bill heretofore filed be, and the same are hereby, overruled, and that the defendants answer within sixty days as of the present term of the court."

"3. That the defendant, David I. Field, be, and he is hereby, enjoined from the further prosecution of his ejectment suit against complainants and from suing out final process for the enforcement of his judgment for rent therein, but may retain the possession of the lands secured in said ejectment suit, subject to the rights of complainants under the judgment of the said supreme court, to be hereafter determined and fixed."

The complainants, then, by leave of the court, filed a supplemental bill, stating as follows, to wit:

"1. After and notwithstanding the filing of the bill in this cause, the defendant, Lucy C. Freeman, prosecuted her suit in this court against your orators for arrearages in rent upon and for her dower interest in the Content plantation as shown in the pleadings, and on the 12th day of June, 1884, after her demurrer and exception to your orator's original bill had been sustained, recovered a final decree against your orator Pattie A. Clay, for $3,092.34 and costs. On the 14th day of June, 1884, on motion, this judgment or decree was reduced to $2,200.15. [47
The same, with the costs in the cause, amounting to $165, your orator well and truly paid, and so performed the said judgment and decree of the said district court, from which there was no appeal, as by the record of said cause doth appear.

"2. That said recovery and payment was not according to right and justice, as appears from the opinion of the Supreme Court of the United States on your orator's appeal from the above decree of this court in this cause, and the said Lucy C. Freeman ought in this cause to be decreed and adjudged to restore the said sum and costs to your orator or be compelled to accept it as a charge against her in any accounting hereafter to be had in the cause.

"The premises considered, your orators pray as prayed in the original bill, and that the said Lucy C. Freeman be adjudged to restore to them the money so wrongfully secured by her in the said cause, or for general relief."

The defendants, David I. Field and Lucy C. Freeman, then filed separate answers to the bill in the present case, alleging in effect that David I. Field, deceased, was not in debt to the partnership firm at the time of his death, nor the firm to Christopher I. Field; that the latter controlled and managed the property after his brother's death, though nominally in the hands of Ezekiel H. Field as administrator, and that for his neglect to sell the same before the war (which it is alleged he could have done at a great advantage) he was answerable for and should be charged with the whole appraised value of the personal estate of the firm (which was $33,663), and such further sum as the evidence might show it to have been worth at the date of David's death, and that the complainants should also be charged with the reasonable rental value of said partnership real estate from the said date down to the date of the accounting. This was the general purport of the defense.

A large amount of evidence was taken in the cause, and in March, 1888, the district judge holding the circuit court, upon final hearing, delivered an opinion on the merits

of the controversy (34 Fed. Rep. 375), and in June following made a decree settling the rights of the parties and the principles upon which an account should be taken between them.

The case as developed by the evidence is very different from what it appeared on the mere statements of the bill. By those statements it was to be inferred that E. H. Field, the administrator of David I. Field's estate, in carrying on the plantation in concurrence with the views of Christopher I. Field, acted as an independent representative of the estate, and with a view to its best interests under all the circumstances of the case, and free from any control on the part of said C. I. Field. In such a case, as held by us in *Hoyt* v. *Sprague*, 103 U. S. 613 [26: 585], the representative waived the peculiar rights which he might enforce in regard to the partnership property; and it follows, as a matter of course, that the surviving partner is subject to no such extra liability as he incurs when he continues to use the partnership property in the business without the consent of the representative of the deceased partner. The evidence, however, shows very clearly that Ezekiel H. Field was appointed administrator of the estate of D. I. Field at the instance of C. I. Field, and was altogether governed by him in the management of the estate. In a letter from C. I. Field to David's widow, the said Lucy, dated January 12, 1860, he said: "I have no desire to do anything that will prove an injury to David's estate. I sometimes fear it will take too long to pay the debts from crops with the present force on the place. I had Ezekiel appointed administrator because I was the largest creditor and did not wish to settle with myself. I put him on the place to live, thinking the negroes would be better contented, and would be managed with more ease and less whipping. True, I have the control and management of the whole, but it is done through him. I am well satisfied it was for the best, and shall wish him to remain there, if he will do so, as long as I have any interest in the property. Don't understand me to think that you disapprove of it, for I do not think so." It is apparent from this language that C. I. Field, whose plantation was next adjoining the Content place, and who was, therefore, at hand to see all that was done on the latter, exercised general control over the partnership property after his brother's death, without the sanction of a responsible and independent representative of his estate. This aspect of the case raises questions with regard to the principle on which the partnership accounts should be adjusted, and the degree of liability of C. I. Field as surviving partner, which were not before us when the case was here formerly.

Then we only decided that the complainants, as representing C. I. Field, were entitled to have an accounting of the partnership estate for the purpose of securing the payment of the amount due to C. I. Field, if anything, out of the partnership property. The court below had decided that they were barred by lapse of time. We held otherwise, on the ground that the complainants and their ancestor, C. I. Field, having been in possession of the property, lapse of time, or the Statute of Limitations, did not run against them. The question now is as to the principles on which the settlement should be made.

There is no doubt that C. I. Field, after his brother's death, acted in entire good faith and for what he supposed the best interests of the concern, including his brother's interest as well as his own. He did not nor did anyone then anticipate the great civil convulsion which soon took place and destroyed the entire value of slave property, and very largely the value of all other property in the Southern States. The case in this respect was an exceptional one, and it may be a question whether ordinary rules can be strictly applied to it. C. I. Field undoubtedly supposed that it would be more for the interest of his brother's widow and infant child that the plantation should be continued in operation until a good purchaser could be found, than that everything should be immediately sold, which could not have been done without sacrifice; and there is some evidence that the widow and her friends acquiesced in this view of the case, although she asserts that she was anxious for an immediate sale. The general principle of law undoubtedly is, that on the dissolution of the firm by the death of one of the partners, it is the survivor's duty to settle up the partnership affairs within a reasonable time, and pay over to the representatives of the deceased partner the amount due to them; and if he takes the responsibility of continuing the business of the firm, and using the [4'
property of the partnership, he becomes liable for losses that may occur, and it is in the option of the representatives of the deceased partner either to insist upon a division of the profits, which may be made in thus carrying on the business, or upon being paid the amount of the deceased's share in the capital, with lawful interest thereon, after deducting his indebtedness to the firm. See Lindley on Part., Book III. chap. 10, pages 976 to 1046, 1047 (4th ed.) The application of the rule in this case would, strictly speaking, entitle the representatives of D. I. Field to call for an account of his share in the capital of the concern at the time of his death, with lawful interest. This is what they do demand as regards the personal property, which was appraised at $33,663, one half of which, with the interest thereon, they claim should be accredited to the estate of D. I. Field. But this personal property consisted almost wholly of the slaves on the plantation; and the court below charged C. I. Field and his estate with the value of their service as long as they continued slaves, as well as with reasonable rent for the real estate during the whole period from the death of D. I. Field, except the years 1863, 1864 and 1865, when the war was flagrant.

Under such anomalous circumstances and such unexpected events, it seems hardly just to visit upon a surviving partner, acting in good faith and with a view to the best interests of all concerned, the strict consequences of the rule. In our view equity, when called

upon to settle the mutual rights of the parties, may very properly mitigate the hardships of the rule, especially when, as in this case, the loss has occurred by public war. The remarks made by this court, through *Justice* Swayne, in *Tate* v. *Norton*, 94 U. S. 746 [24: 222] (which was the case of an administrator), are somewhat apposite to the case now before us. "The intestate," said the court, "had been largely engaged in raising cotton. The administrator put himself, as it were, in the place of the deceased. Everything was carried on and conducted as before his death. Payments were made to the widow from time to time, the children were supported and educated, the taxes were paid, [475] crops were raised, the cotton was sold and the debts were discharged as fast as the circumstances permitted. . . . The commencement of the war was the beginning of the troubles of the trust. The State was a battlefield. Troops on both sides were there. The slaves were sent to Texas for safety. The mules and other live stock were swept away by the advancing and receding tides of the conflict. The lands hardly paid the expenses of cultivating them. Finally the slaves as property were stricken out of existence. This involved a loss to the estate, according to the original inventory, of more than $113,000 of the assets. The administrator became wholly unable to pay this debt. The answer avers that, but for the war, he could, by the year 1863, have extinguished this demand also, and have then handed over to the heirs a large and unincumbered estate for distribution among them. The record shows that this was not an over-sanguine calculation. The calamity was unforeseen, and one for which the administrator was not responsible."

Concurring in the views here expressed, we think with the court below that it would be a very hard application of the general rule relating to a dissolution of partnership by the death of one of the partners, to compel C. I. Field or his estate, under the circumstances of this case, to account for the value of those slaves, which in a few months were entirely freed from bondage by operation of law, and no longer articles of property.

Whilst it is true that C. I. Field, after his brother's death, might have sold the slaves and other property on terms which, in the light of subsequent events, would have been greatly to the advantage of his brother's estate, yet it seems clear from the evidence that the reason he did not sell was that no opportunity offered of effecting a sale of the plantation at what he deemed an adequate price. The sale of the slaves without selling the lands would have rendered the latter entirely unproductive, and a dead weight in his hands. We think, therefore, with the court below, that C. I. Field, as surviving partner, had some excuse for not selling the slaves until by the progress of events it became too late to sell them at all. But in assuming the responsibility of continuing the business of the partnership by carrying on the plantation, he became chargeable [476] with the fair rental value of the property, whether he succeeded in realizing it or not, and took the hazard of such losses as might occasionally occur. We think, therefore, on the whole, that the judge presiding in the court below adopted the proper course in disallowing the claim for the value of the slaves, and charging C. I. Field and his estate with the fair rental value of the property, including that of the slaves as long as they were slaves, and crediting them with the taxes paid and the permanent improvements. He could not do more without making the law an engine of hardship and severity; he could not do less without disregarding its plain principles. An extract from his opinion will more fully show the grounds on which his conclusion was based. After giving a general history of the case, and the making of the four notes claimed to be still due and unpaid, he proceeded as follows:

"It is insisted upon the part of the defendants that if these obligations were not paid at the death of D. I. Field they were canceled by the negligence of C. I. Field, as surviving partner, to sell so much of the personal property, including, if necessary, the slaves, to pay off this indebtedness, which it is insisted should have been done during the year 1860, when such property brought a high price and before its destruction; that this personal property was then of much larger value than the amount due on these obligations and all other indebtedness of the firm. I am satisfied from the proof that this indebtedness did exist against the firm, but not against D. I. Field individually, and that all the attempted proceeding to collect the same against the estate of D. I. Field by a sale of the lands was based upon a mistaken theory and without authority, and is consequently void. Upon the death of D. I. Field the title to all the personal property, including the slaves, belonging to the firm, vested in C. I. Field, as surviving partner, whose duty it was to have sold so much of it within a reasonable time to pay off this and all other indebtedness against the firm. . . . The question is, Did C. I. Field by this neglect render himself liable for the loss of this personal property and the value of the slaves as to the interest of defendants therein, or estop himself from setting up the claim here made?

"Considering the relationship of the parties [47 and all the circumstances, it would, perhaps, be inequitable to hold so strict a rule; but I am satisfied that he had no power to continue the operation of the plantation with the firm slaves, mules and other property belonging to the firm, as a continuation of the firm business, during the years 1861, 1862 and 1863, and that he was liable for a reasonable rent for the land and the hire of the slaves, stock and other property used in the cultivation of the plantation during the years 1861 and 1862, to be applied to the payment of these obligations—no other indebtedness is shown now to exist—and that as C. I. Field and his administrator, Brutus J. Clay, and the complainant, since her attempted purchase, has been in the possession of all the lands, with the exception of Mrs. Freeman's dower, since its assignment, the

complainant must be charged with a reasonable rent for the lands and the hire of the slaves, mules and other property used in making the crops of 1861 and 1862, and for a reasonable rent of the lands since the 1st of January, 1866, omitting the years 1863, 1864 and 1865; that such rents and those for 1861 and 1862 be credited upon the amount due upon the obligations given to said C. I. Field, with interest up to the 1st of January, 1863, and that the rents accruing, commencing with the 1st of January, 1866, with interest for 1866 on the 1st day of January, 1867, and so on from year to year up to the present time, the rents and hire to be estimated at what would be a fair and reasonable rent or hire to a solvent tenant for cash, taking the plantation and property as a whole, and crediting the complainant with the amounts paid for taxes and for such improvements as were necessary to rent the lands at a reasonable price; also for the value of such improvements as may have added to the permanent value of the lands—not what they cost, but the value that they permanently may have added to the lands.

"It is insisted that the complainant should be considered as a mortgagee in possession, and only chargeable with the rents actually received.

"I am of opinion that as C. I. Field neglected to sell the personal property when he [3] should have done so, and by which neglect it was wholly lost to the defendants, the complainant is not entitled to be considered as a mortgagee in possession, and only liable for the rent received. The cause must be referred to a master to take and state an account under the rules stated and report the same to the next term of court. As C. I. Field was chargeable with the rents and hire for 1861 and 1862, he was entitled to the crops for those years; and, being sole owner, the loss, as a matter of course, was his alone."

A decree was made in substantial conformity with this opinion, and an extended inquiry was had before the master for the purpose of ascertaining the rental value of the plantation, stock and slaves during the years 1861 and 1862, and of the plantation and stock from and including the year 1866, no account being taken for the years 1863, 1864 and 1865; and the estate of C. I. Field was charged with the rents thus ascertained, year by year. On the other hand, the said estate was credited with the four notes in question and interest thereon, year by year, except for the years 1863, 1864 and 1865; and with the taxes paid on the property, and the expenditures made for improvements that were necessary or which added permanent value to the estate. In August, 1889, the master made his report, showing, as the result of the account, a balance due from the estate of C. I. Field to that of D. I. Field, on the 1st of January, 1889, of $3,281.40. He also found $3,747.11 due from Lucy C. Freeman to the complainants for the amount which they had paid to her for the rents and profits of her dower, in satisfaction of the judgment obtained by her against them in her suit. Both parties filed exceptions to the report, which were fully discussed before the court below, the result being a readjustment of the amounts due as follows:

Due from complainant to D. I. Field	$4,708.78
Due from Lucy C. Freeman to complainant	2,667.28

A decree for these amounts was made accordingly, and the injunction against D. I. Field from proceeding to collect the rents and profits recovered by him in his action of ejectment was made perpetual, but it was [47 decreed that he be let into possession of the undivided half of the Content plantation. Other proper directions were made in the decree. All the parties appealed,—the complainants and the two defendants, Mrs. Freeman and David I. Field, separately.

A question has been raised as to the jurisdiction of this court to entertain the appeal of Mrs. Freeman. The decree against her is only for the sum of $2,667.28, but little more than half the amount necessary for an appeal to this court. Her case is a distinct one, and her appeal is a distinct and separate appeal. We do not see how it can be so connected with that of D. I. Field, the other defendant, as to be an incident of his, or ancillary thereto. Her estate of dower was a distinct estate, and she prosecuted her supposed rights thereto in a distinct and separate proceeding. The decree against her is that she refund the amount above named to the complainant from whom she had recovered it in a separate action by way of damages, or rents and profits in dower. Unless the action of dower is exempt from, or excepted out of, the Act fixing the jurisdictional amount necessary for an appeal, we have no jurisdiction in this case. We are not aware of any ground on which such an exemption or exception can be placed. It seems to us that the case comes clearly within the principle which has governed the decisions of this court in a large number of cases, in one of the latest of which (*Gibson* v. *Shufeldt*, 122 U. S. 27 [30: 1083]), the previous cases are reviewed and classified. We refer particularly to the cases of *Henderson* v. *Wadsworth*, 115 U. S. 264 [29: 377]; *Stewart* v. *Dunham*, Id. 61 [329]; *Hawley* v. *Fairbanks*, 108 U. S. 543 [27: 820]; *Farmers L. & T. Co.* v. *Waterman*, 106 U. S. 265 [27: 115]; *Russell* v. *Stansell*, 105 U. S. 303 [26: 989], and *Seaver* v. *Bigelows*, 72 U. S. 5 Wall. 208 [18: 595]. Many other cases stand in the same category, but they are referred to and commented on in the cases cited. The general principle observed in all is that, if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience [4 only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by

appeal, but each must stand or fall by itself alone. The principal cases in which the interest has been deemed common and undivided, and appeals have been sustained, are *Shields* v. *Thomas*, 58 U. S. 17 How. 3 [15: 93]; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112 [25: 782]; *The Connemara*, 103 U. S. 754 [26: 322]; *The Mamie*, 105 U. S. 773 [26: 937]; *Davies* v. *Corbin*, 112 U. S. 36 [28: 627]; *Estes* v. *Gunter*, 121 U. S. 183 [30: 884], and *Handley* v. *Stutz*, 137 U. S. 366 [34: 706]. Mrs. Freeman's case does not come within the principle of any of these cases. As before stated, the estate of dower claimed by her was a distinct estate, and she sued for it in a separate proceeding. She and her son are joined in this suit because they claim interests in the same land, namely, D. I. Field's undivided half of the Content plantation, which the complainant seeks to have subjected to the partnership liabilities; but the interests severally claimed by them in said land are entirely distinct and separate from each other. Mrs. Freeman's appeal, therefore, will have to be dismissed.

As we have already expressed our views with regard to the main point involved in the case, and in reference to the general view taken by the court below, it will not need an extended discussion to dispose of the particular questions raised on the exceptions to the master's report, and assigned for error here. It is contended by D. I. Field that the due-bill given to C. I. Field on the settlement of June 13, 1859, was a settlement and adjustment of the whole partnership accounts up to that date. We do not think that this is implied from the terms of the note. The most that can be said is that the words, "Received on settlement to this date," are ambiguous, and may refer to a settlement for the year, or a settlement for the whole period of partnership. This ambiguity, being a latent one, is removed by the evidence in the case. Settlements seem to have been made each year. The other notes were given at nearly annual periods previously. The last
181] previous note for $1,100 was given just a year before this; and the one before that a little over another year. The continued possession of the notes by C. I. Field, uncanceled, is presumptive evidence that they had not been paid. Ezekiel H. Field, the brother and administrator of D. I. Field, testified that D. I. Field owed his brother $12,000; that he understood this from both of them. His evidence is a little confused, as he speaks of a single note for that amount; but afterwards he says there were several notes, and that he saw them in his brother C. I. Field's possession, and that they were signed by D. I. Field. C. F. Clay, a nephew, and intimate with the parties, testifies to his understanding that D. I. Field was indebted to his brother, and he had seen the notes in the latter's hands.

On the whole, we are satisfied that the note referred to, namely, that given on the 13th of June, 1859, was not given in settlement of the entire partnership account, but only of the operations of the year immediately preceding. It seems evident to us, from all the evidence on the subject, that at the time of giving the last note (which was only a short time prior to the death of D. I. Field) there was no unsettled matter between the partners except the partnership notes which had been given to C. I. Field.

The next assignment of error made by D. I. Field is that the surviving partner should have been charged with the value of the slaves and personal property, and with the depreciation of the real estate. This point is involved and discussed in the former part of this opinion, and requires no further observation on our part.

The remaining assignment relates to the accounts taken before the master, respecting which D. I. Field complains (1st) that the rents were placed by the commissioner at too low a rate for the years 1861 and 1862; (2d) that David I. Field's estate should have credit for $5,579 paid by him on the Kirk note; (3d) that the allowance for improvements was much too great. After a careful examination of the evidence on these points, we are satisfied that these exceptions are not well taken, and that, at least, no injustice was done to the estate of D. I. Field.

The complainant, on the other hand, con- [481
tends that the rents for 1861 and 1862, as allowed by the commissioner, were too high, and that a sufficient amount was not allowed for improvements. The evidence on these points is conflicting, and as to the allowance for improvements we do not see any good reason for questioning the result reached by the commissioner and the court below. But as to the rents charged to C. I. Field for the years 1861 and 1862, it does seem to us that they are somewhat excessive, considering the state of the country at the time. Sheriff Carson testified that during those years the taking care of property, real or personal, was quite equal to its value; and another respectable witness for the complainant says that the arable land was worth five dollars per acre rent in 1861, though the crop was burnt; but that in 1862 and the following years it was worth nothing. Other witnesses say that it was worth ten dollars per acre; but in view of the uncertainty of keeping the crop from being destroyed, and of getting it out to a market, and of the general uncertainty of everything in that time of war, it seems to us that these estimates must be extravagant. The commissioner charged seven dollars per acre rent for the 400 acres of arable land for the year 1861, and three dollars and a half for the year 1862. We think that a rent of five dollars per acre for the year 1861 was at least as much as ought to have been charged. Of course it is a matter that does not admit of certain calculation; but it seems to us clear that the amount charged was too high for that year. This, with the interest for one year, would make a difference of $848 in the amount to be carried to the 1st of January, 1863, and from thence over to the 1st of January, 1866, according to the mode of making up the account; and with interest from thence to the 1st of January, 1889, it would make a difference in the result of $2,018.24, being that

amount to be deducted from the decree in favor of the defendant D. I. Field, and reducing said decree to the sum of $2,690.54.

The complainant excepted to various other matters in the account and has assigned errors upon them here; but from the best consideration we have been able to give to them, we 3] are not satisfied that any error has been committed, assuming that the account should be made up in conformity with the directions of the decree. If it were necessary to go into a discussion of the different points in detail, we could not do better than to quote the final opinion of the court below in relation thereto. But no useful purpose could be thereby subserved.

Our conclusion is that the appeal of Lucy C. Freeman must be dismissed, and that the decree in favor of David I. Field should be reversed and a decree be rendered that the complainant, Pattie A. Clay, pay to said David I. Field the sum of $2,690.54, with interest from the first day of January, 1889; and that each party pay his and her own costs on this appeal, except the cost of printing the record, which shall be paid one half by the appellant Pattie A. Clay, and one half by the appellants Lucy C. Freeman and David I. Field. And the cause is remanded with instructions to modify the decree in conformity with this opinion.

Mr. Justice **Brown,** not having been a member of the court when this case was argued, took no part in the decision.

1] JOHN GRAHAM, *Plff. in Err.*,

v.

GEORGE WEEKS, Warden of the WISCONSIN STATE PRISON.

(See S. C. Reporter's ed. 461-464.)

Judgment in criminal case, when erroneous—habeas corpus—federal question.

1. As a general rule, a judgment rendered in a criminal case must conform strictly to the statute, and any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void.
2. It seems that under the law of Wisconsin a judgment in a criminal case, which merely exceeds in the time of punishment prescribed by the sentence that which is authorized by law, is not absolutely void, but only erroneous, and that the error must be corrected on appeal and cannot be corrected by a writ of habeas corpus.
3. When the highest court of a State holds that a judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent in which the law of the State authorized the punishment, and only void for the excess, this court cannot treat it as wholly void, there being no principle of federal law invaded in such ruling.

[No. 1332.]

Argued Jan. 29, 1891. Decided March 2, 1891.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment of that court refusing to issue a writ of habeas corpus for the discharge of the plaintiff in error, the petitioner for the writ. *Affirmed.*

Statement by *Mr. Justice* **Field:**

This is a writ of error to the Supreme Court of Wisconsin to review a judgment of that court refusing to issue a writ of habeas corpus for the discharge of the plaintiff in error, the petitioner for the writ.

A law of Wisconsin declares that "any person who shall assault another and shall feloniously rob, steal or take from his person any money or other property which may be the subject of larceny, such robber being armed with a dangerous weapon, with intent if resisted to kill or maim the person robbed, or, being so armed, who shall wound or strike the person robbed, shall be punished by imprisonment in the State prison not more than ten years nor less than three years." The petitioner in the court below, John Graham, and one Samuel McDonald, were charged with feloniously making an assault upon one Alf. McDonald, putting him in bodily fear and danger of life and feloniously robbing him of two hundred dollars in money, the parties being armed at the time with a loaded revolver, and wounding and striking the said Alf. McDonald. In June, 1889, the parties were tried in the Circuit Court for Ashland County, Wisconsin, and were convicted as charged in the information, and were sentenced to confinement in the State prison at hard labor, one for the period of thirteen years and the other for the period of fourteen years. As the law only authorized punishment by imprisonment not exceeding ten years, and the parties were serving under a sentence much longer than that period, they applied to the court below for a writ of habeas corpus, alleging that the judgment was void as being in excess of the authority vested in the court by which it [4 was rendered. The court below held that the judgment was not void in the sense of being an absolute nullity, but only erroneous, and that the remedy of the parties was by a writ of error and not by a writ of habeas corpus. *Re Graham* and *Re McDonald*, 74 Wis. 450. The writ was therefore refused. Subsequently one of the parties applied again to the Supreme Court of Wisconsin for the writ, and it was again refused. To review this last judgment the case is brought to this court.

NOTE.—*When habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of.* See *note* to United States v. Hamilton, 1:490.

As to what questions may be considered on habeas corpus, see *note* to *Ex parte* Carll, 27:288.

Jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution. See *notes* to Martin v. Hunter, 4:97; Matthews v. Zane, 2:654; Williams v. Norris, 6:571.

Jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws. See *notes* to Hart v. Lamphire, 7:679; Commercial Bank of Cincinnati v. Buckingham, 12:169.

Messrs. **Rublee A. Cole** and *William W. O'Keefe* for plaintiff in error.

Messrs. J. L. O'Connor and *Robert M. La Follette* for defendant in error.

Court declined to hear counsel for defendant in error.

Mr. Justice **Field** delivered the opinion of the court:

It is undoubtedly the general rule that a judgment rendered by a court in a criminal case, must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted, renders the judgment absolutely void; but it seems that under the law of Wisconsin a judgment in a criminal case, which merely exceeds in the time of punishment prescribed by the sentence that which is authorized by law, is not absolutely void, but only erroneous, and that the error must be corrected on appeal and cannot be corrected by a writ of habeas corpus. It would seem that a distinction is there made between those cases in which the judgment is irregular, as being in excess of the time prescribed, and those in which it is void as changing the nature of the punishment from that authorized by the law; and that in the former class, until the time is reached which is prescribed by statute as the limit of the power of the court to punish the prisoner, he has no remedy by habeas corpus.

If such be the law of the State, as would appear by this decision and the argument of
33] counsel, we do not see that we have any right to interfere. That the prisoner should not have been sentenced for any time in excess of ten years, is very evident. When the ten years have expired it is probable the court will order the prisoner's discharge, but until then he has no right to ask the annulment of the entire judgment. Such being the ruling of the state court, and there being nothing in it repugnant to any principle of natural justice, we think that the reason given for a refusal of the writ of habeas corpus in the court below at the present time was a sound one.

Nor is the doctrine of the Wisconsin court peculiar to the courts of that State. In New York it has been held that a judgment in a criminal case, which in the punishment it imposed exceeded that prescribed by statute, was not void except for the excess, where such excess could be omitted in the execution of the judgment. Thus, in *People* v. *Baker*, 89 N. Y. 460, 467, the relator was tried and convicted of a crime for which he was sentenced to be imprisoned in the penitentiary for one year, and to pay a fine of $500, and to stand committed until the fine was paid. Contending that the offense of which he was convicted was shown by the minutes of the court to have been merely an assault and battery, for which he could have been at most sentenced to be imprisoned for one year and to pay a fine of $250 only, he applied to a judge of the Superior Court of Buffalo for a writ of habeas corpus to be discharged from imprisonment. That court refused to discharge him, and the general term of the court having affirmed the ruling, the case was taken to the Court of Appeals of the State. In sustaining the decision that court held that if the relator was only convicted of a simple assault and battery he would not be entitled to his discharge, for then the sentence to imprisonment for one year was authorized and legal, observing that this was a separate portion of the sentence, complete in itself, and the remainder of the sentence could be held void and disregarded; and that the whole sentence was not illegal and void because of the excess, adding that such was the settled law of the State.

But were the general doctrine of other States against that held by the highest court of Wisconsin, it is not perceived how we [46
could interfere with the imprisonment of the plaintiff in error. When the highest court of a State holds that a judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent in which the law of the State authorized the punishment, and only void for the excess, we cannot treat it as wholly void, there being no principle of federal law invaded in such ruling.

Judgment affirmed.

SYLVESTER H. KNEELAND, *Appt.*, [509]
v.
AMERICAN LOAN AND TRUST COMPANY ET AL.

SYLVESTER H. KNEELAND, *Appt.*,
v.
GEORGE WILLIAM BALLOU, Trustee, ET AL.

(See S. C. Reporter's ed. 509-513.)

Decree on reversal—new investigation—respectful language.

1. Where on reversal in this court the case was remanded with instructions to allow certain rentals from a certain time, this in effect affirms so much of the decree as allowed these amounts, and a new decree awarding interest thereon from the date of the former decree was correct.
2. Where this court reversed a decree with instructions to strike out certain specific items and to allow others as already fixed, no new investigation was contemplated or is necessary in respect to those past matters.
3. This court regrets to notice in the brief of appellees' counsel aspersions on the conduct of opposing counsel. Language used in briefs, as well as that employed in oral argument, must be respectful.

[Nos. 1539, 1540.]

Argued Jan. 29, 30, 1891. Decided Mar. 2, 1891.

APPEALS from two decrees of the Circuit Court of the United States for the District of Indiana, making allowances to certain intervenors in railroad foreclosure suits. *Decree in No. 1540 affirmed; in No. 1539 modified.*

The facts are stated in the opinion.

Messrs. **John M. Butler**, *Robert G. Ingersoll* and *Clarence Brown* for appellants.

Messrs. **Henry D. Hyde** for appellees in 1539 and **James L. High** for appellees in 1540.

D] *Mr. Justice* **Brewer** delivered the opinion of the court:

These cases, being appeals from two decrees of the Circuit Court of the United States for the District of Indiana, making allowances to certain intervenors in railroad foreclosure suits, by stipulation of parties are to be heard together and treated as one case. They were before the court a year ago. *Kneeland* v. *American L. & T. Co.* 136 U. S. 89 [34: 379].

The claims of the intervenors are for the rental of rolling stock, from the 1st of August, 1883, to the 1st of January, 1885. The road during that time was in the possession of a receiver. From the 1st of August, 1883, to the 1st of December, 1883, the receivership was at the instance of a judgment creditor; the remainder of the time, at the instance of the bondholders, for whose benefit the appellant became the purchaser at the foreclosure sales. The only questions then determined which are important to the present controversy, were these: *first*, the time for which the property was responsible for the rental; and, *second*, the method of computing it. It was there adjudged that the bondholders, represented by the appellant, the beneficial owners of the property, could not be held liable for rental value prior to December 1, 1883, and during the time that the receivership was at the instance of a judgment creditor. It was also ruled, against the contention of the appellant, that the milage basis was not the proper one for determining the compensation to be paid to the intervenors; but that they were entitled to recover a reasonable rental value, computed as ordinary rentals, by the month, and irrespective of the actual use of the rolling stock. That was the basis of computation pursued by the circuit court, in the decrees from which those appeals were taken; and, therefore, in that respect its rulings were sustained. In those decrees the court had found the amounts due to the several intervenors, stating each separately and decreeing a recovery therefor.

These decrees were based upon and confirmed final reports made by the master. Back of these reports was an immense volume of testimony upon which they were founded. They stated the amounts due the intervenors, separately and for different periods,—one, from August 1, 1883, to August 1, 1884, and the other from thence on to January 1, 1885. With these reports it was a simple matter of arithmetical computation to determine the amount due to each intervenor for the four months from August 1, 1883, to December 1, 1883, that being simply one third of the year. The order which was entered by this court was that the decrees be "reversed, and the cases remanded with instructions to strike out all allowances for rental prior to December 1, 1883, the time when the receiver was appointed at the instance of the mortgagees, and to allow the rentals as fixed for the time subsequent." In other words, all that the court had to do was to deduct from the amount allowed to each intervenor one third of the amount allowed for the year ending August 1, 1884. In each of the reports, as well as the decrees, the rentals due from August 1, 1884, to January 1, 1885, had been stated, and on receiving our mandates the circuit court interpreted them as in effect affirming so much of the decrees as allowed these amounts to the intervenors, and its new decrees awarded interest thereon from the date of the former decrees. This is the first ground of alleged error.

We think the ruling of the circuit court was correct. The amount of the allowances for these five months was separately stated, and such allowances were sustained by this court. While the former decrees were in terms reversed, and the cases remanded for the entering of new decrees, yet the terms of those new decrees were specifically stated, and in so far as the separate and distinct matters embraced in the former decrees were ordered to be incorporated into the new, it is to be regarded as *pro tanto* an affirmance. Equity regards the substance and not the [51 form. The rights of parties are not to be sacrificed to the mere letter, and whether the language used was "reversed," "modified" or "affirmed in part and reversed in part," is immaterial. Equity looks beyond these words of description to see what was in fact ordered to be done. *Illinois Cent. R.* v. *Turrill*, 110 U. S. 301 [28: 154]. That the computations were not made by this court, and the separate amounts due each intervenor stated in the mandates to the trial court, was owing partly to a fact transpiring on the argument here, and which appears in the closing part of our order, as follows: "Counsel for the Grant claims expressly stated in open court, in his argument, that in case certain appeals from the Sixth Circuit were affirmed there might result a double allowance to his clients, which they did not insist upon. As the details and sum are not clearly presented, we can only say that this matter must be taken into account in the subsequent disposition of the cases." This was a matter not disclosed by the record, and of which we were informed simply by the oral statement of counsel. For this reason, as well as from the fact that there were several intervenors, we left the matter of computation to the trial court.

Another error alleged is this: After the mandates were filed in the circuit court the appellant moved that the matters be referred to a master, with instructions to investigate and report the correct and true amounts to be allowed to the claimants; also the exact time at which proceedings were commenced by the mortgagees for the foreclosure of the mortgage resting upon the St. Louis division; whether any receiver was ever appointed at the instance of the mortgagees in said St. Louis division mortgage; and also, whether the receivership theretofore existing under the creditor's bill, known as "Braman's" bill, or under that brought by the mortgagees on the Toledo division, was ever extended to and made to embrace certain foreclosure suits named. In support, he filed an affidavit as to facts which he claimed to have ascertained since the decision in this court. This motion was denied, and the terms of the decrees were settled by the circuit court. This ruling is

complained of, but it obviously was correct.
513] Counsel claims that under the reversal the whole matter of inquiry as to the accounts was opened. On the contrary, the clear language of our decision was to strike out certain specific items, and to allow others as already fixed. No new investigation was contemplated in respect to past matters. The only independent matter left for consideration was that in respect to double allowance, suggested by counsel on oral argument. A final matter of objection, which applies only to case number 1539, and to the allowance in favor of the intervenor the American Loan and Trust Company, is this: To that Company for the year ending August 1, 1884, there was, by the former decree, allowed $33,735.28; deducting one third, leaves $22,490.19. The amount allowed in this decree for such period was $23,262.72, or $772.53 more than the two thirds. Counsel for this intervenor seems to have gone back of the final reports of the master, into the testimony, to work out this result; but, as we have already stated, no such inquiry was intended to be left open by the former decision to one party more than to the other. In this respect, therefore, there was error, and the allowance to such intervenor must be reduced by that sum.

We regret to notice in the brief of appellees' counsel in No. 1540 aspersions on the conduct of opposing counsel. It is not pleasant to be compelled to remind counsel that language used in briefs, as well as that employed in oral argument, must be respectful.

The decree in number 1540 will be affirmed. In number 1539 it will be modified, and the case remanded with instructions to reduce the allowance to the American Loan and Trust Company by the sum of $772.53. The costs of that appeal will be equally divided between the appellant and the American Loan and Trust Company.

---

[439] ROBERT P. SIMMONS ET AL., *Appts.*,
v.
HARRY R. SAUL.

(See S. C. Reporter's ed. 439-460.)

State judgment, effect in other States—Louisiana parish courts—probate jurisdiction—vacant succession—judicial determination—sale of estate, when not void—administrator—jurisdiction of court, for what attacked—not for informality or error—purchaser at administrator's sale—judgment of parish court, when conclusive—fraud, when no defense—equity jurisdiction.

1. The constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction.
2. The parish courts of Louisiana in 1872 were vested with original and exclusive jurisdiction over the administration of vacant and intestate successions.
3. The general principles of probate jurisdiction and practice, as settled by a long series of decisions in the state courts and in the courts of the United States, are applicable to the powers and proceedings of the parish courts of Louisiana.
4. Where a succession had been open for over forty years and no one had claimed it, nor did anyone as heir accept it, either expressly in writing or by judicial proceeding, or tacitly by doing any act which necessarily supposed their intention to accept, it was properly adjudicated to be vacant, and was administered as such.
5. Where the parish court of Louisiana had before it in the petition the death of the intestate within the parish, his intestacy, the possession of property and the smallness of the estate, the order granting letters of administration was a judicial determination of the existence of all those facts, and the parish court had jurisdiction of the intestate estate or succession.
6. The decree of sale and the sale of the effects of the estate of succession and the proceedings were not void, because the appointment of an administrator was made before the inventory of the estate was ordered, contrary to art. 1190 of the Louisiana Code, where the court directed an inventory and appointed an administrator in the same order, and on the next day the inventory was filed, upon which the court based its order directing the sale to be made.
7. The proceedings were not invalid because the administrator appointed by the court was not the public administrator, who, under the law of Louisiana then in force, was the only person to whom such administration could be committed.
8. Where the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority.
9. The jurisdiction of a court over the subject matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court cannot oust that jurisdiction. They are, at most, errors which could be corrected on appeal, or avoided in a direct action of annulment, but cannot be made the grounds on which the decree of the court can be collaterally assailed.
10. In Louisiana, the purchaser at a sale under the order of a probate court, which is a judicial sale, is not bound to look beyond the decree recognizing its necessity. He must look to the jurisdiction of the court; but the truth of the record concerning matters within its jurisdiction cannot be disputed.

NOTE.—*As to conclusiveness of judgment*, see *note* to Bank of United States v. Beverley, 11: 75.

As to judgment in admiralty, when conclusive, and when may be re-examined, see *note* to Williams v. Armroyd, 3: 392.

As to estoppel by judgment, see *note* to Aspden v. Nixon, 11: 1059.

As to effect of judgment beyond territorial limits of jurisdiction, see *note* to Darby v. Mayer, 6: 367.

Judgments of state court, when conclusive, and when not, in another State, see *note* to Mills v. Duryee, 3: 411.

Record evidence of jurisdictional facts; plea of nil debet. See *note* to Mills v. Duryee, 3: 411.

As to conclusiveness of record as to jurisdiction in suit on judgment of another State; fraud as plea to judgment of another State,—see *note* to Christmas v. Russell, 18: 475.

11. A judgment of a parish court of Louisiana, rendered within the sphere of its jurisdiction, is binding upon the courts of the several States and of the United States.

12. Fraud cannot be pleaded to an action in one State upon a judgment obtained in another.

13. A court of equity will not annul and set aside, on the ground of fraud, a decree of a court of probate of another State granting letters of administration upon a succession, and the administrator's sale of the estate directed therein, this being within the exclusive jurisdiction of the probate court; nor will it give relief by charging the purchasers at the sale under the orders of the probate court and those deriving title from them, as trustees in favor of the heirs-at-law, where the court of probate could afford relief.

[No. 1585.]

Submitted Jan. 9, 1891. Decided Mar. 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Eastern District of Pennsylvania dismissing on demurrer a suit to set aside proceedings and a sale in a probate court of another State and to charge the purchaser at the sale as trustees in favor of the heirs. *Affirmed.*

The facts are stated in the opinion.

Mr. **S. Davis Page,** for appellants:

The right to satisfaction for the original land claim pertained to the realty and descended to the heirs.

Brush v. *Ware*, 40 U. S. 15 Pet. 93 (10: 672); *Duncan* v. *Veal*, 49 Tex. 603; *Paul* v. *Willis*, 69 Tex. 261; *Harwood* v. *Wylie*, 70 Tex. 538.

Acceptance vested the estate absolutely in the heirs.

Addison v. *New Orleans Sav. Bank*, 15 La. 527; *O'Donald* v. *Lobdell*, 2 La. 299; *Beckham* v. *Henderson*, 23 La. Ann. 446; *Le Page* v. *New Orleans Gas Light & Bkg. Co.* 7 Rob. 183; *Womack* v. *Womack*, 2 La. Ann. 339; *Calvit* v. *Mulhollan*, 12 Rob. 258.

It is presumed that they accepted.

La. Code 1825, arts. 1007, 1010; Code 1870, arts. 1014, 1017; *Edwards* v. *Ricks*, 30 La. Ann. pt. 2, 926.

They are not required to show acceptance in a suit against a stranger to the succession.

Ware v. *Jones*, 19 La. Ann. 428.

Complainants may properly sue in behalf of the heirs of Elizabeth Wells.

Smith v. *Swormstedt*, 57 U. S. 16 How. 288 (14: 942); *Bacon* v. *Robertson*, 59 U. S. 18 How. 489 (15: 499); *Hendrix* v. *Money*, 1 Bush, 306.

The lack of jurisdiction may be shown in a collateral proceeding in another State by proof *aliunde*.

Thompson v. *Whitman*, 85 U. S. 18 Wall. 457 (21: 897); *Williamson* v. *Berry*, 49 U. S. 8 How. 540 (12: 1189); *Bloom* v. *Burdick*, 1 Hill, 138; *Ripoll* v. *Morina*, 12 Rob. 560.

After such acceptance there was no estate of Robert M. Simmons subject to administration in any court.

Beauregard v. *Lampton*, 33 La. Ann. 827; *Miltenberger* v. *Knox*, 21 La. Ann. 399.

The Louisiana parish courts were courts of special and limited jurisdiction and should show jurisdiction at every step.

Galpin v. *Page*, 85 U. S. 18 Wall. 350 (21: 959); *Thatcher* v. *Powell*, 19 U. S. 6 Wheat. 119 (5: 221); *Williamson* v. *Berry*, 49 U. S. 8 How. 495 (12: 1170); *Shelby* v. *Bacon*, 51 U. S. 10 How. 56 (13: 226); *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 332 (7: 164).

Courts of probate have no jurisdiction except in the cases determined by the law.

La. Code of Pr. 1870, art. 925; *Swan* v. *Gayle*, 21 La. Ann. 478; *Succession of Bartlett*, 21 La. Ann. 531; *Edwards* v. *Edwards*, 21 La. Ann. 610; *Derby* v. *Robertson*, 21 La. Ann. 616; *Hartman* v. *Rentrope*, 21 La. Ann. 663; *O'Donogan* v. *Knox*, 11 La. 384, 389.

Purchasers from executors in Louisiana acquire no title unless the formalities of law are observed.

Gaines v. *De la Croix*, 73 U. S. 6 Wall. 720 (18:966).

In summary proceedings where a court exercises an extraordinary power under a special statute prescribing its course, that course ought to be exactly observed.

Thatcher v. *Powell*, 19 U. S. 6 Wheat. 119 (5:221); *Shelby* v. *Bacon*, 51 U. S. 10 How. 56 (13:326).

A sale without proper order was void, and would be so treated in collateral proceedings.

Donaldson v. *Hull*, 7 Mart. N. S. 112; *Elliott* v. *Labarre*, 2 La. 326.

The appointment of administrator and sale were void because not preceded by proper advertisements and order.

Girod v. *Girod*, 18 La. 394; *King* v. *Lastrapes*, 13 La. Ann. 582; *Succession of Henderson*, 2 Rob. 391; *Succession of Talbert*, 16 La. Ann. 230; *Succession of Gusman*, 35 La. Ann. 404; *Pfarr* v. *Belmont*, 39 La. Ann. 294.

The record of the proceedings discloses no antecedent debts of the estate.

Sanford v. *Granger*, 12 Barb. 392; *Bishop* v. *Hampton*, 15 Ala. 761; *Farrar* v. *Dean*, 24 Mo. 16; *Duncan* v. *Veal*, 49 Tex. 603; *Succession of Walker*, 32 La. Ann. 321; *Succession of Dumestre*, 40 La. Ann. 571; *Burton* v. *Brugier*, 30 La. Ann. 478.

Complainants could not be charged with laches unless they had actual notice of these proceedings, or of facts which would lead them to notice. The fact that the proceedings were recorded did not charge them with such notice.

Meader v. *Norton*, 78 U. S. 11 Wall. 442, 458 (20:184, 187); *Fox* v. *Zimmerman* (Wis.) Sept. 23, 1890; *Jones* v. *Slauson*, 33 Fed. Rep. 632; *Berkey* v. *Judd*, 22 Minn. 287, 299.

The defendant took under a quit-claim deed, and is chargeable with notice of any defects in his grantor's title.

Oliver v. *Piatt*, 44 U. S. 3 How. 333 (11:622).

The title under the patent was not to defendant's grantor, but to Robert M. Simmons or his legal representatives. A patent in that form leaves open in a court, and is intended to leave open, all questions as to the person to whom the title inures.

Hogan v. *Page*, 69 U. S. 2 Wall. 605 (17:854); *Grand Gulf R. & Bkg. Co.* v. *Bryan*, 8 Smedes & M. 234; *Delaunay* v. *Burnett*, 9 Ill. 454; *Warnecke* v. *Lembca*, 71 Ill. 91.

As to derivative title, the surveyor-general could decide nothing between claimants.

Brush v. *Ware*, 40 U. S. 15 Pet. 93 (10:672); *Miller* v. *Kerr*, 20 U. S. 7 Wheat. 1 (5:381); *United States* v. *Minor*, 114 U. S. 233 (29:110); *Vance* v. *Burbank*, 101 U. S. 514 (25:929).

Property obtained by one through the fraudulent practices of a third person will be held

under a constructive trust for the person defrauded, though the person receiving the benefit is innocent of collusion.

Perry, Trusts, § 211; *Bridgman* v. *Green*, 2 Ves. Sr. 627.

There may be a constructive trust distinct from the legal title, while the latter may be in the *cestui que trust*.

Christy v. *Sill*, 95 Pa. 386, 387; *Long* v. *Fuller*, 21 Wis. 121; *Week* v. *Bosworth*, 61 Wis. 78; *Rackham* v. *Siddall*, 16 Sim. 297, 1 Macn. & G. 607; *Bigler* v. *Waller*, 81 U. S. 14 Wall. 297 (20:891).

Defendant was not an innocent holder. His liability is the same as that of an express trustee who has converted trust property.

Perry, Trusts, 245, 265, 288; Hill, Trustees, 246, and *notes*, 247; *Morris* v. *Joseph*, 1 W. Va. 256; *Fisher* v. *Skillman*, 18 N. J. Eq. 229; *New Orleans* v. *Christmas*, 131 U. S. 191 (33:99).

The State Statute of Limitations does not commence to run until the discovery of the fraud; certainly not in favor of one who is not a bona fide purchaser.

M'Dowell v. *Young*, 12 Serg. & R. 115.

The provisions of state statutes do not govern the United States courts in equity cases.

Kirby v. *Lake Shore & M. S. R. Co.* 120 U. S. 130 (30:569).

Complainants have a right to treat defendant and his grantor as their agents in securing this scrip and land, and to hold them accountable as such.

Week v. *Bosworth*, 61 Wis. 78.

Sales under such administrations have been frequently disregarded in collateral proceedings.

Beale v. *Walden*, 11 Rob. 72; *Clemens* v. *Comfort*, 26 La. Ann. 270.

This is a different case from an attack by heirs upon a sale made by an administrator who has ceased to exercise his functions, and where the property sold is found in a foreign jurisdiction.

O'Donogan v. *Knox*, 11 La. 384; *Robert* v. *Allier*, 17 La. 15; *Gillett* v. *Needham*, 37 Mich. 143.

Messrs. **John Douglass Brown, Jr.,** and **Le Roy J. Wolfe,** for appellee:

The judgment of a state court is given the effect of a sister state judgment in a United States court sitting in another State.

Amory v. *Amory*, 3 Biss. 266; *Field* v. *Gibbs*, 1 Pet. C. C. 155.

Error must be shown. It is not to be inferred.

McNitt v. *Turner*, 83 U. S. 16 Wall. 352, 363 (21:341, 347).

Failure to observe the statutory requirements as to advertising does not oust the jurisdiction.

Mohr v. *Manierre*, 101 U. S. 417 (25:1052).

The judgment of a probate court is in the nature of a judgment *in rem*.

Freeman, Judgm. §§ 607, 608, 612.

The orders of those courts within their jurisdiction are conclusive proof in favor of the purchaser and grantee at the sale, and cannot be collaterally impeached.

Thompson v. *Tolmie*, 27 U. S. 2 Pet. 157 (7:381); *Grignon* v. *Astor*, 43 U. S. 2 How. 319 (11:283); *Comstock* v. *Crawford*, 70 U. S. 3 Wall. 396 (18:34); *McNitt* v. *Turner*, 83 U. S. 16 Wall. 352 (21:341); *Thaw* v. *Ritchie*, 136 U. S. 519, 548 (34:531, 538).

An innocent vendee by quit-claim deed has a better title than a vendee by an earlier warranty deed, the quit-claim deed being first recorded.

Cutler v. *James*, 64 Wis. 173; *Tyner* v. *Cotter*, 67 Wis. 482.

A bona fide purchaser of a land warrant which had been stolen is not trustee of the land for the true owner of the warrant.

Dixon v. *Caldwell*, 15 Ohio St. 412.

Any rights which complainants may once have possessed are barred by lapse of time and laches.

Case of Broderick's Will, 88 U. S. 21 Wall. 503 (22:599); *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 (17:261); *Christy* v. *Sill*, 95 Pa. 390.

A federal court of equity will not consider itself bound by a State Statute of Limitations.

Kirby v. *Lake Shore & M. S. R. Co.* 120 U. S. 130 (30:569).

Mr. Justice **Lamar** delivered the opinion of [44
the court:

This was a suit in equity, brought in the Circuit Court of the United States for the Eastern District of Pennsylvania, by ten citizens of Louisiana, two of Mississippi and four of Texas, in their own behalf and in behalf of certain other persons whose names are not known, all of whom claim to be the legal descendants of Robert M. Simmons, late a citizen of Louisiana, against Harry R. Saul, a citizen of Pennsylvania. Its object was to charge the defendant, as the former owner of a tract of land in Wisconsin, as the trustee for complainants, with respect to said ownership, and have him account for the value of the lands, for all their rents and profits received by him and his grantees, and for all loss and damages resulting to the property by reason of the cutting of timber thereon by the defendant and his grantees, and for any other loss occasioned by the defendant's acts.

The amended bill filed December 23, 1890, contained, substantially, the following material averments: In or about the year 1830, Robert M. Simmons died unmarried and intestate in Washington Parish, Louisiana, seised and possessed of an inchoate land claim in St. Tammany Parish for 640 acres, founded upon the purchase of a settlement right, which claim was entered as No. 930, in the report of Commissioner James O. Cosby, dated June 7, 1812, and, with others, was confirmed by the Act of Congress of March 3, 1813.

These complainants are the collateral heirs of Robert M. Simmons, being the lineal descendants of his brothers and sisters, and are all named specifically, excepting the descendants of one sister, who are alleged to be about seventy in number, and so widely scattered that it would be inconvenient to make all of them parties to the suit, wherefore it was asked that the suit might be maintained for the benefit of all of the complainants who were named, and for the unnamed complainants who might afterwards intervene and become parties to it.

By the law of Louisiana in force at the date of the death of Robert M. Simmons, and ever since, the heirs of a decedent become seised [442

and possessed of his whole estate, both real and personal, immediately upon his death, subject only to their rights to renounce said succession, or to the right of creditors to require an administration thereof in case of non-action by the heirs. Such renunciation is not presumed, but must be made by formal act before a notary, but such acceptance may be evidenced by any act of the heirs indicating their intention to exercise ownership over the ancestor's property, and is always presumed unless the contrary appear. After an acceptance by the heirs or any of them of the succession of their ancestor no administrator can lawfully be appointed to administer thereon.

For reasons not involving fault on the part of Robert M. Simmons, or any of his heirs, the said land claim remained unlocated and unsatisfied until Congress passed the Act of June 2, 1858 (11 Stat. 294), the third and fourth sections of which provided as follows:

"Sec. 3. That in all cases of confirmation by this Act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: *Provided*, That such location shall conform to legal divisions and subdivisions.

"Sec. 4. That the register of the proper land office, upon the location of such certificate, shall issue to the person entitled thereto a certificate of entry, upon which, if it shall appear to the satisfaction of the commissioner of the General Land Office that such certificate has been 3] fairly obtained, according to the true intent and meaning of this Act, a patent shall issue as in other cases."

No limit of time was fixed for the presentation of claims under that Act for certificates of location therein provided for. During the lapse of time between the origin of said inchoate claim, its confirmation and the passage of the Act of Congress for its satisfaction, many of those interested in it had died, and their heirs or legal representatives, many of whom were minors, had become widely scattered, and by reason of such delay had lost all hope of satisfaction of the claim. Neither the complainants nor any other persons interested in the claim, who were alive at the time the Act was passed, knew of the existence of the claim, of the passage of that Act or of their rights thereunder, until within a year before the commencement of this suit; none of the surveyors general for the District of Louisiana, since the passage of the Act, ever took any steps to apprise them of their rights, it being the practice to issue certificates of location under the Act only upon application therefor; and none of the persons lawfully interested in the claim ever applied for or received any certificates of location in satisfaction of any part of the claim.

Notwithstanding the above facts and provisions of law, one Daniel J. Wedge, on the 8th of May, 1872, induced the district attorney *pro tempore*, one David Magee, of Washington Parish, Louisiana, to file his petition in the parish court of that parish, by the said Daniel J. Wedge, as attorney, alleging that the estate of Robert M. Simmons was vacant, and that it consisted of the confirmed but unsatisfied land claim hereinbefore referred to, which was less than $500 in value, and praying to be appointed administrator thereof, and for an inventory and sale of the same under the laws of Louisiana regulating the administration of vacant estates of less than $500 of value; that such proceedings were had that, on the 8th day of May, 1872, the judge of the parish court, in pursuance of said petition, issued an order purporting to appoint said David Magee administrator of said estate, and to direct an inventory of the same to be made, and a sale of 144 the property, which might be found to belong thereto, to pay debts; that said inventory was returned on the 9th day of May, 1872, and, on the 22d of the same month, a pretended sale of the claim was made in accordance with the aforesaid order, at which sale one Addison G. Foster pretended to purchase it for the sum of $30, which sum was wholly used and expended in the payment of the costs and expenses of such pretended administration, no other debts than those created thereby existing or being shown to exist. A copy of all those proceedings in the parish court was annexed to the bill and made a part of it, and will be referred to more in detail as we proceed.

At the time the pretended administration proceedings in the parish court were had, the Parish Court of Washington Parish was a court of limited, special and statutory jurisdiction, and in the matter of said proceedings pretended to act under special statutory authority, which is set out with some degree of particularity.

Afterwards said Addison G. Foster, claiming to be the legal representative of Robert M. Simmons, by virtue of the aforesaid proceedings in the parish court, applied to Everett W. Foster, the surveyor-general of the United States for the District of Louisiana (who, it seems, was the brother of applicant), for the delivery to him, as such legal representative, of the certificates of location in satisfaction of the aforesaid land claim, under the Act of 1858, and the surveyor-general, on or about the 31st day of August, 1872, prepared certificates of location for the whole claim, and forwarded them to the commissioner of the General Land Office, who authenticated them, and afterwards delivered them to Chipman, Hosmer & Co., of Washington, D. C., as the agents for Foster. A copy of one of the certificates of location, with the form of the authentication by the commissioner, and the following certificate of the surveyor-general for the District of Louisiana, is set out in full in the bill:

"I certify that from evidence filed in this office A. G. Foster is the legal representative of Robert M. Simmons, and as such is entitled to locate the within strip.

"E. W. Foster, Surveyor-General."

[445] The evidence referred to in that indorsement consisted solely of the pretended act of sale under the administration proceedings before mentioned.

Thereafter certain of those certificates were located by Addison G. Foster, or his agents, upon certain described lands in Wisconsin, and a patent for those lands was issued by the United States in the name of Robert M. Simmons, or his legal representatives, which patent recited the provisions of the third and fourth sections of the Act of June 2, 1858, above set forth, the issue of the certificates of location by the surveyor-general of Louisiana, the name of the commissioner who originally reported the claim, the date of the confirming Act, the number of the certificate by virtue of which the land was located, and that the location of the tract was "in part satisfaction of the aforesaid claim of Robert M. Simmons."

Thereafter the defendant herein pretended to purchase those lands from said Addison G. Foster, through his attorney-in-fact, by quit-claim deed, which deed, together with the patent, was recorded in the office of the register of deeds of Chippewa County, Wisconsin, on the 13th of January, 1875. By several mesne conveyances the land passed to one Charles Saul, who gave to the defendant a power of attorney to convey the lands, which was recorded June 9, 1883. The whereabouts of all the grantees in those conveyances are unknown to complainants, but are believed to be not within the jurisdiction of the court. In 1878, while defendant was in possession of the lands in question, claiming title thereto, he removed therefrom certain timber and other valuable products, and sold the same for large sums of money, and received large rents and profits from the lands, but neglected to pay taxes lawfully assessed thereon; so that in 1880 they were conveyed for the unpaid taxes, whereby the right of complainants to recover the same has been wholly lost and lawfully defeated. The value of the timber and other products, cut and removed from the land, and the value of the lands themselves, largely exceeded $10,000, the precise amount being impossible to state.

[446] The aforesaid administration proceedings in the matter of the succession of Robert M. Simmons, the sale of the land claim, the application for and delivery of the certificates of location, the location of them upon the lands in question and the issue of certificates of entry and patents therefor were done, had and contrived in pursuance of certain agreements, entered into about the 16th of August, 1869, between Everett W. Foster, surveyor-general of Louisiana, said Addison G. Foster and certain other named persons, residents of Washington, D. C., New York and Louisiana, for the purpose of securing for their own use and benefit, and in fraud and disregard of the rights of the persons justly entitled thereto, certificates of location authorized by the said Act of Congress of 1858, by means of pretended administration sales of confirmed claims, as part of the property of the successions of the original confirmees or owners thereof, in Louisiana, which successions were administered in various parishes of Louisiana, in large numbers, under alleged authority of the provisions of Louisiana law relating to the administration of vacant estates of less than $500 in value. All the papers in those proceedings were made out upon printed forms furnished by the parties to those agreements. All of the proceedings in relation to the claim in suit, the cutting of the timber aforesaid and all other acts in any wise connected with the claim or land were done and had without the knowledge of complainants, or of any person interested in the claim; and not until within a year last passed did they ascertain anything in relation thereto.

The bill then avers that all of the aforesaid proceedings in relation to the issue of certificates of location in satisfaction of the claim, the location of them upon lands in Wisconsin, the issue of patents, etc., and all other acts in any wise connected therewith, or with respect to the land, were done and had in fraud of the rights of complainants and those interested in the claim.

The prayer of the bill was that complainants might be adjudged and decreed to be the true legal representatives of said Robert M. Simmons; that the aforesaid proceedings in the parish court in relation to the sale of the land claim might be adjudged null and void; that an account might be taken, by and under the [4 direction and decree of the court, of the timber and other products removed from the land by the defendant, or with his permission or authority, and of the value of the timber and products and land lost by reason of the same having been sold and conveyed for taxes; that the defendant might be decreed to pay unto complainants the value of the timber and products so removed, with interest from the date of such removal; that the defendant might be decreed to pay to them the highest value of the lands since the date of the assessment of the taxes for which the land was sold as aforesaid; and for other and further general relief, etc.

Certified copies of all the papers, orders, judgment, etc., of the Parish Court of Washington Parish, Louisiana, in the matter of the succession sale aforesaid, also of the certificates of location, the patent and the aforesaid agreement in the matter of Louisiana land claims, were attached to the bill as exhibits.

The defendant demurred to the bill, setting up fifteen grounds in support of the demurrer; and on January 6, 1891, the court below sustained the demurrer, and entered a decree dismissing the bill. An appeal from that decree brings the case here.

The first and main ground of the demurrer in this case is, that the facts stated in the complaint show that the relief claimed by the complainants is barred by the judgment or decree of a court of competent jurisdiction, rendered in proceedings regular on their face, and which have not been attacked by any proceeding in that court, or in any appellate court. The bill alleged that the court which rendered that judgment was without jurisdiction; that its proceedings in the matter did not conform to the statute under the authority of which it assumed to act; that the judgment itself was ob-

tained by a fraud upon the court; and that necessarily the pretended succession sale had in pursuance thereof, from which the appellee derived title to the lands with respect to which he committed the wrongs complained of, was illegal and void as to complainants, who, as heirs of Robert M. Simmons, deceased, are the equitable owners of said property. The pleadings, therefore, at the outset, present to
48] us these two questions: (1) The validity of the judgment of the Parish Court of Washington Parish ordering the succession sale of the unlocated land claim of Robert M. Simmons, deceased, and the legality of the sale thereunder, irrespective of any question of fraud. (2) As to the fraud by which it is alleged the judgment in question was procured.

It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction. *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 [21: 897]; *Cole* v. *Cunningham*, 133 U. S. 107 [33: 538].

This leads to the consideration of the powers of the parish courts in Louisiana in 1872, especially with regard to their jurisdiction in probate and succession matters. The Constitution of the State, adopted in 1868, under which the judicial proceedings in 1872 took place, provided in art. 73 that "the judicial power shall be vested in a supreme court, in district courts, in parish courts and in justices of the peace." In art. 87, that "all successions shall be opened and settled in the parish courts; and all suits in which a succession is either plaintiff or defendant may be brought either in the parish or district court, according to the amount involved." And in art. 88, that "in all probate matters, where the amount in dispute shall exceed five hundred dollars, exclusive of interest, the appeal shall be directly from the parish to the supreme court."

The laws of Louisiana, in force when the proceedings in the parish court occurred, relating to the subject under consideration, provide that (Rev. Stat. 1870) "the parish courts of this State shall have jurisdiction . . . of all the matters provided for and embraced in title three (3), part second, of the Code of Practice," which treats of proceedings in the courts of probate.

Art. 921, Code of Practice. "Courts of probate are specially established to appoint legal
9] representatives for minors, orphans, insane and absent persons, and to superintend the administration of vacant successions."

Art. 923. "The parish judges are *ex officio* judges of the courts of probate, in their respective parishes."

Art. 924. "Courts of probate have the exclusive power: . . . 4. To appoint curators to vacant estates and absent heirs. 5. To make the inventories and sales of the property of successions, which are administered by curators or testamentary executors, or in which the heir prays for the benefit of inventory."

Art. 872, Civil Code of 1870. "Succession signifies also the estates, rights and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property."

Art. 873. "The succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also the new charges to which it becomes subject."

Art. 1095. "A succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it."

Art. 1097. "Vacant successions are managed by administrators appointed by courts, under the name of curators of vacant successions."

Art. 934. "The succession, either testamentary or legal, or irregular, becomes open by death, or by presumption of death caused by long absence, in the cases established by law."

Art. 935. "The place of the opening of successions is fixed as follows: In the parish where the deceased resided, if he had a fixed domicil or residence in this State."

Art. 929, Code of Practice. "The place in which a succession is opened is, and in future shall be held to be, as follows, notwithstanding any former law to the contrary: In the parish where the deceased resided, if he had a domicil or fixed place of residence in the State."

Art. 946, Civil Code. "Though the succession be acquired by the heir from the moment [4
of the death of the deceased, his right is in suspense, until he decide whether he accepts or rejects it."

Art. 988. "The simple acceptance may be either express or tacit. It is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding. It is tacit when some act is done by the heir, which necessarily supposes his intention to accept, and which he could have no right to do but in his quality of heir."

Art. 1190. "If a succession is so small or is so much in debt that no one will accept the curatorship of it, the judge of the place where the succession is opened, after having ordered an inventory of the effects composing it, shall appoint the district attorney of the district or the district attorney *pro tempore* of the parish, curator of said succession, who shall cause the effects to be sold, and the proceeds to be applied to the payment of its debts; the whole to be done in as summary a manner as possible to diminish costs; provided, that this article is not to apply to successions amounting to more than five hundred dollars."

Art. 611 of the Code of Practice provides that where no appeal has been taken within the delay prescribed by law, the nullity of the judgment may be demanded by means of an action brought before the court which has rendered the same within a time prescribed. And art. 607 provides that a definitive judgment may be annulled in all cases where it appears that it has been obtained through fraud or through ill practices on the part of the party in whose favor it was rendered.

The provisions of the law abundantly show, we think, that the parish courts were vested

with original and exclusive jurisdiction over the administration of vacant and intestate successions, such as the allegations of the bill show this to have been. They do not differ very materially from the laws of most of the States regulating probate matters. The general principles of probate jurisdiction and practice, as settled by a long series of decisions in the state courts and in the courts of the United States, are applicable to the powers and proceedings of
51] the parish courts of Louisiana, and have been recognized and enforced by the Supreme Court of that State. They also show that, under the averments of the bill, the Parish Court of Washington Parish had jurisdiction of the succession of Robert M. Simmons. The succession had been open for over forty years, and no one had claimed it; nor did any of the complainants as heirs accept it, either expressly in writing or by judicial proceeding, or tacitly by doing any act which necessarily supposed their intention to accept. It was very properly adjudicated to be vacant, and was administered as such. Washington Parish was the one in which the deceased was domiciled at the date of his death, and the succession, being less than $500 in value, was administered under section 1190 of the Code. The petition, in reciting that "Robert M. Simmons departed this life in said parish many years since . . . leaving some property consisting of an old deferred unlocated purchase land claim," and that the same was less than $500 in value, and praying for an inventory, appraisement and sale to pay debts, etc., set forth the necessary jurisdictional facts to warrant the court in proceeding to administer the estate. The court, therefore, had before it in the petition the death of Simmons within the parish, his intestacy, the possession of property and the smallness of the estate. The order granting letters of administration was a judicial determination of the existence of all those facts. Admitting all the facts well pleaded in the complaint to be true, as we are bound to do on demurrer, it is our opinion that the Parish Court of Washington Parish had a clear and unquestionable jurisdiction of the intestate estate or succession of Robert M. Simmons.

But it is contended that the irregularities and failures to comply with the law in the probate proceedings ousted the court of its jurisdiction and rendered the decree of sale and the sale itself invalid. We will proceed to consider these alleged failures, so far as they affect the jurisdiction, in the order in which they are stated in counsel's brief. The first is, that the proceeding is void, because the appointment of an administrator was made before the inventory of the estate was ordered, contrary to art.
52] 1190 of the Louisiana Code, which permits such appointment to be made only after an inventory is ordered. The answer to this is, that the court directed an inventory and appointed an administrator in the same order, and that on the next day the inventory was filed, upon which the court based its order directing the sale to be made. This was, in effect, a compliance with the Statute, and the objection is more technical than substantial. The next point relied on to show the invalidity of the proceedings is, that the administrator appointed by the court was not the public administrator, who, under the law of Louisiana then in force, was the only person to whom such administration could be committed. This point has been considered in two cases before this court, and in each was held to be without merit. *Comstock* v. *Crawford*, 70 U. S. 3 Wall. 396, 403 [18: 34, 37]; *McNitt* v. *Turner*, 83 U. S. 16 Wall. 352, 363 [21: 341, 347]. In the former of these cases the question before the court was as to the validity of an administrator's sale in the Territory of Wisconsin. The Statute of the Territory provided that there should be appointed by the governor, in and for each county, a person known as "the public administrator" therein; and it further required that the administration of a nonresident intestate shall be granted to such public administrator of the county in which the nonresident intestate died. It was contended in that case, as it is here, that the sale was invalid, because the administrator appointed by the probate court was not the public administrator. The court, in answer to this contention, said, *Mr. Justice* Field delivering the opinion: "It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority. . . Whether there was a widow of the deceased, or any next of kin, or creditor, who was a proper person to receive letters, if he had applied for them, or whether there was any public administrator in office authorized or fit to take charge of the estate, or to which of these several parties it [453
was meet that the administration should be intrusted, were matters for the consideration and determination of the court, and its action respecting them, however irregular, cannot be impeached collaterally." In the case of *McNitt* v. *Turner*, *supra*, the same question, under a similar statute, was presented and decided in the same way.

Another ground is that art. 1115 of the Louisiana Code required ten days' public notice before the appointment of an administrator; that, according to the allegations of the bill, no notice of the appointment in the proceedings under consideration was given; and that under art. 1167 of the same Code property belonging to vacant successions could only be sold at public auction after ten days' advertisement for movables and thirty days' for immovables. We do not think that the requirements in arts. 1115 and 1167, as to advertisements, apply to the proceedings in question, which were instituted under art. 1190. That article, as we have seen, provides as follows:

"Art. 1190. If a succession is so small or is so much in debt that no one will accept the curatorship of it, the judge of the place where the succession is opened, after having ordered an inventory of the effects composing it, shall appoint the district attorney of the district or the district attorney *pro tempore* of the parish, curator of said succession, who shall cause the effects to be sold, and the proceeds to be applied to the payment of its debts; the whole to be done in as summary a manner as possible to

diminish costs; provided, that this article is not to apply to successions amounting to more than five hundred dollars."

The history of this provision leads to the conclusion that it was the intention of the Legislature that the administration of such small successions should be granted without previous notice, and that the settlement of them should be done in as summary a manner as possible. But even if it be conceded that the requirements referred to do apply, we are of the opinion that, the jurisdiction over the subject matter having attached, any informalities as to notices, advertisements, etc., in the subsequent proceedings of the court, cannot oust that jurisdiction. They are, at most, errors which could be corrected on appeal, or avoided in a direct action of annulment, as expressly provided in the articles of the Code above cited, but cannot be made the grounds on which the decree of the court can be collaterally assailed.

Our conclusion on this branch of the case is fully borne out by many decisions of this court, two of which are cited above. In *McNitt* v. *Turner*, 83 U. S. 16 Wall. 366 [21:348], *Mr. Justice* Swayne, speaking for the court, said: "Jurisdiction is authority to hear and determine. It is an axiomatic proposition that when jurisdiction has attached, whatever errors may subsequently occur in its exercise, the proceeding, being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error." *Grignon* v. *Astor*, 43 U. S. 2 How. 319, 337, 340, 341 [11:283, 290, 291, 292], was, like this, a case of a sale by an administrator. The court, in its opinion, said: "The whole merits of the controversy depend on one single question, Had the County Court of Brown County jurisdiction of the subject on which they acted? . . . Nor is it necessary that a full or perfect account should appear in the records of the contents of papers on file, or the judgment of the court on matters preliminary to a final order; it is enough that there be something of record which shows the subject matter before the court, and their action upon it, that their judicial power arose and was exercised by a definitive order, sentence or decree. . . . The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken; the rule is the same whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. . . . The court having power to make the decree, it can be impeached only by fraud in the party who obtains it. 31 U. S. 6 Pet. 729 [8:561]. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error." The following authorities are strong in support of the general proposition under consideration: *Thompson* v. *Tolmie*, 27 U. S. 2 Pet. 157 [7: 381]; *Mohr* v. *Manierre*, 101 U. S. 417 [25: 1052]; *Comstock* v. *Crawford*, *supra*; *Florentine* v. *Barton*, 69 U. S. 2 Wall. 210 [17: 783]; *Thaw* v. *Ritchie*, 136 U. S. 519 [34:531].

The adjudications of the Supreme Court of Louisiana are in entire harmony with those decisions. It has long been a fundamental principle of law in that State that "the purchaser at a sale under the order of a probate court, which is a judicial sale, is not bound to look beyond the decree recognizing its necessity. He must look to the jurisdiction of the court; but the truth of the record concerning matters within its jurisdiction cannot be disputed." 2 Hen. Dig. 1494, par. 5, citing a long list of authorities.

One of the leading cases is *Lalanne* v. *Moreau*, 13 La. 431, 436. In that case the heirs brought an action of ejectment in the district court against the purchasers at a sale made by order of the probate court of the real estate of their ancestor, and recovered judgment. Upon appeal the Supreme Court of the State reversed that judgment, thus upholding the title acquired at the succession sale. In its opinion the court said: "We place our decision on the broad ground that sales directed or authorized by the court of probates are judicial sales to all legal intents and purposes. It was so decided by this court in the cases already alluded to, and the principle is recognized in that of *Pintard* v. *Deyris*, 3 Mart. N. S. 32. Art. 114, p. 366, of the old Civil Code, also seems to recognize it, and it is a textual provision of the Louisiana Code, included in art. 1863. The necessity and wisdom for such a rule of property has long been felt and acknowledged in the most important States of the Union, and none is better settled by the decisions of their courts. They all maintain . . . that a judgment, decree, sentence or order passed by a competent jurisdiction, which creates or changes a title or any interest in an estate, is not only final as to the parties themselves and all claiming under them, but furnishes conclusive evidence to all mankind that the right or interest belongs to the party to whom the court adjudged it."

In *Valderes* v. *Bird*, 10 Rob. 396, 398, the court said: "It is now well settled that where there is a formal decree of the court of probates, recognizing the necessity of selling the property inherited by minors for the payment of debts of the succession, and giving an opportunity to the attorney of the absent heirs to show that in fact no such necessity existed, the purchaser is not bound to look beyond the decree. The want of a sufficient time for advertising between the rendition of the judgment of the court of probates and the sale is a defect which the Act of 1834, relative to advertisements, was expressly made to remedy. The plea of prescription (five years) would prevail as to that." [445

In *Beale* v. *Walden*, 11 Rob. 67, 72, the court said: "The whole controversy turns upon the two first questions here presented, to wit, the jurisdiction of the Court of Probates of the Parish of Jefferson, and, if it had such jurisdiction, whether Walden was a purchaser at a judicial sale; for if that court had jurisdiction, we will not go behind its judgment to inquire

whether there was legal evidence of a debt, or, in other words, a necessity for the sale, etc."

In *Michel* v. *Michel*, 11 La. 154, the court held that the purchaser is not bound to look beyond the decree of the court of probates recognizing the necessity of the sale. See also *McCullough* v. *Minor*, 2 La. Ann. 466; *Wright* v. *Cummings*, 19 La. Ann. 353; *Sizemore* v. *Wedge*, 20 La. Ann. 124; *Wisdom* v. *Buckner*, 31 La. Ann. 52; *Graham* v. *Gibson*, 14 La. 146; *Ball* v. *Ball*, 15 La. 173, 182; *Rhodes* v. *Union Bank*, 7 Rob. 63, 65, 66.

A case of great importance, in this connection, is *Duson* v. *Dupré*, 32 La. Ann. 896. That was a petitory action in a district court, by the curator of the succession of one Louis Blanc and the attorney for the absent heirs of the same succession, to recover a tract of land which they alleged was the property of that succession. The defense was, that the plaintiffs were incapacitated to sue, because their appointment by the Parish Court of St. Landry was an absolute nullity, for the following reasons: *First*. That Louis Blanc having died in the Parish of Orleans, where he resided, the [57] Probate Court of St. Landry had no jurisdiction over his succession. *Second*. That Louis Blanc having left heirs residing in the State, the probate court could not treat and administer his succession as a vacant estate. The case was tried on those exceptions, and the district court held them sufficient, and thereupon dismissed the action. Upon appeal the supreme court reversed that judgment, and held: "In our opinion the district judge erred in allowing this *collateral* attack on the judgment of the probate court. . . . The late Parish Court of St. Landry had probate jurisdiction, and was exclusively competent to grant and issue letters of administration in all successions properly opened in that court. Defendants contend that this succession was not properly opened in that court, for the reasons urged in their exceptions. This denial presents a question of fact: that the deceased was not a resident of this parish, and that having left heirs who were residents of this State, his succession was not vacant so as to necessitate or justify the appointment of a curator. . . . These questions can be looked into and adjudicated upon only in a direct action before the same court, or before the tribunal now vested with original probate jurisdiction in the Parish of St. Landry. No principle of our jurisprudence is more firmly established than the following: 'Letters of administration make full proof of the party's capacity until they be revoked. They must have their effect, and the regularity of the proceedings on which they issued cannot be examined collaterally.' This rule was laid down in the early days of our jurisprudence, and has been sanctioned, confirmed and consecrated by an unbroken line of decisions of this court down to the present day,"—citing a long list of authorities.

The cases cited by counsel for appellants, instead of militating against the doctrine of the cases above referred to, are in reality in harmony with them. Many of them were cases in which the judgment of the probate court was attacked directly by appeal or by an action of nullity, and not collaterally; while others were legal actions of revendication to try a title held under a will alleged to be invalid, which, under the Code, are expressly authorized to be brought in the district court.

Having reached the conclusion that a judg- [41
ment of a parish court of Louisiana, rendered within the sphere of its jurisdiction, is binding upon the courts of the several States and of the United States, the next question for our consideration relates to the averments of fraud in connection with the succession sale. These averments, divested of the usual epithets of fraud in such cases, and considered apart from the allegations of a lack of jurisdiction in the court, and of jurisdictional defects in the subsequent proceedings, are meagre and indefinite as to any particular acts of fraud upon the court or upon the appellants. They do not state any falsehood, imposition or undue influence upon the court or any of its officers. They are to the effect, when sifted, that a large number of persons, including the United States surveyor-general for Louisiana and his brother, Addison G. Foster, the purchaser of this claim, in 1872, had entered into agreements to purchase a great number of confirmed private land claims in Louisiana, at succession sales, and then have them satisfied by certificates of location under the Act of 1858; and that this sale was a consummation of a part of this agreement. It may be proper here to observe that the instrument attached to the bill as an exhibit, and referred to as reciting one of these alleged agreements, says nothing whatever in relation to administration of vacant successions, or sales thereunder, as set forth in the bill, and to that extent negatives its averments. Nor do they mention any fact connected with such alleged agreement which in any way affected the judicial proceedings that were taken in this administration or tended to influence the sale thereunder.

But waiving everything as to the sufficiency of the allegations of fraud, the question arises, Do they furnish any grounds for the annulment by a court of equity of the probate proceedings under consideration, for the purpose of charging the defendant as a trustee for the benefit of complainants? We think not, and in this view we are sustained by a number of decisions of this court, to some of which we now refer. *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290 [18: 475], was an action of debt brought in the United States Circuit Court for the Southern District of Mississippi, on a judgment obtained against the defendant in Ken- [42
tucky. The defendant pleaded that the judg-
ment had been obtained by the fraud of the plaintiff. A demurrer to the plea having been sustained by that court, the case was brought here and the judgment below affirmed, upon the ground that fraud could not be pleaded to an action in one State upon a judgment obtained in another.

In *Maxwell* v. *Stewart*, 89 U. S. 22 Wall. 77, 81 [22:564,566], the very same question was presented to this court, in a similar case, upon the same plea, and this principle was reaffirmed.

In *Hanley* v. *Donoghue*, 116 U. S. 1, 4 [29: 535, 537], the court said, *Mr. Justice* Gray delivering the opinion: "Judgments recovered in one State in the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the

merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties,"—citing *Buckner* v. *Finley*, 27 U. S. 2 Pet. 592 [7:531]; *M'Elmoyle* v. *Cohen*, 38 U. S. 13 Pet. 312, 324 [10:177, 183]; *D'Arcy* v. *Ketchum*, 52 U. S. 11 How. 165, 176 [13:648, 653]; *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290, 305 [18:475, 480]; *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457 [21:897].

The case of *Broderick's Will*, 88 U. S. 21 Wall. 503 [22:599], upon this point is absolutely conclusive against the appellants. That was a bill in equity brought by the alleged heirs-at-law of Broderick to set aside and annul the probate of his will in the probate court of California, and to recover the property belonging to his estate, or to have the purchasers at the executor's sale thereof, and those deriving title from them, charged as trustees for the benefit of complainants. The bill alleged that the will was forged; that the grant of letters testamentary and the orders for the sale of the property were obtained by fraud, all of which proceedings, as well as the death of the decedent, were unknown to the complainants until within three years before the filing of the bill. A demurrer to the bill was overruled and the case was appealed to this court. It was held, *Mr. Justice* Bradley delivering the opinion, that a court of equity will not entertain jurisdiction to set aside the probate of a will, on the ground of fraud, mistake or forgery, this being within the exclusive jurisdiction of the probate court; and that it will not give relief by charging the purchasers at the executor's sale, under the orders of the probate court, and those deriving title from them, as trustees, in favor of a third person, alleged to be defrauded by the forged or fraudulent will, where the court of probate could afford relief, in whole or in part.

With the single exception that that case was brought to set aside the probate of a will and this was brought to set aside the granting of letters of administration upon a succession, the two cases are as much alike as two photographs of the same person, the lineaments of the alleged fraud being more distinctly brought out in the bill in the case of *Broderick's Will* than in the bill in this case. Both were bills in equity, brought by the alleged heirs-at-law of a decedent, to set aside and annul a decree of a court of probate, and all the subsequent proceedings, including the order of sale and the sale itself. Both alleged frauds in the procurement of the respective decrees, and knowledge of the fraud by the defendants—actual knowledge in the *Broderick Case*, and constructive knowledge in this case. Both showed a long period of delay,—nine years in the *Broderick Case*, and eighteen in this case,—and both set up ignorance of the facts as the excuse for laches; and in both cases, according to the averments of the bill in each, the probate court had adequate power to afford relief. See also *Ellis* v. *Davis*, 109 U. S. 485 [27:1006]. We think the decision in that case is applicable to the whole of this case upon the question of fraud, and thus obviates the necessity of adverting any further to the question of the establishment of a trust, as against the defendant, in favor of the complainants.

Decree affirmed.

T. P. HEATH, *Plff. in Errr.*, [57
v.
M. T. WALLACE.

(See S. C. Reporter's ed. 573-587.)

Swamp-land grant to California—Act of July 23, 1866—construction—certification to State—survey and plat—judicial notice—land subject to overflow—meaning of terms—question of fact—decisions of Land Department—county surveys—state decisions.

1. Land represented upon the approved township survey and plat as swamp and overflowed land, within the meaning of the Act of July 23, 1866, was, under the first clause of section 4, confirmed to the State, without any certification thereof by the commissioner of the General Land Office, after one year from the date of the Act. The State had other methods of identification provided by the second and fourth clauses of the section, and if the lands were swamp could not fail to get them.
2. No lands should be considered as embraced within the terms "swamp" and "overflowed" in the first clause of sec. 4 of the Swamp Land Act by mere implication, simply because they are described in other terms, which, in some instances, might be equivalent to the terms prescribed by the Act.
3. The construction given to a statute by those charged with the execution of it is entitled to most respectful consideration and ought not to be overruled without cogent reasons.
4. The construction by the Interior Department of the 4th section of the Act of 1866, that land returned by the surveyor-general as subject "to periodical overflow," and not as "swamp and overflowed," is not subject to certification to the State by virtue of the return of the surveyor-general, is the proper one.
5. It is by reference to the plat, together with the field and description notes of the survey, that it is to be determined whether or not the land will inure to the State, and be confirmed, by virtue of the first clause of section 4 of the Act of 1866.
6. This court may take judicial notice of official statements made by the head of one of the branches of the executive department, which relate to the public records under his control. The Land Department has not considered lands "subject to periodical overflow" to be "swamp and overflowed" lands.
7. Lands "subject to overflow," or "subject to overflow from slough," or "subject to periodical overflow," are not necessarily such as come within the descriptive terms of those inuring to the State under the swamp-land grant.
8. The term "overflowed," as used in the Swamp-Land Act, has reference to those lands which are overflowed and will remain so without reclamation or drainage; while "subject to periodical overflow" has reference to a condition which

NOTE.—*That United States courts take judicial notice of the laws of the States, and of laws previously prevailing in acquired countries*, see *note* to McNiel v. Holbrook, 9:1009.

As to pre-emption rights, see *note* to United States v. Fitzgerald, 10:785.

That patents for land may be set aside for fraud, see *note* to Miller v. Kerr, 5:381.

As to errors in surveys and descriptions in patents for lands; how construed,—see *note* to Watts v. Lindsey, 5:423.

As to land grants to railroads, see *note* to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28:794.

may or may not exist, and which when it does exist is of a temporary character.

9. The question of whether or not lands returned as "subject to periodical overflow" are within the descriptive terms of those granted by the Swamp-Land Act—that is, whether they are "swamp or overflowed"—is a question of fact properly determinable by the Land Department.

10. The decisions of the Land Department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country; its decision as to the actual physical character of certain lands is not subject to review by the courts.

11. Surveys and plats made by a county surveyor on application of a person to purchase a tract of land are not the segregation surveys referred to in the second clause of the fourth section of the Act of July 23, 1866.

12. It seems that the question, whether or not a survey made by an officer of the State is a segregation survey of swamp and overflowed lands as defined by Act of the State Legislature, is one on which this court will follow the decision of the state court, it being a construction of a state statute.

[No. 528.]

Submitted Jan. 9, 1891. Decided March 2, 1891.

IN ERROR to the Supreme Court of the State of California to review a judgment of that court affirming a judgment of one of the state courts of California in favor of defendant in an action of ejectment to recover the possession of 160 acres of land in San Joaquin County in that State. *Affirmed.*

The facts are stated in the opinion.

Messrs. **A. T. Britton** and **A. B. Browne,** for plaintiff in error:

Lands which by reason of swamp or overflow become unfit for cultivation are within the purview of the grant of 1850.

Merrill v. *Tobin*, 30 Fed. Rep. 738; *Keeran* v. *Griffith*, 31 Cal. 461; *Thompson* v. *Thornton*, 50 Cal. 142.

The granted lands are such as are made "unfit for cultivation" because of their being swamp or swampy, or subject to such periodical overflows as to injure or destroy the crops unless protected by dams and levees.

Keller v. *Brickey*, 78 Ill. 133; *Merrill* v. *Shea*, 30 Fed. Rep. 743; *Reichart* v. *Felps*, 73 U. S. 6 Wall. 160 (18:849).

It will be presumed that the state officers acted in strict accordance with the law.

Bank of United States v. *Dandridge*, 25 U. S. 12 Wheat. 70 (6:554); *Gonzales* v. *Ross*, 120 U. S. 606 (30:801).

No obligation or duty, statutory or otherwise, demanded of the State any action whatever.

Ryan v. *Carter*, 93 U. S. 78, 82 (23:807, 809); *Glasgow* v. *Hortie*, 66 U. S. 1 Black, 595–602 (17: 110, 114); *Miller* v. *Tobin*, 16 Or. 540; *Johnson* v. *Ballou*, 28 Mich. 379.

The State takes the benefit of the Statute without certification.

Stockton v. *Williams*, 1 Dougl. (Mich.) 546.

The court erred in its conclusion of law against title in the plaintiff, through the State.

U. S. Rev. Stat. §§ 2258, 2271; *Hedley* v. *Leonard*, 35 Mich. 72; *People* v. *State Land Office Comrs.* 23 Mich. 270; *Looney* v. *Bagley* (Tex.) Dec. 2, 1887; *Winsor* v. *O'Connor*, 69 Tex. 571; *Doolan* v. *Carr*, 125 U. S. 618 (31: 844).

The right of the State is prior in time, and is not lost or forfeited by the delay of the federal officers, without fault on her part.

Mc Creery v. *Haskell*, 119 U. S. 327 (30:408); *Crowley* v. *Oregon*, 7 Copp's Pub. Land Laws, 28; *Martin* v. *Marks*, 97 U. S. 345 (24:940).

When there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel.

2 Herman, Estoppel, 1365; *Zottman* v. *San Francisco*, 20 Cal. 96; *Martin* v. *Zellerbach*, 38 Cal. 300.

Messrs. **James K. Redington** and **Wm. J. Johnston,** for defendant in error:

An action of ejectment can be maintained by showing that the land is of the character contemplated by the grant, and for this purpose parol testimony as to the fact is admissible.

Wright v. *Roseberry*, 121 U. S. 488 (30:1039); *Irwin* v. *San Francisco Sav. Union*, 136 U. S. 578 (34:540).

The Land Department is a tribunal of a quasi judicial character. Its decisions are judgments of a court of competent jurisdiction, and conclude all parties and priories.

Johnson v. *Towsley*, 80 U. S. 13 Wall. 72 (20: 485); *Warren* v. *Van Brunt*, 86 U. S. 19 Wall. 646 (22:219); *Shepley* v. *Cowan*, 91 U. S. 330 (23:424); *Moore* v. *Robbins*, 96 U. S. 530 (24:848); *Marques* v. *Frisbie*, 101 U. S. 473 (25:800); *Vance* v. *Burbank*, Id. 514 (929); *Quinby* v. *Conlan*, 104 U. S. 420 (26:800); *St. Louis Smelt. & Ref. Co.* v. *Kemp*, Id. 636 (875); *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 (27:226); *Baldwin* v. *Starks*, 107 U. S. 463 (27:526); *Lee* v. *Johnson*, 116 U. S. 48 (29:570).

Lands not designated as swamp and overflowed did not inure to the State under the grant of 1850 or the Statute of 1866.

Wallace v. *California*, 5 Copp's Pub. Land Laws, 22; *California* v. *United States*, 3 Land Dec. 521, 4 Land Dec. 371; *California* v. *Fleming*, 5 Land Dec. 37.

Mr. Justice **Lamar** delivered the opinion of the court:

This was an action of ejectment in one of the state courts of California, to recover the possession of a tract of one hundred and sixty acres of land in San Joaquin County in that State, particularly described as the northwest quarter of section 23, township 3 north, range 7 east, Mount Diablo base and meridian.

The plaintiff below, who is also the plaintiff in error, set up a title derived from the State, claiming that the land was a part of its swamp-land grant, under the Act of September 28, 1850, as confirmed by the Act of July 23, 1866. The defendant filed a general denial, and claimed title in himself, under the Pre-emption Laws of the United States; and in a supplemental answer alleged that, since the commencement of the action, to wit, on the 1st day of June, 1882, he had received a patent to the land from the United States.

A jury having been waived, the case was tried by the court, which made a special finding of facts, and rendered judgment in favor

of the defendant. That judgment having been affirmed by the Supreme Court of the State (71 Cal. 50), this writ of error was sued out.

The material facts of the case, as found by the trial court, are substantially as follows: The United States subdivisional survey of the township in which the land in dispute is situated was made by Deputy United States Surveyor John Wallace, in the year 1865, and the survey, with the field-notes and plat thereof, was duly approved and the approval certified by the United States surveyor-general for California on the 23d of August of that year. The official plat of the survey was filed in the United States land office at Stockton (that being the land district in which the land was situated) on the 18th of October, 1865, and a certified copy of the field and descriptive notes of the survey was filed in that land office on or about June 17, 1881.

A considerable part of the plat, including section 23, was colored blue, to distinguish it from the other portions of it, and thereon was written "Land subject to periodical overflow." The field-notes of the survey state that in running the east line of this section the surveyor crossed three sloughs having a westerly course, one 30, one 50 and the other 80 links wide; and that in running the west line two sloughs, each 50 links wide and having the same general course, were crossed. And the descriptive notes made mention that the section was first-rate, level land, subject in some places to "overflow from slough." These designations represented that the land colored blue was subject to inundation by [5] the overflow of the Calaveras River and its branches, and was thus rendered incapable of being cultivated for the raising of crops, except by means of banks and levees which had been erected to prevent the overflow of the water during the winter and spring months.

In April, 1865, H. T. Hartwell made an application, under the laws of California, to purchase the tract in dispute from the State, as swamp and overflowed inuring to it under the swamp-land grant, and on the 28th of that month the county surveyor of San Joaquin County made a survey, and recorded a plat and field-notes thereof, in accordance with the law of the State and the instructions of the state surveyor-general, which plat and field-notes showed the survey of the county surveyor to be in accordance with the United States survey of the township, and the land to be swamp and overflowed. This plat and the field-notes accompanying it were filed with the state surveyor-general on the 22d day of October, 1865, and were duly approved by him on the 23d of November following.

It does not appear that any further action was taken on this application. In April, 1869, Hartwell made another application to purchase the tract from the State, under the Act of the California Legislature, approved March 28, 1868. A survey thereof was accordingly made by the county surveyor, which made the same showing as the former one, and, together with the field-notes thereof, was filed with the state surveyor-general on the 4th of May, 1869, and approved by him November 12, 1869. On the 19th of April, 1870, the State of California issued and delivered to Hartwell a certificate of purchase of the land in suit, founded on the last application and survey, which certificate set forth that Hartwell had made part payment of the purchase price and was the purchaser of the land, and that, on making full payment and surrendering the certificate, he should receive a patent of the State for the same. On the 1st of April, 1871, Hartwell sold this certificate to the plaintiff, to whom a patent of the State was issued on the 21st of July, 1876, in accordance with the provisions of the laws of the State relating to swamp and overflowed lands.

Prior to this, however, January 10, 1866, [576] Hartwell filed a pre-emption declaratory statement for the land, alleging settlement thereon September 20, 1862, which was formally relinquished October 29, 1873, and canceled December 8 of that year. No other claim was ever made to the land, under any of the laws of the United States relating to the disposition of the public lands, until the 24th of July, 1876, when the defendant, Wallace, presented a pre-emption declaratory statement therefor to the register of the land office at Stockton, alleging settlement on the 25th of April preceding, which that officer refused to file, indorsing thereon, as his reason for such refusal, that the land had been returned as subject to periodical overflow. Wallace appealed to the commissioner of the General Land Office, and on the 5th of September, 1876, that officer wrote the register and receiver of the Stockton land office, saying that the land in question was claimed by the State under the first section of the Act of July 23, 1866, as having been sold, in good faith, as swamp land, prior to that date, and directing those officers to give notice to the state authorities, to Wallace and to all other parties in interest, and hold an investigation to determine the said claim of the State. That investigation having been held, the local land officers, on the 8th of February, 1877, decided that the State had no valid claim to the land under the first section of the Act of July 23, 1866. The commissioner of the General Land Office affirmed that decision on the 19th of May, 1877, and further adjudged that the State was not entitled to show the character of the land as swamp and overflowed, under the 4th clause of the 4th section of that Act. The State appealed to the Secretary of the Interior, who, on the 28th of December, 1877, overruled the commissioner in that behalf, and directed a hearing to be given to the State on the question of the character of the land, by virtue of the 4th clause of the 4th section of the Act.

Pursuant to the decision of the Secretary of the Interior, after notice to all parties in interest, the United States surveyor-general held an investigation as to the character of the land, and decided that the land was not in fact swamp and overflowed on the 28th of September, 1850, the date of the General [577] Swamp-Land Act. The decision of the surveyor-general was affirmed by the Secretary of the Interior on the 25th of February, 1881,

who also adjudged that the land was subject to disposal under the Pre-emption Laws, and that Wallace should be allowed to perfect his pre-emption claim thereto. Wallace afterwards complied with the provisions of the Pre-emption Law, and in June, 1882, received a patent to the land from the United States.

After this patent was issued, the State of California applied to the Interior Department to have the land certified over to her, by virtue of the provisions of the first and second clauses of the 4th section of the Act of July 23, 1866, and the first and second clauses of section 2488, together with section 2479, of the Revised Statutes. This application was denied by the commissioner of the General Land Office, April 26, 1883, upon the ground that a patent having been issued to Wallace for the tract, the Department had no further jurisdiction over the matter. That decision was affirmed by the Secretary of the Interior, March 3, 1884, upon the same ground.

There is no record in the United States Land Department showing a selection of this land by the State, as swamp and overflowed land, or any certification thereof to the State by the United States, except in so far as the foregoing proceedings show a selection.

The plaintiff insisted in the court below that the land passed to the State of California, as swamp and overflowed land, either under the first clause of section 4 of the Act of July 23, 1866 (14 Stat. 218), or under the second clause of the same section, both of which clauses are substantially embodied in section 2488 of the Revised Statutes; and that, therefore, by virtue of his patent from the State, he had acquired whatever right the State possessed under either or both of those clauses of the Statute. They provide as follows:

"That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, [578] within one year from the passage of this Act, or within one year from the return and approval of such township plats.

"The commissioner shall direct the United States surveyor-general for the State of California to examine the segregation maps and surveys of the swamp and overflowed lands made by said State; and where he shall find them to conform to the system of surveys adopted by the United States; he shall construct and approve township plats accordingly, and forward to the General Land Office for approval."

The Supreme Court of California held that the State never acquired any title to the tract under the first clause of said section 4, because the land was not represented upon the approved township plat as swamp and overflowed, within the meaning of the Swamp-Land Acts, the designation "subject to periodical overflow" not being identical with, or equivalent to, the description of lands inuring to the State under those Acts; and that the State did not acquire any title under the second clause of the section for the following reasons: "We are of opinion that the surveys and plats made, as in this case, under the Acts of 1863 and 1868, on the application of a party desiring to purchase the tract sought to be purchased, are not the segregation maps and surveys referred to in the Act of Congress of July 23, 1866, and the section of the Revised Statutes above referred to. Granting the survey and plat made on the application of Hartwell to purchase a specific tract of land (the northwest quarter in controversy) was a segregation map and survey, such as is embraced within the above-quoted clause from the Act of 1866, it does not appear that the commissioner gave any direction to the United States surveyor-general for this State, as required by the Act, or that if such order was given it was complied with, or that any township plat was made under this order, or, if made, that it was approved at the General Land Office."

It is to these two rulings that error is assigned and argument is principally directed. The first question presented for our consideration, therefore, is this: Was this land represented upon the approved township plat, or did the approved township survey and [579] plat, including the field and descriptive notes of the survey, represent it as swamp and overflowed land, within the meaning of the Act of July 23, 1866? If it was so represented, then, under the first clause of said section 4, it was confirmed to the State, without any certification thereof by the commissioner of the General Land Office, after one year from the date of the Act. *Wright* v. *Roseberry*, 121 U. S. 488 [30: 1039]; *Tubbs* v. *Wilhoit*, 138 U. S. 134 [34: 887].

As held in *Tubbs* v. *Wilhoit*, *supra*, this section of the Statute established rules or methods for the identification of swamp and overflowed lands in California which superseded all previous rules or methods for that purpose. The several rules or methods provided for were intended to meet any emergency that might arise, and thus give to the State all the swamp and overflowed lands within her limits. The method provided in the first clause was but one of several specified in the section. But one thing was required to be shown under this clause—only one kind of evidence as to the character of the lands was necessary—in order to give to the State the right to demand the certification of them over to her as swamp and overflowed lands; and that evidence the United States furnished in the plat of the survey of the township in which the lands were situated. An inspection of the township plat would show whether or not any lands in the township were returned as swamp and overflowed. If they were, that designation was sufficient and conclusive evidence, under the first clause of section 4 of the Act, to establish the title of the State to them. But as that particular designation was but one of several methods of identification prescribed by the Act, it should not be unnecessarily extended beyond its plain and obvious import. For

if lands which, in fact, were swamp and overflowed, were not so designated on the approved plat of the township, the State was not precluded from claiming them as swamp and overflowed, and having them identified by one of the other methods provided by the Act. She still had recourse to the methods of identification provided by the second and fourth clauses of the section, and if the lands were in fact swamp could not fail to get [581] them. On the other hand, the United States were bound by the action of the surveyor if he noted on his survey that the lands were swamp and overflowed, and that survey was approved. We think, therefore, that while the Act of July 23, 1866, may be called remedial in its character, yet the particular clause of the Statute, operating as it does in the nature of an estoppel against the grantor, and not so against the grantee, should not be construed as embracing more than its terms will fairly warrant. In other words, this designation, operating as an estoppel against the United States, should have a strict construction. No lands should be considered as embraced within the terms "swamp and overflowed" by mere implication, simply because they may have been described in other terms which, in some instances, might be equivalent to the terms prescribed by the Act. If, in any instance, terms claimed to be equivalent to those prescribed by the first clause of the fourth section of the Act of 1866 can be shown by evidence to have reference to lands not contemplated by the swamp-land grant, as inuring to the State under that grant, then such terms cannot be considered as equivalent to the terms "swamp and overflowed."

The question before us thus resolves itself into one of the definition of words or terms, more than one of the interpretation of a statute. To arrive at a proper determination of the question, therefore, it will be useful to refer to some of the adjudications of the Interior Department upon the subject; for, the survey of the public lands being confided to certain officers of that Department, the meaning of the descriptive terms used by those officers in performing that duty is best known there. In one sense, the language of the survey is technical, and it should therefore be taken according to the acceptation of those most familiar with its use and significance.

In *Wallace* v. *California*, 2 Copp's Pub. Land Laws (1882), 1057, 1058, involving the same land here in controversy (the decision referred to above as having been made by the Secretary of the Interior on the 28th of December, 1877), Mr. Secretary Schurz said: "The first clause of the said 4th section of the Act of 1866 provides that, in cases where the townships had been surveyed by the United States, and the plats approved, the lands returned as swamp and overflowed were to be certified to the State without further action; hence, no hearing as to the character of the land is necessary. In the case under consideration, however, the township was surveyed by the United States prior to July 23, 1866, and the land is returned by the surveyor-general as subject to 'periodical overflow,' and not as 'swamp and overflowed,' as provided in the Statute; hence it is not subject to certification to the State by virtue of the return of the surveyor-general. The State, however, claims the land as swamp. A question is thus raised as to the correctness of the return of the officer and a hearing is requested that the facts in the case may be ascertained. I find nothing in either the Act of September 28, 1850, or July 23, 1866, which debars the State of this right; on the contrary, it is expressly guaranteed in the 4th clause of the 4th section above quoted."

In *California* v. *United States*, decided May 1, 1885, 3 Land Dec. 521, 524, involving part of section 27, in the same township, it was said: "Again, the approved plat of survey of this township and the return of the deputy have been passed upon by this Department in the case of *Wallace* v. *California*, involving the northwest ¼ of section 23, which corners upon the section embracing the land in controversy. In that case, it was held that 'the township was surveyed by the United States prior to July 23, 1866,' and the land is returned by the surveyor-general as subject 'to periodical overflow,' and not as 'swamp and overflowed,' as provided in the Statute; hence, it is not subject to certification to the State by virtue of the return of the surveyor-general; and also that where a question is raised as to the correctness of the return of the officer, a hearing should be ordered in accordance with the provisions of the fourth clause of the fourth section of the Act of July 23, 1866."

Upon review of the same case, February 5, 1866, 4 Land Dec. 371, it was said: "There can be no question that the returns of the surveyor-general did not represent said land as swamp and overflowed within the meaning of the Act of September 28, 1850. In addition to the adjudication of this Department in the case of *Wallace* v. *California*, [582] in which it was expressly held that the land in said township was not subject to certification to the State, by virtue of the return of the surveyor-general, United States Deputy-Surveyor Wallace testified at the hearing as follows: '*Q*. Did you consider this land in question swamp land at the time you made that survey? *A*. No. I considered those distinct from swamp lands; if they had been swamp lands I should have entered it so in my notes.'"

In *California* v. *Fleming*, decided August 7, 1686, 5 Land Dec. 37, 38, involving, among other lands, part of the same quarter-section here in dispute, it was said: "The lands in controversy were returned by the surveyor-general as 'lands subject to periodical overflow,' and hence were not subject to certification to the State by virtue of the return of the surveyor-general."

Those adjudications, covering a consecutive period of nearly nine years, and, so far as can be gathered from the printed reports of the decisions of that Department relating to public lands, being the only ones bearing upon the subject, ought to be taken as showing conclusively the meaning attached to the phrase "land subject to periodical overflow," by the officers of the Department whose duty

it is, and has been, to administer the swamp-land grant.

Moreover, if the question be considered in a somewhat different light, viz., as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. For, as said in *United States* v. *Moore*, 95 U. S. 760, 763 [24: 588, 589], "the officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." See *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 366 [33: 363, 367], and cases there cited, *Schell* v. *Fauché*, 138 U. S. 562 [34: 1040].

583] But we are not disposed to rest our judgment on this branch of the case upon the foregoing propositions alone. We are of opinion that the construction by the Interior Department of the clause of the Act of July 23, 1866, which we are now considering, is the proper one. In this connection, we are not unmindful of the rule that the field and descriptive notes of a survey form a part of the survey, and are to be considered along with the plat of the townships to which they relate. *Cragin* v. *Powell*, 128 U. S. 691, 696 [32: 566, 568]. As already indicated, it is by reference to the plat, together with the field and descriptive notes of the survey, that it is to be determined whether or not the land will inure to the State, and be confirmed, by virtue of the first clause of section 4 of the Act of 1866. An inspection of the field-notes of this section of land showed that, in six different places, in running the lines, the surveyor crossed "sloughs" ranging from 20 to 80 links in width, all having a westerly or northwesterly course. The descriptive notes showed the land to be level, first-rate, "subject to overflow," or "subject to overflow from slough." As a conclusion from those data, the surveyor wrote across the face of that part of the plat embracing the land in controversy: "Land subject to periodical overflow." The third finding of fact states that those designations represented that the body of land to which they applied (and which was colored blue on the plat to distinguish it from other portions of the plat) was "subject to inundation by the overflow of the Calaveras River and its branches, and is thus rendered incapable of being cultivated for the raising of crops, except by means of banks and levees which have been erected to prevent the overflow of the water during the winter and spring months." This general description on the plat of the township must be read in the light of the field-notes of the boundary lines, and the annotations made upon the plat. The Secretary of the Interior in *California* v. *United States*, 8 Land Dec. 521, 523, referring to this same township plat, said: "Upon the margin appears this note: 'The lands represented upon this map as *subject to periodical overflow* can be cultivated and crops raised thereon, as returned by the deputy.'" And at another place he said that the register "certifies that the only [58 land designated on said official plat as swamp and overflowed land is situated in the north half of section 5 of said township,"—thus showing clearly that the Department considered that a radical distinction existed between lands returned as "subject to periodical overflow" and those returned as "swamp and overflowed;" and showing also that these lands were not considered "swamp and overflowed" lands. We think we may take judicial notice of such official statements made by the head of one of the branches of the executive department, especially as they relate to the public records under his control. 1 Greenleaf on Ev. § 479; *Jones* v. *United States*, 137 U. S. 202 [34: 691], and authorities there cited.

Now, lands "subject to overflow," or "subject to overflow from slough," or "subject to periodical overflow," are not necessarily such as come within the descriptive terms of those inuring to the State under the swamp-land grant. Whether the terms "swamp" and "overflowed," when connected by the particle "and," be taken together as a general term of description for the lands granted by the Swamp-Land Act, or whether those terms are separable and refer to two different qualities of lands thus granted, makes little or no difference in this consideration. If the former theory be the correct one, then manifestly the meaning of the phrase is entirely different from the phrase "subject to periodical overflow." And if the latter theory be adopted, still we think there is a marked distinction between the terms "overflowed" and "subject to periodical overflow." The term "overflowed," as thus used, has reference to a permanent condition of the lands to which it is applied. It has reference to those lands which *are* overflowed and will remain so without reclamation or drainage; while "subject to periodical overflow" has reference to a condition which may or may not exist, and which when it does exist is of a temporary character. It was never intended that all the public lands which perchance might be temporarily overflowed at the time of freshets and high waters, but which, for the greater portion of the year, were dry lands, should be granted to the several States as "swamp and overflowed" lands. At any [59 rate, the question whether or not lands returned as "subject to periodical overflow" are within the descriptive terms of those granted by the Swamp-Land Act—that is, whether they are "swamp and overflowed,"—is a question of fact properly determinable by the Land Department. It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that Department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. *Johnson* v. *Towsley*, 8 U. S. 13 Wall. 72 [20: 485]; *St. Louis Smelt. & Ref. Co.* v. *Kemp*, 104 U. S. 636 [26: 875]; *Steel* v. *St. Louis Smelt. & Ref. Co.* 106 U. S. 447 [27: 226]; *United States* v. *Minor*, 114 U. S. 233 [29: 110], and many other cases. We

are of opinion, therefore, that the decision of the Land Department on a question of the actual physical character of certain lands is not subject to review by the courts. And that consideration is sufficient to dispose of the first assignment of error against the plaintiff in error.

We do not think the second assignment of error can be sustained. The surveys and plats made upon the application of Hartwell to purchase the tract were not the segregation surveys referred to in the second clause of the fourth section of the Act of July 23, 1866. As said in *Tubbs* v. *Wilhoit*, *supra*, that clause "provided for the construction of township plats where none previously existed. It required the commissioner of the General Land Office to direct the United States surveyor-general for California to examine the segregation maps and surveys of the swamp and overflowed lands made by the State, and directed that when he should find them to be in conformity with the system of surveys adopted by the United States he should construct and approve township plats accordingly, and forward them to the General Land Office for approval." See also *Wright* v. *Roseberry*, 121 U. S. 488, 513, 514 [30: 1039, 1046, 1047]. After the United States surveys had been made, there was no necessity for any further survey by the State in order to locate the swamp lands. In fact there could be no state survey after that date of any recognized force.

The segregation maps referred to in that clause were such as were directed by the Act of the Legislature of California approved May 13, 1861. Session Laws of 1861, chap. 352, page 355. That Act provided, among other things, as follows:

"Sec. 19. The county surveyors of the several counties of this State shall, immediately after the organization of the board of commissioners, proceed to segregate the swamp and overflowed lands within their respective counties from the high lands in said counties, and make complete maps of all the swamp and overflowed lands, within their respective counties, in legal subdivisions of sections and parts of sections, together with a tabular statement of all such lands as have been sold by the State, and under what Act the same were sold, of all lands claimed and by whom claimed, and as nearly as possible by what title the same are held, and file the said tabular statement in the county recorder's office of their respective counties, also transmit duplicates of said maps to the surveyor-general of the State: *Provided, however*, That it shall be discretionary with the board of commissioners whether land already surveyed and segregated under a former Act for the sale and reclamation of swamp and overflowed lands shall be segregated or surveyed under this Act. . .

"Sec. 21. The surveyor-general shall compile a general map of the State in duplicate, showing all the swamp and overflowed lands of the State which shall have been returned by the county surveyors as the property of the State, together with the county boundary lines where crossing the same. He shall also enter thereon the number corresponding with the affidavit; he shall also compile from the testimony received, and on file in his office, a general schedule of the swamp lands in the State by their description. He shall also distinguish on said map the lands already sold by the State as swamp and overflowed; he shall prepare a report showing any case in which the swamp lands have been infringed upon by the United States government surveys."

No survey such as described in those sections of the laws of California was ever made of the land in dispute. The surveys that were made upon the application of Hartwell to purchase the tract do not come within that description. They were, in reality, mere private surveys. Moreover, the phrase "segregation surveys," as used in the [587 Act of 1866, means such segregation surveys as are defined and described by the aforesaid Act of the Legislature of the State, and are made by state officers; and it would seem, therefore, that whether or not a survey made by an officer of the State is a segregation survey, as defined by the Act of the State Legislature, is one on which this court will follow the decision of the state court. It is in reality a construction of a state statute. The Supreme Court of the State has invariably held such maps or plats not to be the segregation maps referred to in the Act of July 23, 1866. *Sutton* v. *Fassett*, 51 Cal. 12; *People* v. *Cowell*, 60 Cal. 400. For these reasons we hold that the second specification of error cannot be sustained.

There are no other features of the case that call for further consideration or even special mention. We see no error in the decision of the Supreme Court of California prejudicial to the plaintiff in error, and its *judgment is affirmed.*

ABNER L. MERRILL, *Plff. in Err.*, [673
v.
TOWN OF MONTICELLO.

(See S. C. Reporter's ed. 673-694.)

Towns, unless by statute, cannot issue negotiable bonds—Indiana law—town not estopped, by receiving avails of bonds, from denying power to issue.

1. The Town of Monticello had no authority, under the laws of Indiana in force May 20, 1878, to issue for sale in open market its negotiable securities, in the form of bonds and coupons, for the purpose of retiring and paying off bonds of the Town previously issued.
2. The implied power of a town in Indiana to borrow money or contract a loan does not confer upon the town the further power to issue funding negotiable bonds for the amount and sell them in open market as commercial paper.
3. That the Indiana Laws of 1867, 1869 and 1873 authorized towns to issue bonds for certain specified purposes, and under proper limitations, indicates that, without some express statute, no power existed in the town to issue negotiable bonds and sell them in open market.
4. That the money arising from the sale of town

bonds was paid to the agent of the town does not estop the town, in an action on the bonds, from pleading its want of authority to issue them: whether that would be a circumstance in favor of the equitable right of the holders of the bonds to recover from the town the money which they represent, is not decided.

[No. 125.]

Argued Dec. 19, 22, 1890. Decided March 2, 1891.

IN ERROR to the Circuit Court of the United States for the District of Indiana to review a judgment in favor of defendant in an action against the Town of Monticello, Indiana, upon its bonds and coupons purchased by plaintiff in open market. *Affirmed.*

Statement by *Mr. Justice* **Lamar:**

This was an action at law by Abner L. Merrill, a citizen of Massachusetts, against the Town of Monticello, in the State of Indiana, upon certain bonds and coupons issued by the Town and purchased by the plaintiff in open market.

The bonds and coupons were in form like the following:

"United States of America.

"No. 1. State of Indiana. $100.

"Funding Bond of the Town of Monticello.

"Ten years after date, the Town of Monticello, in the County of White, State of Indiana, promises to pay to the bearer, at the Importers' and Traders' National Bank, New York, one hundred dollars in gold, with interest thereon at the rate of seven per cent per annum, payable annually, in gold, at the same place, upon presentation of the [674] proper coupon hereto attached, without any relief whatever from the Valuation or Appraisement Laws of the State of Indiana. The principal of this bond shall be due and payable, at the option of the holder, on the nonpayment, after due presentation, of any of said coupons, for ninety days after the maturity thereof. This bond is one of a series of $21,000, authorized by the said Town by an ordinance passed by the board of trustees thereof, on the thirteenth day of May, 1878, for the purpose of funding the indebtedness of the said Town.

"In witness whereof, the board of trustees of the Town of Monticello have caused this bond and the coupons thereof to be signed by their president and clerk, and the seal of the Town to be affixed hereto, at the said Town of Monticello, this twentieth day of May, 1878.

"Attest: F. Bosinger, Clerk.

"R. W. Christy, President."

[Copy of coupon.]

"The Town of Monticello, Indiana, will pay the bearer, in gold coin, seven dollars, without relief from Valuation or Appraisement Laws of the State of Indiana, at the Importers' and Traders' National Bank, New York, on the twentieth day of May, 1880, being one year's interest on bond No. 1.

"Attest: F. Bosinger, Clerk.

"R. W. Christy, President."

The coupons numbered 2, attached to each bond, having been presented for payment when due, at the place specified therein, and payment having been refused, the plaintiff, as the holder of 143 of the bonds with coupons attached, elected to declare the principal sum due, in accordance with the terms of the bonds, and, accordingly, on the 1st of July, 1881, brought this action to recover that amount.

A demurrer to the defendant's answer having been sustained, it filed an amended answer, in substance as follows: At the time the bonds in suit were issued the defendant was, and still is, a municipal corporation or town, duly organized under the laws of Indiana, in pursuance of a Statute of that State passed June 11, 1852. On the 24th of June, 1869, a petition was presented to the board of trustees of the Town by the school trustees, [6 praying for the issue of the bonds of the Town to aid in building a school-house; and on the same day the trustees of the Town passed an ordinance directing that there be issued to the school trustees $20,000 worth of coupon bonds, of the denomination of $100 each, bearing 10 per cent interest, payable annually, which bonds, running ten years, were issued by the Town May 1, 1869, and were afterwards sold in open market. The principal of them had not been paid, and they constituted the only indebtedness of the Town, when, on the 11th of May, 1878, the following petition, signed by the owners of taxable property in the Town, was presented to the town trustees:

"We, the undersigned, citizens of the Town of Monticello, Indiana, and owners of the taxable property therein, respectfully petition that you, as trustees of said Town, contract a loan for said Town, for the purpose of paying the indebtedness thereof, in the sum of twenty-one thousand dollars."

On the same day the board of town trustees passed and entered of record the following ordinance:

"Be it ordained by the board of trustees of the Town of Monticello, Indiana, That said Town issue bonds in the sum of twenty-one thousand dollars, in denominations of one hundred dollars, bearing interest at the rate of seven per centum per annum, payable in gold, to provide the means with which to pay the indebtedness of said Town. And be it further ordained, That when said bonds are issued they be placed in the hands of J. C. Wilson, a member of the board of trustees, for negotiation and sale. And be it further ordained, That said bonds shall not be sold at a price less than ninety-four cents on the dollar."

In pursuance of this ordinance, on the 20th of May, 1878, there were issued coupon bonds of the Town to the amount of $21,000, bearing 7 per cent interest, payable annually, and due in ten years, being the same bonds a large amount of which are involved in this action. After the bonds were issued, they were delivered to said J. C. Wilson, who sold them and converted the proceeds thereof to his own use, the Town not receiving any benefit therefrom.

The answer further alleged that on the 20th [6 of May, 1878, when these bonds were issued,

there was no law of the State of Indiana which authorized the trustees of an incorporated town in that State to issue its bonds for the purpose of funding its indebtedness, or to issue its bonds for negotiation and sale, for the purpose of paying its indebtedness or of raising money to pay its indebtedness; and that, at the date last above mentioned, the defendant was an incorporated town, organized under the general law of the State for the incorporation of towns having a population of twelve hundred inhabitants.

A general demurrer to the amended answer, as not stating facts sufficient to constitute a good defense to the complaint, was overruled by *Judge* Gresham, in December, 1882 (14 Fed. Rep. 628); and the plaintiff then filed a reply, that part of it material to this consideration being, in substance, as follows: After admitting the main facts stated in the answer respecting the issue and sale of the bonds of 1869, and also as to the issue of the bonds of 1878, here in suit, it was alleged that the bonds in suit were legal, having been authorized by an Act of the State Legislature, passed March 3, 1873; that the Town was without means to pay its indebtedness except by the issue of its bonds, the tax levies permitted by law being insufficient for that purpose; that J. C. Wilson, as the agent of the Town, under and by virtue of the authority conferred upon him by the aforesaid ordinance, negotiated the bonds in open market, and received from their sale the sum of $19,680.17, a part of which sum, to wit, $6,618.10, he deposited in a bank in that Town, and absconded with the remainder; that the Town, by suit instituted for that purpose, recovered the aforesaid amount which had been deposited in the bank, and appropriated it to its own use; and that the plaintiff, in July, 1878, purchased 143 of the bonds (those in suit) in open market in Boston, at par, for cash, without any notice or knowledge on his part that Wilson had not accounted to the Town for the money received by him from the sale of the bonds.

A demurrer to the reply was overruled by *Judge* Woods, holding the circuit court. 22 Fed. Rep. 589. The case was then tried before *Judges* Gresham and Woods, upon the merits, under a written stipulation waiving a jury, judgment being given in favor of the defendant.

Plaintiff afterwards made a motion for a new trial, which was overruled by *Judge* Woods at the November Term of the court, 1886. At the same time plaintiff again made a motion for a new trial, setting up, in substance, the following: That he had prepared a bill of exceptions setting forth all the evidence in the case, all of which, it was alleged, tended to support the declaration and the reply; that he was desirous of bringing the case to this court by writ of error, but, under the rules and practice here and the statutes of the United States, he would not be able to present the questions involved to this court without a special finding of facts upon the evidence adduced at the trial; that a manifest hardship and injustice had been done him in the case, which occurred in the manner following: The judge who heard the case on the demurrer to the answer held the answer sufficient, while another judge of the court, who heard the case on demurrer to the reply, pronounced the reply sufficient, and at the final hearing plaintiff, relying upon the evidence which supported and proved his reply, did not require or ask a special finding of facts, supposing, of course, that his reply having been proved, there would be a certificate of division in opinion between the judges who tried the cause, or that, if not so, he would have saved to him by the record the questions of law in some other proper manner; that the entry of the judgment took him wholly by surprise, and he had not saved the legal questions as he should have done by requesting beforehand a special finding of facts, because, having had his replication sustained, he had no doubt of the final judgment of the court being favorable to him; and that he was fearful he would be remediless to present to this court the questions involved in the case unless the judgment should be set aside and a special finding of facts made by the court.

This motion was sustained by *Judge* Woods, over the objection of the defendant, and a new trial was granted. The case was again tried by *Judge* Woods, without a jury, who, at plaintiff's request, made and filed the following finding of facts, and entered judgment thereon in favor of the defendant: [678

"1st. At the time hereinafter mentioned the defendant was a municipal corporation organized and existing under and by virtue of the laws of the State of Indiana and situated in the County of White, in the said State.

"2d. That upon the 24th day of January, 1869, a petition was presented to the board of trustees of said Town by the school trustees thereof praying for the issue of the bonds of said Town to aid in the building of a school-house in said Town, which said petition was granted, and in pursuance thereof the trustees of said Town did pass and adopt an ordinance directing that there should be made and issued to the said school trustees of said Town twenty thousand dollars of coupon bonds of said Town of the denomination of one hundred dollars each, with interest at the rate of ten per cent per annum, payable annually; and afterwards, to wit, on the 1st day of May, 1869, the said Town executed the said bonds under said ordinance to the amount of $20,000, maturing in ten years after the date thereof, which bonds were sold and delivered to certain persons, who then and there became the purchasers thereof, and which bonds at the times hereinafter mentioned were outstanding, unpaid and valid obligations of the said Town.

"3d. On the 11th day of May, 1878, a petition was presented to the board of trustees of the defendant, signed by citizens, owners of taxable property in said Town, praying for the issue of bonds of said Town, to the amount of $21,000, which petition (omitting the names of the signers thereto) is in the words following, to wit:

[Then follows the petition as set out in the answer, and heretofore quoted.]

"4th. That upon the 20th day of May,

1878, in pursuance of the said petition and ordinance, the said defendant Town made and executed its 210 coupon bonds, payable to bearer, of the denomination of $100 each, bearing interest at the rate of seven per centum per annum, which bonds and coupons are in the words and figures following, to wit:

[679] [Then follows a copy of a bond and a coupon, heretofore set out in full.]

"5th. That the said bonds were put in the hands of the said J. C. Wilson, in pursuance of said ordinance, for sale, and that $14,-300 of the said bonds, being the same as those now in suit, were sold to Claypool and Stoddard, of Indianapolis, Indiana, for which the said firm of Claypool and Stoddard paid to the said Wilson the sum of $12,918.40, which said last-named sum was paid to said Wilson in the following manner: On or about April 14, 1879, said Claypool and Stoddard, by the direction of said Wilson, paid a draft drawn by G. A. Ivers, of Chicago, for $6,-000; on the same day said Claypool and Stoddard paid said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $5,000; that on the 13th day of May, 1879, the said Claypool and Stoddard paid to said Wilson, by their check on the First National Bank of Indianapolis, the further sum of $1,840.30, and within a few days after the last-named date said Claypool and Stoddard, for the balance of the said sum of $12,918.40, paid to him the sum of $78.17.

"6th. That the board of trustees of said Town required and exacted from their said agent, J. C. Wilson, a bond, with sureties, to secure the money which he might realize from the sale of said bonds.

"7th. That the said Wilson, after the sale of said bonds, failed to turn over the proceeds thereof to the treasurer of the said Town and fled the country.

"8th. That at the time the said Wilson fled the country he had a large sum of money on deposit in the First National Bank of Monticello, Indiana, to his credit as 'trustee;' that suit was instituted by the defendant Town against said bank to recover the same, upon the ground that such money was the proceeds of the sale of said bonds so made by the said Wilson; that judgment was rendered in favor of said Town and against said Bank for the sum of $6,988.43; that thereupon the receiver of the said bank appealed to the Supreme Court of Indiana, and thereupon said judgment was affirmed by said supreme court—*Bundy* v. *Monticello*, 84 Ind. [680] 119—and said Town recovered the sum of $6,-988.43.

"9th. That the said Town instituted a proceeding upon the bond so given by the said Wilson to the said Town to secure the money which he might realize from the sale of said bonds, and in a court of competent jurisdiction recovered judgment against the sureties and the said Wilson on the said bond for the full amount of the proceeds arising from the sale of said bonds, and from which judgment an appeal was taken to the Supreme Court of Indiana, and reported in 85 Indiana Reports, at page 10, and which said judgment was reversed and remanded by said supreme court for another trial, and afterwards the said suit was dismissed by the said Town, and that the said Town has received nothing on account of said bond.

"10th. That at the time of the issuing of the bonds in suit there was in the town treasury $3,047.85, and no more, received under the Taxing Act of the Legislature of Indiana, under which the bonds were issued, as a special fund for the payment of the $20,000 ten per cent bonds then outstanding, and that under the laws of the State of Indiana a sum sufficient to pay said bonds could not have been raised before maturity of the same on the amount of taxable property in said Town.

"11th. That the plaintiff is a resident of Newton, in the State of Massachusetts, and that he bought the bonds in suit in open market, in the City of Boston, as an investment, and paid therefor a valuable consideration, without any notice of any irregularity as to their issue or any claim to that effect.

"And the court further finds that the principal of the bonds sued on is wholly unpaid, and that the interest upon the same accrued is wholly unpaid from the 20th day of May, 1880.

"And the court further finds, as a conclusion of law upon the foregoing facts, for the defendant."

Mr. **Addison C. Harris,** for plaintiff in error:

The Town of Monticello had the power to borrow money to meet its outstanding bonds, about to mature, and after selling the bonds the Town cannot now be heard to say they were *ultra vires.*

Van Hostrup v. *Madison City*, 68 U. S. 1 Wall. 291 (17: 538); *Myer* v. *Muscatine*, Id. 398 (567); *Grand Chute* v. *Winegar*, 82 U. S. 15 Wall. 356 (21: 170); *Coloma* v. *Eaves*, 92 U. S. 484 (23: 579); *Marcy* v. *Oswego*, Id. 638 (748); *Venice* v. *Murdock*, Id. 494 (583); *Rock Creek* v. *Strong*, 96 U. S. 271 (24: 815); *Brooklyn* v. *Ætna L. Ins. Co.* 99 U. S. 370 (25: 416); *Walnut* v. *Wade*, 103 U. S. 695 (26: 530); *Bissell* v. *Jeffersonville*, 65 U. S. 24 How. 300 (16: 672); *Logansport* v. *Dykeman*, 116 Ind. 20; *Johnson County* v. *January*, 94 U. S. 202 (24: 110); *Anderson County* v. *Beal*, 113 U. S. 238 (28: 970).

The power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes or bonds, payable in the future.

Seibert v. *Pittsburg*, 68 U. S. 1 Wall. 272 (17: 553); *Rogers* v. *Burlington*, 70 U. S. 3 Wall. 666 (18: 83); *Savannah* v. *Kelly*, 108 U. S. 190 (27: 698); *Claiborne County* v. *Brooks*, 111 U. S. 400 (28: 470); *Gardner* v. *Haney*, 86 Ind. 17; *Utica Twp.* v. *Miller*, 62 Ind. 230; *Allen Twp.* v. *Macy Twp.* 8 West. Rep. 402, 109 Ind. 559; *Miller* v. *Dearborn County Comrs.* 66 Ind. 166; *Platter* v. *Elkhart County Comrs.* 1 West. Rep. 235, 103 Ind. 370; *Thompson* v. *Peru*, 29 Ind. 306; *Bluffton* v. *Studebaker*, 3 West. Rep. 877, 106 Ind. 129; *Richmond* v. *McGirr*, 78 Ind. 198; *Marshall County Suprs.* v. *Schenck*, 72 U. S. 5 Wall. 772 (18: 556); *Redd* v. *Henry County Suprs.* 31 Gratt. 695; Dill Mun. Corp. § 551, and *note;* Burroughs, Mun.

Sec. § 447; *Police Jury* v. *Britton*, 82 U. S. 15 Wall. 566 (21: 251).

Messrs. **David Turpie** and **William E. Uhl**, for defendants in error:

A municipal corporation can exercise no power which is not in express terms or by fair implication conferred upon it.

Thompson v. *Lee County*, 70 U. S. 3 Wall. 327 (18: 177).

The power to make and issue bonds, even when expressly granted, does not imply a power to negotiate and sell such bonds.

Starin v. *Genoa*, 23 N. Y. 439; *Gould* v. *Sterling*, 23 N. Y. 460; 2 Daniel, Neg. Inst. (2d ed.) 488; *Atchison* v. *Butcher*, 3 Kan. 104; *Daviess County Ct.* v. *Howard*, 13 Bush, 102; *Police Jury* v. *Britton*, 82 U. S. 15 Wall. 566 (21: 251).

When a particular method of exercising any corporate power of a municipality is prescribed by statute, no other can be adopted.

Anthony v. *Jasper County*, 101 U. S. 697 (25: 1008); *Ogden* v. *Daviess County*, 102 U. S. 634 (26: 263); *Wells* v. *Pontotoc County Suprs.* Id. 625 (122).

Corporate powers cannot be enlarged by by-laws and ordinances.

Thompson v. *Carroll*, 63 U. S. 22 How. 422 (16: 387); *Paul* v. *Kenosha*, 22 Wis. 266; *Andrews* v. *Union Mut. F. Ins. Co.* 37 Me. 256; *Katzenberger* v. *Aberdeen*, 121 U. S. 172 (30: 911).

No one can purchase municipal bonds of a public corporation, either in ignorance of the law concerning them, which he is presumed to know, or in ignorance of the facts concerning them, which he has the means of knowing.

East Oakland v. *Skinner*, 94 U. S. 257 (24: 126); *McClure* v. *Oxford*, Id. 432 (129); *Marshall County Suprs.* v. *Cook*, 38 Ill. 44; *Bissell* v. *Kankakee*, 64 Ill. 249.

A ratification can only be made when the party ratifying possesses the power to perform the act ratified.

Marsh v. *Fulton County*, 77 U. S. 10 Wall. 684 (19: 1042); *Hayes* v. *Holly Springs*, 114 U. S. 120 (29: 81).

Mr. Justice **Lamar** delivered the opinion of the court:

The decisive question presented by the record in this case is, Did the Town of Monticello have authority, under the laws of Indiana, to issue for sale in open market negotiable securities in the forms of the bonds and coupons on which recovery is here sought? *Chancellor* Kent, in his Commentaries, vol. 2, 298, 299, referring to the strictness with which corporate powers are construed, irrespective of the distinction between public and private corporations, uses the following language: "The modern doctrine is, to consider corporations as having such powers as are specifically granted by the Act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any other. The Supreme Court of the United States declared this obvious doctrine, and it has been repeated in the decisions of the state courts. . . . As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the Acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined, in their operations, to the mode and manner and subject matter prescribed." *Judge* Dillon, in his work on Municipal Corporations, § 89, says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

In *Hopper* v. *Covington*, 118 U. S. 148, 151 [30: 190, 192], this court, in passing upon the power of incorporated towns in Indiana, under laws which we will have to consider and pass upon in this case, said, *Mr. Justice* Gray delivering the opinion: "When the law con- [68
fers no authority to issue the bonds in question, the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value. *Marsh* v. *Fulton County*, 77 U. S. 10 Wall. 676 [19: 1040]; *East Oakland* v. *Skinner*, 94 U. S. 255 [24: 125]; *Buchanan* v. *Litchfield*, 102 U. S. 278 [26: 138]; *Dixon County* v. *Field*, 111 U. S. 83 [28: 360]; *Hayes* v. *Holly Springs*, 114 U. S. 120 [29: 81]; *Daviess County* v. *Dickinson*, 117 U. S. 657 [29: 1026]."

In *Gause* v. *Clarksville*, 5 Dill. 165, the court, in an able discussion of the inherent and incidental authority of municipal corporations, holds that, whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the State applicable to it.

In order to determine the question before us, recourse must be had to the statutory enactments, applicable to the subject, that were in force at the time the bonds in this suit were issued, in May, 1878. These enactments are contained in sections 3333, 3342, 3344, 3345, 4488 and 4489 of the Revised Statutes of Indiana of 1881. Sec. 3333 is a section of the Act of 1852 for the incorporation of towns in that State, and contains the usual grant of municipal powers. Sec. 3342, which was also sec. 27 of the same Act of 1852, provides as follows: "No incorporated town under this Act shall have power to borrow money or incur any debt or liability, unless the citizen owners of five eighths of the taxable property of such town, as evidenced by the assessment roll of the preceding year, petition the board of trustees to contract such debt or loan. And such petition shall have attached thereto an affidavit verifying the genuineness of the signatures to the same. And for any debt created thereby, the trustees shall add to the tax duplicate of each year, successively, a levy sufficient to pay the annual interest on such debt or loan, with an addition of

not less than five cents on the hundred dollars, to create a sinking fund for the liquidation of the principal thereof."

The other sections contain the provisions of certain statutes passed in 1867, 1869 and 1873. It is only necessary to quote here sections 4488 and 4489, as they embody the provisions of the Act of 1873, which is itself the [683] Statute of 1869 rewritten in order to extend to other purposes not material to this inquiry.

"Sec. 4488. Any city or incorporated town in this State which shall, by the action of its school trustees, have purchased any ground and building or buildings; or may hereafter purchase any ground and building or buildings; or has commenced, or may hereafter commence, the erection of any building or buildings for school purposes; or which shall have, by its school trustees, contracted any debts for the erection of such building or buildings, or the purchase of such ground and building or buildings; or such trustees shall not have the necessary means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, or pay such debt, may, on the filing, by the school trustees of said city or town, of a report, under oath, with the common council of such city, or the board of trustees of such town, showing the estimated or actual cost of any such ground and building or buildings, or the amount required to complete such building or buildings, or purchase such ground and building or buildings, or the amount of such debt, on the passage of an ordinance authorizing the same by the common council of said city, or the board of trustees of such town, issue the bonds of such city or town to an amount not exceeding in the aggregate fifty thousand dollars, in denominations not less than one hundred nor more than one thousand dollars, and payable at any place that may be designated in the bonds (the principal in not less than one year nor more than twenty years after the date of such bonds, and the interest annually or semi-annually, as may be therein provided) to provide the means with which to complete such building or buildings, or to pay for the purchase of such ground and building or buildings, and to pay such debt. Such common council or board of trustees may, from time to time, negotiate and sell as many of such bonds as may be necessary for such purpose, in any place and for the best price that can be obtained therefor in cash: *Provided*, That such bonds shall not be sold at a price less than ninety-four cents on the dollar.

"Sec. 4489. The proceeds of the sales of [684] such bonds shall be paid to the said school trustees, to enable them to erect or complete such building or buildings and pay such debt. But before payment to them, such school trustees shall file with the county auditor a bond, payable to the State of Indiana, in a sum not less than the full amount of the said money so to be paid to them, and with security to be approved by said auditor, conditioned for the faithful and honest application of such money to the purpose for which the same was provided; and such trustees, and their surety or sureties, shall be liable to suit on such bond for any waste, misapplication or loss of such money, in the same manner as now provided for waste or loss of school revenue."

We have given these sections in full to show the entire legislation of the State in 1878, upon the subject of the power of towns to borrow money, contract loans, incur debts and issue bonds, so that it may be the more clearly determined whether it anywhere expressly confers upon incorporated towns of the State the general power of issuing, for sale in open market, negotiable securities, in the form of bonds and coupons, which, in the hands of bona fide purchasers before maturity, will be subject to no legal or equitable defenses in favor of the maker. In our opinion no such express power is given by these sections, either for the purpose of raising money or funding a previous indebtedness. Obviously, it cannot be found in sections 4488 and 4489, for they relate specifically and exclusively to bonds for school buildings, school grounds and school debts, and prescribe the mode by which bonds may be issued by towns for those specified objects—a mode confessedly not followed, or even attempted to be followed, in issuing the bonds in this suit. We are confirmed in this conclusion by the view taken in *Hopper* v. *Covington*, *supra:* "The averment, that the defendant is a municipal corporation under the laws of Indiana, 'with full power and authority, pursuant to the laws of said State, to execute negotiable commercial paper,' if understood as alleging a general power to execute negotiable commercial paper, is inconsistent with the public laws of the State, of which the courts of the United States take judicial notice."

The laws of Indiana referred to are those [6 we are now considering. The court also says: "The General Statute of May 15, 1869, authorized towns to issue bonds for the purchase and erection of lands and buildings for school purposes only." But the bonds in suit were not issued for either of the purposes named, but to retire and pay off the bonds of 1869. The Town had no power to pay off those bonds in this way, viz., by the issue of new bonds, or it could perpetuate a debt forever. Bonds once issued for a lawful purpose must be paid by taxation. This is manifest from the provision which requires a tax to be levied each year "sufficient to pay the annual interest, with an addition of *not less* than five cents on the hundred dollars to create a sinking fund for the liquidation of the principal." When bonds are once issued for a lawful purpose, the town is *functus officio* as to that matter. To argue that the old bonds are a *debt* for school purposes which may be liquidated by new bonds is a refinement of construction which the sound sense of the law rejects.

The plaintiff in error relies mainly upon the ground that the authority in question arises, by necessary implication, from the power to make certain expenditures; from the character of the objects to be accomplished by those authorized expenditures; from the

necessity of providing the means for paying a previous indebtedness lawfully incurred in such expenditures, and from other powers expressly granted. The line of his counsel's argument, and that of the district judge to whose opinion our attention has been especially called, is this: Whilst section 3342 (the same as section 27 in the Act of May, 1852) is not in itself a substantive grant of power, it clearly evinces the legislative intent and understanding that the right to borrow money or otherwise incur any debt or liability might be implied as incidental to the express power given in that or any subsequent Act containing not inconsistent provisions, and includes a case like this, where the power is necessary to prevent a default of payment of a previous debt, which it was authorized to create. It is insisted farther, that it is the settled doctrine in Indiana that corporations take, by implication, all the reasonable modes of executing their express or substantive powers which a natural person may adopt; and that, in the absence of positive restrictions, a corporation has the power to borrow money as an incident to such power.

Section 119, Dillon on Mun. Corp., lays down the Indiana law on this subject, substantially as is contended for by the plaintiff in error. That section is as follows: "In Indiana, the doctrine is that corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt. It is a power incident to corporations, in the absence of positive restriction, to borrow money as means of executing the express powers." A large number of cases from the Supreme Court of Indiana are cited in a note to support the doctrine of the text. We think the proposition that, under the laws of Indiana, a town has an implied authority to borrow money, or contract a loan, under the conditions, and in the manner, expressly prescribed, cannot be controverted.

But this only brings us back to the question, Does the implied power to borrow money or contract a loan carry with it a farther implication of power to issue funding negotiable bonds for that amount, and sell them in open market, as commercial paper? Let us see. Sec. 3342 is unquestionably a limitation upon the power to borrow money. Its very language is that of mandatory negation. "No incorporated town shall have the power to borrow money, or incur any debt," unless certain conditions precedent are complied with. The conditions which the Statute prescribes the Statute means to be performed. There can be no legal borrowing unless the Statute is strictly followed. What does it prescribe? That there must be first a petition to the town trustees, which shall be signed by the citizen owners of at least five eighths of the taxable property of the town, whose signatures shall be verified by an affidavit to the petition. The prayer of the petition is required to be that the board of trustees shall contract such debt or loan. The board could not depart, in its action, from this legally required prayer of the petition without transcending its authority, and acting *ultra vires*. But the board did depart from the prayer, for it did not borrow money, nor contract a loan; but it ordained, in so many words, that the town issue bonds for negotiation and sale at not less than ninety-four cents on the dollar. We think the words of *Chief Justice* Marshall, in *Head* v. *Providence Ins. Co.*, 6 U. S. 2 Cranch, 127, 169 [2: 229, 243], aptly characterize this transaction, and bear upon the points which are the subject of this controversy. Speaking of bodies corporate which have only a legal existence, he said: "The Act of incorporation is to them an enabling Act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated." See also *New York Firemen's Ins. Co.* v. *Ely*, 5 Conn. 560; *McCracken* v. *San Francisco*, 16 Cal. 619. [687

It is admitted that the power to borrow money, or to incur indebtedness, carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and, perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue, for sale in open market, a bond, as a commercial security, with immunity, in the hands of a bona fide holder for value, from equitable defenses. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a sale, is not so in fact; and that the so-called purchaser who takes the bond and advances his money for it is actually a lender, as much so as a person who takes a bond payable to him in his own name.

We think the case of *Police Jury* v. *Britton*, 82 U. S. 15 Wall. 566 [21: 251], is directly and absolutely conclusive against the position of the plaintiff in error on this point. It was an action upon coupons of certain bonds issued by the Police Jury of Tensas Parish, Louisiana, the validity of which the defendant denied, upon the ground that they were issued without the authority of any law of that State. It appeared that the police jury had no express authority to issue the bonds in question; and, if they had any authority of the kind, it must be implied from the general powers of administration with which the said police jury was invested. The question, therefore, directly presented in that case was precisely the question directly presented in this case, viz., whether the trustees or representative officers of a parish, county or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in [688

the hands of bona fide holders, for the purpose of raising money or funding a previous indebtedness.

The opinion of the court, delivered by *Mr. Justice* Bradley, clearly illustrated the fundamental distinction between issuing bonds merely as evidence of a debt or loan and issuing bonds for negotiation and sale generally, with respect to the powers of a municipal corporation. It said: "That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement or rescission in whole or in part that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interest. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day and transferable from hand to hand. . . . The power to issue such paper has been the means, in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens [689] of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of bona fide holders. . . . It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements."

The plaintiff in error quotes from the opinion in that case, to support his contention, the following: "We do not mean to be understood that it requires, in all cases, express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus, it has been held that the power to borrow money implies the power to issue the ordinary securities for its repayment, whether in the form of notes, or bonds payable in future." We think the significance of these sentences, as applicable to the facts of this case, can be clearly discerned from the following concluding sentences of the paragraph: "But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities."

The same doctrine is presented most forcibly in the case of *Nashville* v. *Ray*, 86 U. S. 19 Wall. 468 [22: 164]. In *Claiborne County* v. *Brooks*, 111 U. S. 400, 406 [28: 470, 472], it was held that the Statutes of Tennessee, which conferred upon counties in that State the power to erect a court-house, jail and other necessary county buildings, did not authorize the issue of commercial paper as evidence of or security for a debt contracted for the construction of such a building. Referring to the view of the court below in that case, which held that, as the county had power to erect a court-house, that power implied the power to contract out the work, and to issue negotiable bonds of a commercial character in payment thereof, *Mr. Justice* Bradley, who delivered the opinion of the court, said: "We cannot concur in this view. The erection of court-houses, jails and bridges is amongst the ordinary political or administrative duties of all counties; and from the doctrine of the charge it would necessarily follow that all counties have the incidental power, without any express legislative authority, to issue bonds, notes and other commercial paper in payment of county debts and charges; and if they have this power, then such obligations issued by the county authorities and passing into the hands of bona fide holders would preclude the county from showing that they were issued improperly, or without consideration, or for a debt already paid; and it would then be in the power of such authorities to utter any amount of such paper, and to fasten irretrievable burdens upon the county without any benefit received. Our opinion is that mere political bodies, constituted as counties are, for the purpose of local police and administration, and having the power of levying taxes to defray all public charges created, whether they are or are not formally invested with corporate capacity, have no power or authority to make or utter commercial paper of any kind, unless such power is expressly conferred upon them by law, or clearly implied from some other power expressly given, which cannot be fairly exercised without it,"—citing *Police Jury* v. *Britton*, 82 U. S. 15 Wall. 566 [21: 251]; *Nashville* v. *Ray*, 86 U. S. 19 Wall. 468 [22: 164].

In *Young* v. *Clarendon Twp.*, 132 U. S. 340, 347 [33:356, 360], many of the decisions bearing on this question were referred to, and the court said: "Even where there is authority to aid a railroad, and incur a debt in extending such aid, it is also settled that such power does not carry with it any authority to execute negotiable bonds, except subject to the restrictions and directions of the enabling Act,"—citing *Wells* v. *Pontotoc County Suprs.* 102 U. S. 625 [26: 122]; *Claiborne County* v. *Brooks*, 111 U. S. 400 [28: 470]; *Kelley* v. *Milan*, 127 U. S. 139 [32: 77].

In *Hill* v. *Memphis*, 134 U. S. 198, 203 [33: 887, 889], it was held that the power conferred by statute on municipal corporations to subscribe for stock in a railway corporation did not include the power to create [6 a debt and issue negotiable bonds in order to pay for that subscription. In delivering the opinion of the court, *Mr Justice* Field said:

"Whilst a municipal corporation, authorized to subscribe for the stock of a railroad company, or to incur any other obligation, may give written evidence of such subscription or obligation, it is not thereby empowered to issue negotiable paper for the amount of indebtedness incurred by the subscription or obligation. Such papers in the hands of innocent parties for value cannot be enforced without reference to any defense on the part of the corporation, whether existing at the time or arising subsequently. Municipal corporations are established for purposes of local government, and in the absence of specific delegation of power cannot engage in any undertakings not directed immediately to the accomplishment of those purposes. Private corporations created for private purposes may contract debts in connection with their business, and issue evidence of them in such form as may best suit their convenience. The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court." All of the cases we have cited above were referred to in the opinion in that case as sustaining the doctrine therein laid down.

The logical result of the doctrines announced in the above-cited cases, in our opinion, clearly shows that the bonds sued on in this case are invalid. It does not follow that because the Town of Monticello had the right to contract a loan, it had therefore the right to issue negotiable bonds and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case all that can be contended for is that the Town had the power to contract a loan, under certain specified restrictions and limitations. Nowhere in the Statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality.

It is true that there is a considerable number of cases, many of which are cited in the brief of counsel for plaintiff in error, which hold a contrary doctrine. But the view taken by this court in the cases above cited and others seems to us more in keeping with the well-recognized and settled principles of the law of municipal corporations. For as is said in Dillon's Mun. Corp. (Third ed.), § 507: "The frauds which unscrupulous officers will be enabled successfully to practice if an implied and unguarded power to issue negotiable securities is recognized, and which the corporation or the citizens will be helpless to prevent, is a strong argument against the judicial establishment of any such power. And the argument is unanswerable, when it is remembered that in ascertaining the extent of corporate powers there is no rule of safety, but the rule of *strict* construction, and that such an implied power is not necessary, however convenient it may be at times, to enable the corporation to exercise its ordinary and usual express powers, or to carry into effect the purposes for which the corporation is created. We regard as alike unsound and dangerous the doctrine that a public or municipal corporation possesses the *implied power* to borrow money for its ordinary purposes, and, *incidental* to that, the power to issue commercial securities. The cases on this subject are conflicting, but the tendency is towards the view above indicated. The opinion of *Mr. Justice* Bradley, in a case before referred to (*Nashville* v. *Ray*), evinces a thorough comprehension of the whole question, and, in our judgment, is sound in every proposition it advances, and must become the law of this country. This view is confirmed by the almost invariable legislative practice in the States to confer, when it is deemed expedient, upon municipalities and public corporations, in *express* terms, the power to borrow money or to issue negotiable bonds or securities."

In the case before us the power in question is not, in our opinion, indispensable to the [693] exercise of the express or implied powers conferred upon the Town by law. The utmost that can be said is, that it was deemed more convenient or expedient to issue the bonds in that form than in the mode prescribed.

We think that the fact that the Legislature of the State of Indiana, by the Acts of 1867, 1869 and 1873, above referred to, expressly authorized towns in the same class as the defendant in error to issue bonds for certain specified purposes, under proper safeguards and limitations, is indicative of the legislative understanding that, without some such express statutory provisions, no power existed in the town to issue negotiable bonds, and sell them in open market.

The same may be said of the Act of the Legislature of that State which took effect August 24, 1879, expressly conferring upon the towns in that State power to fund their indebtedness by issuing bonds and negotiating them for that purpose, under certain specified terms, restrictions and limitations.

We are not unmindful that in several of the cases in the Supreme Court of Indiana, cited by counsel for plaintiff in error, there may be found abstract propositions, susceptible of a construction in support of the position he seeks to maintain. But we think this case is distinguishable from them all, in essential features which except it from those general propositions, and leave the conclusion which we have reached in harmony with them.

It is contended that the bonds sued on were issued practically for the purpose of taking the place of the prior bonds outstanding and unpaid, which represented a debt for the erection of a school building, and were therefore authorized by section 4488. This position is untenable. It cannot be reasonably contended that the bonds were issued under any of the sections relating to the negotiation and sale of bonds for school purposes. It is not even pretended that they were issued

in accordance with the clearly defined conditions and restrictions imposed by those sections.

Nor do we think the fact that the Town actually received a portion of the money arising from the sale of the so-called bonds (or, in legal contemplation, perhaps all of it, as 694] it was paid to the agent of the Town), estops the corporation from pleading a want of authority in the municipality to issue the instruments sued on. The original act of issuing the bonds for sale was not only unauthorized by law, but in disregard of its requirements, and no subsequent act of the town trustees could make it valid. Whether it could be a circumstance in favor of the equitable right of the holders of the bonds to recover from the municipality the money which they represent is a question not here for consideration. The suit was upon the bonds themselves, and for the reasons above stated we hold that there can be no recovery upon them.

Judgment affirmed.

Mr. Justice **Brown** was not a member of the court when this case was argued, and took no part in its decision.

The Chief Justice and *Mr. Justice* **Brewer** were not present at the argument, and took no part in the decision.

694] J. C. ANDERSON, Administrator of the Estate of EDWARD J. WILSON, Deceased, ET AL., *Appts.*,

v.

JAMES S. WATT, Executor of JAMES SYMINGTON, Deceased.

(See S. C. Reporter's ed. 694-708.)

Jurisdiction of circuit courts—citizenship must be positively averred—Act of 1875—parties to foreclosure—husband, necessary party—voluntary appearance—domicil, what is—domicil of husband is domicil of wife—jurisdiction not conferred by striking out parties.

1. Under the Act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. 472), the objection to the jurisdiction upon a denial of the averment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted.
2. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the circuit court to dismiss the suit; and this court, on appeal or writ of error, will see to it that the jurisdiction of the circuit court has in no respect been imposed upon.
3. In cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, must be distinctively and positively averred in the pleadings, or affirmatively with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments.
4. Since the Act of 1875, if it appears from the pleadings and proofs taken together that the defendants are citizens of the United States and reside, in the sense of having their permanent domicil, in the State of which the complainants are citizens, or that each of the indispensable adverse parties is not competent to sue or liable to be sued therein, the circuit court cannot maintain cognizance of the suit. And the inquiry is determined by the condition of the parties at the commencement of the suit.
5. A bill to foreclose a mortgage is properly filed in the name of the two executors under the will of the mortgagee to whom letters testamentary have issued.
6. The husband of one in possession of land claiming title is a necessary party, with his wife, to an action in Florida to foreclose a mortgage thereon.
7. A person who has not been named as defendant to a bill may appear at the hearing, with the consent of all the parties to the cause.
8. The place where a person lives is taken to be his domicil until facts adduced establish the contrary, and a domicil when acquired is presumed to continue until it is shown to have been changed.
9. Although the wife may be residing in another place, the domicil of the husband is her domicil. Even where a wife is living apart from her husband, without sufficient cause, his domicil is in law her domicil.
10. Where a suit was commenced by two executors, one of whom was a citizen of the same State as defendants, jurisdiction cannot be given the circuit court by an amendment striking out the original averment of citizenship and inserting a new averment that since the commencement of the suit the letters to that executor have been revoked, by the court directing the suit to proceed in the name of the other as sole surviving executor, as he could not have maintained the bill as amended on the day the bill was filed.

[No. 138.]

Argued Jan. 8, 1891. Decided March 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of Florida decreeing a sale of lands on foreclosure of the mortgage. *Reversed and cause remanded with instructions to dismiss for want of jurisdiction.*

Statement by *Mr. Chief Justice* **Fuller:** [695]

This was a bill filed on the 25th day of August, 1885, by Gustavus W. Faber and James S. Watt, describing themselves as "both of the City and State of New York and citizens of the State of New York, executors of the last will of James Symington, deceased, late of the State of New York," as such executors, against "J. C. Anderson, of Orlando, Orange County, Florida, a citizen of the State of Florida, as the administrator of Edward J. Wilson, deceased, and Thomas Emmett Wilson and Sarah J. Davis, both of Sylvan Lake, Orange County, Florida, citizens of the State of Florida," for the foreclosure, by sale of the property, of a mortgage given by Edward J. Wilson to James Symington, August 28, 1875, and re-

---

NOTE.—*As to jurisdiction of the United States circuit court depending on parties and residence*, see *note* to Emory v. Greenough, 1: 840.

As to jurisdiction of United States courts over common-law offenses, see *note* to United States v. Coolidge, 4: 124.

As to jurisdiction of state and United States courts, as to territory and offense, see *note* to United States v. Bevans, 4: 404.

corded May 3, 1876, on certain real estate in Orange County, Florida.

Anderson and Wilson demurred to the bill, and assigned as one of the causes of demurrer that the bill did not "sufficiently show the authority of complainants to bring this suit as the executors of James Symington, deceased." Mrs. Davis filed a verified plea, averring that the executors had been discharged, and also that she, "before and at the time of the filing of the said bill, was, and now is, under the coverture of one George W. Davis, who is still living, to wit, in the City and State of New York," and praying judgment, and to be hence dismissed.

December 26, the plea and demurrer were severally set down for hearing by the solicitors for the complainants. Copies of Symington's will, the proofs on its presentation for probate, the order admitting to probate and the letters testamentary, duly exemplified, were subsequently filed, and the demurrer overruled. Defendants Anderson and Wilson answered March 15, 1886, setting up a homestead entry of the land, possession, improvement, commutation and payment by one Earnest; the conveyance by him to E. J. Wilson by deed dated March 15, 1871, and recorded November 28, 1876; deed of E. J. Wilson of one half, for a valuable consideration, to Thomas E. Wilson, May 22, 1871, recorded September 11, 1875; actual possession by Thomas E. and his grantee from May 22, 1871, to the present time; issue of the patent April 10, 1875, to E. J. Wilson, recorded November 24, 1879; large advances by Thomas E. prior to the Symington mortgage, for the benefit of the land, in excess of his share, and valuable improvements made thereon by himself and his grantee.

The answer further averred that E. J. Wilson, who resided in New York, died there in April, 1876; that the taxes upon the undivided half interest belonging to E. J. Wilson's estate were not paid for the years 1876 and 1877; that the heirs and devisees would have nothing to do with the affairs of the estate, and Symington took no steps and made no sign; that the undivided half was sold January 8, 1878, for the taxes, and defendant Thomas E. became the purchaser and received a deed January 16, 1879, as by statute prescribed, which was duly recorded that day; that he and his grantee had remained in full, quiet and peaceable possession of said undivided half from thence hitherto, and no suit had been commenced to set aside said tax deed or recover possession; and that the statutory bar was complete.

It was further alleged that on the 18th of October, 1879, defendant Wilson sold the land to Sarah J. Davis, wife of George W. Davis, of the City of New York, for $8,000, $2,000 cash and $6,000 on time, secured by a mortgage back, and conveyed it to her by warranty deed in fee simple, which deed was recorded November 24, 1879. Defendant Wilson further answered that Mrs. Davis immediately went into the actual possession of the land, and has continued in such possession from thence hitherto, and made improvements upon the property to the amount of over $20,000.

Certain assignments of the purchase-money mortgage to Mary F. Wilson, of New York, in January and June, 1884, and duly then recorded, were set forth, as well as a mortgage, by Mr. and Mrs. Davis, to Appleton [69
& Co., made and recorded in 1884.

May 3, 1886, an answer, sworn to by defendant Sarah J. Davis, entitled as "the answer of Sarah J. Davis and George W. Davis, her husband, two of the defendants above named, to the bill of complaint exhibited against them by the complainants," signed by "def'ts' sol's," and purporting throughout to be by "these defendants," was filed in the case. This set out the circumstances under which the purchase from Thomas E. Wilson was made, the consideration, the possession and improvement of the land, and that by virtue of the conveyance to her and her adverse possession she had acquired absolute title.

Replications were filed and proofs taken; and on December 20, 1886, the court ordered that the bill be amended by striking out from the address the words "Gustavus W. Faber and James S. Watt, both of the City and State of New York and citizens of the State of New York," and inserting therein as follows: "Gustavus W. Faber, of the City and State of New York and a citizen of the State of New York, and James S. Watt, a subject of the Kingdom of Great Britain, temporarily residing in the City of New York." It was further ordered that, "it appearing to the court that letters testamentary on the estate of James Symington, deceased, heretofore issued to Gustavus W. Faber, deceased, one of the complainants herein, suing as one of the executors of James Symington, deceased, have been revoked, as is shown by a duly exemplified copy of the records of the Surrogate Court of the County of New York, State of New York, filed herein, it is therefore ordered, adjudged and decreed, on motion of complainants herein, that this cause proceed in the name of the said James S. Watt, sole surviving executor of James Symington, deceased, and that it be discontinued as to said Gustavus W. Faber, suing as co-executor." The exemplified copy of the record referred to was filed in the court, with the amendment, December 21, and showed that on the 4th of May, 1886, Faber filed a petition in the office of the surrogate for the County of New York for a decree revoking the letters testamentary issued to him, and that the order of revocation was thereupon entered thereon.

The cause was heard upon the pleadings [69
and proofs, and at the hearing the respondent introduced an exemplified copy of the will of Edward J. Wilson, deceased, the proceedings on its admission to probate and the letters testamentary issued to his executors, May 19, 1876.

January 19, 1887, a decree was entered (by the district judge holding the circuit court) finding: "That the defendant J. C. Anderson, as the administrator of the estate of Edward J. Wilson, deceased, and in his capacity as such administrator, is justly indebted to the complainant as the sole acting executor of the last will and testament of

James Symington, deceased, in the sum of thirteen thousand ($13,000) dollars principal, and ten thousand eight hundred and eighty-seven $\frac{13}{100}$ ($10,887.13) dollars interest, making in all twenty-three thousand eight hundred eighty-seven $\frac{13}{100}$ ($23,887.13) dollars, and that said complainant holds a mortgage lien to secure the said principal and interest hereby adjudicated and declared in his favor upon an undivided one-half interest in and to the following lands:" [describing them]; and decreeing a sale in default of payment. Sale having been made and reported, exceptions were filed to its confirmation, and overruled. Thereupon an appeal was perfected from the main decree and the order confirming the sale.

Mr. **J. Hubley Ashton,** for appellants:

It was error in the circuit court to assume jurisdiction in this suit, which should have been dismissed for want of jurisdiction; and the final decree rendered therein by that court, therefore, should be now reversed by this court.

Morris v. *Gilmer*, 129 U. S. 325 (32: 693); *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 374 (34: 367); *Farmington* v. *Pillsbury*, 114 U. S. 144 (29: 116).

Where the jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctly and positively averred in the pleadings, or should appear affirmatively and with equal distinctness in other parts of the record.

Robertson v. *Cease*, 97 U. S. 646 (24: 1057); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 382 (28: 463); *Stevens* v. *Nichols*, 130 U. S. 231 (32: 914).

The jurisdiction fails if it is consistent with the record that, when the suit was begun, one of the parties was not a citizen of any State of the Union, or that adverse parties were citizens of the same State.

Cameron v. *Hodges*, 127 U. S. 325 (32: 133); *Metcalf* v. *Watertown*, 128 U. S. 588 (32: 543); *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 381 (28: 463).

Each co-plaintiff must be competent to sue and each co-defendant liable to be sued in the circuit court, or the jurisdiction cannot be entertained.

Strawbridge v. *Curtiss*, 7 U. S. 3 Cranch, 267 (2: 435); *Smith* v. *Lyon*, 133 U. S. 319 (33: 636).

Where a man lives is taken prima facie to be his domicil, until the facts establish the contrary, and when a person has resided in a State for a considerable time, being in business there, he may be presumed to be a citizen of such State, unless the contrary appears.

Ennis v. *Smith*, 55 U. S. 14 How. 400 (14: 472); *Shelton* v. *Tiffin*, 47 U. S. 6 How. 185 (12: 397).

In legal contemplation, the domicil of the husband is the domicil of the wife, although she may be actually residing in another place.

Story, Confl. Laws, § 46; 2 Bishop, Mar. and Div. § 125; *Greene* v. *Greene*, 11 Pick. 410; *Harteau* v. *Harteau*, 14 Pick. 185; *Hairston* v. *Hairston*, 27 Miss. 704; *Harrison* v. *Harrison*, 20 Ala. 643.

The jurisdiction of the circuit court depends on the condition of the parties at the commencement of the suit, and no subsequent change can give or take it away.

Mollan v. *Torrance*, 22 U. S. 9 Wheat. 539 (6: 154); *Dunn* v. *Clarke*, 33 U. S. 8 Pet. 1 (8: 845); *Conolly* v. *Taylor*, 27 U. S. 2 Pet. 556 (7: 518).

In a suit against a married woman by a third person, her husband must be joined with her as a co-defendant, and his nonjoinder is a sufficient cause for dismissal of the bill.

United States v. *Pratt Coal & C. Co.* 18 Fed. Rep. 709; *Douglas* v. *Butler*, 6 Fed. Rep. 228; *Taylor* v. *Holmes*, 14 Fed. Rep. 514; *O'Hara* v. *McConnell*, 93 U. S. 152 (23: 842); 1 Dan. Ch. Pl. and Pr. 482; Story, Eq. Pl. § 71; *Ferguson* v. *Smith*, 2 Johns. Ch. 139, 1 N. Y. Ch. L. ed. 323.

In Florida, a married woman can neither sue nor be sued at law or in equity, without the joinder of her husband, except in special cases.

Lignoski v. *Bruce*, 8 Fla. 269; *Coffee* v. *Grover*, 20 Fla. 64; *Smith* v. *Smith*, 18 Fla. 789; *Dzialynski* v. *Bank of Jacksonville*, 23 Fla. 346; *McGill* v. *McGill*, 19 Fla. 341; *Staley* v. *Hamilton*, 19 Fla. 275; *Carn* v. *Haisley*, 22 Fla. 317

Mr. and Mrs. Davis were both necessary parties to any bill to extinguish their rights in the property, and no valid decree of sale could be made without their presence in the case as defendants to the bill.

Jones, Mortg. § 1394; Barbour, Parties, 502; *Terrell* v. *Allison*, 88 U. S. 21 Wall. 293 (22: 636); *Hagan* v. *Walker*, 55 U. S. 14 How. 38 (14: 316); *Chicago, D. & V. R. Co.* v. *Fosdick*, 106 U. S. 68 (27: 54); *McArthur* v. *Scott*, 113 U. S. 341 (28: 1015); *Berlack* v. *Halle*, 22 Fla. 236.

Mr. **James Lowndes,** for appellee:

Residence and citizenship are not synonymous.

Robertson v. *Cease*, 97 U. S. 646 (24: 1057); *Everhart* v. *Huntsville College*, 120 U. S. 223 (30: 623); *Menard* v. *Goggan*, 121 U. S. 253 (30: 914).

The averment that a party had a "fixed and permanent domicil" in a State is not equivalent to an averment of his citizenship in that State.

Brown v. *Keene*, 33 U. S. 8 Pet. 112 (8: 885).

The supposed defect would have been curable by amendment.

Conolly v. *Taylor*, 27 U. S. 2 Pet. 557 (7: 518); *Carneal* v. *Banks*, 23 U. S. 10 Wheat. 181 (6: 297).

The interests of Mary F. Wilson and D. Appleton and Company are incumbrances only of the equity of redemption and on that ground those persons are not necessary parties.

Jones, Mortg. §§ 1374, 1395.

As regards the tax title, the jurisdiction to set it aside in such a suit is asserted in *Hefner* v. *Northwestern Mut. L. Ins. Co.*, 123 U. S. 747 (31: 309).

The owner of such title was a proper, if not a necessary, party to the bill.

Mendenhall v. *Hall*, 134 U. S. 559 (33: 1012); *Bradley* v. *Parkhurst*, 20 Kan. 462.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Under the Act of March 3, 1875, determining the jurisdiction of circuit courts of the United States (18 Stat. 472), the objection to the jurisdiction upon a denial of the aver-

ment of citizenship is not confined to a plea in abatement or a demurrer, but may be taken in the answer, and the time at which it may be raised is not restricted. Although the averment as to citizenship may be sufficient, yet, if it appear that that averment is untrue, it is the duty of the circuit court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the circuit court has in no respect been imposed upon. *Morris* v. *Gilmer*, 129 U. S. 315, 325 [32: 690, 693]; *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356, 374 [34: 363, 367]; *Cameron* v. *Hodges*, 127 U. S. 322, 325 [32: 132, 133].

As remarked in *Bernard's Twp.* v. *Stebbins*, 109 U. S. 341, 353 [27: 956, 960], it has been the constant effort of Congress and of this court to prevent the discrimination in respect to suits between citizens of the same State and suits between citizens of different States, established by the Constitution and laws of the United States, from being evaded by bringing into the federal courts controversies between citizens of the same State. *Shreveport* v. *Cole*, 129 U. S. 36, 44 [32: 589, 592].

Although the Fourteenth Amendment declares all citizens of the United States to be citizens "of the State where they reside," yet as the jurisdiction of the circuit court is limited in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears, it is essential that in cases where jurisdiction depends upon the citizenship of the parties, such citizenship, or the facts which in legal intendment constitute it, should be distinctively and positively averred in the pleadings, or should appear affirmatively with equal distinctness in other parts of the record. It is not sufficient that jurisdiction may be inferred argumentatively from the averments. *Robertson* v. *Cease*, 97 U. S. 646, 649 [24: 1057, 1058]; *Brown* v. *Keene*, 33 U. S. 8 Pet. 112, 115 [8: 885, 886]. It was therefore held in *Robertson* v. *Cease*, *supra*; *Continental Ins. Co.* v. *Rhoads*, 119 U. S. 237 [30: 380]; *Menard* v. *Goggan*, 121 U. S. 253 [30: 914], and other cases, that the averment that the parties to a cause were "residents" in different States, respectively, was not enough. And in *Brown* v. *Keene*, *supra*, which was an action in the United States Circuit Court for the Eastern District of Louisiana, where the plaintiff was a citizen of the State of Maryland, that the averment that the defendant was a citizen or resident, "holding his fixed and permanent domicil in the Parish of St. Charles," there being no allegation that he was a citizen of the United States, was insufficient.

Since the Act of 1875, if it appears from the pleadings and proofs taken together that the defendants are citizens of the United States and reside, in the sense of having their permanent domicil, in the State of which the complainants are citizens (or that each of the indispensable adverse parties is not competent to sue or liable to be sued therein), the circuit court cannot maintain cognizance of the suit. And the inquiry is determined by the condition of the parties at the commencement of the suit. *Mollan* v. *Torrance*, 22 U. S. 9 Wheat. 537 [6: 154]; *Conolly* v. *Taylor*, 27 U. S. 2 Pet. 556 [7: 518]; *Crehore* v. *Ohio & M. R. Co.* 131 U. S. 240 [33: 144]; *Jackson* v. *Allen*, 132 U. S. 27 [33: 249].

The bill in this case was properly filed in the name of the two executors under the will of Symington, the mortgagee, to whom letters testamentary had issued; Laws Fla. McClellan's Dig. chap. 2, § 73, p. 97; 3 Williams on Executors (6th Am. ed. bottom paging) 1867; 1 Id. 267, 687, and *notes;* 1 Danl. Ch. Pr. (4th Am. ed.) 226; *Providence Rubber Co.* v. *Goodyear*, 76 U. S. 9 Wall. 788 [19: 566]; *Hill* v. *Tucker*, 54 U. S. 13 How. 458 [14: 223]. Both qualified and acted, and the question of their authority to bring the suit as executors of Symington, raised by the demurrer, was determined in their favor.

Hugh C. Wilson and Edward C. Wilson were appointed executors of and trustees under the will of Edward J. Wilson, the mortgagor, and letters testamentary issued to them, describing them as "both of Peekskill, Westchester County, New York." By the will certain legacies were bequeathed, and all the rest, residue and remainder of the estate, both real and personal, of whatsoever nature or kind, and wherever situated, was directed to be divided into five equal shares, one of which was bequeathed and devised to Edward C. Wilson and the other four shares to Hugh C. and Edward C. Wilson, to hold upon certain trusts therein described. Neither the executors and trustees, nor the devisees, nor the heirs at law were made parties defendant to this bill.

Under the Statutes of Florida it was provided that "when any person shall die leaving property in this State, and for the space of six months thereafter no person shall be appointed administrator on the estate of such deceased person, it shall be the duty of the sheriff of the county, *ex officio*, to take charge of such estate, and to administer on and settle said estate, in the same manner as directed for other administrators." McClellan's Dig. chap. 2, sec. 15, p. 81.

It is indicated by the record that J. C. Anderson was sheriff of Orange County, and it was admitted that he was duly appointed by the county court of that county administrator of the estate of Edward J. Wilson, deceased, July 20, 1885, but not with the will annexed, although Edward J. Wilson died testate in New York, where he resided, and where his will was admitted to probate, which will conformed to the laws of Florida in the form and manner of its execution, and might have been admitted to record in the county court. McClellan's Dig. chap. 200, §§ 1, 8, pp. 985, 987; *Crolly* v. *Clark*, 20 Fla. 849. Thomas E. Wilson was a citizen of Orange County, Florida, and he and Anderson, as administrator, were made defendants, together with Sarah J. Davis, to whom the property had been conveyed by Thomas E., and who had occupied it from October, 1879, to September, 1885, when the process in this case was served upon her, and had paid all taxes and made large and valua-

ble improvements thereon. George W. Davis, her husband, was not made a party, but on the 3d of May, 1886, an answer was filed in the case, entitled "the answer of Sarah J. Davis and George W. Davis, her husband, two of the defendants above named, to the bill of complaint exhibited against them by the complainants," signed by solicitors for defendants, and answering for those defendants. To this answer the complainants filed their replication, entitled "replication of said complainants to the answer of Sarah J. Davis and George W. Davis, defendants," and describing the answer as that of those two defendants. The names of all the parties defendant were not set forth in the titles of the decrees. The bond on appeal was signed by Anderson, administrator, Thomas E. Wilson, Sarah J. Davis and George W. Davis, as principals; recited that the appeal had been taken by them all, and was conditioned for the prosecution of the appeal by all.

Mr. Davis appears to have been a necessary party. McClellan's Dig. chap. 150, p. 754; 1 Dan. Ch. Pr. (4th ed.) 178; *Lignoski* v. *Bruce*, 8 Fla. 269; *Smith* v. *Smith*, 18 Fla. 789; *Dzialynski* v. *Bank of Jacksonville*, 23 Fla. 346; *McGill* v. *McGill*, 19 Fla. 341; *Staley* v. *Hamilton*, Id. 275; *Carn* v. *Haisley*, 22 Fla. 317. And although plaintiffs did not originally, or by amendment after answer, make him in terms a party to their bill, which would have disclosed that he was a citizen of New York, yet the effect of what was done was such as bound him by the decree, and we think upon this record he must be held to have become such. [705]

A person who has not been named as defendant to a bill may appear at the hearing, with the consent of all the parties to the cause (*Dyson* v. *Morris*, 1 Hare, 413, 419; *Boxon* v. *Bolland*, 1 Russ. & M. 69); and in this instance the objection of want of consent cannot be taken.

The plea which Mrs. Davis interposed under oath, December 7, 1885, stated that "before and at the time of the filing of the bill, she was, and now is, under the coverture of one George W. Davis, who is still living, to wit, in the City and State of New York." No replication was filed to the plea, but notice given by the plaintiffs, setting it down for hearing. No further action upon it is disclosed by the record. The answer of Mrs. Davis and her husband set forth "that in the winter of 1878 and spring of 1879 these defendants were residing in the City of New York, where they had been residing for some years; that the health of the defendant Sarah J. Davis not being good, she thought residing in Florida would benefit her, and that in the summer of 1879 she and her husband investigated the subject as well as they could by reading and talking with people from Florida, and from such investigation they concluded that if the climate should prove beneficial to the said Sarah J. Davis they would find it profitable to purchase an orange grove in South Florida, which the said Sarah J. Davis could take care of and manage, except in the summer months, while the said George W. Davis remained at his business in New York, the said Sarah J. Davis spending the summer with him there;" and that after the purchase was consummated with the approval of Mr. Davis in New York in September, 1879, Mrs. Davis went to Florida in October and took actual possession of the property herself. The proofs showed that she continued personally in occupation of it from that time forward, and improved and cultivated it. Mrs. Davis was examined as a witness and testified that her husband was living in New York and was a party to the suit; and that she resided on the property and had occupied it ever since she purchased it, except when she went "north in the summer for a few months." [706]

The deed of Thomas E. Wilson to her of October 13, 1879, recorded November 24, 1879, described her as "Sarah J. Davis, wife of George W. Davis, of the City of New York," and the mortgage back was given by "Sarah J. Davis and George W. Davis, her husband, of the City of New York." On the 30th of March, 1884, Mr. and Mrs. Davis gave a mortgage to D. Appleton & Co., which was recorded in Orange County, Florida, February 12, 1884, and described the mortgagors as "George W. Davis, of the City of New York, and Sarah J. Davis, his wife."

We are satisfied the pleadings and proofs in the record, taken together, negative the averment of the bill as to the citizenship of Sarah J. Davis, and show that she and her husband were not citizens of Florida when the suit was commenced, and that it is fairly to be presumed that they were citizens of the State of New York.

The place where a person lives is taken to be his domicil until facts adduced establish the contrary, and a domicil when acquired is presumed to continue until it is shown to have been changed. *Mitchell* v. *United States*, 88 U. S. 21 Wall. 350, 352 [22: 584, 587]; *Desmare* v. *United States*, 93 U. S. 605, 609 [23: 959, 960]; *Shelton* v. *Tiffin*, 47 U. S. 6 How. 163 [12: 387]; *Ennis* v. *Smith*, 55 U. S. 14 How. 400 [14: 472]. And although the wife may be residing in another place, the domicil of the husband is her domicil. Story, Confl. Laws, § 46; Wharton Confl. Laws, § 43, and cases cited. Even where a wife is living apart from her husband, without sufficient cause, his domicil is in law her domicil. *Cheely* v. *Clayton*, 110 U. S. 701, 705 [28: 298, 299].

The rule is, said *Chief Justice* Shaw, in *Harteau* v. *Harteau*, 14 Pick. 181, "founded upon the theoretic identity of person, and of interest, between husband and wife, as established by law, and the presumption that, from the nature of that relation, the home of the one is that of the other, and intended to promote, strengthen and secure their interests in this relation, as it ordinarily exists, where union and harmony prevail. But the law," he continued, "will recognize a wife as having a separate existence, and separate interests and separate rights, in those cases where the express object of all proceedings is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests." [707]

Mrs. Davis was not separated from her husband, and no element of separate domicil, in any legal sense, existed.

It is clear that the circuit court, upon the development of the facts, should have proceeded no further, and dismissed the case.

But it is contended that the supposed defect was curable by amendment, and that this was actually done, and the court thereby justified in retaining jurisdiction. *Conolly* v. *Taylor*, 27 U. S. 2 Pet. 556 [7: 518], is relied on. In that case a bill was filed in the United States court in Kentucky by aliens and a citizen of Pennsylvania. The defendants were citizens of Kentucky, except one who was a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court was not questioned so far as respected the alien plaintiffs, but as between the citizen of Pennsylvania and the citizen of Ohio, the court could not exercise jurisdiction. Before the cause was brought on, however, the court permitted the complainants to amend their bill by striking out the citizen of Pennsylvania as complainant and making him a defendant, and the question was whether the original defect was cured by this circumstance, and whether the court, having jurisdiction over all the parties then in the cause, could make a decree. This court held that jurisdiction depended upon the state of the parties at the commencement of the suit, which no subsequent change could give or take away; that if an alien became a citizen pending the suit, the jurisdiction which was once vested would not be devested; and so if a citizen sued a citizen of the same State he could not give jurisdiction by removing and becoming a citizen of a different State, but that just as the omission to state the character of parties might be corrected at any time before hearing, so by an amendment made by striking out the person whose presence as a complainant prevented the exercise of the jurisdiction, the impediment could be properly removed. The case was one, however, where the remaining complainants might have originally instituted the suit without joining the other unless as a defendant, and the other was retained as a party by the amendment.

In this case, on the 21st of December, 1886, after the proofs had been taken, but before the hearing, an amendment was permitted by the court by striking out the original averment as to the citizenship of the complainants Faber and Watt, executors, and inserting a new averment stating Faber's citizenship as before, but Watt to be "a subject of the Kingdom of Great Britain, temporarily residing in the State of New York," and the cause was then directed, upon the ground that the letters to Faber had been revoked, to proceed in the name of James S. Watt, sole surviving executor of James Symington, and was discontinued as to Faber. But the difficulty with this attempt to obviate the fatal defect in jurisdiction was that the record showed that Watt was not the sole surviving executor of James Symington when the bill was filed, but on the contrary, when the application to amend was made, plaintiffs exhibited to the court and filed in the case exemplified copies of the records and files in the office of the surrogate of the County of New York in the matter of the application of Gustavus W. Faber for a revocation of the letters testamentary issued to him as one of the executors, by which it was shown that on the 4th of May, 1886, Faber filed his petition for the revocation of the letters as to him, and that the order of revocation was entered on that day. It therefore appeared that Watt could not have maintained the bill as amended, on the 25th day of August, 1885, when the bill as originally framed was filed, and jurisdiction could no more be given to the circuit court by the amendment than if a citizen of Florida had sued another in that court and subsequently sought to give it jurisdiction by removing from the State. *Clarke* v. *Matthewson*, 37 U. S. 12 Pet. 164 [9: 1041]; *Morris* v. *Gilmer*, 129 U. S. 315 [32: 690].

The decree is reversed and the cause remanded with instructions to dismiss the bill for want of jurisdiction.

Mr. Justice **Brewer** dissented.

TROY LAUNDRY MACHINERY COMPANY, LIMITED, *Plff. in Err.*, [617]
v.
ALEXANDER M. DOLPH.

(See S. C. Reporter's ed. 617-623.)

Damages—when only nominal.

Where the parties have made certain stipulations which determine the measure of damages in case of the breach of a clause of a contract, and in an action for damages for the breach the injured party fails to bring himself within those stipulations, he can recover no more than nominal

---

NOTE.—*As to vendee's damages for breach of contract for sale of chattels*, see *note* to Shepherd v. Hampton, 4:369.

As to damages for breach of contract for sale of lands; amount of,—see *note* to Hopkins v. Lee, 5:218.

As to measure of damages for breach of covenant of seisin, see *note* to Le Roy v. Beard, 12:1151.

As to stated sum in contract, whether penalty or liquidated damages, see *note* to Tayloe v. Sandiford, 5:384.

As to interest as damages, see *note* to Sneed v. Wister, 5:717.

As to damages for infringement of patents; treble damages,—see *note* to Hogg v. Emerson, 13:824.

As to vindictive damages in actions for torts, see *note* to Day v. Woodworth, 14:181.

As to damages for personal injury from negligence, see *note* to Pennsylvania Co. v. Roy, 26:141.

As to measure of damages for nuisance, see *note* to Baltimore & P. R. Co. v. Fifth Baptist Church, 27:739.

As to damages in case of capture; on restitution,—see *note* to United States v. The Nuestra Señora De Regla, 27:662.

As to damages in cases of illegal capture and in collision, see *note* to The Amiable Nancy, 4:456.

As to measure of damages in collisions, see *note* to Smith v. Condry, 11:35.

As to damages, where two vessels are at fault, for injury to a third, see *note* to The City of Hartford v. Rideout, 24:930.

damages, and it is error for the court to submit the matter to the jury for them to give such actual damages as they believe the plaintiff has suffered.

[No. 149.]

Argued Jan. 13, 14, 1891. Decided Mar. 2, 1891.

IN ERROR to the Circuit Court of the United States for the Northern District of New York to review a judgment in favor of plaintiff for damages for breach of a contract. *Reversed.*

Statement by *Mr. Justice* **Brewer:**

In 1882 the parties hereto entered into the following contract:

"This agreement made this third day of January, 1882, between A. M. Dolph, of Cincinnati, O., of the first part, and the Troy Laundry Machinery Company, Limited, of Troy, N. Y., party of the second part, witnesseth:

"1st. That the said A. M. Dolph, party of the first part, in consideration of the covenants hereinafter named, made and to be kept, shall furnish, crated or packed for shipment, delivered at depot in Cincinnati, O., to the order of said Troy Laundry Machine Company, Limited, and within a reasonable time after such order is received, certain washing machines of standard size of the style heretofore manufactured by the said A. M. Dolph as the hydraulic washer, and known and designated as the Standard Dolph washer, at the price of one hundred and ten dollars ($110) each, which shall be designated as the manufacturer's price for said Standard Dolph washer.

"2d. That the said Troy Laundry Machine —, Limited, party of the second part, in consideration of the covenants herein made and to be kept, agree to pay to the said A. M. Dolph the sum of one hundred and ten [18] dollars ($110) each, for said Standard Dolph washer delivered as before mentioned, and to bind themselves herein and agree to take at least fifty (50) of said Standard Dolph washers each year.

"3d. That the said A. M. Dolph shall have the refusal or option of manufacturing any and all washing machines sold by the said A. M. Dolph and said Troy Laundry Machinery Company, Limited, or for them through their agents, at the price of one hundred and ten dollars ($110) each for the said Standard Dolph washer, and at such price for other washing machines as may be bid for them in open competition for equal quality of goods by any responsible manufacturers other than said Dolph, and these prices shall constitute and be designated as the manufacturer's prices for these machines.

"4th. That the selling price of the said Standard Dolph washer is hereby fixed at two hundred dollars ($200) each, and that the selling price of washing machines that may be sold by either party hereunto other than the Standard Dolph washer shall be fixed at a price the same in proportion to the designated manufacturer's price thereof as the selling price of the Standard Dolph washer is to its manufacturer's price, provided that the selling price of any of the aforesaid washing machines may be changed by the mutual consent of the parties hereto.

"5th. That the said A. M. Dolph and the said Troy Laundry Machinery Company, Limited, do hereby agree together to equally divide between them, the said parties, the entire profits arising from the combined sales made by both parties or for them through their agents of any and all washing machines, and this profit shall be in all cases the entire margin between the designated manufacturer's price and the fixed selling price at the time the sale is made, provided that a discount or commission of twenty per cent of the selling price may be allowed by either party to their regular published agents other than a paid employé on sales actually made by said agent, which discount may be deducted from the profits before a division of the same is made.

"6th. Each party to this agreement shall furnish to the other party annually a sworn [61 statement of the number of each kind of washing machines sold by them; also the profits made above manufacturer's price on sales of washing machines other than the Standard Dolph washer, and the number of each kind of washing machine sold by their agents.

"7th. That the party of the second part agrees to pay to the party of the first part for all the goods ordered and delivered according to articles one and two to this agreement, within four months after the delivery of said goods.

"8th. That at the close of each year a division of profits shall be made according to articles five and six of this agreement, and any balance found to be due to either party shall be paid to that party within the first two months of the year following.

"9th. That on all washing machines furnished to the said Troy Laundry Machinery Company, Limited, shall be fixed a plate inscribed with the name and place of business of the said Company.

"10th. This agreement shall be in force for the term of five years next ensuing.

"In witness whereof the parties hereunto have set their hand and seal the day and year first herein written.

"A. M. Dolph. [Seal].
"Delavan Peck, Pres't.
"Charles Angus, Sec'y.
"[Corporate Seal of the Company.]"

In February, 1884, Dolph, the defendant in error, commenced his action in the Circuit Court of the United States for the Northern District of New York, alleging breach of this contract by the defendant, now the plaintiff in error, and claiming damages in the sum of thirty thousand dollars. Trial being had, resulted in a verdict, March 26, 1886, in favor of plaintiff, for sixteen thousand dollars. That verdict having been set aside (28 Fed. Rep. 553), a new trial was had, which resulted in a verdict, March 26, 1887, in favor of plaintiff, for the sum of seven thousand two hundred and eight dollars. Judgment was entered on that verdict, of which the defendant complains in [62 this court, by proper proceedings in error, and asks a reversal.

Mr. **Esek Cowen** for plaintiff in error.
Mr. **H. P. Lloyd** for defendant in error.

0] *Mr. Justice* **Brewer** delivered the opinion of the court:

The defendant kept this contract for a year and then repudiated its obligations. The excuse made in its correspondence and alleged in its answer was that the parol agreement between the parties, an agreement authorized by the directors of the defendant Company, was a three years' contract; that the contract prepared by plaintiff was for five years; and that through inadvertence and mistake the contract thus prepared was signed by the officers of the defendant Company. A change in the written agreement from five years to three was demanded and refused. As no testimony was offered to support this contention, it must, for the purposes of this suit, be taken as a mere pretense. The defendant, having made a five years' contract, at the end of one year repudiated it. The contract was not against public policy,—simply a contract between a manufacturer and a dealer, with reference to the manufacture and sale of washing machines. Many errors are alleged in the trial of the case. We notice but one, for we are constrained to hold that the court erred in its ruling in that respect.

It will be observed that the contract had two phases,—one for the manufacture and sale of the Dolph washer; the other, in paragraph three, in reference to the manufacture and sale of other washing machines. In reference to that, the contract provided that Dolph should have the option to manufacture for defendant any other machines, at such price "as may be bid for them in open competition, for equal quality of goods, by any responsible manufacturers other than said Dolph." In reference to this branch of the case the learned judge, charging the jury, said: "Regarding the machines other than the Dolph machines, it is well-nigh impossible to lay down any satisfactory rule of damages. In attempting to do so difficulties and perplexities are encountered at every turn. At first I was inclined to withdraw this branch of the subject from your consideration entirely, for the reason that the evidence was so uncertain that no damage could properly and certainly be based upon the breach of the contract in this regard: but subsequent reflection has induced me to submit the facts for your consideration, with such instructions as will induce you, if you award anything, to give only such actual damages as you believe the plaintiff has suffered." And further on, quoting also from the opinion given on the motion for a new trial: "No option was given him the first year, and, as there is no way of ascertaining whether, if the option had been given thereafter, it would have been accepted, it is by no means easy to state what his rights in this respect are. The decision of the court before referred to says upon this branch of the case: 'As to the damages recoverable for the breach of that provision of the contract by which the plaintiff was to have the privilege of supplying the defendant with other washing machines at the lowest price bid by other manufacturers for supplying defendant with the same, it is not clear that the plaintiff could establish any loss of profits, unless it could be shown that there is some usual or average percentage of profit customarily realized by manufacturers of analogous articles, or some established manufacturer's price. The plaintiff might have been unwilling to act upon the option at prices which other manufacturers would have offered, and the extent of his prospective loss, if any, is largely a matter of speculation. The defendant may have been so situated that it could better afford to employ its own men and facilities, even although by doing so its machines would cost it more than to buy them of others, and in this view the difference between the actual cost of the machines to the defendant and the sum it would have cost the plaintiff to make and furnish them might not be the correct rule of damages.'" Obviously he appreciated the difficulty, but felt that the misconduct of defendant compelled an open door to some substantial recovery, even in respect to this branch of the contract.

No option was given to plaintiff, and none [62
claimed by him; nor was there anything that could be fairly called open competition. True, the defendant made a contract with a neighbor to manufacture these machines. After awhile it abandoned that contract, and manufactured them itself. The plaintiff never exercised or sought the option conferred by this clause of the contract. The circumstances under which the contract was made with the neighboring manufacturer are not disclosed. It does not appear that his offer was made in thought of any competition. If the idea of open competition, as named in the contract, had been presented, who can say that he might not have been willing to have contracted for the machines at a less figure, and how can it be said, with this uncertainty, that the plaintiff would have exercised his option? The opinion of the circuit judge, in sustaining the motion for a new trial, evidently was that, in the uncertainty surrounding the facts, recourse might be had to some usual or average percentage of profits customarily realized by manufacturers of analogous articles. His idea seemed to be that, when contract provisions fail, supposed equivalents may be resorted to. Possibly in some cases such ruling as that may be adopted; but we think it inapplicable here. Specific provisions as to the Dolph machines, which was obviously the real subject matter of the contract, were inserted, and the defendant agreed to take at least fifty of them each year. Other machines were subordinate, and the stipulations in respect to them were incidental rather than principal, and apparently more for supporting and giving force to the principal matter of the contract, the Dolph machines; hence, whatever of uncertainty attends those provisions. On breach of such a contract, the principal matter in respect to which provision was made is the one to be mainly regarded. If subordinate provisions are clear and definite, and damages for disregard there-

of determinable by plain and obvious rules, of course such damages may be recovered; but if because they are subordinate the provisions in respect thereto are indefinite, then the court may not, with the idea of preventing injustice, attempt to substitute equivalents therefor. The main purpose of the con-
[623] tract must be regarded, and its specific provisions in connection therewith enforced, and proper damages given for the breach thereof. A lack of certainty as to terms of contract obligations of either party, or measure of damages for breach, is simply the misfortune of him who seeks to recover in case of a breach thereof. The case practically is one of those in which, however reprehensible the conduct of the defendant may be in repudiating its contract obligations, the parties, having reference to one portion of the subject matter of the contract, made certain stipulations which determine the measure of damages in the case of breach; and on the breach the injured party has failed to bring himself within those stipulations. Such failure is his loss. The court should have charged the jury that, in reference to the machines other than the Dolph machines, there could be none other than a recovery of nominal damages. *Jackson* v. *Allen*, 120 Mass. 64-80.

For this error the judgment is reversed, and the case remanded, with instructions to grant a new trial.

---

[623] MICHAEL GORMLEY ET AL., *Plffs. in Err.*,
v.
JAMES BUNYAN ET AL., Executors of EDWARD CLARK, Deceased.

(See S. C. Reporter's ed. 623-635.)

Amending pleadings—curing variance—deposition—taxes, when may be taken from proceeds of sale—evidence—damages for wrongful sale of lands—Statutes of Limitation must be pleaded—suit by executors.

1. The granting or refusal of leave to file an additional plea, or to amend one already filed, is discretionary with the court below, and not reviewable by this court, except in a case of gross abuse of discretion.
2. The trial court may allow a technical variance between the pleadings and proofs to be cured by amendment without introducing any other cause of action or affecting the merits of the case between the parties.
3. Although the heading of a notice for the taking of a deposition was not technically correct, yet if there could have been no mistake made with reference to what case the notice applied, and the notice was properly served, and the deposition was taken at the place and time specified in the notice, the deposition may properly be admitted in evidence.
4. Where there is a covenant in a trust deed on the part of the makers of the deed to pay all taxes and assessments on the property, if the amount necessary to pay off the taxes was not advanced before the sale, it is an item which can be properly taken out of the proceeds of the sale of the property.
5. Checks upon which original loans were made, although not counted on in the declaration, are admissible in evidence as showing that the money was actually received and as constituting part of the *res gestæ*.
6. The claim for damages sustained by the grantors in a trust deed for a wrongful sale of lands under the same is against the trustee who made the sale, and such damages cannot be pleaded to defeat the claim of the holder of the note secured by that deed.
7. It was not error not to allow the Statutes of Limitation to be admitted in evidence, after the court had overruled the motion of the defendants to be allowed to plead them as a defense. The only way in which such Statutes are available as a defense is when they are, at the proper time, specially pleaded.
8. The courts of the United States take judicial notice of all the public statutes of the several States.
9. Where executors sued on notes as belonging to the estate of deceased there was no error in excluding evidence offered to show that the notes had never been inventoried as a part of the estate, it having been shown that the notes were his property at the time of his death, and by operation of law, in pursuance of his will, they passed to his executors, who possessed the right to sue for the amount due on them.

[No. 574.]

Submitted Jan. 9, 1891. Decided Mar. 2, 1891.

IN ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment for plaintiffs in an action on a promissory note and coupon notes for interest. *Affirmed.*

[62

Statement by *Mr. Justice* **Lamar:**

This was an action of assumpsit, brought on the 24th of December, 1886, by James Bunyan and James Meehan, executors of the last will and testament of Edward Clark, deceased, citizens of New York, against Michael Gormley and Morton Culver, citizens of Illinois, to recover a balance due on a certain promissory note dated at Chicago, May 15, 1877, and due in three years, with interest at 9 per cent per annum, payable semi-annually until due, and 10 per cent thereafter, at the Chemical Bank of New York, made and signed by the defendants, payable to their own order, and by them indorsed in blank; and also to recover the amount due on six coupon notes of the same date, of $450 each, representing the semi-annual interest on the principal note,—all of which notes the plaintiffs claimed to own as such executors.

The declaration consisted of a special count on the notes, describing them as having been indorsed and delivered to Edward Clark by the defendants, alleging that the same were lost and could not, therefore, be produced in court, and stating that the coupon notes represented interest upon the principal note; [6
and also of the usual common counts in assumpsit of indebtedness for work and labor, materials, money lent and advanced, paid, laid out and expended, had and received, etc., to Edward Clark. Attached to the declaration were copies of the coupon notes, and what was intended to be a copy of the principal note, but which differed from it in

some minor particulars hereafter referred to. The plaintiffs also made profert of the letters testamentary issued to them, as executors of the last will and testament of Edward Clark, deceased.

The defendants put in a plea of the general issue, and filed an affidavit of merits, March 10, 1887. On the 8th of December, 1887, the cause then being on the trial call of cases for that day, the defendants moved to be allowed to file *instanter* four additional pleas, viz.: (1) plea of *non est factum;* (2) plea of the Statutes of Limitation of New York; (3) plea of the Statutes of Limitation of Illinois, and (4) plea of satisfaction. This motion was denied by the court, and the defendants excepted. Afterwards, on the 10th day of December, 1887, the case being still on the trial call of cases for that day, the defendants moved the court to be allowed to file *instanter* additional pleas of set-off, claiming as due them from the plaintiffs the sum of $50,000, and also former recovery. The court overruled this motion also, and the defendants excepted.

The case went to trial before *Judge* Dyer and a jury, on the 15th of December, 1887. At the trial the plaintiffs offered in evidence the original principal note for $10,000 and the six coupon notes (which it was shown had been found a few days prior thereto), all indorsed payable to the plaintiffs, and offered evidence to prove the execution of the notes by the defendants. The $10,000 note had a credit of $8,848.50, indorsed as of September 10, 1878, and the coupon notes were marked "paid."

The defendants objected to the introduction of these notes, claiming (1) that they differed from the notes set out in the special count of the declaration; (2) that they were not admissible under the common counts, which charged an indebtedness to Edward Clark and not to the plaintiffs; (3) that the coupon notes were not described in the special count [626] of the declaration, and were not admissible under the common counts, because the common counts all ran to Edward Clark, and not to plaintiffs; and (4) because the coupon notes were marked "paid." The objections were overruled, and the defendants excepted.

The indorsements upon the notes were explained as follows: All of the notes had been secured by a deed of trust to Adolph Loeb, upon certain described property. This trust deed was foreclosed by Loeb, and on the 10th of September, 1878, the property was sold, under the power of sale contained in the deed, for $8,848.50. Loeb thereupon made the indorsement on the note to represent the amount of money received by him as trustee. Loeb also testified that the coupon notes had been marked "paid" by his clerk, without any authority, and that such marking was incorrect.

It was further shown in evidence that the amount due on the notes at the time the sale was made was $11,027.79; and that Loeb, as trustee, deducted from the proceeds of the sale the following items: $374.90, for redeeming the property from tax sales, for the taxes of 1876 and 1877; $16, costs of advertising the sale of the property; and $200, as his fees for the sale of the property,—in all, $590.09, leaving a balance of $8,257.91 to be applied on the note September 10, 1878, which left $2,769.88 due on the note on that day. Interest was then computed on that amount, at nine per cent to the maturity of the note, and ten per cent thereafter, according to the terms of the note, and the total amount due at the trial was thus ascertained to be $5,290.

Objection was made at the trial by the defendants to the allowance of the above items deducted by Loeb from the proceeds of the sale of the property, on the grounds that the items for advertising and for trustee's fees were grossly excessive, and that after the trustee's sale of the property September 10, 1878, the trustee had no authority to redeem the property from the tax sales.

The plaintiffs also offered in evidence the deposition of James Meehan, one of the executors, taken in New York City, before a notary public, to prove, among other minor matters, that the note sued on had been in [627] the possession of Edward Clark, before his death, and had never been disposed of by him in any manner. Objection was made to the introduction of this evidence on several grounds, chiefly that the notice of taking it was defective in several particulars, and was not served on the defendants; that it was not taken by the commissioner named in the commission, and did not show when or for what reason it was taken; and that other informalities and irregularities existed on the face of it. The court overruled the objections and admitted the deposition, and the defendants excepted.

The plaintiffs also offered in evidence certified copies of the will of Edward Clark and the probate proceedings had thereon. The defendants objected to this evidence generally, "and on the specific ground that where the seal ought to be there is nothing but the letters 'L. S.'" But the court overruled this objection and the defendants excepted.

The defendants sought to obtain credit on the note for a number of small items of charges made by Loeb at the time the original note and deed of trust were made and executed, which were disallowed by the court. They will be understood best, perhaps, from a recital of the following undisputed facts: The defendants, being indebted to the Traveler's Insurance Company in the sum of $10,000, with certain accrued interest, applied to Loeb, who was a loan agent in Chicago, through John Culver, a brother of one of the defendants, to secure a loan of $10,000 to pay off their debt to the insurance company. That debt was evidenced by a bond, and was secured by a deed of trust on the lands afterwards included in the Loeb trust deed and certain other lands, to Lyman Baird. Loeb made arrangements to procure the loan from Edward Clark, through Clark's agent in Chicago, one Bolton. For procuring this loan and clearing up the title of the lands included in his trust deed, Loeb made the following charges: $40.40, to pay certain taxes due on the property; $32.50, to pay a judgment against the defendant Culver;

$12.90, for a continuation of the abstract of title; $37.50, for attorney's fees; $2.25, for recording fees, and $350, for his own services
328] in securing the loan. Accordingly, it was found that a loan of $10,000 was insufficient to satisfy the indebtedness of the defendants, and another loan of $1,300 was effected, through Bolton, from Edward Clark. The money in these transactions was paid over by Bolton in the form of checks—one for $10,000, and the other for $1,300—of the Singer Sewing Machine Company, of which Clark was president, and Bolton an agent in Chicago. The minutiæ of this transaction need not be stated. It is sufficient for our purpose to state that the court held all those matters to be purely personal between Loeb and the defendants, and therefore having no connection with the debt due to the plaintiffs.

The defendants also sought to have a credit of $142.60 allowed on the first coupon note as of date April 10, 1878, but the court held that the evidence showed that they ought to be allowed a credit of but $100 at that time, the other $42.60 having been paid to Loeb to induce him to stop proceedings which he had commenced looking to the foreclosure of the trust deed.

The defendants attempted to show by the evidence of one witness that the property sold at the foreclosure sale was worth at least $40,000, and that, therefore, they had been greatly wronged in the transaction; but the court refused to allow the evidence to be introduced, and the defendants excepted.

The defendants also attempted to show that the notes sued on were never scheduled as a part of the estate of Edward Clark, deceased, as, they claimed, was required to be done by the laws of New York; but the court refused to allow such evidence to be introduced, and the defendants excepted.

At the close of the trial the court charged the jury: (1) That there was no issue of fact under the evidence for them to consider; (2) That the items, heretofore mentioned as having been deducted by Loeb from the proceeds of the sale of the property, were properly charged against the defendants; (3) That the other items of account above mentioned as having arisen about the time the loan was negotiated were purely personal between Loeb and the defendants, and in no wise concerned
329] the plaintiffs; (4) That the defendants should be allowed credits on the note only as above stated; (5) That it was immaterial how much the land was worth which was sold at the foreclosure sale, and (6) That the jury were instructed to find and return a verdict for $5,290 in favor of the plaintiffs and against the defendants. The defendants objected to this charge of the court, but their objections were overruled and they excepted. The jury returned a verdict, as instructed by the court, for $5,290, to which the defendants excepted, and made a motion to set it aside and for a new trial. This motion was overruled, and judgment was entered on the verdict for $5,290. To reverse that judgment a writ of error was then prosecuted.

Mr. **Morton Culver,** for plaintiffs in error:

The court should have allowed the plaintiffs in error to plead the several pleas offered by them of *non est factum*, Statutes of Limitations, satisfaction and set-off.

Hyman v. *Bayne*, 83 Ill. 256; *Emory* v. *Keighan*, 88 Ill. 482; *Bemis* v. *Stanley*, 93 Ill. 230; *Leffingwell* v. *Warren*, 67 U. S. 2 Black, 599 (17:261); *Amy* v. *Dubuque*, 98 U. S. 470 (25:228).

The notes were improperly admitted in evidence.

Streeter v. *Streeter*, 43 Ill. 155; *Wilson* v. *King*, 83 Ill. 232; *Nauvoo* v. *Ritter*, 97 U. S. 389 (24:1050).

The charges made for moneys paid out for taxes and for redemption from tax sales after sale under the trust deed were improperly allowed.

Webster v. *Nichols*, 104 Ill. 172.

The items of moneys retained by Loeb and paid to Loeb by Culver and Gormley were improperly excluded.

Olds v. *Cummings*, 31 Ill. 188; *Haskell* v. *Brown*, 65 Ill. 29; *Payne* v. *Newcomb*, 100 Ill. 611; *Noonan* v. *Braley*, 67 U. S. 2 Black, 499 (17:278); *Orchard* v. *Hughes*, 68 U. S. 1 Wall. 73 (17:560); *Chicago, D. & V. R. Co.* v. *Fosdick*, 106 U. S. 82 (27:60).

The court erred in excluding the Statutes of Limitations of New York and Illinois.

2 Parsons, Cont. 583-586.

The court improperly refused to allow any proof as to the value of the lands taken under the pretended foreclosure sale.

The second notice and sale thereunder were illegal, and Culver and Gormley would have the right on suit upon the note to set off the value of the land so wrongly taken and appropriated by Clark.

People v. *Waynesville*, 88 Ill. 469; *Smyth* v. *Taylor*, 21 Ill. 296.

Messrs. **Charles E. Pope, Alexander McCoy** and **Charles B. McCoy,** for defendants in error:

By the court's refusal to allow plaintiffs in error to file pleas of *non est factum* and payment, and notice of former recovery, they are not injured, for all these matters could be proved under the general issue.

Mason v. *Eldred*, 73 U. S. 6 Wall. 231, 234 (18:783, 784); *Chambers County* v. *Clews*, 88 U. S. 21 Wall. 317, 323 (22:517, 519); *Wilson* v. *King*, 83 Ill. 232, 238; *Biederman* v. *O'Conner*, 4 West. Rep. 152, 117 Ill. 493.

Defendants, by allowing the property to go to sale, will be considered as assenting to the sale.

Tyler v. *Massachusetts Mut. L. Ins. Co.* 108 Ill. 58.

A trustee's deed for land, made under a power of sale in a trust deed, is conclusive evidence of the sale under the power, and it cannot in a court of law be contradicted, and proved to have been executed in violation of law, and therefore fraudulent and void. It cannot be shown in such case that there was no money due at the time of sale, and therefore the sale was not authorized. The sole remedy is in equity.

Windett v. *Hurlbut*, 3 West. Rep. 453, 115 Ill. 403; *Chapin* v. *Billings*, 91 Ill. 539; *Rice* v. *Brown*, 77 Ill. 549.

The refusing leave to file various pleas and notices at the trial was within the discretion of the court, and refusal to grant such leave or to grant a new trial cannot be assigned as error.

Marine Ins. Co. v. *Hodgson*, 10 U. S. 6 Cranch, 206 (3:200); *Wright* v. *Hollingsworth*, 26 U. S. 1 Pet. 165 (7:96); *United States* v. *Buford*, 28 U. S. 3 Pet. 13 (7:585); *Ex parte Bradstreet*, 32 U. S. 7 Pet. 634 (8:810); *Spencer* v. *Lapsley*, 61 U. S. 20 How. 264 (15:902); *Chirac* v. *Reinicker*, 24 U. S. 11 Wheat. 280, 302 (6:474, 479); *Murphy* v. *Stewart*, 43 U. S. 2 How. 263 (11:261); *Jenkins* v. *Banning*, 64 U. S. 23 How. 455, 457 (16:580, 581); *Tilton* v. *Cofield*, 93 U. S. 163, 166 (23:858, 859); *Clause* v. *Bullock Print. Co.* 6 West. Rep. 537, 118 Ill. 612, 616, 617; Wood, Lim. § 7; Ang. Lim. (5th ed.) § 285.

A blank over the indorsers' names to a note can be filled at the trial.

Lee v. *Mendel*, 40 Ill. 359, 361, 362.

Copies of the instruments sued upon are not a part of the declaration under the Illinois practice.

Harlow v. *Boswell*, 15 Ill. 56; *Stratton* v. *Henderson*, 26 Ill. 68; *Humphrey* v. *Phillips*, 57 Ill. 132; *Home Flax Co.* v. *Beebe*, 48 Ill. 138; *Rock Island* v. *Cuinely*, 126 Ill. 408, 411.

The notes were admissible under the common counts.

Chesapeake & O. Canal Co. v. *Knapp*, 34 U. S. 9 Pet. 541 (9:222); *Bank of Columbia* v. *Patterson*, 11 U. S. 7 Cranch, 299 (3:351); *Biederman* v. *O'Conner*, 4 West. Rep. 152, 117 Ill. 498-497.

Where a contract has been fully executed and nothing remains to be done under it but the payment of money, which the defendant is to do, the plaintiff may recover in *indebitatus assumpsit*. This rule of pleading applies to promissory notes.

Streeter v. *Streeter*, 43 Ill. 155; *Brand* v. *Henderson*, 107 Ill. 141.

In such case the question of variance is immaterial if the execution of the notes is proven.

Boxberger v. *Scott*, 88 Ill. 477.

Loeb was the trustee under the trust deed given by plaintiffs in error, but this made him a trustee for plaintiffs in error as well as for Edward Clark.

Williamson v. *Stone*, 128 Ill. 129; *Ventres* v. *Cobb*, 105 Ill. 33; *Meacham* v. *Steele*, 93 Ill. 135; *Sherwood* v. *Saxton*, 63 Mo. 78, 82; 2 Jones, Mortg. (4th ed.) §§ 1, 771.

The objections to the deposition are without merit.

Ex parte Fiske, 113 U. S. 713 (28:1117); *Flint* v. *Crawford County Comrs.* 5 Dill. 481; *Patterson* v. *Hubbard*, 30 Ill. 201; *Brackett* v. *Nikirk*, 20 Ill. App. 525.

[10] *Mr. Justice* **Lamar** delivered the opinion of the court:

The first three assignments of error cover the whole case, and are as follows:

The first is, that the court erred in refusing to allow the plaintiff in error to file the several pleas of *non est factum*, Statutes of Limitation, payment and set-off. The reply to this is, that as long ago as *Mandeville* v. *Wilson*, 9 U. S. 5 Cranch, 15, 17 [3: 23, 24], and as late as *Chapman* v. *Barney*, 129 U. S. 677 [32: 800], it has been held that the granting or refusal of leave to file an additional plea, or to amend one already filed, is [6 discretionary with the court below, and not reviewable by this court, except in a case of gross abuse of discretion.

The second assignment of error is that the court erred in admitting incompetent and irrelevant evidence in behalf of the defendants in error. Under this assignment various objections are specified.

(1) The first is, that there was a fatal variance between the indorsement on the $10,000 note and that declared upon in the special count, and that for the same reason it and the coupon notes were inadmissible under the common counts.

The only variance between the declaration and the proof (and this manifestly arose from the fact that the notes were lost at the time of the filing of the declaration) was that the indorsement on the note was, "Pay to the order of Bunyan and Meehan, executors of Edward Clark," instead of "Pay to the order of Edward Clark," as stated in the declaration; and in the common counts the *indebitatus* was laid to Edward Clark instead of to Bunyan and Meehan, his executors.

The proof was clear that Edward Clark lent the money to the plaintiffs in error: that they executed the notes, and made them payable to their own order, and put on it their blank indorsement; that Clark owned and had in his possession the note at the time of his death; and that Bunyan and Meehan were appointed as his executors, in which capacity they brought the suit.

Such a technical variance may be cured by amendment without introducing any other cause of action or affecting the merits of the case between the parties, and it was proper for the court to allow it. It appears that on the trial the indorsement on the note was amended by the counsel for the defendants in error to correspond with the declaration, with the court's acquiescence, and pursuant to what they considered its order. In the bill of exceptions is this statement of the judge:

"The minutes of the court made at the trial and the shorthand reporter's notes do not show that the court formally granted leave to the plaintiffs to change the indorsement on the note in suit so that it should [6 read, 'Pay to the order of Edward Clark;' but, from what was said by the court in its opinion on the subject, I am satisfied that the attorneys for the plaintiffs in good faith supposed or understood that they had leave to make such change, and that, accordingly, they had in fact changed the form of the indorsement on the note independently of the minutes of the trial. The court cannot say that leave was expressly granted, or that it said anything further on the subject than is expressed in the opinion hereunto annexed."

We think that all the notes offered, either with or without amendment, conformed in legal effect to the allegation of the common counts. This objection cannot, therefore, prevail.

(2) A second objection relied on under this assignment is that the deposition of James Meehan was improperly admitted because not complying with the United States Revised Statutes (sec. 863) in that respect. The heading of the notice was not technically correct, perhaps, but it was substantially so. It was as follows: "United States of America, State of Illinois, County of Cook, *ss:* In the Circuit Court of the United States." Then follows the title of this case, and everything else was regular. There could have been no mistake made by the defendants with reference to what case the notice applied. The proof showed that the notice was properly served, and that the deposition was taken at the place and time specified in the notice, but before a different notary public from the one specified in the notice. The notice read that the deposition would be taken "before William G. Peckham, Esq., notary public, *or some other officer authorized by law to take depositions,*" etc. The deposition was actually taken before Nicoll F. Elmendorf, a notary public, and an officer authorized by law to take depositions in such cases. That was perfectly regular, and cannot be objected to. The notice conformed to section 863 of the Revised Statutes. There is no merit in this objection.

(3) It is also objected that "the will and probate proceedings of the estate of Edward Clark was improperly admitted." This objection, as stated in the record, is wanting in precision; but taking it as stated in the [633] brief of counsel for plaintiffs in error it is that "the certificates of authenticity are not in accordance with the laws of the United States. They are not under the seal of the court." In this statement counsel are in error. An inspection of the record shows that the only "certificates of authenticity" to which counsel refer are the certificates of exemplification of the surrogate's court. These are in proper form, and are under the seal of the court. The letters "L. S." appear on the copy of the original letters testamentary. This objection is therefore without merit.

Another objection urged under this assignment is that the charges for taxes and redemption of tax certificates by Loeb, after the sale of the property under the trust deed, were improperly allowed. With reference to these charges the court said:

"Here was a covenant in this trust deed on the part of the makers of the deed to pay all taxes and assessments on the property. They had up to the last moment before the sale in which to do that. It was not done. In fact those taxes were not paid until after the sale by this trustee—that is, he took up these certificates, procured them to be canceled, so that they were no longer a lien on the property. It is true that in this deed the language used is, that out of the proceeds of sale he may pay all moneys advanced—advanced for insurance, taxes and other liens or assessments; but it has seemed to me that the act of paying the taxes or taking up the certificates after the sale related back, in legal effect, to a period antedating the sale, and that it was equivalent to an advancement of money before the sale for the payment of the taxes and the clearing off of these tax liens and assessments. I understand from *Judge* Blodgett, and am authorized to say, that he has had this very question up in connection with trust deeds like this, and that he has taken the same view of the question, and has held that, although the amount necessary to pay off the taxes was not advanced before the sale, but was paid after the sale, it was an item which could be properly taken out of the proceeds of the sale of the property."

We see no objection to anything in that part of the court's opinion or in that ruling. [63 *Hall* v. *Gould*, 79 Ill. 16; *Parsons* v. *East St. Louis Gas Light & C. Co.* 108 Ill. 380.

Another objection is that the checks upon which the original loans were made were irrelevant and not counted on in the declaration, nor proof made of signatures. These were, in the view we take of the case, admissible as showing that the amount of money due on these notes was actually received from Edward Clark, as constituting part of the *res gestæ*.

One more objection remains under this second assignment, which is that the statement of the account by McCoy should not have been received and adopted by the court as the basis of its judgment. It is not shown to our satisfaction that the account is wrong in any particular item or items. The objection is to the account as a whole. There is no ground for such an objection, if the principles upon which the account is stated are correct; and they are so in this case.

Under the third assignment of error, viz., that the court erred in excluding proper and competent testimony on behalf of the plaintiffs in error, the points relied on are that the court ruled out (1) proof of the moneys paid by plaintiffs in error to said Edward Clark; (2) the Statutes of Illinois and New York concerning limitations, mortgages and estates; (3) evidence of the value of land sold by Loeb under the trust deed to and for Clark; (4) the evidence to show that the notes in suit were never scheduled in the surrogate's court of New York.

With reference to the moneys claimed to be paid by plaintiffs in error to Edward Clark or his agents, and to the value of the land sold by Loeb at the foreclosure sale, the reply is that there was no evidence going to show, nor do the defendants claim, that they ever paid money to anyone but Loeb. Loeb was not the agent of Clark any more than of the defendants. He was a trustee for both parties to the contract. The moneys paid to Loeb by the defendants at the time they secured the loans were paid to him as their own agent. Bolton was Clark's agent in those transactions. We agree with the court below in holding those transactions to have been purely personal between Loeb and the defendants. So also with regard to [6 the sale of the property under the trust deed. If the defendants were wronged by that sale their remedy is against Loeb; and any loss they may have suffered cannot be pleaded to

defeat the claim of the plaintiffs on the note.

There was no error in not allowing the Statutes of Limitation of New York and Illinois to be admitted in evidence, after the court had overruled the motion of the defendants to be allowed to plead them as a defense. The only way in which such Statutes are available as a defense is when they are, at the proper time, specially pleaded. 1 Chitty on Pl. 514, 515; Stephen on Pl. 76, *note; Wilson* v. *King*, 83 Ill. 232.

With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only be said that the courts of the United States take judicial notice of all the public statutes of the several States.

Neither was there any error in excluding evidence offered to show that the notes sued on had never been inventoried as a part of the estate of Edward Clark, deceased. It was shown that the notes were his property at the time of his death, and by operation of law, in pursuance of his will, they passed to his executors, who possessed the right to sue for the amount due on them.

We see no error in the proceedings of the court below, and its *judgment is affirmed.*

---

[587] JOHN DUCIE ET AL., *Appts.*,
v.
THOMAS FORD.

(See S. C. Reporter's ed. 587-595.)

Resulting trust, parol evidence to sustain—surrender of possession, when will take case out of Statute of Frauds—contest for mining claim.

1. A trust results to him who pays the consideration for an estate, where the title is taken in the name of another; such trust is not within the Montana Statute, and parol evidence is admissible to show whose money is paid for the property; but the trust must have arisen at the time the purchase was made, and the whole consideration must have been paid or secured at the time of or prior to such purchase.
2. In order to make surrender of possession to the defendant a sufficient performance to take a case out of the Statute of Frauds, such surrender must be made in pursuance of the contract, and be referable to it; it must be a new possession under the contract, and not merely the continuance of a former possession claimed under a different right or title; delivery of possession will not be satisfied by proof of a scrambling and litigious possession.
3. Where both parties had located and claimed a lode as a mining claim under the United States laws, and plaintiffs were preparing to contest defendant's application for a patent, and it was agreed between them that plaintiffs should relinquish such possession as they had to defendant in consideration of the latter agreeing to purchase the land upon their joint account, and plaintiffs only withdrew their claim and omitted to prosecute it, this is insufficient to take the case out of the Statute.

[No. 777.]

Submitted Jan. 8, 1891. Decided March 2, 1891.

ON APPEAL from a judgment of the Supreme Court of the Territory of Montana affirming a judgment of the District Court of the Second Judicial District of Montana in favor of defendant sustaining a demurrer to the complaint in a suit to compel the defendant to hold the title to land as trustee for plaintiffs for one half the land, and that he execute a deed of such half to plaintiffs and account for the rents, issues and profits accrued from such undivided half. *Affirmed.*

Statement by *Mr. Justice* **Brown:**

This was an appeal from a decree of the [588] Supreme Court of the Territory of Montana

---

NOTE.—*Lands bought with trust money and deeded to trustee belong to* cestui que trust; *any statement by trustee, or credit in account, amounts to declaration of trust; profit gained by trustee by sale of property belongs to* cestui que trust. See *note* to Wormley v. Wormley, 5:651.

Parol trust on conveyance of land, good; where one takes the title for another at judicial sale, he is trustee. See *note* to Hughes v. Edwards, 6:142.

As to Statute of Frauds; what is sufficient note or memorandum under,—see *note* to Barry v. Coombe, 7:295.

As to the delivery and acceptance necessary under the Statute of Frauds, see *note* to Mahan v. United States, 21:307.

Resulting trusts; when trust results to one who pays the consideration for land and the title is taken in the name of another; resulting trusts in chattels; where there are joint purchasers; trusts result eo instanti; *personal property; fiduciary character; parol agreement alone will not create trust; trusts by acts of agents; proof by parol; laches.*

Where property is purchased and the conveyance of the legal title is taken in the name of one person, while the consideration is paid by another, a trust arises at once in favor of the person paying the purchase price, and the holder of the legal title becomes a trustee for him. Jackson v. Miller, 6 Wend. 228, 21 Am. Dec. 316; Jackson v. Matsdorf, 11 Johns. 91, 6 Am. Dec. 355; Williams v. Hollingsworth, 1 Strobh. Eq. 103, 47 Am. Dec. 527; Dudley v. Bosworth, 10 Humph. 9, 51 Am. Dec. 690; Strimpfler v. Roberts, 18 Pa. 283, 57 Am. Dec. 606; Mutual F. Ins. Co. v. Deale, 18 Md. 26, 79 Am. Dec. 673; Blodgett v. Hildredth, 103 Mass. 484; Preston v. Mc Millan, 58 Ala. 84; 2 Pom. Eq. Jur. § 1037; Shaw v. Shaw, 86 Mo. 594; Mershon v. Duer, 40 N. J. Eq. 333; McDonogh v. Murdoch, 56 U. S. 15 How. 367, 14 L. ed. 732; Brown v. Brown, 79 Va. 648; Heiskell v. Powell, 23 W. Va. 717; Bibb v. Hunter, 79 Ala. 351; Mc Donough v. O'Neil, 113 Mass. 92; Farley v. Blood, 30 N. H. 354; Hutchins v. Heywood, 50 N. H. 491; Scheerer v. Scheerer, 109 Ill. 11; Mc Carroll v. Alexander, 48 Miss. 128; Campbell v. Campbell, 21 Mich. 438; Johnson v. Quarles, 46 Mo. 423; Brown v. Cherry, 59 Barb. 628; Nixon's App. 63 Pa. 279; Perry, Trusts, § 126; Neill v. Keese, 5 Tex. 23, 57 Am. Dec. 746.

The trust of a legal estate, of whatever nature, whether taken in the name of one or several, whether in the name of the purchaser or another, whether jointly or successively, results to the one who advances the purchase money. Dyer v. Dyer, 2 Cox, Ch. 92, 1 Lead. Cas. Eq. 236; 2 Story, Eq. Jur. § 1201; Edwards v. Edwards, 39 Pa. 377; 2 Pom. Eq. Jur. § 1037; Peabody v. Tarbell, 2 Cush. 227; Bostleman v. Bostleman, 24 N. J. Eq. 103; Glidewell v. Spaugh, 26 Ind. 319; Belford v. Crane, 16 N. J. Eq. 265, 84 Am. Dec. 155.

sustaining a demurrer to a complaint originally filed in the Second Judicial District of such Territory. The complaint set forth in substance that the plaintiffs on September 18, 1888, "became possessed of and owned" certain premises upon which they had discovered a vein or lode of valuable quartz; that they "duly located" such lode "as a mining claim" under the laws of the United States, "and posted a notice of such location," and established by posts and corners boundaries thereto, designating it as the "Figi" lode; and further claimed to have possessed and owned said premises up to the 15th of March, 1881, when the defendant was about to procure a patent to himself for the same premises "under a pretended location and claim designated by him as the 'Odin' lode." The plaintiffs apprised the defendant of their claim and notified him that they "would adverse and contest" his application for a patent. Thereupon they "entered into a mutual and verbal agreement" by which it was understood that in consideration of the plaintiffs' "promising and agreeing to relinquish and give up the possession of such premises" to the defendant, and to abstain from filing any adverse claim or protest against defendant's application for a patent, and to permit him to proceed and procure a patent, the defendant agreed that he would be tenant in common of the plaintiffs in an undivided half of the premises; that plaintiffs and defendant should purchase the premises jointly, but in defendant's name, defendant acting as "purchasing agent and as trustee of the plaintiffs," and that after the issuance of a patent, defendant would execute and deliver to plaintiffs a deed of an undivided half of the premises; that, relying on defendant's honesty, the plaintiffs relinquished and delivered up possession to the defendant, withdrew all objections to defendant's claim, and permitted him to procure a patent, and "from time to time thereafter" paid him their share of the purchase money of the [58
premises; and that a patent was subsequently issued to defendant in pursuance of such agreement, but he refused, and still refuses, to convey their share to the plaintiffs.

The prayer was as follows: *First*, that defendant be declared to hold the legal title to an undivided half of said premises as trustee for the plaintiffs. *Second*, that he be directed to execute a deed of such undivided half to plaintiffs. *Third*, that he be required to account to them for the rents, issues and profits accrued from such undivided half. Defendant demurred upon the ground: *First*, that the complaint set forth a contract within the Statute of Frauds; that no part-performance was averred, and that mere delivery of possession to another does not pass title and cannot be given in evidence as affecting the transfer of real estate.

Second, that the complaint is ambiguous, uncertain and unintelligible in that it does not show how much or at what times plaintiffs were to pay to defendant any money, nor what amount of money they are willing to pay, and they make no tender. The demurrer was sustained, and appeal was taken

---

One buying land with the money of another becomes a trustee for the latter, even though he stood in no fiduciary relation to the person whose money had been used. Foote v. Colvin, 3 Johns. 216, 3 Am. Dec. 478; Lisloff v. Hart, 25 Miss. 245, 57 Am. Dec. 203; Denton v. M'Kenzie, 1 Desaus. Eq. 299, 1 Am. Dec. 664; Jackson v. Morse, 16 Johns. 197, 8 Am. Dec. 306; Sullivan v. McLenans, 2 Iowa, 437, 65 Am. Dec. 780; Fowke v. Slaughter, 3 A. K. Marsh. 56, 13 Am. Dec. 133; Beck v. Uhrich, 13 Pa. 636, 53 Am. Dec. 507; Law v. Law, 76 Va. 527.

Where a person purchases chattels with the funds, and for the use, of another, but takes a bill of sale in his own name, a trust arises in favor of the owner of the fund. Guphill v. Isbell, 1 Bail. L. 230, 19 Am. Dec. 675; Gray v. Perry, 51 Ga. 180.

If an agent takes a title from his principal for a certain purpose, a resulting trust arises. Towle v. Ambs, 123 Ill. 410.

Joint purchasers.

If several make a purchase, taking a title in another, a joint trust will result to them; likewise if the title is taken in the name of one of them. Letcher v. Letcher, 4 J. J. Marsh. 500; Keaton v. Cobb, 1 Dev. Eq. 439, 18 Am. Dec. 595; Baumgartner v. Guessfeldd, 38 Mo. 36; Larkins v. Rhodes, 5 Port. (Ala.) 196; Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371; Case v. Codding, 38 Cal. 191; McDonald v. McDonald, 24 Ind. 68; Clark v. Clark, 43 Vt. 685; Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Union College v. Wheeler, 5 Lans. 160; Frederick v. Haas, 5 Nev. 389; Springer v. Springer, 114 Ill. 550; Jenkins v. Frink, 30 Cal. 586, 89 Am. Dec. 134; Mandeville v. Solomon, 33 Cal. 38.

If the amounts are unequal the trust results to them *pro rata*. Shoemaker v. Smith, 11 Humph. 81; Hall v. Young, 37 N. H. 134; Botsford v. Burr, 2 Johns. Ch. 405, 1 N. Y. Ch. L. ed. 426; Pinney v. Fellows, 15 Vt. 525; Jackson v. Bateman, 2 Wend. 570; Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623.

A trust arises in a part as well as in the whole, but it is not sufficient that there should be a general contribution to a common fund; it must appear that a specific sum was paid, which is a fractional or aliquot part of the whole. Cutler v. Tuttle, 19 N. J. Eq. 549; Coppage v. Barnett, 34 Miss. 621; Sayre v. Townsend, 15 Wend. 647; Dudley v. Bachelder, 53 Me. 408; McGowan v. McGowan, 14 Gray, 119, 74 Am. Dec. 668; Baker v. Vining, 30 Me. 121, 50 Am. Dec. 617; Edwards v. Edwards, 39 Pa. 385; Fickett v. Durham, 109 Mass. 422; Turner v. Nye, 7 Allen, 184; Snow v. Paine, 114 Mass. 526; Brennihan v. Sheehan, 125 Mass. 11; Edgerly v. Edgerly, 112 Mass. 179; Somers v. Overhulser, 67 Cal. 237; Olcott v. Bynum, 84 U. S. 17 Wall. 44 (21:570); Smith v. Smith, 85 Ill. 189; Thalman v. Canon, 24 N. J. Eq. 127; Harris v. McIntyre, 6 West. Rep. 233, 118 Ill. 275.

Trusts result eo instanti.

A trust must result, if at all, when the papers and the title pass. No agreements before or after the transfer, and no payments before or after, will raise a trust; it must be at the inception of the title. Barnard v. Jewett, 97 Mass. 87; Davis v. Wetherell, 11 Allen, 19, *note;* Roberts v. Ware, 40 Cal. 634; McClure v. Doak, 6 Baxt. 364; Gee v. Gee, 32 Miss. 190; Forsyth v. Clark, 3 Wend. 637; Page v. Page, 8 N. H. 187; Brown v. Cave, 23 S. C. 251; Hollida v. Shoop, 4 Md. 465, 59 Am. Dec. 88; Lehman v. Lewis, 62 Ala. 129; Rogers v. Murray, 3 Paige, 390, 3 N. Y. Ch. L. ed. 201; Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521; Remington v. Campbell, 60 Ill. 516; Knox v. McFarran, 4 Colo. 586; Rob Lee v. Clarke, 25 Cal. 317; Thorne v. Thorne, 18 Ind. 462; Lear v. Chouteau, 23 Ill. 39; Cross's App. 97 Pa. 471; Dudley v. Bosworth, 10 Humph. 9, 51 Am. Dec. 690.

to the Supreme Court of the Territory and the judgment of the court below affirmed. Plaintiffs thereupon appealed from such affirmance to this court.

Mr. **Walter H. Smith,** for appellants:

This case is not within the Statute of Frauds. Browne, Stat. Fr. § 83.

Resulting trusts in which the purchase money is paid by one and the deed taken in the name of another may be *pro tanto* or for a part of the estate proportionate to such part of the purchase money as the *cestui que trust* may have advanced.

Crop v. *Norton*, 9 Mod. 233, 2 Atk. 75; *Wray* v. *Steele*, 2 Ves. & B. 388; *Benbow* v. *Townsend*, 1 Myl. & K. 506; *Dale* v. *Hamilton*, 5 Hare, 369; *Ryall* v. *Ryall*, 1 Atk. 59; *Buck* v. *Swazey*, 35 Me. 41; *Livermore* v. *Aldrich*, 5 Cush. 435; *Powell* v. *Monson & B. Mfg. Co.* 3 Mason, 362; *Botsford* v. *Burr*, 2 Johns. Ch. 405, 1 N. Y. Ch. L. ed. 426; *Stark* v. *Cannady*, 3 Litt. 399; *Ross* v. *Hegeman*, 2 Edw. Ch. 373, 6 N. Y. Ch. L. ed. 434; *Larkins* v. *Rhodes*, 5 Port. 195; *Cecil Bank* v. *Snively*, 23 Md. 261.

Where a man buys land in the name of another and pays the consideration money, the land will generally be held by the grantee in trust for the person who so pays the consideration money.

Com. Dig. chap. 3, W, 3; 2 Fonbl. Eq. chap. 5, § 1, *note a;* 3 Wooddes. Lect. 57; Co. Litt. 290; Sugd. Vend. chap. 15, § 2; *Young* v. *Peachy*, 2 Atk. 256; *Lloyd* v. *Spillet*, 2 Atk. 150; *Scott* v. *Fenhoullet*, 1 Bro. Ch. 69; *Lane* v. *Dighton*, Ambl. 413; *Finch* v. *Finch*, 15 Ves. Jr. 50; *Boyd* v. *M'Lean*, 1 Johns. Ch. 582, 1 N. Y. Ch. L. ed. 254; *Steere* v. *Steere*, 5 Johns. Ch. 1, 1 N. Y. Ch. L. ed. 987; *Powell* v. *Monson & B. Mfg. Co.* 3 Mason, 362; 4 Kent, Com. 61; *Jackson* v. *Moore*, 6 Cow. 706; *Peabody* v. *Tarbell*, 2 Cush. 232; *Barnard* v. *Jewett*, 97 Mass. 87; *Nixon's App.* 63 Pa. 279; *Robinson* v. *Robinson*, 22 Iowa, 427; *Snell* v. *Elam*, 2 Heisk. 82.

Possession alone, without payment or other acts of ownership, is sufficient part performance of a verbal contract for land to sustain a decree for its specific execution.

Browne, Stat. Fr. § 467; Fry, Spec. Perf. § 579.

Possession is part performance both by and against the stranger and the owner; and they are therefore both bound.

Borrett v. *Gomescrra*, Bunb. 94; *Earl of Aylesford's Case*, 2 Str. 783; *Pyke* v. *Williams*, 2 Vern. 455; *Lacon* v. *Mertins*, 3 Atk. 1; *Willis* v. *Stradling*, 3 Ves. Jr. 381; *Bowers* v. *Cator*, 4 Ves. Jr. 91; *Gregory* v. *Mighell*, 18 Ves. Jr. 328; *Kine* v. *Balfe*, 2 Ball & B. 343; *Pain* v. *Coombs*, 1 De G. & J. 34; *Coles* v. *Pilkington*, L. R. 19 Eq. 174; *Tilton* v. *Tilton*, 9 N. H. 386; *Pindall* v. *Trevon*, 30 Ark. 249; *Eaton* v. *Whitaker*, 18 Conn. 222; *Murray* v. *Jayne*, 8 Barb. 612; *Malins* v. *Brown*, 4 N. Y. 403; *Ryan* v. *Dox*, 34 N. Y. 307; *Johnston* v. *Glancy*, 4 Blackf. 94; *Anderson* v. *Simpson*, 21 Iowa, 399; *White* v. *Watkins*, 23 Mo. 423; *Catlell* v. *Bacon*, 33 Miss. 269; *Reynolds* v. *Johnston*, 13 Tex. 214; *Harris* v. *Crenshaw*, 3 Rand. 14; *Wells* v. *Stratton*, 1 Tenn. Ch. 328; *Arrington* v. *Porter*, 47 Ala. 714; *Reed* v. *Reed*, 12 Pa. 117;

No trust results to a husband for payment on land of the wife after purchase, nor from an agreement to buy at sheriff's sale and reconvey. A parol agreement to convey at a future time is insufficient. Francestown v. Deering, 41 N. H. 438; Kellum v. Smith, 33 Pa. 156; Caple v. McCollum, 27 Ala. 461; Pattison v. Horn, 1 Grant, Cas. 301; Pinnock v. Clough, 16 Vt. 500, 42 Am. Dec. 521.

Payment by the *cestui que trust* must be clearly shown, and it must be payment as a purchaser and not in the nature of a loan. Faringer v. Ramsey, 4 Md. Ch. 33; Crop v. Norton, 9 Mod. 235; Loomis v. Loomis, 28 Ill. 454; Gibson v. Foote, 40 Miss. 788; White v. Carpenter, 2 Paige, 217, 2 N. Y. Ch. L. ed. 682; Burleigh v. White, 64 Me. 23; Robinson v. Leflore, 59 Miss. 148; Whaley v. Whaley, 71 Ala. 159.

If there be no payment, there will be no trust. There must be an actual payment in money, or its equivalent, by the one becoming the *cestui que trust.* Stucky v. Stucky, 30 N. J. Eq. 546; Lounsbury v. Purdy, 18 N. Y. 515, 16 Barb. 380; Honore v. Hutchings, 8 Bush, 687; Buck v. Pike, 11 Me. 9; Greene v. Cook, 29 Ill. 186; Smith v. Burnham, 3 Sumn. 435; Roberts v. Ware, 40 Cal. 634; Kendall v. Mann, 11 Allen, 15; Wheeler v. Kirtland, 23 N. J. Eq. 13; Russell v. Allen, 10 Paige, 249, 4 N. Y. Ch. L. ed. 965; Dickinson v. Davis, 43 N. H. 647, 80 Am. Dec. 202; Jackson v. Cleveland, 15 Mich. 94.

If two persons agree to purchase, one furnishing the money and taking the title himself, no trust results. Tebbetts v. Tilton, 31 N. H. 273; Edwards v. Edwards, 39 Pa. 369; Fowke v. Slaughter, 3 A. K. Marsh. 56, 13 Am. Dec. 133.

Trusts in personal property.

The same rules apply whether the trust results in personal property or real estate, and the person paying the purchase money holds the equitable interest; as, if in the name of a third party a person purchases stocks, bonds, mortgages, annuities, a note, the separate property of a wife or an unnegotiable bill; or where an administrator takes possession of taxes collected by his intestate, and so of any other chattel interest; but not if the personal property is of a perishable nature. Garrick v. Taylor, 29 Beav. 79; *Ex parte* Houghton, 17 Ves. Jr. 253; Creed v. Lancaster Bank, 1 Ohio St. 1; Ebrand v. Dancer, 2 Ch. Cas. 26, 1 Eq. Cas. Abr. 332; Kelley v. Jenness, 50 Me. 455, 79 Am. Dec. 623; Randall v. Phillips, 3 Mason, 378; Ryall v. Rowles, 1 Ves. Sr. 363; Smyth v. Oliver, 31 Ala. 39; May v. Nabors, 6 Ala. 24; People v. Houghtaling, 7 Cal. 348; Martin v. Decatur Branch Bank, 31 Ala. 115; Orr v. Pickett, 3 J. J. Marsh. 269; Carter v. Bennett, 6 Fla. 214; Doyle v. Murphy, 22 Ill. 502, 74 Am. Dec. 165; Union Bank v. Baker, 8 Humph. 447; Lyon v. Lyon, 1 Tenn. Ch. 225.

Trusts from fiduciary relations.

If a person holds the funds of another in consequence of some fiduciary relation between them, he will hold any property purchased with those funds in trust for that other; as, if a guardian purchase with a ward's money, a trust results to the ward. If an executor or administrator purchase in his own name, with estate money, the beneficial interest belongs to the estate. Cookson v. Richardson, 69 Ill. 137; Schlaefer v. Corson, 52 Barb. 510; Buck v. Swazey, 35 Me. 41, 56 Am. Dec. 681; Ferguson v. Lowery, 54 Ala. 510, 25 Am. Rep. 718; Coles v. Allen, 64 Ala. 98; Blodgett v. Hildredth, 108 Mass. 484; Bancroft v. Consen, 13 Allen, 50.

But if the guardian buys land on his own account, and afterwards pays for it with the money of his ward, no trust results. French v. Shepler, 83 Ind. 266, 43 Am. Rep. 67; Kisler v. Kisler, 2 Watts, 323, 27 Am. Dec. 306; Broyles v. Nowlin, 3 Baxt. 191; Coles v. Allen, 64 Ala. 98; Beck v. Uhrich, 13 Pa.

Sands v. *Thompson*, 48 Ind. 18; *Wharton* v. *Stoutenburgh*, 35 N. J. Eq. 266; *Graham* v. *Theis*, 47 Ga. 479; *Purcell* v. *Miner*, 71 U. S. 4 Wall. 513 (18:435); *Brown* v. *Sutton*, 129 U. S. 242, 248 (32:666, 668).

Mr. **M. F. Morris**, for appellee:

In order to take a case out of the operation of the Statute of Frauds on the ground of part performance, such part performance must be conclusively proved.

Purcell v. *Miner*, 71 U. S. 4 Wall. 513 (18: 435); *Williams* v. *Morris*, 95 U. S. 444 (24:360); *Semmes* v. *Worthington*, 38 Md. 298; *Dunphy* v. *Ryan*, 116 U. S. 491 (29:703).

591] *Mr. Justice* **Brown** delivered the opinion of the court:

By Rev. Stats., sec. 2319, all valuable mineral deposits in lands belonging to the United States are declared to be free and open to exploration and purchase "by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law." By sec. 2324, the miners of each mining district may make regulations not in conflict with the laws of the United States, or of the State or Territory, governing the location, manner of recording and amount of work necessary to hold possession of a mining claim, subject to the requirement, among others, that "upon each claim located after May 10, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." By sec. 2325, a patent for any land so claimed and located may be obtained by filing in the proper land office an application, showing compliance with the terms of the Act, together with the plat and field-notes, showing the boundaries of the claim, which shall be distinctly marked by monuments, and by posting a copy of such plat, with the notice of such application for a patent, in a conspicuous place on the land, etc. Sec. 2326 provides also for proceedings upon filing adverse claims, declaring that it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment.

The sole question in this case is whether the contract between these parties is not within the Statute of Frauds. Sec. 217 of the Compiled Statutes of Montana declares that "no estate or interest in lands . . . shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing," etc. To take the case out of the operation of the Statute, plaintiffs claim, *first*, that the transaction constitutes a trust by operation of law, and is therefore within the express exception of sec. 217; *second*, that there was such part performance, by taking possession under the contract, as takes it out of the Statute.

636, 53 Am. Dec. 507; Harper v. Archer, 28 Miss. 212; Dodge v. Cole, 97 Ill. 338; White v. Drew, 42 Mo. 561; Williams v. Hollingsworth, 1 Strobh. Eq. 108, 47 Am. Dec. 527; Barker v. Barker, 14 Wis. 131.

So a trust will arise if a trustee purchase with trust funds in his own name, or a guardian of insane persons or an agent with the money of his principal, or if trustees of a corporation purchase in their own name with corporate funds, or if a partner so purchase lands with partnership funds, or a husband buy land in his own name with separate estate of wife, but not if purchased out of an allowance by the husband. Mc Larren v. Brewer, 51 Me. 402; Day v. Roth, 18 N. Y. 448; Thompson's App. 22 Pa. 16; Hancock v. Titus, 39 Miss. 284; Pugh v. Pugh, 9 Ind. 132; Hamnett's App. 72 Pa. 337; Stratton v. Dialogue, 16 N. J. Eq. 70; Reid v. Fitch, 11 Barb. 399; Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145; Burden v. Sheridan, 36 Iowa, 125, 14 Am. Rep. 291; Hall v. Sprigg, 7 Mart. O. S. 243, 12 Am. Dec. 505; Crocker v. Crocker, 31 N. Y. 507, 88 Am. Dec. 506; Depeyster v. Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723; Church v. Sterling, 16 Conn. 388; M. E. Church v. Wood, 5 Ohio, 283; Richards v. Manson, 101 Mass. 482; Homer v. Homer, 107 Mass. 85; Traphagen v. Burt, 67 N. Y. 30; Settembre v. Putnam, 30 Cal. 490; Ebbert's App. 70 Pa. 79; Lefevre's App. 69 Pa. 122, 8 Am. Rep. 229; Sherburne v. Morse, 132 Mass. 469; Barron v. Barron, 24 Vt. 375; Woodford v. Stephens, 51 Mo. 443; Dickinson v. Codwise, 1 Sandf. Ch. 214, 7 N. Y. Ch. L. ed. 804; Tilford v. Torrey, 53 Ala. 120; Davis v. Davis, 46 Pa. 342; Merrill v. Smith, 37 Me. 394; Farley v. Blood, 30 N. H. 354.

If a father purchase with funds of his children in his own name, a trust results to them, as in the case when a widow purchases with estate funds. Such may be followed as long as they can be identified; beyond that the claim of a *cestui que trust* is that of a general creditor. Robinson v. Robinson, 22 Iowa, 427; Musham v. Musham, 87 Ill. 80; Fox v. Doherty, 30 Iowa, 334; Hyde v. Wason, 131 Mass. 450; Sanderson v. Walker, 13 Ves. Jr. 601; United States v. Waterborough, 2 Ware, 154; Overseers v. Bank of Virginia, 2 Gratt. 544, 44 Am. Dec. 399; Moore v. Stinson, 4 New Eng. Rep. 654, 144 Mass. 594; Bresnihan v. Sheehan, 125 Mass. 11; Mc Givney v. Mc Givney, 2 New Eng. Rep. 583, 142 Mass. 156; Mason v. Commerce Bank, 16 Mo. App. 276; Hunter v. Yarborough, 92 N. C. 68; Allen v. Russell, 78 Ky. 105; *Re* Youngs, 5 Dem. 141; Fast v. Mc Pherson, 98 Ill. 496; Thompson's App. 22 Pa. 16; Portland & H. S. S. Co. v. Locke, 78 Me. 370; Hooley v. Gieve, 9 Abb. N. C. 8, 9 Daly, 104.

A fiduciary purchaser can make no profit from the trust estate; the *cestui que trust* can claim all the benefit from investments or speculations. Hill, Trustees, 534; Lench v. Lench, 10 Ves. Jr. 511; *Ex parte* Pease, 19 Ves. Jr. 58.

Trusts do not arise from agreements alone.

Resulting trusts grow out of actions, and do not arise from parol agreements; as, if one purchase land with his money and agree to give a portion of it to another, no trust results; neither does there if no payment has been made, as where a deed was made in consideration of natural love and affection. Loomis v. Loomis, 35 Barb. 634; Rogers v. Simmons, 55 Ill. 76; Duffy v. Masterson, 44 N. Y. 557; Stover v. Flack, 41 Barb. 162; Smith v. Hollenback, 51 Ill. 223; Hidden v. Jordan, 21 Cal. 92; Meason v. Kaine, 63 Pa. 335; Botsford v. Burr, 2 Johns. Ch. 405, 1 N. Y. Ch. L. ed. 429; Sharp v. Long, 28 Pa. 434; Lynn v. Lynn, 27 Md. 547; Lathrop v. Hoyt, 7 Barb. 60.

An oral statement that one is purchasing land for another is insufficient. A subsequent agreement has no effect. Williard v. Williard, 56 Pa. 119; Kisler v. Kisler, 2 Watts, 323, 27 Am. Dec. 308; Knox v. McFarran, 4 Colo. 593.

1. While there is no doubt of the general proposition that a trust results to him who pays the consideration for an estate, where the title is taken in the name of another; that such trust is not within the Statute, and that parol evidence is admissible to show whose money is actually paid for the property,—it is equally clear that the trust must have arisen at the time the purchase was made, and that the whole consideration must have been paid or secured at the time of or prior to such purchase. *Olcott* v. *Bynum*, 84 U. S. 17 Wall. 44 [21: 570]; *White* v. *Carpenter*, 2 Paige, 217, 241, 2 N. Y. Ch. L. ed. 882, 891; *Buck* v. *Swazey*, 35 Me. 41; 1 Perry on Trusts, sec. 133; 2 Pom. Eq. Jur. sec. 1037. But, as before stated, parol evidence is competent to prove that the consideration actually moved from the *cestui que trust*. *Boyd* v. *M'Lean*, 1 Johns. Ch. 582, 1 N. Y. Ch. L. ed. 254; *Baker* v. *Vining*, 30 Me. 121; *Whitmore* v. *Learned*, 70 Me. 276; *Page* v. *Page*, 8 N. H. 187, 195; 2 Pom. Eq. Jur. sec. 1040. It follows that the bill or complaint should show, without ambiguity or equivocation, that the whole of the consideration appropriate to that share of the land which the plaintiffs claim by virtue of such payment was paid before the deed was taken. Tested by these rules, we think the plaintiffs have failed to make out their case with that clearness which the law demands. They aver that after they had delivered up possession of the premises to the defendant, "they withdrew all objections, protest and adverse claims to or against the defendant's claim, and abstained from filing any adverse claim or protest in the United States land office against defendant's application, and thereby permitted and enabled the defendant to procure a patent for said premises, and *from time to time thereafter* paid to defendant their share of the purchase money of said premises, and that *thereafter*, to wit, on or about the 15th day of May, 1881, the defendant, in pursuance of said agreement and of said trust, purchased from the United States of [51
America for the use and benefit of the plaintiffs, an undivided half of said premises," etc. And they further aver in a subsequent allegation that "if there be, or if defendant claims that there is, anything or any amount due by plaintiffs in connection with the procuring of said patent, or with said agreement, the plaintiffs are ready and willing and fully able to pay the same and offer to do so; that the defendant has refused to inform plaintiffs whether there was, or whether he claimed that there was, any money or thing due from the plaintiffs, although requested to do so, and that plaintiffs had many times offered to pay defendant whatever he might claim that there was due in said connection, and that defendant has refused, and that on account of said refusals of defendant plaintiffs are not informed in relation to said matter." Not only is there a failure to aver when and how much money was paid before the purchase was made, but the first allegation above quoted leaves a doubt whether the payment was made before or after the patent was taken. In one place

Acts of agents.

Where an attorney purchased property sold on execution in favor of client at an inadequate price, he became a trustee for his client. Howell v. Baker, 4 Johns. Ch. 118, 1 N. Y. Ch. L. ed. 784; Wade v. Pettibone, 11 Ohio, 57, 37 Am. Dec. 408, 14 Ohio, 557.

If an agent invest his principal's money in land, and take a deed in his own name, whether with or without principal's consent, a trust will arise. Crocker v. Crocker, 31 N. Y. 507, 88 Am. Dec. 291; Moffatt v. Shepard, 2 Pinn. 66, 52 Am. Dec. 141; Depeyster v. Gould, 3 N. J. Eq. 474, 29 Am. Dec. 723; Hall v. Sprigg, 7 Mart. O. S. 243, 12 Am. Dec. 506; Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145; Burden v. Sheridan, 36 Iowa, 125, 14 Am. Rep. 505.

Proof by parol.

A resulting trust, especially one arising to the payor, may be established by parol. Nixon's App. 63 Pa. 279; Morgan v. Clayton, 61 Ill. 35; Livermore v. Aldrich, 5 Cush. 435; Gardiner Bank v. Wheaton, 8 Me. 373; Byers v. Wackman, 16 Ohio St. 440; Boyd v. M'Lean, 1 Johns. Ch. 582, 1 N. Y. Ch. L. ed. 254; Faris v. Dunn, 7 Bush, 276; Powell v. Monson & B. Mfg. Co. 3 Mason, 347; Groesbeck v. Seeley, 13 Mich. 329; Barbin v. Gaspard, 15 La. Ann. 539; Smitheal v. Gray, 1 Humph. 491, 34 Am. Dec. 664; 2 Pom. Eq. Jur. § 1040.

The Statute of Frauds does not extend to any trusts arising by operation of law. Williams v. Hollingsworth, 1 Strobh. Eq. 103, 47 Am. Dec. 527; Fox v. Doherty, 30 Iowa, 334; Nelson v. Worrall, 20 Iowa, 469; Osborne v. Endicott, 6 Cal. 149, 65 Am. Dec. 498; Irwin v. Ivers, 7 Ind. 308, 63 Am. Dec. 420; Ward v. Armstrong, 84 Ill. 151; Black v. Black, 4 Pick. 238.

Lapse of time; laches.

A resulting trust will not be enforced after a long lapse of time, constituting laches on the part of the *cestui que trust*. Douglass v. Lucas, 68 Pa. 11; Robertson v. Maclin, 3 Hayw. 70; Brown v. Guthrie, 27 Tex. 610; Trafford v. Wilkinson, 3 Tenn. Ch. 701; Beckford v. Wade, 17 Ves. Jr. 97; Midmer v. Midmer, 26 N. J. Eq. 299; King v. Pardee, 96 U. S. 90 (24:666).

If the trust is admitted, and there has been no adverse holding, mere lapse of time is not a bar, if a good excuse is given. Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371; Harris v. Mc Intyre, 6 West. Rep. 233, 118 Ill. 275; Heneke v. Floring, 114 Ill. 554.

In New York, when one purchases land, and at his request the same is deeded to another, although the purchaser receives and retains the deed, without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and, under the prohibitions of the Statute of Uses and Trusts (1 Rev. Stat. 728, § 51), no trust results in favor of the purchaser. Everett v. Everett, 48 N. Y. 218.

The Statutes of New York (1 Rev. Stat. 728) are as follows:

"Sec. 51. Where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made; but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.

"Sec. 52. Every such conveyance shall be presumed fraudulent, as against the creditors, at that time, of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands."

they say that they thereby permitted and enabled the defendant to procure a patent for said premises, and *from time to time thereafter* paid the defendant, and immediately follow it by an averment that *thereafter*, to wit, on or about the fifteenth day of May, the defendant made the purchase. The subsequent allegation throws additional doubt upon the question, and, in fact, is susceptible of the implication that plaintiffs were by no means confident that they had paid any considerable amount, but were willing to pay their share upon being informed of the amount still due.

We think the contention of the plaintiffs that a trust is made out by operation of law is not sustained. The allegations amount to nothing more than that they made certain advances of money to defendant for the purchase of this interest; but when or in what form or at what time such advances were made is left entirely unanswered. As plaintiffs have chosen to stand upon their complaint, without apparently asking leave to amend, which we cannot doubt would have been readily granted, we are constrained to hold the allegations insufficient to create a trust.

[594] 2. Was there a part performance of the parol contract with the defendant sufficient to take the case out of the Statute? The only act alleged in that connection is the surrender of possession to the defendant; or, in the language of the complaint, that, "relying upon the good faith and honesty of the defendant, plaintiffs thereupon relinquished and delivered their possession of said premises to the defendant, and that the defendant then and there was admitted and went into possession of the same in compliance with and under said agreement and said trust." This, however, must be taken in connection with the prior allegation that the "defendant was about to proceed to procure a patent" to himself for the same premises, "under a pretended location and claim designated by him as the Odin lode;" whereupon plaintiffs apprised him that they "claimed, owned and possessed said premises," and would adverse and contest his application. Now, conceding that the surrender of possession to the defendant is a sufficient performance to take a case out of the Statute, such surrender must be made in pursuance of the contract, and be referable to it. In short, it must be a new possession *under the contract*, and not merely the continuance of a former possession claimed under a different right or title. Pomeroy on Contracts, secs. 116, 123; *Morphett* v. *Jones*, 1 Swanst. 172; *Wills* v. *Stradling*, 3 Ves. Jr. 378; *Anderson* v. *Chick*, 1 Bail. Eq. 118; *Smith* v. *Smith*, 1 Rich. Eq. 130; *Jacobs* v. *Peterborough & S. R. Co.* 8 Cush. 223; *Jones* v. *Peterman*, 3 Serg. & R. 543; *Christy* v. *Barnhart*, 14 Pa. 260; *Johnston* v. *Glancy*, 4 Blackf. 94. As stated by *Mr. Justice* Grier in *Purcell* v. *Coleman*, 71 U. S. 4 Wall. 513, 518 [18: 435, 437], delivery of possession "will not be satisfied by proof of a scrambling and litigious possession."

Taking the averments of the complaint together, it appears that both these parties had located and claimed this lode, and that plaintiffs were preparing to adverse and contest defendant's application for a patent when a bargain was made between them, by which it was agreed that plaintiffs should relinquish such possession as they had to defendant in consideration of the latter agreeing to purchase the land upon their joint account. In *Clinan* v. *Cooke*, 1 Sch. & Lef. 41, *Lord* Redesdale indicated, as a test, whether the party let into possession could have been treated as a trespasser in the absence of the parol agreement, and this has been accepted by many writers upon equity jurisprudence as a most satisfactory criterion. Now, it does not appear in this case that the antecedent relations of the defendant to this land were changed by reason of this contract, and it does appear that the only change that took place, in fact, arose from the plaintiffs' withdrawal in favor of the defendant, and from their refraining to prosecute an adverse claim which was never filed. This would clearly be insufficient to take the case out of the Statute. If, in fact, plaintiffs had been in the exclusive possession of the lode in question, and defendant had never been in possession or exercised acts of ownership until the bargain was made between them, and the plaintiffs had surrendered possession in pursuance of the contract, it would have been easy to set forth such facts in unequivocal terms, and not have left them to be inferred from the ambiguous averments of this complaint.

There was no error in sustaining the demurrer, and *the judgment of the court below must be affirmed.*

CITY AND COUNTY OF SAN FRANCISCO, *Appt.*,
v.
EUGENE LE ROY ET AL.

(See S. C. Reporter's ed. 656-672.)

Public lands in San Francisco—pueblo lands—Van Ness Ordinance—title of possessors of pueblo lands—Swamp-Land Act—duty of government—lands overflowed—deed of tide-land commissioners.

1. The attorney of the City and County of San Francisco had no authority to relinquish rights reserved for the benefit of the public by the Van Ness Ordinance, by which the City relinquished its pueblo land within its corporate limits as defined by its Charter of 1851, with certain exceptions, and reserved from the grant all the lots which it then occupied or had set apart for public squares, streets and sites for school-houses, city-hall and other buildings belonging to the corporation.

2. The title of the City of San Francisco to the pueblo lands within its limits rests upon the decrees of the circuit court recognizing its title to the four square leagues, and establishing the boundaries, and the confirmatory Acts of Congress.

3. The trust upon which the City of San Francisco held the municipal lands it had acquired as successor of the Mexican pueblo was a public and municipal trust, to be exercised chiefly in the distribution of the lands to occupants and settlers and in the use of the remainder for the public purposes of the City; the Van Ness Ordinance was

to settle and quiet title to such lands and was confirmed by Legislative Act of the State.

4. Those who continued in possession of the lands in San Francisco claimed by it as successor of a Mexican pueblo of that name, for the period required by the Van Ness Ordinance, so as to have the benefit of the transfer it made, acquired as complete title as the City could convey under that ordinance and the confirmatory legislation of the State and of the United States.

5. The interest of the pueblo in the lands within its limits goes back to the acquisition of the country, and precedes the passage of the Swamp-Land Act of Congress; that Act was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect.

6. When the United States acquired California it was with the duty to protect all the rights and interests which were held by the Pueblo of San Francisco under Mexico; the duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and of the City of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the State of California, or of individuals.

7. The lands which passed to the State of California upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation; but the existence of such lands could in no way affect the rights of the pueblo.

8. A deed of the tide-land commissioners could not impair the right of the City of San Francisco to exercise the power reserved in the Van Ness Ordinance over such portions of the lands conveyed to occupants under that ordinance as had been occupied or set apart for streets, squares and public buildings of the City.

[No. 878.]

Submitted Jan. 19, 1891. Decided Mar. 2, 1891.

APPEAL from a decree of the Circuit Court of the United States for the Northern District of California in favor of plaintiffs decreeing that they are owners of the lands described in the complaint and that defendant has no right therein, and enjoining defendant and persons claiming under it from asserting any right therein. *Decree modified.*

Statement by *Mr. Justice* **Field:**

This is a suit in equity against the City and County of San Francisco, a municipal
7] corporation of California, to quiet the title of the plaintiffs below, the defendants in error here, to certain real property within the limits of that municipality, against the alleged claim of the corporation to an adverse estate therein. The plaintiffs are citizens of France. The defendant, as a corporation of California, must be treated, for purposes of jurisdiction, as a citizen of that State.

The bill alleges that the plaintiffs are seised and possessed in fee simple absolute of certain real property in the City and County of San Francisco, which is particularly described, and that they and their predecessors have been thus seised and possessed for more than ten years; that the defendant sets up some claim of title to the property, or to some portion thereof, adversely to the plaintiffs, which claim is without right or justice and unfounded in law or equity, and has assumed to make surveys within the limits of the land, mark out lines of streets, subdivide a portion of the property into lots and make a map thereof; and that it threatens to sell such subdivisions and lots and open such streets, and in divers other ways assumes to exercise acts of ownership over the property, to the slandering and disquieting of plaintiffs' title, the depreciation of its market value and the hindrance and prevention of its sale or use, to the manifest injury, loss and detriment of the plaintiffs.

They further aver that they deraign title to all but a small portion of the property by divers mesne conveyances from William J. Shaw, who, on the 28th of March, 1861, commenced a suit in the District Court of the Twelfth Judicial District in and for the said City and County of San Francisco, against the defendant herein, to quiet his title to the land described in his complaint in that suit; that the claim of the defendant might be determined and the title of the plaintiff therein (the said Shaw) be established and declared valid, and that it might be decided that the defendant had no title, claim and interest in the land; that the said defendant was served with summons and appeared by attorney, and such proceedings were afterwards had in the suit that on the 5th of February, 1862, the court entered its final judgment and decree therein, whereby it adjudged that the claim of the defendant to the premises was invalid and void, that the title of the plaintiff therein was valid and sufficient as against the defendant and against all persons claiming through or under the defendant, and that all such persons should be forever barred and restrained from asserting any estate or title or interest in the premises or any part thereof; that the said judgment and decree in favor of Mr. Shaw still remains in full force, never having been appealed from, reversed or vacated; and they insist that by it the defendant is estopped from claiming or pretending to any right, title or interest in the lands therein described.

The plaintiffs therefore pray that the defendant may answer the bill and set forth whatever right, title or interest it may have in the real property in relation to which the bill is filed, or in any part thereof, to the end that the court may determine upon its validity and that it may be adjudged and decreed that the plaintiffs are the owners of the property and that the defendant has no right, title or interest therein, either in law or equity.

The defendant appeared by its attorney and filed its answer, in which it denies upon information and belief the allegations of the bill, and avers in like manner that the defendant is and has been for more than ten years last past continuously the owner in fee and possessed of the described premises.

The answer also avers, in the same way, that the plaintiffs ought not to maintain the suit, because neither they nor their predecessor or grantors, or any of them, were seised or possessed of the premises or any part thereof within five years next before the filing of their bill; but, on the contrary, that the defendant has been during all that time

in the complete, open and notorious possession of the premises, claiming title to them in good faith and adversely to the whole world.

A general replication to the answer having been filed, proofs were taken, and upon the pleadings and proofs a decree was passed for the plaintiffs, adjudging that the plaintiffs are now, and have been since the 26th of October, 1883, the day on which the bill was filed, the owners and seised in fee simple of the premises described in the complaint, [659] and that the defendant has no estate, right, title or interest therein, or to any part thereof, and adjudging that the defendant and all persons claiming under it be forever barred and enjoined from asserting any right or interest in the premises.

From this decree an appeal was taken to this court by the defendant. Before the decree was entered, one of the plaintiffs, Victor Le Roy, died, and his title and interest in the premises described in the bill of complaint passed to René de Tocqueville, who is a citizen of the Republic of France, and by consent of counsel he was substituted in the place of the deceased as a party plaintiff.

Mr. **George Flournoy** for appellant.

Messrs. **Evans S. Pillsbury** and **Gordon Blanding,** for appellees:

Title passed to those in possession pursuant to the conditions imposed by the Van Ness Ordinance.

Cal. Stat. 1858, 50–57; *Davis* v. *Perley*, 30 Cal. 630, 637; *Wolf* v. *Baldwin*, 19 Cal. 306; *San Francisco* v. *Beideman*, 17 Cal. 443–463; *Satterlee* v. *Bliss*, 36 Cal. 489, 512; *Carleton* v. *Townsend*, 28 Cal. 219; *Hart* v. *Burnett*, 15 Cal. 530, 612.

The common-law rule as to riparian owners is in force in the State of California.

Lux v. *Haggin*, 69 Cal. 255.

An action to quiet title may be maintained against the City of San Francisco at the instance of a private person.

San Francisco v. *Holladay*, 76 Cal. 18; *San Francisco* v. *Itsell*, 80 Cal. 57, 60.

Mr. Justice **Field** delivered the opinion of the court:

It was conceded in the court below that the premises, to remove the cloud from which the present bill is filed, were at the time "pueblo lands" of San Francisco; that is, that they were part of the lands claimed by the City as successor of a Mexican pueblo of that name; that they are within the limits of the City of San Francisco as prescribed by the Charter of 1851, and are within the four square leagues described in the decree of the United States Circuit Court for the District of California, entered May 18, 1865, by which the claim of the City as such successor was confirmed and its boundaries established, and also within the lines of the patent of the United States for the pueblo lands, issued to the City in 1884.

It was also stipulated that the decree of the circuit court and the patent of the United States should be considered as in evidence, and that all the statutes of California and of the United States affecting the pueblo lands of San Francisco might be referred to, in the consideration of the case, as though formally introduced in evidence.

The plaintiffs in their bill rely principally [66 upon the decree of the District Court for the Twelfth Judicial District of the State, in the case brought by William J. Shaw to quiet his title against the claim of the defendant herein, contending that the title of Shaw, through whom they deraign their interest, was thereby adjudged to be valid as against the defendant and parties deriving title under the defendant, and that they are estopped from asserting against that decree any title or interest in the premises. The decree was rendered upon a disclaimer of the City and County of San Francisco, by its attorney, that it had any right, title or interest in the premises described in the complaint, or any part thereof, at the commencement of the suit, and its consent that the plaintiff might take judgment therein in accordance with his prayer. Whatever authority the attorney of the City and County may have had to conduct its ordinary litigation, he had none to relinquish rights reserved for the benefit of the public by the Van Ness Ordinance; and the property in that case was claimed, as will be afterwards seen, under that ordinance alone. The City and County of San Francisco had previously [6 succeeded to all the rights of property, and become subject to all the liabilities, of the [6 City. Act of April 19, 1856, consolidating the government of the City and County of San Francisco.

The plaintiffs did not, however, on the [6 hearing, rely principally, or to any great extent, upon any estoppel by that decree, but endeavored to establish their claim of title by conveyances from former occupants of different parcels of land, known as the "Kissling tract," and the "Thorne and Center tract," and of the rights inuring to the occupants under what is known, from its reputed author, as the Van Ness Ordinance, the object of which was to settle and quiet the title of persons in possession of lands in the City of San Francisco; and under the Act of the Legislature of the State of California, passed in March, 1858, ratifying and confirming the ordinance; and under the Act of Congress relinquishing and granting to the City all the interest of the United States to lands within the corporate limits of the [66 Act of 1851 in trust for the uses and purposes of that ordinance. They also claimed the benefit of a deed of the tide-land commissioners of the State to Eugene L. Sullivan, one of the grantors of William J. Shaw, dated December 3, 1870, which purported, for the consideration of $352.80, to release to the grantee the right, title and interest of the State of California to the premises therein described.

The testimony, documentary and otherwise, produced in the case, gives a very clear as well as accurate account of the origin, nature and extent of the title claimed by the City of San Francisco, or the City and County of San Francisco, to its municipal lands, as successors to the rights of the former pueblo. This history has been related in

several cases in this court, notably in *Trenouth* v. *San Francisco*, 100 U. S. 251 [25: 626]; *Palmer* v. *Low*, 98 U. S. 1 [25: 60]; *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 363 [18: 863], and *Townsend* v. *Greeley*, 72 U. S. 5 Wall. 326 [18: 547]. A brief statement of the principal facts only will be necessary to an intelligent disposition of the questions presented for consideration.

When California was occupied by the forces of the United States in 1846 there was a Mexican pueblo at San Francisco, that is, a settlement or town under the Mexican government, with alcaldes and other officers, for the administration of its municipal affairs. It was the law of Mexico that pueblos or towns, when once recognized by public authority, became entitled, for their benefit and that of their inhabitants, to the use of lands constituting the site of such pueblos or towns, and adjoining territory, to the extent of four square leagues, to be measured off and assigned to them by officers of the government. *Townsend* v. *Greeley*, 72 U. S. 5 Wall. 326, 336 [18: 547, 549]. Under those laws the Pueblo of San Francisco asserted a claim to four square leagues, to be measured off from the northern portion of the peninsula on which the present City is situated. The alcaldes, or officers of the town, under the Mexican government, exercised the power of distributing the lands in small parcels to the inhabitants, for building, cultivation and other uses, the remainder being generally held for commons and other public purposes. When our forces took possession of San Francisco citizens of the United States were appointed by the naval and military commanders to act in the place of the Mexican officers of the pueblo, and they exercised a like authority, which they supposed was invested in them, in making various grants of land in the City. Many persons then there, and many who subsequently settled in California, disputed such authority, and took up and occupied any land which they found vacant within the limits of the pueblo. The natural consequence followed—confusion and uncertainty in the titles in the City for some years after the acquisition of the country.

In April, 1850, San Francisco was incorporated by the state government as a city. She at once claimed the lands of the pueblo as its successor, and, after the board of land commissioners to settle private land claims in California was created by Act of Congress in March, 1853, prosecuted her claim to this land for confirmation. 9 Stat. chap. 41, p. 631. In December, 1854, that board confirmed her claim to a portion of the four square leagues and denied it for the balance. The City appealed to the district court of the United States from that decision, and the appeal remained there for some years undisposed of. In September, 1864, the case was transferred from that court to the circuit court of the United States, under the authority of the Act of Congress to expedite the settling of titles to lands in the State of California (13 Stat. chap. 194, sec. 4, p. 333), and in October following its claim was confirmed to four square leagues, subject to certain reservations. The decree of final confirmation, in its present form, was not entered until the 18th of May, 1865. That decree confirmed the claim of the City to a tract of land embracing so much of the upper portion of the peninsula which is situated above the ordinary high-water mark of 1846 as would contain an area of four square leagues, the tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean and on the south by a due east-and-west line drawn so as to include the area designated, subject to certain deductions which it is unnecessary to mention here. The confirmation was to San Francisco in trust for the benefit of lot holders under grants from the Pueblo, Town or City of San Francisco, or other competent authority, and as to any residue in trust for the benefit of the inhabitants of the City.

In April, 1851, the charter of San Francisco was repealed and a new charter adopted. Pending the appeal of the pueblo claim in the United States district court, the Van Ness Ordinance, above mentioned, was passed by the common council of the City, by which the City relinquished and granted all its right and claim to land within its corporate limits as defined by its Charter of 1851, with certain exceptions, to parties in the actual possession thereof by themselves or tenants on or before the first of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the common council, which was in June, 1855, or, if interrupted by an intruder or trespasser, had been or might be recovered by legal process; and it declared that for the purposes contemplated by the ordinance persons should be deemed possessors who held titles to land within those limits by virtue of a grant made by any ayuntamiento, town council, alcalde or justice of the peace of the former pueblo before the 7th of July, 1846, or by virtue of a grant subsequently made by the authorities, within certain limits of the City previous to its incorporation by the State, provided the grant, or a material portion of it, had been recorded in a proper book of records in the control of the recorder of the County previous to April 3, 1851. The City, among other things, reserved from the grant all the lots which it then occupied or had set apart for public squares, streets and sites for school-houses, city-hall and other buildings belonging to the corporation, but what lots or parcels were thus occupied or set apart does not appear.

Subsequently, in March, 1858, the Legislature of the State ratified and confirmed this ordinance (Stat. of Cal. of 1888, chap. 66, p. 52), and by the fifth section of the Act of Congress to expedite the settlement of titles to lands in the State of California, the right and title of the United States to the lands claimed within the corporate limits of the Charter of 1851 were relinquished and granted to the City and its successors for the uses and purposes specified in that ordinance. 13 Stat. chap. 194, sec. 5, p. 333.

Notwithstanding the title to the lands within the limits of the Charter of 1851 was

thus settled, the appeal from the decree of the board of land commissioners was prosecuted both by the City and the United States—by the City from so much of the decree as included in the estimate of the quantity of the land confirmed, the reservations made, —and by the United States from the whole decree.

Whilst these appeals were pending, Congress passed the Act of March 8, 1866, to quiet the title to the land within the city limits. 14 Stat. chap. 18, p. 4. At that time the limits of the City were coincident with those of the County, and embraced the whole of the four square leagues confirmed. By that Act all the right and title of the United States to the land covered by the decree of the circuit court were relinquished and granted to the City, and the claim to the land was confirmed, subject, however, to certain reservations and exceptions, and in trust that all lands not previously granted to the City should be disposed of and conveyed by the City to the parties in the bona fide actual possession thereof, by themselves or tenants, on the passage of the Act, in such quantities and on such terms and conditions as the Legislature of the State of California might prescribe, excepting such parcels as might be reserved and set apart by ordinance of the City for public uses. In consequence of this Act the appeals pending were dismissed. *Townsend* v. *Greeley*, 72 U. S. 5 Wall. 326 [18: 547]. The title of the City therefore rests upon the decree of the court recognizing its title to the four square leagues, and establishing the boundaries, and the confirmatory Acts of Congress. *Grisar* v. *McDowell*, 73 U. S. 6 Wall. 363 [18: 863].

The trust upon which the City held the municipal lands it had acquired as successor of the Mexican pueblo, as declared in the decree of confirmation, was a public and municipal trust, to be exercised chiefly in the distribution of the lands to occupants and settlers and in the use of the remainder for the public purposes of the City; and the exercise was subject to the supervision and control of the legislative authority either of the State or of the United States, and it does not matter which, inasmuch as its exercise, [668] as directed by the Van Ness Ordinance, was authorized both by the Legislature of the State and the Act of the Congress of the United States. The purpose of the ordinance, as indicated in its title, as well as in its several provisions, was to settle and quiet titles to lands in the City of San Francisco. The settlement which it made was by a recognition of certain previous grants of the City or of its officers and the transfer of its title to those who had occupied the lands in good faith during certain periods. As held by the Supreme Court of California, in its elaborate and exhaustive examination of the law respecting the property rights of Mexican pueblos, in *Hart* v. *Burnett*, 15 Cal. 530, 612, the ordinance was justified by a policy which was analogous to the laws and purposes which gave existence to the rights of the pueblo. Section two of an order of the common council, passed on the 16th of October, 1856, which was ratified by the same Legislative Act of the State which confirmed the Van Ness Ordinance, provides that the grant or relinquishment of title made by that ordinance in favor of the several possessors of the land should take effect as fully and completely for the purpose of transferring the City's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to the parties individually and by name, and that no further conveyance or act should be necessary to invest such possessors with the interest, title, rights and benefits which the ordinance intended or purported to transfer and convey.

The claims of the grantors of the plaintiffs to the title to the lands, through conveyances from Kissling, and from Thorne and Center, are fully sustained by the evidence. Kissling settled upon a parcel of the land in relation to which this suit is brought, in March, 1849. He was at the time a native of Denmark, but had declared his intention to become an American citizen, and in the notice which he recorded of his claim he represented it as a pre-emption right to one hundred and sixty acres of land in the District of San Francisco. That claim of itself was of no value whatever, as the lands were not subject to pre-emption, not being lands of the United States, nor would they have been, even if owned by the United States, except under [669] the Town-Site Act, because they were within the limits of what was then a town; but a large portion of the tract thus taken up was fenced in by Kissling, occupied by him, and a portion of it cultivated. His occupation was continuous during the whole period required by the ordinance to enable him to have the benefit of the transfer it made. He therefore acquired as complete a title in the interest which the City then held in the property as it was possible for the City to convey, under the Van Ness Ordinance and the confirmatory legislation of the State and the United States.

The same may be said of the claim taken up by Thorne and Center on the 5th of August, 1850, and which purported to cover sixty acres. Of itself, it was, like the other, of no validity, and conferred no rights, for the land was not public land open to acquisition in that way. But these parties inclosed the land, occupied and cultivated it and exercised acts of ownership over it, until the 15th of July, 1854, when they sold four and one-half acres of it to one Charles V. Stewart. They continued, however, to exercise ownership over the residue during all the period required by the Van Ness Ordinance to obtain its benefits and the transfer of title from the City. As to the four and one-half acres sold, the grantee continued in the possession and use of that portion also, during the period required by the ordinance.

The title to the lands thus claimed by Kissling, and by Thorne and Center, and by Stewart as a purchaser from them of four and a half acres, became, by operation of that ordinance and the confirmatory legislation mentioned, vested in those parties, and by their conveyance passed to William J. Shaw, and was by him conveyed to Eugene L.

Sullivan, and thence to the plaintiffs in this suit. All the right, title and interest which the City held, and which could be conveyed under the Van Ness Ordinance, had therefore passed to Shaw when the suit to quiet his title was commenced and carried to judgment in the District Court of the Twelfth Judicial District of the State, and whatever benefit Shaw had acquired by that decree in his favor inured to the benefit of his grantees, the public rights reserved by the Van Ness Ordinance being necessarily excepted. One of those was a reservation, notwithstanding its grant, of lands then occupied or set apart for public squares, streets and sites for school-houses, city-hall and other buildings belonging to the corporation; and the decree in this case should have excepted from its operation the lands thus reserved. An effort was make before the examiner, who took the evidence in the case, to do away with the reservation by the verbal statement of a witness that the premises described did not include "any school-lots, engine-lots, hospital-lots or property dedicated for street purposes or public squares;" but such testimony was objected to as incompetent, and as not being the best evidence the subject admitted of, and the objection was in our judgment well taken. If there were no reservations, as specified in the ordinance, the fact should have been established by the public records of the City and County. Its property reserved by statute from private ownership for public uses is not to be sacrificed or lost upon loose verbal testimony of the character offered.

We do not attach any importance, upon this question of reservation, to the deed of the tide-land commissioners, executed to Sullivan on the 3d of December, 1870, for the State did not at that time own any tide or marsh lands within the limits of the pueblo as finally established by the Land Department. All the marsh lands, so called, which the State of California ever owned, were granted to her by the Act of Congress of September 28, 1850, known as the Swamp-Land Act, by which the swamp and overflowed lands within the limits of certain States, thereby rendered unfit for cultivation, were granted to the States to enable them to construct the necessary levees and drains to reclaim them. 9 Stat. chap. 84, p. 519. The interest of the pueblo in the lands within its limits goes back to the acquisition of the country, and precedes the passage of that Act of Congress. And that Act was never intended to apply to lands held by the United States charged with any equitable claims of others, which they were bound by treaty to protect. As to tide-lands, although it may be stated as a general principle—and it was so held in *Weber* v. *Board of Harbor Comrs.*, 85 U. S. 18 Wall. 57, 65 [21: 798, 802]—that the titles acquired by the United States to lands in California under tide-waters, from Mexico, were held in trust for the future State, so that their ownership and right of disposition passed to it upon its admission into the Union, that doctrine cannot apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their disposition in some other way. When the United States acquired California it was with the duty to protect all the rights and interests which were held by the Pueblo of San Francisco under Mexico. The property rights of pueblos equally with those of individuals were entitled to protection, and provision was made by Congress in its legislation for their investigation and confirmation. *Townsend* v. *Greeley*, 72 U. S. 5 Wall. 326, 337 [18: 547, 549]. The duty of the government and its power in the execution of its treaty obligations to protect the claims of all persons, natural and artificial, and of course of the City of San Francisco as successor to the pueblo, were superior to any subsequently acquired rights or claims of the State of California, or of individuals. The confirmation of the claim of the City necessarily took effect upon its title as it existed upon the acquisition of the country. In confirming it the United States through its tribunals recognized the validity of that title at the date of the treaty,—at least, recognized the validity of the claim to the title as then existing,—and in the execution of its treaty obligations no one could step in between the government of the United States and the City seeking their enforcement. It is a matter of doubt whether there were any lands within the limits of the pueblo, as defined and established by the Land Department, that could be considered tide-lands, which, independently of the pueblo, would vest in the State. The lands which passed to the State upon her admission to the Union were not those which were affected occasionally by the tide, but only those over which tide-water flowed so continuously as to prevent their use and occupation. To render lands tide-lands, which the State by virtue of her sovereignty could claim, there must have been such continuity of the flow of tide-water over them, or such regularity of the flow within every twenty-four hours, as to render them unfit [672] for cultivation, the growth of grasses or other uses to which up-land is applied. But even if there were such lands, their existence could in no way affect the rights of the pueblo. Its rights were dependent upon Mexican laws, and when Mexico established those laws she was the owner of tide-lands as well as up-lands, and could have placed the boundaries of her pueblos wherever she thought proper. It was for the United States to ascertain those boundaries when fixing the limits of the claim of the City, and that was done after the most thorough and exhaustive examination ever given to the consideration of the boundaries of a claim of a pueblo under the Mexican government. After hearing all the testimony which could be adduced, and repeated arguments of counsel, elaborate reports were made on the subject by three Secretaries of the Interior. They held, and the patent follows their decision, that the boundary of the bay, which the decree of confirmation had fixed as that of ordinary high-water mark, as it existed on the 7th of July, 1846, crosses the mouth of all creeks entering the bay. There was therefore nothing in the deed of the tide-land commissioners which could by any possibility

impair the right of the City to exercise the power reserved in the Van Ness Ordinance over such portions of the lands conveyed to occupants under that ordinance as had been occupied or set apart for streets, squares and public buildings of the City. Such a reservation should have been embodied in the decree in this case. *The decree should therefore be modified* by adding the declaration that nothing therein shall be deemed to impair in any respect the rights reserved in the Van Ness Ordinance to the City of San Francisco, or to its successor, the City and County of San Francisco, over lands that had then been occupied or set apart for streets, squares and public buildings of the City, *and as thus modified be affirmed; and it is so ordered.*

---

[595] CITY OF NEW ORLEANS, *Appt.*,
v.
WILLIAM WALLACE WHITNEY, Administrator of the Succession of MYRA CLARK GAINES.

WILLIAM WALLACE WHITNEY, Administrator of the Succession of MYRA CLARK GAINES, *Appt.*,
v.
CITY OF NEW ORLEANS.

(See S. C. *New Orleans* v. *Gaines' Admr.*, Reporter's ed. 595-619.)

Jurisdiction founded on citizenship—subrogation—representatives—judgment, when binding on grantor—defense of grantor—knowledge of buyer of defect of title—effect of warranty—suit against warrantor—judgment against possessor of land—judgment after defendant's death—objection, when raised—discharge of judgment against possessor, when does not discharge warrantor—separation of claims—heir, when not bound by ancestor's deed—estoppel by plea of former judgment.

1. Persons subrogated by the rules of equity to the rights of others stand upon their own citizenship in the federal courts, irrespectively of the citizenship of those to whose rights they are subrogated, and may sue in those courts although the persons to whose rights they are subrogated could not by reason of their citizenship.

2. Representatives, such as executors, administrators, guardians, trustees, receivers, etc., may stand upon their own citizenship in federal courts irrespectively of the citizenship of the persons whom they represent. When, however, the plaintiff is a mere nominal party, as the State or the governor of a State in a suit on a sheriff's or administrator's bond, the rule does not apply. There the real party in interest is taken into account on the question of citizenship.

3. Judgments obtained by the real owner against parties in possession for the recovery of lands and for the rents and revenues are binding on the parties to them, and on their grantor with warranty who defended the suits and was represented by counsel therein, unless fraud is shown in the entry of the judgments and the objection is taken at the proper time; such judgments cannot be questioned on the mere ground of error except upon appeal from them.

4. Grantors, having made express contract of warranty, cannot set up knowledge of vice in their title to exonerate themselves from the obligations of their contract.

5. Under the laws of Louisiana, the knowledge of the buyer that the thing does not belong to the seller, or that it is hypothecated, does not prevent him from being received to demand a restitution of the price in case of eviction; neither does it prevent him from being received to demand the damages which he suffers beyond the price, if the warranty is expressly stipulated by the contract.

6. In that State one who recovers against the possessor of land may compromise and settle with him and discharge him personally, and may on such settlement be subrogated to the right of action of the possessor against his warrantor, without discharging the latter, and may recover against the latter; discharge of a surety does not discharge a principal.

7. A judgment against a possessor of land for the rents and revenues may be passed into account and decree against his warrantor after the death of the possessor, without revivor of the judgment against the heirs or representatives of the deceased, where the warrantor is the principal debtor and had notice of the suit against the possessor, and the possessor's rights against the warrantor have been transferred to plaintiff.

8. A judgment rendered after defendant's death, without plaintiff's fault, is not void; the irregularity or error may be cured by entering it *nunc pro tunc* of a date prior to the defendant's death, and even this is not necessary in a collateral proceeding.

9. Where an objection was not raised until after decree of the circuit court and an appeal to this court and a remand of the cause to the circuit court for further proceedings, during all which time it might have been made, appellant is estopped from raising it.

10. A formal discharge of judgments against the possessors of land does not discharge their warrantor any more than a personal discharge by settlement, where the right to pursue the remedy against the warrantor was reserved, and was one of the considerations for the agreements for settlement.

11. The claim against the warrantor for the restitution of the price of land may be separated by the act of the parties from the claim for rents and revenues, and a judgment be had for the latter, where the price belongs to the possessor and the rents and revenues to the plaintiff under her right of subrogation. It is too late to raise the objection to such separation after judgment for the rents and revenues, and the objection, if taken at all, should be taken in the suits for the price, where those were commenced after the suits for the rents and revenues.

12. One who has never accepted the succession of her grandmother as unconditional heir is not liable for her grandmother's debts, whether created by warranty or otherwise; she is not therefore

---

NOTE.—*As to jurisdiction of United States circuit court depending on parties and residence*, see *note* to Emory v. Greenough, 1: 640.

As to conclusiveness of judgment, see *note* to Bank of United States v. Beverley, 11: 75.

As to judgment in admiralty, when conclusive, and when may be re-examined, see *note* to Williams v. Armroyd, 3: 392.

As to estoppel by judgment, see *note* to Aspden v. Nixon, 11: 1059.

As to subrogation, right of assignee to, and as to prior incumbrances; junior incumbrancer, right of, —see *note* to Bank of United States v. Peters, 10: 89.

As to estoppel in pais, see *note* to Stowe v. United States, 22: 144.

estopped from claiming lands which her grandmother had fraudulently conveyed.

13. Pleading a former judgment against defendant does not estop defendant from claiming before the master, to whom the amount due was referred, that the plaintiff had been partly paid the amount of the former judgment.

[Nos. 1293, 1320.]

Argued Jan. 15, 16, 1891. Decided Mar. 2, 1891.

APPEALS from a decree of the Circuit Court of the United States for the Eastern District of Louisiana in favor of plaintiff for rents and revenues of land in the City of New Orleans. *Modified by adding costs and interest.*

The facts are stated in the opinion.

Messrs. Thos. J. Semmes and **Alfred Goldthwaite** for Whitney, Admr.

Mr. **J. R. Beckwith** for the City of New Orleans.

7] *Mr. Justice* **Bradley** delivered the opinion of the court:

This is the case which was before us in October Term, 1888, and the decision in which will be found reported in 131 U. S. 191 [33: 99], under the name of *New Orleans* v. *Gaines's Administrator*. The suit was commenced in August, 1879, and was brought against the City of New Orleans to recover the rents, fruits, revenues and profits of 135 arpents of land, situated in the City, from the year 1837 to the time of the accounting sought. This land had been purchased by the City from one Evariste Blanc in 1834, and afterwards disposed of to various parties, except four or five blocks reserved for city purposes, which are not now in question. The City, however, is sought to be charged with all the rents, fruits and revenues of the land, whether in its own possession or in the possession of its grantees. In two previous suits brought by Mrs Gaines against the parties in possession, one against P. H. Monsseaux and others,] and the other against P. F. Agnelly and others (said suits being in the nature of ejectments), decrees were obtained for the recovery of the lands held by the defendants respectively, and references were made to a master to ascertain the amounts of rents and revenues due. The total of these rents and revenues found and reported by the master in the two suits was $517,049.34, which, with interest, calculated up to January 10, 1881, amounted to the sum of $576,707.92. The bill in this case sought a recovery from the City of New Orleans, not only of the said last-mentioned sum, but also of a large amount, exceeding $1,800,000, for the rents and revenues of unimproved property whilst in the possession and ownership of the City. A decree was rendered in the court below for both of these amounts, but for the reasons expressed in the opinion of this court, reported in 131 U. S., the latter amount was disallowed, and the decree was reversed. We held that the City was concluded by the proceedings against the tenants in possession in the two former suits referred to, and must respond for the amounts decreed against the tenants in those suits, subject to a reduction, however, in any of the individual cases in which compromises had been effected, for a less amount than the sum adjudged. It was contended, indeed, by the complainant, that the City, by virtue of claiming title to the property, and conveying it to purchasers with a guaranty, was primarily liable for all rents and revenues to Mrs. Gaines and her representatives (the real owners of the property), without reference to the grantees, and that no settlement with the latter could affect such primary liability. We did not concur in that view, however, as will be seen by reference to the opinion before referred to. We held that the City was only liable to Mrs. Gaines, the true owner, in consequence of its engagements as vendor and warrantor to the persons to whom it had sold the property, through the equity which those persons and their grantees had to be protected from loss and damage by reason of defective title; and that Mrs. Gaines and her representatives could not hold the City liable beyond that. We held further that, *as between the City and its grantees*, the City was the principal debtor, and was bound to protect them.

The primary obligations of the parties are [5 based upon two articles of the Civil Code of Louisiana:

"Art. 502. The products of the thing do not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor held it bona fide."

It having been decided that the holders of Mrs. Gaines's property under the sales of Relf and Chew (which is the case here) are possessors in bad faith, the above article makes them responsible to her for the products, or, in other words, the fruits or revenues.

"Art. 2506. When there is a promise of warranty, or when no stipulation was made on that subject, if the buyer be evicted, he has a right to claim against the seller:

"1. The restitution of the price.

"2. That of the fruits or revenues, when he is obliged to return them to the owner who evicts him.

"3. All the costs occasioned, either by the suit in warranty on the part of the buyer, or by that brought by the original plaintiff.

"4. The damages, when he has suffered any, besides the price that he has paid."

Our views with regard to the obligations of the City enforceable in the present suit were expressed in the former case in the following terms:

"As between the City and its grantee, the former, by reason of its guaranty of title, is really the principal debtor, and bound to protect the grantee as a principal is bound to protect his surety. Therefore the grantee is entitled to such remedies as a surety hath; and when fixed by judgment, if not before, may file a bill against his guarantor to protect him. *Lord* Redesdale says: 'A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered, by a bill which has been sometimes called a bill *quia timet*, in analogy to proceedings at the common law, where in some cases a writ may be maintained before

any molestation, distress or impleading. Thus a surety may file a bill to compel the [600] debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances.' [Cases cited.] In *Lee* v. *Rook*, Mosely, 318, the Master of the Rolls said: 'If I borrow money on a mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disincumbered by him.'

"Then, if the grantees, who have been ousted, and who are condemned in judgment to pay to Mrs. Gaines the rents and revenues due to her, might have maintained a suit in equity against the City to compel it to indemnify them, why may not Mrs. Gaines be subrogated to the grantees' right and equally maintain a suit against the City? The claim is an equitable one. It is in proof that all the acts of sale of the City contained express agreements of guaranty, with right of subrogation; and an act of sale in Louisiana imports a guaranty, whether it is expressed or not.

"But if the suit could not be maintained on purely equitable grounds alone, there is a principle of the civil law obtaining in Louisiana, by the aid of which there can be no doubt of its being maintainable. The Code Napoleon had an article (art. 1166) expressly declaring that creditors may exercise all the rights and actions of their debtor, with the exception of those that are exclusively attached to the person. It is true that the Louisiana Code has no such article; but it is laid down by writers of authority that this principle prevails in French jurisprudence without the aid of any positive law. 43 Dalloz, 239, etc., title *Vente*, arts. 932-935. The decisions to the contrary seem to be greatly outweighed by other decisions and by sound doctrine. The right thus claimed for the creditor (the word 'creditor' being used in its large sense, as in the civil law) may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States; and all existing rights in any State of the Union ought to be suable in some form in those courts.

"We think, therefore, that this part of the [601] decree, amounting to the sum of $576,707.92, with accrued interest, being for the amount of the judgments obtained in the other suits, ought to be allowed, unless subject to reduction for the cause hereafter referred to."

Our conclusion was subsequently, in the same opinion, expressed as follows:

"As to the residue of the decree, amounting to $576,707.92, founded on the judgments recovered against persons in possession of various portions of the property, claiming under sales made by the City of New Orleans, whilst those persons would have been proper parties to the suit, in order that it might appear that the sums recovered against them had not been released or compromised for less amounts than the face of the judgments, and that they might be bound by the decree, still, as the objection of want of parties was not specifically made, and as it would be a great hardship on all the parties concerned to have to begin this litigation over again, we do not think that the bill should be dismissed on that ground, but that the said sum of $576,707.92 should be allowed to the complainant, with interest thereon as provided in the decree of the circuit court, subject, however, to the qualification that, if the defendant can show that any of the said judgments have been compromised and settled for any less sums than the face thereof, with interest, the defendant should be entitled to the benefit of a corresponding reduction in the decree; and a reasonable time should be allowed for the purpose of showing that such compromises, if any, have been made. The result is that the decree of the circuit court must be reversed and the cause remanded, with instructions to enter a decree in conformity with this opinion."

The mandate issued from this court, after reciting the former decree of the circuit court and reversing the same and awarding costs on the appeal, concluded as follows:

"And it is further ordered that this cause be and the same is hereby remanded to the said circuit court with directions to enter a decree in conformity with the opinion of this court."

In pursuance of this mandate, a decree was made and entered in the circuit court, by which it was referred to a master to take testi- [60
mony and report as to whether the defendant (the City of New Orleans) was entitled to any, and, if so, how much, reduction in the said decree of $576,707.92, by reason of any compromises and settlements of the judgments for rents in the said Agnelly and Monseaux cases, made and entered into by the complainant and any of said defendants in said judgments for any less sums than the face thereof.

An investigation was thereupon had, and evidence taken, and from the master's report it appears that fifty-one of the tenants had made settlements with Mrs. Gaines, or her representative; and that the aggregate of the judgments against the tenants making such settlements, with interest to the 10th of January, 1881, amounted to $220,213.16, forming part of the gross amount of $576,707.92. The amounts of money received by Mrs. Gaines on these settlements were small not exceeding, in the aggregate, as found by the court below, the sum of $15,394.50. The master, in considering whether the settlements should have the effect to abate the amount of the decree under the opinion of this court, came to the conclusion that they should not. His views on the subject are expressed in brief as follows:

"The complainant has settled with the defendants in many cases where they were evicted by selling the land back to the defendants evicted and taking from said defendants their claims against the City in part for the price, and sometimes it constituted the entire consideration, but in every one of these cases she has expressly reserved to her-

self, where the subject matter of her judgment for rents and revenues is mentioned, the right to claim the amount of said judgments from the vendors of the defendant back to and including the City of New Orleans, and if it were not for the contention of counsel for the defendant that the legal effect of most, if not all, these compromises made by the complainant with the defendants had discharged the City from all obligation of warranty for rents and revenues I might close this report with the statement made above—that there was no evidence going to show that any sum had been received by the complainant on account of her judgments for rents and revenues or in any way to diminish the sum of five hundred and seventy-six thousand seven hundred and seven and ninety-two hundredths dollars ($576,707.92), the sum of the judgment in favor of complainant as fixed by the supreme court."

After an examination of the objections to this view presented by the counsel of the City, the master concluded his report as follows:

"But I need not pursue this line of argument further, being satisfied that the supreme court, in its opinion, has settled the question of the right of Mrs. Gaines to be subrogated to the right of the grantees and maintain a suit against the City of New Orleans.

"The claim is equitable, and especially is this so under the law of Louisiana, where the warranty and the right of subrogation is part of the act of sale, whether or not it is expressed in the act of sale.

"I therefore report—

"1st. That the evidence discloses no case where Mrs. Gaines has received any sum or sums on account of her judgments for rents, revenues and values for use in the cases where compromises and agreements have been made between the complainant and the defendants.

"2d. I report that the legal effects of the acts of compromise do not diminish her judgments for rents or revenues in said Agnelly and Monsseaux cases, nor do they impair her right to recover the amounts awarded to her in her decree as fixed by the Supreme Court of the United States, say, five hundred and seventy-six thousand seven hundred and seven and ninety-two hundredths dollars ($576,707.92), with five per cent interest, as provided in the decree of the circuit court, say from January 10, 1881."

The first conclusion seems open to this criticism. Mrs. Gaines did, in some of the cases, receive money. It is true that the acts do not express on what account such money was received; but it is acknowledged to be in part consideration of the contract on Mrs. Gaines's part, which contract is usually a personal discharge of the tenant from any further claim for money, and an agreement to convey the land as soon as the rents and revenues have been collected from the city, or otherwise. Thus, the act of settlement between Mrs. Gaines and Albin Rochereau, after reciting the recovery of two judgments against Rochereau in the Monsseaux suit, the first establishing Mrs. Gaines's title, and the second decreeing to her for fruits, revenues and values for use the sum of $6,885.50 and interest, and $2,006.50 costs; and reciting the fact that Rochereau had an action of warranty against his vendor and previous vendors, including the City of New Orleans, as well for the price of the land as for the amount of said judgment and costs: it was agreed—

First. That Rochereau transferred to Mrs. Gaines his said action of warranty for the price of the property.

Second. Rochereau requires his vendors, including the City, to pay to Mrs. Gaines the amount they were respectively bound for to him for fruits and revenues owing to said judgment therefor, and authorizing her to sue for the same.

The act then proceeds as follows:

"*Third.* And in consideration whereof and of the sum of eleven hundred dollars, receipt whereof is hereby acknowledged, the party of the first part hereby releases the party of the second part from personal liability for the said judgment for fruits, revenues and values for use of the property hereinbefore referred to, taking and accepting in lieu and place thereof the said indebtedness in warranty of said preceding vendors, including the City of New Orleans, to the said party of the second part.

"*Fourth.* And the party of the first part further agrees, upon her obtaining final judgment against or settlement with the City of New Orleans in said action in warranty for the price as set forth in article one of this agreement, to transfer and surrender unto the party of the second part all her right, title and interest in and to the property recovered by and described in the said final judgment of the 30th April, 1877, being the following." [Here describing the property.]

Here was an acknowledged receipt of eleven hundred dollars without specifying on what account, but manifestly as a consideration (in part) of Mrs. Gaines's contract and acquittance. The same thing occurred in other cases, but generally the amounts received were small. When the report came up for consideration on exceptions, the court, whilst confirming it in other respects, was of opinion that the sums thus received by Mrs. Gaines ought to be deducted from the amount of the decree; and having evidence that the aggregate thereof was $15,394.50, that amount was deducted accordingly, reducing the decree from $576,707.92 to $561,313.42.

The counsel of the City of New Orleans filed a large number of exceptions to the report, all of which, except those relating to the credit claimed for the above receipts, were overruled, and some of which, as well as some portions of the brief filed on behalf of the City in this court, are obnoxious to animadversion for want of ordinary courtesy and temperance of language due from members of the bar. We trust we may not be called upon to repeat an observation of this kind.

So far as the exceptions filed to the report are made the basis of any of the assignments of error in this court, they will be noticed.

Those assignments are twelve in number, and will now be considered.

The first assignment asserts that the circuit court had no jurisdiction over the cause and parties for compelling the City of New Orleans to pay to the appellees the decrees in the Monsseaux and Agnelly cases, because the defendants in those decrees were citizens of the same State with the appellant, the City of New Orleans, and could not themselvs sue the City in the federal court, and the appellees have no better right in that respect than their assignors.

If the claim of Mrs. Gaines against the City depended upon an assignment by the defendants in the Monsseaux and Agnelly cases of their rights against the City, arising from their eviction, the position of the appellant would be well founded; but, as explained in our former opinion, this is not the case. The right of Mrs. Gaines to pursue the City was an equitable right, arising and accruing to her on the basis of her own claims against the said defendants, and by subrogation to their equity to be protected and indemnified by the City. Although a derived equity on the part of Mrs. Gaines, [606] so far as the City is concerned, yet it is not created by assignment, but by operation of law through the rules of equity. Hence the assignment of error is not well founded in point of fact. This may be more manifest by what will be said in relation to the next assignment.

The second assignment of error repeats the objection made in the first in cases where any assignment or convention has been made whereby any right has been assigned to Mrs. Gaines so as to modify in any respect the legal rights resulting from the situation of the parties. We do not see that this specification has any greater force than the first. The written conventions between Mrs. Gaines and the tenants or grantees had the effect, not to confer upon Mrs. Gaines a right of suit in equity, but rather to indicate the intention of the parties as to her exercise of that right. The acts of settlement in this regard amounted to a declaration of the parties that Mrs. Gaines should exercise the equitable right which she possessed. In terms, the several acts may indicate more. They may indicate the actual assignment of rights; but as Mrs. Gaines had the right of prosecution by way of subrogation, independent of any such assignment, the assignment did not destroy it or take it away. It was merely in aid of the equitable right, and might be available in a court of law.

Subrogation is not assignment. The most that can be said is that the subrogated creditor by operation of law represents the person to whose right he is subrogated. But we have repeatedly held that representatives may stand upon their own citizenship in the federal courts irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law. Persons subrogated to the rights of others by the rules of equity are within this principle. When, however, the State or the governor of a State is a mere figurehead, or nominal party, in a suit on a sheriff's or administrator's bond, the rule does not apply. There the [6 real party in interest is taken into account on the question of citizenship. Spear's Fed. Jud. 150, 152, and cases there cited: *Susquehanna & W. V. R. & C. Co.* v. *Blatchford*, 78 U. S. 11 Wall. 172 [20: 179]; *Rice* v. *Houston*, 80 U. S. 13 Wall. 66 [20: 484]; *Browne* v. *Strode*, 9 U. S. 5 Cranch, 303 [3: 108]; *Irvine* v. *Lowry*, 39 U. S. 14 Pet. 293 [10: 462]; *McNutt* v. *Bland*, 43 U. S. 2 How. 9 [11: 159]; *Huff* v. *Hutchinson*, 55 U. S. 14 How. 586 [14: 553].

The third assignment of error complains that the circuit court erred in supposing that, by the decree of this court, the complainant was entitled to a definitive decree for the amount of the judgments in the suits against Monsseaux and Agnelly, subject only to diminution by such amounts as Mrs. Gaines may have received in compromising with the several defendants; whereas the appellant contends that the said judgments were open for examination as to any defense against them which might be shown to exist, such as corrections to be made for mistakes in the calculation of interest, and errors in entering the judgments after the decease of the parties, or for other equally valid reasons. Upon an examination of the record, however, we do not perceive that the court below misunderstood or departed, in this respect, from the terms of the decree made by this court. The judgments were binding on the parties to them, and therefore were binding upon the City of New Orleans, which in most cases had assumed the defense of the suits, and had been represented by counsel therein. We supposed that it was right and proper to consider litigation as at an end in those suits, and that the judgments had passed into *res adjudicata*. If any fraud could have been shown and proved in the entry of the judgments, the case might have been different, provided the objection had been taken at the proper time; but, although hints and charges of fraud are loosely made in argument, we have not found that any fraud was proved; and it is too late at this time to search for errors in the proceedings in those cases, or to review the judgments for the purpose of discovering error. The time for that has gone by; and, besides, mere matters of error cannot be inquired of in this collateral way. This is not an appeal from those judgments, and they cannot be questioned on the ground of mere error. If any of them were absolutely void, it would be another matter. We do not think that [6 the assignment of error in question, or the fourth assignment, which raises the question of erroneous computation of interest, can be sustained.

The fifth assignment of error is based upon the supposition that the defendants in the cases of Monsseaux and Agnelly had been adjudged to be fraudulent purchasers of the property, with knowledge that it did not belong to their pretended vendor, but that it

did belong to Mrs. Gaines; that therefore the sales made to such persons were a nullity under art. 2452 of the Civil Code of Louisiana, which declares that "the sale of a thing belonging to another person is null; it may give rise to damages when the buyer knew not that the thing belonged to another person." We are of opinion, however, that this article does not affect the question here. The defendants in those cases, being purchasers either from the City of New Orleans or its grantees, remote or immediate, are not adjudged to have had actual knowledge of the vice in the title of their grantors; and the grantors, having made express contracts of warranty, cannot set up such knowledge, even if it existed, to exonerate themselves from the ordinary obligations of their contract. If the position of the counsel for the City was correct, no possessor in bad faith, though merely such in law, and not in fact, could ever recover compensation from the author of his title, however solemn may have been the acts of sale and warranty by which the title was transferred. The article of the Code referred to (art. 2452) is the same as art. 1599 of the French Code, and is derived from the old French law. Pothier says: "The knowledge of the buyer that the thing does not belong to the seller, or that it is hypothecated, does not prevent him from being received to demand a restitution of the price in case of eviction; neither does it prevent him from being received to demand the damages which he suffers beyond the price, if the warranty is expressly stipulated by the contract, for it is only in those cases when it is not stipulated that the buyer who has this knowledge is excluded from his demand in damages." Pothier on Sales, sec. 191.

Duranton, writing since the Code was adopted, and commenting upon it, says: "As to the second question, whether the buyer who knows the danger of eviction, but has stipulated for a guaranty, has this right of guaranty, even for damages, we would decide according to the Roman law before cited in the affirmative." Cours de Droit Fr. suivant le Code Civil, vol. 16, No. 264. Troplong says: "According to this article (1599), the buyer who knows that the thing sold to him belongs to another has no right to damages. But nothing prevents the parties from making a contract in derogation of this rule of law and the stipulation for a guaranty places the parties beyond the operation of art. 1599." Tropling, Vente, vol. 1, No. 469.

The same doctrine is laid down by Laurent, vol. 24, No. 260.

In the present case there was an express warranty in all the acts of sale made by the City. There is, therefore, no foundation for this assignment of error.

The sixth assignment is as follows:

"The circuit court erred in passing into the account and decree any part or portion of any pretended decree or decrees in the Monsseaux and Agnelly ejectment bills, where the decrees against the evicted had been either released, canceled, modified, compromised or discharged, either before or after the filing of the bill in this cause, particularly the decrees against the persons and defendants in the Monsseaux and Agnelly bills, set forth in 'Appendix B' of this brief, made part of this assignment of error for certainty, being a tabulated list of evicted, the decrees against whom were formally discharged and released prior to the institution of this action."

The judgments referred to in this assignment are the fifty-one judgments before mentioned, in regard to which settlements were made between Mrs. Gaines and the defendants, and the assignment brings up the main question to be determined on this appeal; that question being whether, by these settlements, Mrs. Gaines, or her representatives, waived or discharged her claim against the City. The different acts of settlement were appended to the report, and form part of the record on this appeal. The form in which a number of them is conceived has already been given in the case of Albin Rochereau. Other acts were in a somewhat different form, but there was in no case an absolute discharge of the defendant or grantee without a reservation of right of subrogation against the City of New Orleans, and other warrantors. In most cases a small sum of money was received from the defendant, with a transfer by him to Mrs. Gaines of his right to proceed against his warrantors, including the City of New Orleans, followed by a personal discharge of such defendant from any further claim for fruits and revenues, with a contract to give him a title to the land in his possession as soon as a recovery should be had from the City. In other cases the defendant or grantee surrendered and gave up to Mrs. Gaines the possession of the land, and assigned to her all his rights against the City in consideration of a personal discharge from her claim for fruits and revenues. Still other forms were also adopted, but in all the right to prosecute the City was reserved. Under the peculiar law of Louisiana with regard to subrogation, as explained in our former opinion, we think that Mrs. Gaines might make settlements of this kind with the defendants or grantees without losing her claim against the City as warrantor and principal debtor. The City was not injured thereby, having no claim over against the defendant thus settled with. An absolute payment or compromise of her claim without any such reservation might have had a different effect, inasmuch as it would have shown that the intention of the parties was to extinguish the claim altogether. Such was our view in the former decree in providing for an abatement in regard to cases in which compromises may have been made. As stated in our former opinion, the City of New Orleans was the principal debtor as between it and its grantees, immediate or remote. This being so, such grantees might be settled with so far as their personal liability was concerned, without discharging the City, or other warrantors, provided it was stipulated, or shown to be the intention of the parties, that the City, or other warrantors, should not be discharged. It is a general rule that discharge of a surety does not discharge a principal; and the equity of that rule is applicable to the present case. The

[610]

rule itself is so self-evident that it hardly [611] needs authority for its support. It is, however, directly asserted in the case of *Mortland* v. *Himes*, 8 Pa. 265, and is laid down in Pitman on Princ. and Surety, 176, 192 (Law Lib.). See also *Kirby* v. *Taylor*, 6 Johns. Ch. 242, 250, 2 N. Y. Ch. L. ed. 113, 116, to the same effect. Art. 2205 of the Civil Code of Louisiana declares that "the remission or even conventional discharge granted to a principal debtor discharges the sureties. That granted to the sureties does not discharge the principal debtor. That granted to one of the sureties does not discharge the others."

In our opinion, therefore, this assignment cannot prevail.

The seventh assignment of error complains that a number of the defendants in the cases of Monsseaux and Agnelly died before the remand of this cause from this court to the circuit court, on occasion of the former appeal, and before the decree of reference by the circuit court upon the mandate from this court; and that there had been no attempt at revivor of the alleged decrees against the heirs or representatives of said deceased. We do not see how the facts referred to can benefit the appellant. The decree is not against those defendants who are said to be now deceased, but against the City of New Orleans; and no change by death or otherwise of the parties in said former suits could affect the rights of Mrs. Gaines or her representatives in the present suit. The prosecution of the City operated in relief of the obligations of the defendants in those suits, and if any of them die the prosecution of this case will operate in relief of their lawful heirs, whoever they be, or their successions, however represented. We think there is no force in the assignment. The same may be said with regard to the eighth assignment of error, which complains that the court below erred in charging the account against the City of New Orleans with the amount of a pretended decree against Albin Soulié, rendered, as alleged, five years after his death, for rents accruing after his death. The facts appearing in the record are, that Soulié resided in France, and was represented in this country by Bernard Soulié, his brother and agent, and that counsel were regularly employed to represent him in the controversy, said counsel being also the counsel of the City of New [612] Orleans; and that the suit was continued to its termination in the name of said Albin Soulié, without any mention of his death. The said Bernard, his brother, being his universal legatee, and recognized as such in the probate court, it would be a fraud upon the circuit court to set aside all those proceedings as absolutely null and void. A judgment rendered after a defendant's death, without the plaintiff's fault, is not void. The irregularity or error may be cured by entering it *nunc pro tunc* of a date prior to the defendant's death; and even this has been held not necessary in a collateral proceeding. Freeman on Judgments, §§ 57, 140, 153, and cases cited.

But it does not lie in the mouth of the City of New Orleans to raise the question, at the present stage of the case, after the decree passed by the circuit court and an appeal to this court, and a remand of the cause to the circuit court for further proceedings, during all which time this objection could have been made, but never was made until the matter came before the master on the last reference. We think that the appellant was estopped from raising the objection, and that it cannot be urged now.

The ninth assignment of error asserts that the court below erred in charging the City with the judgments against Amée Gautier, Jules Bermudez and others, who had been formally discharged by order of the court on motion of Mrs. Gaines, complainant, before the bill in this case was filed. We do not see how the discharge of the decrees against these defendants could have any greater effect in discharging the City of New Orleans from its obligation than the personal discharge of the defendants by the several acts of settlement. We have already considered the question whether the City was discharged from its obligation by the personal discharge of the defendants in the other suits, and have expressed our conviction that it was not. As it was the intent of the parties not to discharge the City, and as one of the considerations of the agreements for settlement was that Mrs. Gaines should pursue her remedy against the City, it seems to us that the manner in which the defendants were discharged is of no consequence. It might have been by acts or deeds passed before a [61 notary, or by a cancellation of the judgments against the parties, or in any other manner.

The tenth assignment of error is based on the fact alleged and appearing in evidence, that in thirty-three cases in which judgments had been rendered in the Monsseaux and Agnelly suits, the City had been sued upon the obligation of warranty for the recovery of the prices of the respective properties involved, and judgments had been recovered and satisfied, the aggregate amount being $65,500.59. The point of the assignment of error is that the prosecution of these suits upon the respective waranties therein propounded and the recovery of a part of the demands under the said warranties, namely, the prices of the lands, operated as a waiver and discharge of the other liabilities arising upon the same warranties, viz., the liabilities to restore the rents, revenues, etc.; that the contract of warranty is one and undividable; that although upon the breach of it a recovery may be had against the warrantor for the restitution of the price, for the fruits or revenues, for costs and other damages, yet only one suit can be maintained upon the contract, and not different suits for the different matters recoverable; and that the splitting of actions upon single demands is not allowed by the Code of Practice of Louisiana, the 156th article of which declares: "If one demand less than is due him, and do not amend his petition in order to augment his demand, he shall lose the overplus."

The thirty-three judgments referred to were obtained against the City for the price of certain lands. The present suit is brought

for the rents and revenues of the same and other lands. The thirty-three suits were brought in the names of the original defendants in the Monsseaux and Agnelly suits. The present suit is brought in the name of Mrs. Gaines, under her right of subrogation. There does not seem to be any good reason for saying that the claim for the price and the claim for rents and revenues may not be separated by the act of the parties. In some of the cases the defendants surrendered the land to Mrs. Gaines. In such cases there would have been no incongruity in their reserving to themselves the right of looking to the City
4] for the price, and of giving to Mrs. Gaines the right of looking to the City for the rents and revenues. The price might well belong to them, and the rents and revenues to her. Besides, the article of the Code of Practice referred to is a rule of practice, relating to the due order of proceeding to prevent an unnecessary multiplication of suits, and does not affect the equity and justice of the different portions of the plaintiff's demand; and therefore the benefit of the rule should be claimed, on the institution of a second and unnecessary action, at an early stage of the proceedings. This cause went to a decree; that decree was appealed to this court, the appeal was heard and the amount of the judgments for rents and revenues was sustained, and the matter was referred back to the court below to make a single inquiry. It was then too late, as it seems to us, if the suits for price had been commenced before the present suit, to raise for the first time the objection now made. But the fact is that those suits were commenced after the present suit, and the objection, if taken at all, was one to be taken in those suits, and not in this. We think, therefore, that this assignment of error is not tenable.

The eleventh assignment of error is that the complainant, Mrs. Gaines, had no right to recover the property in question in the suits against Monsseaux and Agnelly, because they acquired their title under Mary Clark, the grandmother of Mrs. Gaines, and the first warrantor of the spurious title, who falsely claimed ownership of the property under the first will of Daniel Clark, dated in 1811, which was revoked by the will of 1813 made in favor of Mrs. Gaines; and that therefore, as Mrs. Gaines was the direct heir at law of Mary Clark, as such she was estopped from claiming the lands which her grandmother had fraudulently conveyed, and through whose conveyance the defendants held possession of the lands as purchasers thereof. If Mrs. Gaines had ever accepted the succession of her grandmother, Mary Clark, as unconditional heir she would have been liable for Mary Clark's debts, whether created by warranty or other cause. But not otherwise. No such acceptance has been alleged or proved. But it is obvious that this defense against the claim of Mrs. Gaines,
5] if it was a defense at all, should have been set up in the Monsseaux and Agnelly suits, and not in this collateral way. The assignment is clearly not well taken.

The remaining assignment is a general one which does not call for particular observation.

In concluding this part of the case, we have only to say that as far as the appeal of the City is concerned, we do not find any error in the decree of the court below.

The complainants, on their part, also appealed, and have brought to our attention two matters which they regard as errors to their prejudice: *first*, the allowance of the sum of $15,394.50 as an abatement of the amount due from the City on account of the sums received by Mrs. Gaines from the parties with whom she made settlements; *secondly*, the non-allowance to the complainant of the costs of the suits against Monsseaux and others, and Agnelly and others, which costs amounted to the sum of $34,000.

As to the first specification, the counsel of Mrs. Gaines rely upon a declaration of record made by the City of New Orleans, in the Civil District Court of New Orleans, Division D, in a suit brought against the City for the price of four several lots recovered in the Monsseaux and Agnelly suits. The City in that case, by way of peremptory exception, pleaded that Mrs. Gaines had recovered against it, in the Supreme Court of the United States, $576,707.92, with interest, decreed to be due by the City on its warranty to said purchasers. It is contended by the counsel for Mrs. Gaines that this declaration is an estoppel against the City as to the amount of the decree in this court, and that no reduction of it can be made on account of the moneys received by Mrs. Gaines, or in any other way. But we do not consider that this declaration has the effect contended for by counsel. The City, in that case, simply pleaded the decree of this court, such as it was, the point being that a prosecution and recovery had already been had upon the same warranties which were sued upon in that case. The effect of the averment as an estoppel cannot properly be carried beyond the true purport and effect of the decree which was the subject of the averment, namely, the decree of this court. This was evidently the intent with which the averment was made, and we think that the City was not precluded by the declaration in question from contending before the master that the amount of moneys actually received by Mrs. Gaines on the judgments included in the decree should be charged to her. Especially do we think so, in view of the terms of the said decree, which expressly allowed an inquiry into any settlements or compromises that had been made. We think the court below committed no error in allowing the said sum, and deducting it from the amount of the decree. The payments which it embraced were clearly intended as payments on the respective judgments. There was no other account to which they could be applied; and as there was no proof to the contrary, they must be presumed to have been made upon the money portion of said judgments.

As to the other point, the costs of the Monsseaux and Agnelly suits, we think they should have been allowed. There was nothing in the terms of our former decree which

precluded such an allowance. The general effect of that decree was that the fictitious rents and revenues allowed for unimproved lands, amounting to over a million of dollars, were improperly allowed; but that the decree for the amount of the judgments recovered against the defendants in the Monsseaux and Agnelly suits was proper and right, unless it could be shown that those judgments had been compromised for less than the amounts due. The naming of the amount was for the purpose of identification. There was nothing in this general language that prevented the court below from including the costs of those suits in the decree. Our conclusion upon the whole case, therefore, is that the decree of the court below should be modified by adding to it the amount of said costs, to wit, $34,000, with interest as adjudged in the original decree of said court. *The cause is therefore remanded with instructions to the court below to modify its decree in accordance with this opinion.*

Mr. Justice **Brewer** dissented.

Mr. Justice **Gray** was not present at the argument, and took no part in the decision.

---

[635] COUNTY OF COOK, *Plff. in Err.*,
v.
CALUMET AND CHICAGO CANAL AND DOCK COMPANY.

(See S. C. Reporter's ed. 635-655.)

Jurisdiction of state judgments—federal question—validity of authority, when drawn in question—swamp lands—state decision.

1. To give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.
2. Where a county in Illinois claimed title to land therein under the Act of Congress granting swamp land to the State, and the state court made no decision against the title asserted under the United States, but decided that the county did not obtain title under grant from the State because the land passed to a purchaser under his entry, no federal question was decided by the state court.
3. The ruling of the court, admitting in evidence, to show defendant's title, the register and receiver's certificate after it appeared to have been canceled and reinstated by the Land Department, did not draw the validity of the authority of that Department in question, within sec. 709, Rev. Stat., giving this court jurisdiction.
4. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.
5. The State had full power of disposition of the swamp lands granted to it, and the application of the proceeds to the purposes of the grant rested upon the good faith of the State, which might exercise its discretion as to their disposal.
6. The construction by the state court of the laws of the State is controlling, where it is in harmony with the Acts of Congress on the subject.

[No. 1406.]

Submitted Jan. 9, 1891. Decided March 2, 1891.

IN ERROR to the Supreme Court of the State of Illinois to review a judgment of that court affirming a judgment of the Circuit Court of Cook County in that State for the defendant in an action of ejectment to recover land. *Dismissed.*

Statement by *Mr. Chief Justice* **Fuller:** [636

This was an action of ejectment brought by the County of Cook, in the Circuit Court of Cook County, Illinois, on the 31st of January, 1883, against the Calumet and Chicago Canal and Dock Company, to recover the S. W. ¼ of section 7, township 37 N., R. 15 E., of the third principal meridian, north of the Indian boundary line, containing 46 $\frac{48}{100}$ acres, except a strip of land held for a railroad right of way. Judgment passed for the defendant, and was affirmed by the Supreme Court of the State on error. The opinion, by *Mr. Justice* Craig, will be found reported in 131 Ill. 505.

By the Act of Congress of September 28, 1850, entitled "An Act to Enable the State of Arkansas and Other States to Reclaim the 'Swamp Lands' within Their Limits," Congress granted to the State of Illinois, as one of the other States, all the swamp and overflowed lands lying within its borders which then remained unsold, and provided for their segregation and the issue of patents therefor. 9 Stat. 519.

On the 22d of June, 1852, an Act of the [637 General Assembly of the State of Illinois was approved, entitled "An Act to Dispose of the Swamp and Overflowed Lands, and to Pay the Expenses of Selecting and Surveying the Same," which provided that all the swamp and overflowed lands granted to the State of Illinois by the Act of Congress were thereby granted to the counties respectively in which the same might lie or be situated "for the purpose of constructing the necessary levees and drains to reclaim the same," etc., and the second section of which contained the following:

"Whenever it shall appear that any of the lands granted to the State by the aforesaid Act of Congress shall have been sold by the United States since the passage of this Act, it shall be lawful for the said counties to convey such lands to the purchasers thereof. The said deed of conveyance shall be made by the judges of the county court, as such, and countersigned by the clerk of said

---

NOTE.—*As to jurisdiction in the United States Supreme Court, where federal question arises, or where are drawn in question statutes, treaty or Constitution,* see *notes* to Martin v. Hunter, 4:97; Matthews v. Zane, 2:654; Williams v. Norris, 6:571.

As to jurisdiction of United States Supreme Court to declare state law void as in conflict with State Constitution; to revise decrees of state courts as to construction of state laws,—see *notes* to Hart v. Lamphire, 7: 679; Commercial Bank of Cincinnati v. Buckingham, 12: 169.

court, with the official seal thereof affixed; and on delivering said deed to the purchaser, the county judge shall take from him an assignment of all his rights in the premises, and as such assignees they shall be authorized to receive from the United States the purchase money of said land; and whenever any lands embraced by the said Act have been located by bounty land warrants since the passage thereof, it shall be lawful for such county in which the same are situated to convey the same in manner aforesaid, to the person or persons who located said warrant, and to take assignment of the same to them as county judges, who shall thereupon be considered as assignees of the State, and as such may locate said warrant on any of the public lands belonging to the United States within the limits of such county, or elsewhere." Sess. Laws Ill. 1852, p. 178.

By the third section the state auditor was directed to furnish each county with an abstract of the swamp lands which had been purchased from the United States, or which had been located by land warrants, or to which the right of pre-emption had attached since the passage of the Swamp-Land Act.

March 4, 1854, this Act was amended by
[8] an Act providing: "That in all cases where any of the lands granted to the counties, by the Act to which this Act is amendatory, have been sold by the United States since the passage of the Act of Congress, entitled: 'An Act to Enable the State of Arkansas and Other States to Reclaim the Swamp Lands within Their Limits,' approved September 28, 1850, the county courts of the several counties in this State shall by an order to be entered of record at any regular or special term, sitting for the transaction of county business, make all necessary orders for securing to the purchasers who have purchased swamp and overflowed lands situated in their respective counties, since the passage of the Act of Congress as aforesaid, in pursuance and in the manner prescribed by the Act of the General Assembly of this State, to which this is an amendment: *Provided*, That the county courts may, in their discretion, require the purchasers aforesaid to pay to the drainage commissioner, for the use of said county, the cash, at the rate they purchased the lands from the United States, within the time to be specified by said court, by an order entered of record as aforesaid, and on a failure on the part of all such purchasers to comply with the terms of said court, as specified by this Act, the said swamp and overflowed lands, purchased by the United States as aforesaid, may be sold by the county courts or drainage commissioners, as other swamp and overflowed lands are sold." Sess. Laws Ill. 1854, p. 19.

And at the same session it was enacted:

"That the care and superintendence of so much of the swamp and overflowed lands granted to the State of Illinois by the Act of Congress entitled: 'An Act to Enable the State of Arkansas and Other States to Reclaim the Swamp Lands within Their Limits,' approved September twenty-eight, one thousand eight hundred and fifty, as lies in the County of Cook, is hereby vested in the board of supervisors of said County, and the said board of supervisors are hereby vested with all the powers in relation thereto heretofore given to the county court, subject in all respects to the provisions of the Act entitled: 'An Act to Dispose of the Swamp and Overflowed Lands, and to Pay the Expenses of Selecting and Surveying the Same,' approved June 22d, 1852." Sess. Laws Ill. 1854, p. 184.

On March 2, 1855, Congress passed an Act, entitled "An Act for the Relief of Purchasers and Locators of Swamp and Overflowed Lands," which was as follows:

"That the President of the United States cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash, or with land warrants, or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the Act approved September twenty-eight, eighteen hundred and fifty, entitled 'An Act to Enable the State of Arkansas and Other States to Reclaim the Swamp Lands within Their Limits,' any decision of the Secretary of the Interior, or other officer of the government of the United States, to the contrary notwithstanding: *Provided*, That in all cases where any State, through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale or location of the same, under the pre-emption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State, through its constituted authorities, shall release its claim thereto, in such form as shall be prescribed by the Secretary of the Interior: *And provided, further*, That if such State shall not, within ninety days from the passage of this Act, through its constituted authorities, return to the General Land Office of the United States a list of all the lands sold as aforesaid, together with the dates of such sale and the names of the purchasers, the patent shall be issued immediately thereafter, as directed in the foregoing section.

"Sec. 2. *And be it further enacted*, That upon due proof, by the authorized agent of the State or States, before the commissioner of the General Land Office, that any of the lands purchased were swamp lands, within the true intent and meaning of the Act aforesaid, the purchase money shall be paid over to the said State or States; and where the lands have been located by warrant or scrip, the said State or States shall be authorized to locate a quantity of like amount, upon any of the public lands subject to entry, at one dollar and a quarter per acre, or less, and patents shall issue therefor, upon the terms and conditions enumerated in the Act aforesaid: *Provided, however*, That the said decisions of the commissioner of the General Land Office shall be approved by the Secretary of the Interior." 10 Stat. 634.

On the third of March, 1857, an Act of Congress was approved, reading thus:

"That the selection of swamp and overflowed lands granted to the several States by the Act of Congress, approved September twenty-eight, eighteen hundred and fifty, entitled 'An Act to Enable the State of Arkansas and Other States to Reclaim the Swamp Lands within Their Limits,' and the Act of the second of March, eighteen hundred and forty-nine, entitled 'An Act to Aid the State of Louisiana in Draining the Swamp Lands therein,' heretofore made and reported to the commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, in conformity with the provisions of the Act aforesaid, as soon as may be practicable after the passage of this law: *Provided, however*, That nothing in this Act contained shall interfere with the provisions of the Act of Congress entitled 'An Act for the Relief of Purchasers and Locators of Swamp and Overflowed Lands,' approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage." 11 Stat. 251.

The cause coming on for trial, a jury was waived and the cause submitted to the court for its findings and judgment. The plaintiff introduced in evidence a certified copy of the certificate of the surveyor-general of October 29, 1853, that this (with other) land was swamp or overflowed land within the meaning of the Act of Congress of September 28, 1850; and also a certificate of the state auditor showing the segregation by the State of the land prior to the passage and approval of the confirmatory Act of Congress of March 3, 1857; and the approval of the list of selections by the Secretary of the Interior, May 8, 1866, "subject to any valid legal rights that may exist to any of the tracts therein described;" and thereupon rested its case.

[641]

On the part of the defendant there was offered a certified copy of a certificate of the register and receiver of the United States land office at Chicago, Illinois, dated October 20, 1853, to William B. Egan, but not the indorsements made thereon or the entries upon the face thereof; to which evidence the plaintiff objected on the ground that if said paper was put in evidence the whole paper must go in, and also on the ground that such title was subsequent to the swamp-land grant under which the plaintiff claimed, and also on the ground that said certificate showed upon its face that it was canceled; but the court, holding that all of said paper, including the indorsements or entries upon its face, should be in evidence, subject to all objections, allowed the same to be read: to which rulings the plaintiff then and there excepted, and the defendant, excepting to the ruling upon the indorsements and writing on said certificate, read said copy of said certificate in evidence in words and figures as follows:

"Military Bounty Land Act of
March 22, 1852.
"Land Warrant No. 2495.
"Register and Receiver's No. 34.
"Land Office, Oct. 20, 1853.

"We hereby certify that the attached military bounty land warrant No. 2495 was on this day received at this office from William B. Egan, of Cook County, State of Illinois.

"James Long, Register.
"Eli B. Williams, Receiver.

"I, William B. Egan, of Cook County, State of Illinois, hereby apply to locate, and do locate, the southwest fractional ¼, N. I. B. L., of section No. (7) seven, in township No. (37) thirty-seven N., of range No. 15 E., in the district of lands subject to sale at the land office at Chicago, containing 46 $\frac{44}{100}$ acres, in satisfaction of the attached warrant, numbered 2495, issued under the Act of 22d of March, 1852.

[64

"[Written across the face:] Canceled. See letter to R. R. at Springfield, Aug. 10, 1855. Binckly.

"[Written across the face in red ink:] Reinstated Feb. 15, 1883. W't 101,043, Act of 1850, 40 a, substituted.

"Witness my hand this 20th day of October, A. D. 1853.

"William B. Egan.

"Attest: James Long, Register.
"Eli B. Williams, Receiver.

"I request the patent to be sent to —— ——.

"Land Office, Chicago, Oct. 20, 1853.

"We hereby certify that the above location is correct, being in accordance with law and instructions. James Long, Register.
"Eli B. Williams, Receiver.

"Indorsements: 40 acres. 2495. 40. Chicago, Ill. W't 101,043, Act 18—, 40 acres, substituted for the above number Feb'y 15, 1883. Canceled. See letter to reg'r, Springfield, Ill., Aug. 10, 1855. Binckly. Cancellation noted on tract book. 17 Nov'r, 1855. R. W. B. B. K. Reinstatement noted Feb'y 15, 1883. See cash entry No. 29,531, Springfield. Lawrence. Approved. ——, clerk. Patented ——. Recorded ——.

"This location is reinstated and warrant No. 101,043 for 40 acres, Act of Sept. 28, 1850, substituted for w't No. 2495 for 40 acres, Act of 1852, in div. K., February 15, 1883. E. Kilpatrick.

"Div. 'K.'

"See letter in div. 'K' to Cohrs, Dearborn & Shope, Chicago, Ills., Feb. 15, 1883.

"(Memorandum.)

"This entry is in conformity with Com. letter Sep. 13, 1883. The cash part was paid February 28, 1853. James Long, Register.

"W't susp., however, for erasure; party desires its location canceled. See reg. (Chicago) letter of May 28, 1855, canceled therefor, and party allowed to relocate with another wt' No. 101,043.

[643

"Aug. 10, 1855."

It was admitted by the plaintiff that William B. Egan, in April, 1854, executed, acknowledged and delivered to H. S. Monroe a proper deed of conveyance of the land de-

scribed in the certificate, conveying the same to said Monroe, which deed was duly recorded in January, 1855. And it was further admitted, that May 11, 1871, Monroe executed, acknowledged and delivered to Bowen a deed in due form conveying the land in suit in consideration of $1,000 to said Bowen, which deed was recorded in the recorder's office of Cook County in May, 1871. The defendant offered in evidence a deed, properly executed and acknowledged by Bowen, dated January 21, 1872, and recorded June 21, 1872, conveying the land in controversy to the defendant. These deeds were objected to by the plaintiff as immaterial and irrelevant. It was also admitted that this land, together with other lands, was subdivided and platted into blocks and lots by the defendant on June 29, 1875, in accordance with the provisions of the Statute of the State of Illinois in that behalf, and duly recorded in the recorder's office of Cook County; and that streets and alleys were, upon said plat, laid out across the land in suit, and the lines of said streets and of the blocks and lots were staked out on the land by defendant. It was shown by the defendant that the land had been taxed each year from 1870 to 1886 (except 1877) for county and state and other purposes, and that these taxes, amounting to nearly $8,000, were from time to time paid by it; but this evidence was objected to by plaintiff, because it did not bring defendant within any section of the Limitation Laws concerning the payment of taxes; and plaintiff also objected to the showing of any taxes paid since the commencement of this suit. It was agreed that the property as described in the declaration, or as subdivided, was not assessed for taxes for the year 1877.

It appeared that on May 24, 1870, John W. Bunn entered this land and received a certificate of entry from the register and receiver at the Springfield land office, which he assigned to Bowen, and that a patent issued on the 15th of November to Bowen, as Bunn's assignee.

It also appeared that the land was situated within six miles of the Illinois Central Railroad location, and, being part of an odd-numbered section, its minimum price was fixed at $2.50 per acre, under the Act of Congress of September 20, 1850 (9 Stat. 466); and that a reservation was made by order of the President of the land fifteen miles in width on each side of the location of that railroad, and specific directions were given on the 19th and 20th of September, 1850, by the commissioner of the General Land Office to the register and receiver, to withhold certain lands, including that in question, from sale or entry of any kind until such lands should be again made subject to private entry by proclamation of the President; and that on the third of April, 1852, by the President's proclamation the lands were restored to market, and thereafter those within the six-mile limit, not inuring to the State for railroad purposes, were offered by the government at public sale.

The circuit court was asked by the parties respectively to rule upon certain propositions of law, some of which were approved and some rejected, exceptions being taken accordingly. Its affirmative rulings were as follows:

"The lists of lands, including the tract of land in question, transmitted to the governor of Illinois under the Act of Congress of September 28, 1850, by the Secretary of the Interior, a copy of which, duly certified by the state auditor, has been introduced in evidence, is sufficient evidence in this action to show prima facie title to the tract in question in the plaintiff under law.

"If the evidence shows that the land in question was listed as swamp land, and so certified by the Secretary of the Interior to the governor of the State of Illinois, then the effect of such listing and certification was to vest the title thereto in the State of Illinois on the 28th of September, 1850, irrespective of the question whether said tract was situate within six miles of the line of the Illinois Central Railroad as located, or not.

"As a matter of law, the fact that the premises in question were part of an odd-numbered section and lying within six miles of the line of the Illinois Central Railroad as finally located would not prevent the title thereto passing to the State of Illinois under the Swamp-Land Act of Congress of September 28th, 1850, if it were in fact swamp and overflowed land within the meaning of that Act at that date.

"If the land in question had in fact been selected as swamp and overflowed land under the Swamp-Land Act, approved September 28th, 1850, by the surveyor-general of the United States for the States of Missouri and Illinois, and said tract was reported as such swamp land by said surveyor to the commissioner of the General Land Office on October 29th, 1858, and if the evidence shows that the same remained vacant and unappropriated and not interfered with by an actual settlement under any existing law of the United States on the 3d day of March, 1857, then the title to said tract of land was confirmed in the State of Illinois by the Act of Congress approved March 3d, 1857, entitled 'An Act to Confirm to the Several States the Swamp and Overflowed Lands Selected under the Act of September 28th, 1850, and the Act of the 2d of March, 1849.'

"If the land in question was in fact swamp land on the 28th day of September, 1850, the day of the passage of the swamp-land grant, then the title passed to the State by virtue of said Act irrespective of any acts of the officers of the Department of the Interior of the United States and irrespective of any subsequent confirmatory Acts of Congress.

"Under the evidence in this cause the title to the land in controversy, it being swamp land, passed by the grant of September 28th, 1850, known as the Swamp-Land Act, to the State of Illinois, and the title to the said land vested in the plaintiff, the County of Cook, by virtue of the Act of the General Assembly of Illinois entitled 'An Act to Dispose of the Swamp and Overflowed Lands and to Pay the Expenses of Selecting and Survey-

ing the Same,' approved June 22d, 1852, without the execution of any deed therefor.

346] "The mere collection and payment of taxes under the Township Organization Laws of Illinois does not work an estoppel to an action of ejectment for lands so taxed.

"That the entry of said land by William B. Egan on October 20, 1853, and the receipt and retention by the United States of the money and warrant delivered by said Egan in payment therefor was a sale by the United States of said land to said Egan, and an appropriation of said land by the United States within the intent and meaning of the confirmatory Acts of Congress.

"That said William B. Egan was the owner in said lands in fee, and that the defendant in this case, as assignee of said Egan by regular conveyances, made prior to the commencement of this suit, was at the time of the commencement of this suit the owner of said land in fee and entitled to the possession thereof.

"That under the Act of the Legislature of Illinois of June 22, 1852, in relation to swamp lands, and under the Act amendatory thereof, of the Legislature of said State, of March 4, 1854, the County of Cook could not become the owner of said land as against said Egan or his grantees until said County of Cook should comply with the requirements of said Acts as to the purchasers of swamp land from the United States subsequent to the enactment of the Swamp-Land Act of September 28, 1850, and that the burden was upon said County of Cook, plaintiff herein, to prove affirmatively such compliance.

"That, under the law upon the facts shown upon the trial, the plaintiff cannot recover herein."

Among other rulings requested by plaintiff and refused, was this: "The cancellation of the Egan entry, August 10, 1855, by the Department of the Interior of the United States, in the absence of any facts or evidence showing the circumstances which led to this cancellation, must be presumed to have been based upon sufficient facts to authorize it."

The court thereupon found for the defendant and the plaintiff moved for a new trial, which motion being overruled, judgment for defendant was entered, and the cause taken by writ of error to the Supreme Court of the State, and the judgment affirmed.

347] The Supreme Court held (131 Ill. 505) that, conceding the evidence introduced by the plaintiff was sufficient to establish prima facie a title upon which a recovery might be had if no evidence had been introduced by the defendant, yet that, as Egan was a purchaser within the meaning and protection attached to this grant, no beneficial title passed to the County. The court said: "It will be observed that the land was entered by Egan after the passage of the Act of Congress granting swamp lands to the State. But the entry was made nine days before the land was selected as swamp land; and in this connection it may be remarked that the fact is well known, to all who have given the subject any consideration, that, after the passage of the Swamp-Land Act of 1850, the various land offices continued open, and lands were sold by the United States which were subsequently claimed by the States under the provisions of the Swamp Act. This condition of things, no doubt, led to some of the legislation by Congress and the State of Illinois after the Act of 1850, which will be referred to hereafter." The court then considered the Acts of Congress of September 28, 1850, March 2, 1855, and March 3, 1857, and the Acts of the Legislature of the State of January 22, 1852, and March 4, 1854, and thus continued:

"It is thus manifest, from the legislation of Congress and the legislation of the State, that it has always been the intention, both of the general government and of the State, to protect the title of a purchaser of swamp lands. Congress, in making the grant to the State, had the right to impose such terms and conditions as it saw proper, and the State, in granting the lands to the counties, had the undoubted power to provide that purchasers who had bought and paid for the lands should be protected in their several purchases, as, in effect, it did. The County of Cook derived its title to the land under and by virtue of the Act of 1852, as amended in 1854, and if the Acts do not pass the title to the land in question, it is plain that Cook County could not recover. The first section of the Act of 1852 is general in terms, granting all swamp lands which had been granted to the State to the respective counties; but section two qualifies section one, and declares that, whenever it shall appear [648] that any of the lands granted to the State shall have been sold, it shall be lawful for the said counties to convey such lands to the purchasers thereof. This was followed by an amendment, passed in 1854, requiring the county courts, by an order to be entered, to make all necessary orders for securing to purchasers of swamp lands their titles to such lands. Under this legislation it is manifest that the State of Illinois never intended to transfer to the counties lands that had been entered from the United States, but on the other hand, the object was to protect the title of all purchasers. The language, 'It shall be lawful for the said counties to convey,' did not leave a discretion resting with the county, to hold the land or convey, as it might think proper, but a positive duty was imposed to transfer such title as it acquired to the purchaser from the United States, and a county could acquire no rights to the lands by a refusal to observe the requirements of the Statute. Indeed, we think it a fair and reasonable construction of the Acts of 1852 and 1854, when considered in connection with the Acts of Congress, to hold that where lands have been bought, in good faith, from the United States, the title to such lands did not become vested in the county, but passed to the purchaser, under his entry.

"The copy of the certificate of entry procured from the land office at Washington, and read in evidence, contained a statement written across its face, that the entry had been canceled, and also another statement